

**TAMIL NADU ELECTRICITY REGULATORY COMMISSION**

**Order of the Commission dated this the 13<sup>th</sup> day of August 2024**

**PRESENT:**

|                             |     |                       |
|-----------------------------|-----|-----------------------|
| <b>Thin M. Chandrasekar</b> | ... | <b>Chairman</b>       |
| <b>Thiru K. Venkatesan</b>  | ... | <b>Member</b>         |
| <b>Thiru B. Mohan</b>       | ... | <b>Member (Legal)</b> |

**D.R.P. No.3 of 2024**

M/s. SEPC Power Private Limited  
Represented by its Vice President  
MEIL House, First Floor  
395, Anna Salai, Teynampet  
Chennai – 600 018.

....Petitioner  
Ms. Gayatri Aryan &  
Mr. Rajesh Jha  
Advocates for the Petitioner

**Vs**

Tamil Nadu Generation and Distribution  
Corporation Limited (TANGEDCO)  
Rep. by its Chairman cum Managing Director  
NPKRR Maaligai,  
144, Anna Salai  
Chennai 600 002.

..... Respondent  
Mr. Richardson Wilson,  
Advocate for the Respondent

This Dispute Resolution Petition stands preferred by the Petitioner M/s.

SEPC Power Private Ltd., with a prayer to-

- (a) Hold and declare that SEPC is entitled to fixed cost for non-supply of power in periods mentioned in Para 2 of the petition as this situation of non-supply arose only due to factors beyond SEPC's control.
- (b) Direct TANGEDCO to pay fixed charges to SEPC for the period of non-supply in FY 2022-23 i.e. Rs.2,43,59,11,020 along with pendente lite interest.
- (c) Extend the period of PPA by four months .
- (d) Direct TANGEDCO to pay SEPC the cost of litigation (i.e.) court fees paid by SEPC for filing the present petition.
- (e) Pass such further or other orders as the Commission may deem fit proper in the facts and circumstances of the case and thus render justice.

This Dispute Resolution Petition coming up for final hearing on 04.07.2024 in the presence of Ms. Gayatri Ariyan, Advocate for the Petitioner and Thiru Richardson Wilson, Advocate for the Respondent upon hearing the arguments of 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. Contention of the Petitioner:-**

1.1. SEPC Power Private Ltd. ("SEPC") is a power generating company under Section 2(28) of the Electricity Act, 2003 ("Act") which has set up 1x525 MW Imported Coal Based ("ICB") Thermal Power Plant ("Project") for supply of power to Tamil Nadu Generation and Distribution Company Ltd. ("TANGEDCO"). For such supply of power, SEPC executed a power purchase agreement dated 12.02.1998 with TANGEDCO under Section 62 of the Act, which was last amended on 25.02.2021 – Addendum #3 ("PPA").

1.2. SEPC is aggrieved by non-payment of Fixed Capacity Charges (FCC) by TANGEDCO, for deemed generation / period of non- supply of power due to no fault of SEPC, particularly in FY 2022-23 viz period starting 01.12.2022 till 31.03.2023 (about 4 months i.e. 121 Days) i.e. Rs.2,43,59,11,020/- (including interest till the date of filing i.e. 08.01.2024). SEPC could also not supply power in FY 2021-22 i.e. from 01.12.2021 to 28.03.2021 (4 months) due to (i) expiration of Consent to Operate ("CTO") and non-issuance of the same by Tamil Nadu Pollution Control Board ("TNPCB") and (ii) exorbitant rise in global imported coal prices and mechanism of ceiling on variable fuel charge ("VFC") in the PPA. SEPC is praying for the Commission to direct TANGEDCO to pay

fixed charges for FY 2022-23 (with interest). Details of this period of non-supply of power are as follows:

| Sl.No. | Date                | Particulars  |
|--------|---------------------|--|
| 1.     | 25.02.2021          | SEPC and TANGEDCO executed Addendum #3 to the PA incorporating certain conditions for supply of power including a ceiling/cap on VFC and discount on tariff. Details of ceiling on VFC are as follows:<br>a) The ceiling/cap was linked to domestic coal prices i.e. TANGEDCO would pay VFC to SEPC as per either prevailing actual imported coal prices or domestic coal prices, whichever was lower.<br>b) This ceiling cap was agreed to by SEPC at the time of execution of Addendum #3 as at that time, imported coal prices and domestic coal prices were similar where imported coal prices would even fall below the domestic coal prices. |
| 2.     | June 2021           | Global imported coal prices shot up exorbitantly and the trend of increase is continuing till date.  |
| 3.     | 30.11.2021          | SEPC's Project got commissioned and declared commercial operation date ("COD"). The Project could however not operate due to non-renewal of consent to operate by the Tamil Nadu Pollution Control Board (TN PCB) till 28.03.2022.   |
| 4.     | COD till April 2022 | SEPC could not operate the Project due to expiration of CTO and due to conditions under the PPA prescribed in Addendum #3 which put a ceiling on VFC.  |
| 5.     | 03.02.2022          | SEPC filed M.P. No.3 of 2022 [SEPC v. TANGEDCO] seeking relief in light of exorbitant rise in imported coal prices.  |
| 6.     | 12.04.2022          | Ministry of Power ("MoP") and the Ministry of New and Renewable Energy ("MNRE") along with heads of State Electricity Commissions and representatives of power plants met and discussed the issue of demand superseding supply where imported coal based power plants ("ICBs")   |

|     |                                |  |
|-----|--------------------------------|--|
|     |                                | stopped functioning due to rise in prices of imported coal. MoP decided to invoke Section II of the Act.   |
| 7.  | 29.04.2022                     | TANGEDCO wrote to SEPC directing SEPC to commence supply of power in deviation to the PPA.   |
| 8.  | 16.06.2022                     | TANGEDCO wrote to SEPC inter alia stating that power under Section II will be requisitioned till 31.12.2022.                                     |
| 9.  | 23.11.2022                     | TANGEDCO withdrew the above requisition w.e.f. 01.12.2022 and requested SEPC to supply power as per PPA.   |
| 10. | 01.12.2022<br>to<br>31.03.2023 | Period of non-supply of power by SEPC since power could not to be supplied at a ceiling VFC where global imported coal prices were skyrocketing, |

1.3. The circumstances of non-supply of power as per Addendum #3 were beyond SEPC's control viz unprecedented rise in global imported coal prices since June 2021 in the absence of a pass-through clause in the PPA. In fact, the Commission in Order dated 31.08.2023 passed in M.P. No.3 of 2022 [SEPC v. TANGEDCO] has held that rise in global imported coal prices is an event beyond SEPC's control viz:

*"10.7 A prudent man, leave alone the petitioner, would be least inclined to suffer such a huge loss which is bound to be occasioned due to sudden surge in the price of imported coal. Section 61 and 62 of the Electricity Act, 2003 mandates that commercial principles be considered for the supply of electricity. To protect all the parties from suffering any loss the above referred provisions have been incorporated in the Electricity Act. The Commission cannot be oblivious of the noble object enshrined in Section 61 and 62 of the Electricity Act, while deciding this issue.*

*10.8 On a conspectus evaluation of the evidence placed on record through documents the Commission decides that the unprecedented rise*

*in the price of imported coal has rendered the supply of power by the petitioner to the respondent under the Power Purchase Agreement as amended on 25-02-2021 vide Addendum 3 with the existing price mechanism an unviable one as contended by the petitioner. Accordingly, this issue is answered in favour of the petitioner"*

1.4. SEPC was thus ready for supplying power on pass through basis. SEPC time and again requested TANGEDCO to permit supply of power on full pass-through basis i.e. where TANGEDCO would pay full VFC without any ceiling to SEPC in order to compensate SEPC adequately for expensive imported coal. For this request, SEPC wrote letters to TANGEDCO starting 04.08.2021 till 28.03.2022. TANGEDCO failed to agree to SEPC's requests.

1.5. At the same time, TANGEDCO recognised the problem of ICBs not functioning due to rise in imported coal prices and requested SEPC to commence power supply in deviation to PPA. Be that as it may, as it evident from the list of dates above, TANGEDCO withdrew the requisition w.e.f. 01.12.2022.

1.6. In view of the above, non-supply of power was not attributable to SEPC. Despite such, SEPC was ready to supply power to TANGEDCO and is entitled to fixed charges for FY 2022- 23 in accordance with the PPA and the Commission's regulations.

1.7. The PPA provides for the following:

(a) Payment of fixed cost/capacity charges in case of 'deemed generation' i.e. non-generation due to the factors beyond the control of the power generator.

[Article 1- definition of Deemed Generation and Article 7.3 which provides that TANGEDCO shall be obligated to purchase electrical energy or to pay fixed charges for deemed generation]

(b) Reduction in Tariff ONLY in case of deemed generation caused by 'Indirect Political Event' or 'Non-Political Event' [Article 12.2]

(c) Continuation of obligation of TANGEDCO towards payment of 'Tariff' and other payment obligations in case of a force majeure event [Article 12.2 and 12.5]

(d) Duty to mitigate upon the affected party in case of force majeure event [Article 12.4]

(e) Non implication of liability of breach of contract on the affected party in case of 'force majeure' [Article 12.6 (a)]

1.8. PPA also stipulates for the 'Tariff' to be paid to SEPC in line with Tamil Nadu Electricity Regulatory Commission (Terms and Conditions for the determination of Tariff) Regulations, 2005 ("TNERC Tariff Regulations") which

provide for payment of capacity charges 'corresponding to plant availability' viz [Paragraphs 76 to 78 below]

(a) Regulation 36 which provides for components of Tariff i.e. 'unbundled tariff' comprising 'variable' and 'fixed' charge separately.

(b) Regulation 37 which provides for norms of operation where recovery of full fixed charges is dependent on 'target availability'.

(c) Regulation 42 (3) which provides for payment of capacity charges (Fixed Charges) on monthly basis in proportion to allocated / contracted capacity.

1.9. In view of the provisions of the PPA and TNERC Regulations, SEPC prays for the Commission to direct TANGEDCO to pay fixed cost to SEPC starting 01.12.2022 for period of non-supply of power by SEPC due to reasons beyond SEPC's control until commencement of actual supply of power, on the following broad grounds:

(a) Enabling provisions of the PPA for grant of fixed cost for non-generation of power due to reasons beyond SEPC's control [Paragraphs 49 to 59 below]

(b) Requirement of purposive interpretation of the contract [Paragraphs 68 to 71] in the facts and circumstances of the present case where:



- (i) SEPC has invested a sum of about Rs.5118.37 Cr. in the Project.
  - (ii) Project is an imported coal-based plant where there has been an unprecedented rise in imported coal prices since June 2021. [Paragraph 28]
  - (iii) SEPC proposed supply of power on pass through basis since the ceiling price mechanism under the PPA was unviable. Had SEPC supplied power on ceiling VFC with exorbitantly high price of imported coal, SEPC would have suffered a loss of about Rs.100 Cr. every month.
  - (iv) SEPC is servicing its debt obligation and has already born an amount of Rs.446.89 Cr. by way of an unsecured loan. [Paragraph 61]
  - (v) Non-payment of fixed charges by TANGEDCO which will eventually render the Project as a 'Non-Performing Asset' ("NPA") [Paragraph 60, 72 to 75]
- (c) Tariff is bifurcated in two parts (unbundled tariff) as the intention of payment of fixed charges is for the developer to recover its investment. [Paragraphs 63 to 66]
- (d) Buyout clause under the PPA demonstrates that the Project was developed solely for the purpose of supply of power to TANGEDCO. Payment of fixed charges therefore ought to be interpreted as payment made by

TANGEDCO in tranches for a project developed for its own purpose. [Paragraph 67]

(e) Interpretation by courts of payment of fixed charges not being dependent upon 'scheduled generation' [Paragraph 79] makes it clear that fixed charges are to be paid to the generator regardless of supply of power.

(f) Objective of the Electricity Act ought to be fulfilled in view of Section 3, Section 61 and Section 62. [Paragraph 85 to 86]

1.10. SEPC ought to be compensated in terms of fixed charges for periods of actual non-supply of power since 01.12.2022 due to no fault of SEPC. Further the term of PPA ought to be extended by 4 months for non-supply in FY 2021-22. This ought not be construed as relinquishment of SEPC's right to seek appropriate relief at a later stage in terms of the Order II Rule 2 of the Code of Civil Procedure, 1908 ("CPC"). SEPC respectfully seeks leave to approach the Commission at an appropriate time with the relevant data to seek appropriate relief of compensation under the PPA and the Commission's regulations for the losses suffered by SEPC on account of non-supply of power not attributable to SEPC.

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

1.12. On 13.07.1998, the PPA was approved by GoTN vide GO (Ms) No. 114. On 30.10.1998, PPA was amended (Addendum # 1) to incorporate the terms of the GO dated 22.04.1998 of GoTN. Since project could not achieve financial closure due to non-availability of escrow cover as per PPA and cancellation of land allotted by the Port for the Project, Petitioner took up the matter with Port, Government of India and TANGEDCO for implementation of the Project. In June 2003, Electricity Act 2003 was enacted.

1.13. On 16.04.2009, a joint meeting was held between TANGEDCO, Ministry of Power ("MoP") and SEPC with a follow-up meeting on 05.05.2009, during which the committee agreed to revive the Project subject to the condition that the validity of the PPA has to be determined by the Commission and that Port would allocate alternate land to SEPC for implementing its Project.

1.14. On 28.03.2006 and 15.02.2008, MoP issued clarifications on the legal validity/enforceability of MoU route projects and stated that concluded PPA shall

continue to remain valid. Pursuant to the above clarification and the decision taken in the joint meeting, MoP issued a letter dated 24.02.2010 clarifying to TANGEDCO and the Petitioner that the concluded PPA such as the Petitioner's project continues to remain valid and changes such as land does not alter the legal enforceability of the PPA.

1.15. On 18.08.2009, SEPC filed a petition being M.P.No.18 of 2010 before the Commission, seeking the direction for implementing the Project. On 09.05.2011, the Commission vide its order directed SEPC and TANGEDCO to implement the Project and to amend the PPA in line with the TNERC Tariff Regulations and issued further directions for finalizing the Engineering, Procurement and Construction ("EPC") Contract through International Competitive Bidding, and submit to the Commission the financing plan, amended PPA and costs, for approval. Relevant portion of the Order dated 09.05.2011 is extracted herein below:

*"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 Mo U 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.*

#### *10.4.4. 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 P P A. 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 P P A. The TNEB is directed to take a clear stand on the issue and amend the P P A, 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. "*

1.16. 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. On 30.04.2015, the Commission passed its order in P.P.A.P. No.5 of 2012 inter alia approving the provisional capital cost of the Project as Rs.3514 Cr.

1.17. 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. 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.

1.18. On 04.05.2018, TANGEDCO filed an affidavit in the above said petition to inter alia express the apprehension that due to high variable cost, the Project may fall on higher rank under Merit Order Despatch and TANGEDCO would be forced to pay fixed charges. This statement by TANGEDCO demonstrates admission of liability on the part of TANGEDCO to pay fixed costs.

1.19. During the course of hearings in the above said petition, it was time and again discussed that 'fixed charges' will be based on Project's capital cost. On 10.01.2020, the Commission passed an order in M.P.No.27 of 20 16 filed by

SEPC, directing SEPC to approach the Commission with actual completed cost for true up and fixing of actual completed cost. Further, the Commission held that in the intervening period, provisional fixed cost may be paid by TANGEDCO based on provisional capital cost already approved.

1.20. In March 2020, due to COVID-19, the implementation of the Project got delayed. 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 of2012, M.P. No. 36 of2015 and M.P. No. 27 of2016 and signed the minutes of meeting ("MoM"). 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 of2012, M.P. No. 36 of2015 and M,P. No. 27 of 2016. Copy of Addendum # 3 to the PPA dated 25.02.2021 is annexed herewith as Annexure-I

1.21. 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). Tabular summary of astronomical increase in imported prices is as follows:

|  | ARGUS Index<br>(Average of API<br>3, API5, ICI2-<br>\$/Tonne) | CSTA (Value of<br>Cheapest Index-<br>Including freight --<br>\$/Tonne) | Cost in Indian<br>Rupees (Rs./Unit) |
|--|---|--|-------------------------------------|
| 2011 till 2019-<br>Average of 9<br>Years | 64.62   | 81.46  | 2.61                                |
| January 2020                             | 59.18   | 72.7   | 2.88                                |
| May 2020                                 | 43.92   | 53.53  | 2.34                                |
| February 2021                            | 63.89   | 78.13  | 3.12                                |
| June 2021                                | 84.14   | 102.12   | 4.02                                |
| August 2021                              | 109.37  | 129.49   | 4.97                                |
| November 2021                            | 116.91  | 131.89   | 5.12                                |
| March 2022                               | 237.63  | 267.42   | 10.07                               |
| May 2022                                 | 217.98  | 220  | 8.31                                |
| November 2022                            | 149.40  | 181.38   | 7.16                                |
| Jan- Feb 2023<br>Average                 | 128.94  | 158.83   | 6.33                                |

1.22. Starting 04.08.2021 until 28.03.2022, SEPC wrote to TANGEDCO about the unprecedented increase in coal prices and attempting to find a viable solution not limited obtaining Indian coal linkage or obtaining coal from TANGEDCO's linkages for generation of power or for TANGEDCO to take-over the plant since TANGEDCO was building new plants which are costlier, etc. Copies of letters from SEPC to TANGEDCO from 04.08.2021 till 28.03.2022 are annexed herewith as Annexure-2.



1.23. On 21.09.2021, SEPC achieved synchronisation (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. 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.

1.24. 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. On 03.02.2022, SEPC filed a petition before the Commission M.P.No.3 Of 2022 [SEPC v. TANGEDCO] praying for the following reliefs:

- "(i) Direct and/or Permit the Petitioner to terminate the Coal Supply and Transportation Agreement (CSTA) dated 09.02.2018;*
- (ii) Permit the Petitioner to execute a Fuel Supply Agreement (FSA) with CIL/any domestic Coal Supplier in order to procure Indian Domestic Coal and consequently remove the ceiling price mechanism;*
- (iii) Permit the Petitioner to procure Coal from alternate sources in the interim period between termination of the CSTA and execution of the FSA without ceiling price mechanism in order to commence supply of electricity;*
- (iv) Amend the PPA to incorporate the above changes and such other changes as the Commission may deem fit ... "*

1.25. On 28.03.2022, SEPC obtained a valid CTO from TNPCB and the same has been communicated to TANGEDCO. 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 supply situation and high cost of coal in international market, the generating cost has gone up for imported coal-based plants viz

*"Due to unprecedented increase in the price of imported coal, Intra State Private Power Generators with total capacity of 1697 MW having P PAs with TANGEDCO are not supplying power from October 2021. Despite the notices served to them as well but, as the penalty for non-generation is lower compared to high cost 0/ generation using Imported coal, supply is almost nil and very intermittent in nature .. "*

1.26. On 30.04.2022, SEPC commenced generation from the Project under Section 11 and operated the plant based on the instructions from TANGEDCO and SLDC. Copy of TANGEDCO's letter dated 29.04.2022 is annexed herewith as Annexure-3. 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') has been stipulated which has now become contrary to Section 61 of the Act.

1.27. 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 II directions inter alia directing all ICB thermal power plants to operate at full capacity. Copy of MoP's Section II Direction dated 05.05.2022 is annexed herewith as Annexure-4.

1.28. On 23.11.2022, TANGEDCO abruptly withdrew the Section 11 direction and sought for supply of power as per the PPA. However, based on TANGEDCO's assurance 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 has 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. Copy of TANGEDCO's letter dated 23.11.2022 and SEPC's letter dated 29.11.2022 are annexed herewith as Annexure-5.

1.29. 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.

1.30. On 23.02.2023, M.P.No.3 of2022 [SEPC v. TANGEDCO] was listed for hearing. During the hearing, 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 Energy Charges Rate ("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.

1.31. 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."*

1.32. On 09.03.2023, SEPC inter alia informed the Commission in M.P.No.3 of2022 that:

- (a) No requisition of power was made by TANGEDCO from 01.03.2023 as agreed.
- (b) As per the last date of hearing on 23.02.2023, Ld. TNERC directed both parties to conduct a joint inspection of the coal stock lying with SEPC in

order to commence supply of power from SEPC's Plant from 01.03.2023, as agreed to by TANGEDCO.

- (c) The purpose of inspection was to assess that SEPC has costlier coal which was purchased in 2022. Had the intent been to simply supply power under Section 11 direction based on MoP determined benchmark ECR (to be notified), no inspection would have been ordered by Ld. TNERC.
- (d) TANGEDCO conducted an inspection on the evening of 27.02.2023 where they used the drone methodology to survey the physical coal stock at plant site. SEPC also issued a letter to TANGEDCO on the same day conveying that SEPC has about 90,000 MT of coal stock for generation of power.
- (e) SEPC was willing to supply power to TANGEDCO on pass through basis using the more expensive coal stock currently lying with SEPC, on pass through basis and on MoP determined benchmark ECR after the coal stock was utilised.

(f) Be that as it may, SEPC is willing to supply power to TANGEDCO at MoP determined benchmark ECR subject to SEPC's right under Section 11 (2) being protected by Ld. TNERC.

1.33. Ld. TNERC 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 Coalfield. 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 ... "*

1.34. Since passing of the above Daily Order dated 09.03.2023, SEPC has time and again requested TANGEDCO to off take power from SEPC under Section II 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.

1.35. 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 conveyed payment of variable fuel cost at benchmark-rate fixed by MoP and fixed charges as per the PPA. As on the date of filing the present petition, SEPC has been supplying power to TANGEDCO under Section 11 direction. SEPC has filed its petition under Section II (2) seeking compensation for adverse impact of power supplied under Section 11 direction to TANGEDCO in 2022 and 2023.

1.36. On 31.08.2023, the Commission passed its final Order in M.P. No.3 of 2022 [SEPC v. TANGEDCO] by holding that rise in global imported coal prices is beyond SEPC's control. Relevant portion of the Order is extracted below:

*"10.7 A prudent man, leave alone the petitioner, would be least inclined to suffer such a huge loss which is bound to be occasioned due to sudden surge in the price of imported coal. Section 61 and 62 of the Electricity Act, 2003 mandates that commercial principles be considered for the supply of electricity. To protect all the parties from suffering any loss the above referred provisions have been incorporated in the Electricity Act. The Commission cannot be oblivious of the noble object enshrined in Section 61 and 62 of the Electricity Act, while deciding this issue.*

*10.8 On a conspectus evaluation of the evidence placed on record through documents the Commission decides that the unprecedented rise in the price of imported coal has rendered the supply of power by the petitioner to the respondent under the Power Purchase Agreement as amended on 25-02-2021 vide Addendum 3 with the existing price*



*mechanism an unviable one as contended by the petitioner. Accordingly, this issue is answered in favour of the petitioner"*

Copy of relevant portion of the Order dated 31.08.2023 in M.P. No. 3 of 2022 [SEPC v. TANGEDCO] is annexed herewith as Annexure-6.

1.37. In view of the above in the present petition, SEPC is seeking fixed charges for FY 2022- 23 i.e. from 01.12.2022 till 31.03.2023.

A. PPA has enabling provisions for payment of fixed charges to the generator :

1.38. SEPC and TANGEDCO have executed the PPA which provides for enabling provisions for payment of fixed/capacity charges based on Project's 'availability' and upon 'deemed generation' which essentially means payment of charges for generation which could not actually take place for reasons/factors beyond the control of the generator. Relevant provisions of the PPA are as follows:

a) 'Deemed Generation' means:

*"Deemed Generation' means the energy which a generating station was capable of generating but could not generate due to the conditions of grid or power system, etc. beyond the control of generating station or on receipt of backing down instructions from the State Load Despatch*

*Centre based on merit order principle laid down by TNERC from time to time. "*

b) 'Declared Capacity' means:

*'Declared Capacity' or 'DC' means the capability of the generating station to deliver ex-bus electricity in MW declared by such Generating Station in relation to any period of the day or whole of the day, duly taking into account the availability of fuel'*

c) 'Tariff' means:

*"The rates to be charged by the Company and payable by TANGEDCO under this agreement, all as set forth in Schedule-S, which are as per Sections 86 and 62 of the Electricity Act, 2003 and in line with Regulation of the Commission including the (Terms and Conditions of Determination of Tariff) Regulations, 2005 as amended and TNERC orders with respect to SEPC. "*

(d) 'Availability' means:

*'Availability' in relation to a thermal Generating Station for any period means the average of the daily average declared capacities (DCs) for all the day during that period expressed as a percentage of the installed capacity of the Generating Station minus normative auxiliary consumption In MW; and shall be computed in accordance with the following formula: ... "*

(e) Article 7.1 read with Article 5.2(a) and 2.3 of the PPA casts an obligation on the SEPC to keep ready the entire aggregate contracted capacity for the exclusive benefit of TANGEDCO.

(f) Article 7.3 of the PPA provides for terms of operation of the Project viz:

*"TANGEDCO shall be obligated to purchase electrical energy (or to pay FCC for Deemed Generation) for the P LF of the current Year less than or equal to 80% (assuming that the PLF for the remaining part of the Year is 0%). For example, if the Rated Capacity during the year is 525 MW; TANGEDCO's obligation to purchase Net Electrical Output and to pay for Deemed Generation, shall cease for such year once the sum of Net Electrical Output, Auxiliary Consumption and Deemed Generation for such year has reached 3,679,200 megawatt hours. TANGEDCO shall not be required to purchase electrical energy in excess of 100% of the Rated Capacity, and an instruction by TANGEDCO to reduce the output to Rated Capacity shall not be subject to limitations in Clause 7.3 (c). The Company is obligated to generate and sell power to TANGEDCO even when the PLF (actual generation plus the Deemed Generation) equals or exceeds 80% and such generation is first applied to replace the already included Deemed Generation in the P LF calculation."*

- (g) Article 12 provides for relief in case of force majeure:

*"Article 12 Force Majeure*

*(a) Force Majeure (the "Force majeure ") shall mean any event or circumstance or combination of events or circumstances that materially and adversely affects, prevents or delays any Party in the performance of its obligations in accordance with the terms of this Agreement, but only if unto the extent that such events and circumstances are not within the affected Parties reasonably control, directly or indirectly, and the effects of which the affected Party could not have prevented through the employment of Prudent Utility Practices or, in the case of construction activities through reasonable skill and care, including through the expenditure of reasonable sum of money. Any events or circumstances meeting the description of Force Majeure which have the same effect upon the performance of any Contractor shall constitute Force Majeure with respect to the Company.*

*(b) Force Majeure circumstance and events shall include without limitation the following events to the extent that such events or their consequences (it being agreed that if a passing event is within the reasonable control of the affected Parties, the direct consequences shall*

also be deemed to be within such Parties reasonable Control) satisfy the above requirement.....

(2) The following other Force Majeure Events (collectively "Indian Political Events") comprising;

(ii) "Direct Indian Political Events" comprising :

(E) Any interruption in the supply of Fuel (or of allocation or linkage of Fuel) resulting from the action or inaction of any Government Agency ;  
or.

(F) Any event or circumstance or a combination of the same of a nature analogous to any of the foregoing."

#### 12.2 Effect on payment obligations

(a) notwithstanding that an event of Force Majeure may otherwise exist, the provisions of Clause 12 shall not in any event excuse any failure to pay or any delay in paying money due and owing under this Agreement.

#### 12.4 Duty to Mitigate

The parties shall use reasonable efforts to mitigate the effects of any event of Force Majeure and to cooperate to develop and implement a plan of remedial and reasonable alternative measure to remove the event of Force Majeure provided, however, that no Party shall be required under this provision to settle any strike or other labour disputes on terms it considers to be unfavourable to it. Upon the cessation of the event of Force Majeure, the Party affected thereby shall make its best efforts to resume normal performance of its obligation under the Agreement as soon as possible.

#### 12.5 Continuing Payment Obligations

(a) Upon the occurrence and during the continuance of any event of Force Majeure, the Tariff and all other payment obligations of the Parties hereunder shall continue to be payable. "

1.39. The SEPC ought to be deemed to have generated power in period of non-supply in FY 2022-23 i.e. from 01.12.2022 to 31.03.2023 and any other period SEPC was/is not able to supply power as per Addendum #3 which was/is beyond SEPC's control. The above period for non-supply must be considered as periods of 'deemed generation' for two reasons:

- (a) *Non-generation has occurred on account of 'events beyond SEPC's control'.*
- (b) *The event of unprecedented rise in imported coal prices is a force majeure event under Article 12 of the PPA.*

1.40. From a bare perusal of the afore-said clause of the PPA, it is evident that: -

- (a) A generator (SEPC) which is affected by an event of force majeure is construed as an aggrieved party.
- (b) The term 'force majeure' has been given an inclusive definition. The ambit of the force majeure clause is not exhaustive and will include an array of events which are beyond the reasonable control of the party. This interpretation is supported by the observation of the Hon'ble Supreme Court in Industrial Finance Corporation of India vs. Cannanore Spinning & Weaving Mills Ltd. (2002) 5 SCC 54 wherein it was held that

any impediment beyond one's control which was unforeseen and unavoidable in nature shall attract the force majeure clause in the contract. The relevant extract is as under: -

*"40. It may be noticed here that the statute itself has recognised the doctrine of frustration and encompassed within its ambit an exhaustive arena of force majeure under which non-performance stands excused by reason of an impediment beyond its control which could neither be foreseen at the time of entering into the contract nor can the effect of the supervening event be avoided or overcome. "*

1.41. The Courts have adopted a wide connotation to the term 'force majeure'. It is settled that the main intention behind force majeure clause is to save the contracting party from any event over which it has no control. In this regard, reliance may be placed on the decision of the Hon'ble Supreme Court in *Dhanrajamal Gobindram vs. Shamji Kalidas & Co.*, AIR 1961 SC 1285, wherein the following observation was made:-

*"17. Mc Cardie, j. in Lebeauvin v. Crispin [(1920) 2 KB 714J has given an account of what is meant by "force majeure": with reference to its history. The expression "force majeure" is not a mere French version of the Latin expression "vis major". It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in "force majeure ". Judges have agreed that strikes, breakdown of machinery, which, though normally not included in "vis major" are included in "force majeure". An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to 'force majeure': the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to 'force majeure', and even if this be the meaning, it is obvious that the condition about "force majeure" in*

*the agreement was not vague. The use of the word "usual" makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties. "*

1.42. The fact of imported coal price rise causing the inability of SEPC to generate power and supply to TANGEDCO, falls under the definition of 'force majeure' which ought to be harmoniously read with the definition of 'deemed generation'.

1.43. In view of the above, it is relevant to cite National Agricultural Cooperative Marketing Federation of India vs. Alimenta S.A., AIR 1954 SC 44 where the Hon'ble Supreme Court held that the contract became unenforceable due to the contingency of non-supply of contracted quantity by Govt. of India. In addition, reference may also be drawn to Alopi Parshad & Sons Ltd. v. Union of India, AIR 1960 SC 588 where the court held the contract to not bind the parties where a situation fundamentally different from what was envisaged by the parties had unexpectedly emerged. In the present case, SEPC and TANGEDCO never envisaged a situation where the imported coal prices will rise triple fold in a span of a year. Adjudication of the effect of rise in coal prices on the PPA has been finally decided by the Commission where in its final Order dated 31.08.2023 in M.P. No.3 of 2022 [SEPC v. TANGEDCO] the Commission has primarily allowed the petition and has given the following directions:

(a) Rise in global imported coal prices is beyond SEPC's control, which has made supply of power as per PPA completely unviable.

(b) SEPC is permitted to procure domestic coal linkage for long term future supply to TANGEDCO.

(c) SEPC in the interim period i.e. until it gets domestic coal linkage, is to supply power to TANGEDCO using cheapest imported coal which will be purchased not exceeding Argus Index prices.

B. Requirement of purposive interpretation of contract in view of facts and circumstances

B.1 Facts pertaining to cost of investment made in the Project

1.44. The purpose of payment of fixed cost is derived from the factual background viz obligations undertaken by the generator (SEPC) to develop the Project. In this regard, the following is noteworthy:

(a) In the factual background above, it has been stated that on 30.04.2015, the Commission approved the estimated Project cost and passed directions viz achieving financial closure and SCOD. In the Order dated 30.04.2015 it has been noted that "Fixation of Capital cost of a Power Plant is important because it decides the Fixed Cost of the electricity generated for the entire life period of



30 years ... " [Para 13.2]. The provisional capital cost of Rs.3514 Cr. was approved by the Commission. The approval of provisional capital cost was done on the basis of submissions made by SEPC viz debt service obligations for the Project towards M/s. Power Finance Corporation ("PFC") and M/s. REC Limited ("REC") are appointed as the Lead Financial Institutions. The Commission was aware that PFC and REC sanctioned Rupee Term Loan (RTL). The conditions of repayment of loan have been clearly stipulated in the Common Rupee Term Loan Agreement ("CRTLA") which was executed on 05.12.2014.

(b) Further, it has been TANGEDCO's own submissions that even in case SEPC's Project falls outside of merit order despatch due to any reason, TANGEDCO is liable to pay fixed cost/charges for the Project [Ref to TANGEDCO's affidavit dated 04.05.2018].

(c) On 10.01.2020, the Commission passed its Order after consideration of the above, holding that SEPC is to approach the Commission with actual completed cost for true up and fixing of actual completed cost and in the intervening period, provisional fixed cost may be paid by TANGEDCO based on provisional capital cost already approved.

(d) Thus, it was only upon approval of the Commission and TANGEDCO of the debt obligation of SEPC, the provisional capital cost was approved based on which the FCC payable by TANGEDCO to SEPC is decided.

1.45. Besides the cost of maintaining the Project despite non scheduling of power by TANG EDCO on pass through basis, SEPC is servicing its debt taken for the Project by way of an unsecured loan in absence of getting fixed charges from TANGEDCO. Until now SEPC has borne an amount of Rs. 446.89 Cr. as fixed cost which remains unpaid by TANGEDCO viz

| Sl.No. | From      | To        | Invoice No.        | Invoice date | Amount (in    |
|--------|-----------|-----------|--------------------|--------------|---------------|
| 1      | 01-Dec-21 | 31-Dec-21 | SEPC/21-22/003     | 14-Feb-22    | 58,60,04,804  |
| 2      | 01-Jan-22 | 31-Jan-22 | SEPC/21-22/004     | 14-Feb-22    | 58,53,98,904  |
| 3      | 01-Feb-22 | 28-Feb-22 | SEPC/21-22/005     | 01-Mar-22    | 52,87,47,397  |
| 4      | 01-Mar-22 | 31-Mar-22 | SEPC/21-22/006     | 01-May-23    | 58,53,98,904  |
| 5      | 01-Dec-22 | 31-Dec-22 | SEPC/22-23/FCC/009 | 02-Jan-23    | 55,93,63,193  |
| 6      | 01-Jan-23 | 31-Jan-23 | SEPC/22-23/FCC/010 | 01-Feb-23    | 55,93,63,193  |
| 7      | 01-Feb-23 | 28-Feb-23 | SEPC/22-23/FCC/011 | 01-Mar-23    | 50,52,31,271  |
| 8      | 01-Mar-23 | 31-Mar-23 | SEPC/22-23/FCC/012 | 01-Apr-23    | 55,93,63,193  |
|        | Total     |           |                    |              | 446,88,70,859 |

1.46. In view of the above, SEPC is required to bear a monthly expense of debt service, O&M cost which includes manpower of nearly 1000 people,

mandatory spares cost, insurance cost and other statutory payments, etc. to keep the plant ready for coming to operation to rescue Tamil Nadu State from power crisis which is recurring and continuous. Since the ultimate purpose of developing the Project (for which the above said cost has been incurred by SEPC for now) is to supply power to TANGEDCO (especially since the Project was developed under an MoU route i.e. on agreement and consent of TANGEDCO that the Project is required by TANGEDCO for supply of power to its consumers), the cost of development i.e. FCC is to be borne/reimbursed by TANGEDCO. The talented manpower is leaving the company with no hope of Plant running. The attrition rate is nearby 30%. Under these circumstances, it is extremely difficult and unsafe to keep the Plant available for operation when Tamil Nadu State faces power crisis.

## B.2 Intent of two part tariff

1.47. The PPA is required to be interpreted in a purposive manner in order to compensate SEPC for development of the Project. Fixed price component of Tariff is payable irrespective of whether the power is scheduled or not by the power procurer. This is so for the reason that the generator ought not to be made to suffer on account of non-scheduling of power due to any reason not attributable by the generator. Since the power project is developed by the

generator for the ultimate purpose of supply of power to the procurer only. The rationale behind such provision is to re-compensate the generating company for providing the infrastructure and setting up the plant. Variable costs are payable only in respect of the power actually scheduled. This is the reason variable costs are linked to the fuel prices, fuel being the major and vital component in the production of power.

1.48. There is a concept of 'prudent investment theory' arising out of foreign law which states that the element of value is a property right, and should be considered in determining value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use. The concept relates to importance of adequate returns to an investor. The concept is applied for fixing rates for a utility which creates its service merely by its investment i.e. the quality of service rendered by the utility is to be measured by the amount of capital it puts into the enterprise.

1.49. Reference is also drawn to 'The World Bank's' description of fixed return  
viz

*"A Power Purchase Agreement ("PPA ") is generally the primary contract between the public and private sector parties which underpin a power sector PPP. It is typically between a public sector purchaser "offtaker" (often a state-owned electricity utility, in jurisdictions where the power sector is largely state operated) and a privately-owned power producer. It*

*usually provides the primary revenue stream which underwrites the PPP project. Therefore, the structure and risk allocation regime under the PPA is central to the private sector participant's ability to raise finance for the project, recover its capital costs and earn a return on equity. This summary is focused on a base load thermal plant developed pursuant to a PPP. While certain elements may be common across all P PAs, different considerations would apply for mid-range or peaking thermal plants or plants using different generation technology (e.g. wind or solar). A number of the considerations outlined below would also need to be adapted for P PAs between private parties: for example, for sale on an electricity spot market (which are more commonly seen in jurisdictions with a more de-regulated power sector). (see Deregulated Electricity Markets and Synthetic P PAs below) ...*

*Pricing - the pricing regime in the PPA typically has two components:*

*1. an availability or capacity charge, which is payable by the off taker in consideration of the power plant operator making generation capacity available to the off taker, whether or not it actually off takes electricity from the power plant. This component is typically designed to provide a revenue floor for the project and is the primary channel " through which each project proponent would recover its fixed costs (including its capital investments, financing costs and a return on equity); .. "*

1.50. The above said intent is reflected in, 'unbundling of tariff' in case of sale of electricity by generating stations to power procurers. This is confirmed by reasoning accorded by Ld. CERC in its Consultation Paper on Bulk Electricity Tariffs (Sept. 15, 1999) which states as follows:

*"5.4.1 ... Availability Based Tariff (ABT) .... This proposal intends to implement a two-part generation tariff which unbundles the availability charge from the energy charge. This availability charge will be payable by all those SEBs, who have either contracted for capacity creation with the generator, or to whom capacity has been allocated under the Gadgil*

*formula. The availability charge will comprise of all fixed costs, which have been prudently incurred by the generator as a consequence of installing capacity. Its recovery will be linked to a target availability ...*

*5.4.5.1 One alternative, is to introduce competition during off peak periods. The appropriate definition of peak and off peak periods will be a precondition Presently, REBs notify peak and off-peak periods. Appreciating the considerable scope for regional variations, the methodology for such identification would need detailed examination. The experience with IPPs so far indicates that incremental investments in generation are dependent on the assured payment of 'fixed cost linked to availability targets ...*

### B.3 Buyout clause in the PPA

1.51. Besides the requirement for reimbursement of investment made by SEPC and the intent of fixed charges on economic principles as demonstrated herein above, the provision of 'Buy Out' clause in the PPA demonstrates that the Project was made solely for TANGEDCO. Article 12.7 [Article 12 being the force majeure clause] stipulates that in case Direct Indian Political event continues beyond the period of 277 days of SEPC achieving reduced Plant Load Factor ("PLP") as a consequence of Direct Indian Political force majeure event, TANGEDCO may elect to 'Buy Out' the Project as per Schedule 5 of the PPA. For this reason, payment of fixed charges to SEPC ought to be interpreted as 'tranche payments made by TANGEDCO for the Project made for its own purpose'.

### B.4 Purposive interpretation of the PPA

1.52. In view of the above, the provisions of the PPA ought to be interpreted harmoniously in order to give business efficacy to the contract. In this regard, the following decisions by the Hon 'ble Supreme Court, are noteworthy:

(a) Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission & Ors. 2019 SCC Online SC 813 held as under:

*"22. It could thus be seen that it is more than well settled that the clauses in the agreement ought to be given the plain, literal and grammatical meaning of the expression used in the same. No doubt, that the courts will also try to gather as to what intention the parties wanted to give them. As has been held by Ranjan Gogoi, J. (as His Lordship then was) the principle of business efficacy could be invoked only if by a plain literal interpretation of the term in the agreement or the contract, it is not possible to achieve the result or the consequence intended by the parties acting as prudent businessmen. This test requires that a term can only be implied, if it is necessary to give business efficacy to the contract, to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. If the contract makes business sense without the term, the courts will not imply the same. It is amply clear that courts can imply a clause only if it is found that the plain and literal meaning given to the expression used in the terms is not in a position to make out the intention of the parties. Reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. It must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract. As held in the case of Nabha Power Ltd. (supra), for invoking the business efficacy test and carving*

*out an implied condition, not expressly found in the language of the contract, the following five conditions will have to be satisfied:*

*(1) Reasonable and equitable;*

*(2) Necessary to give business efficacy to the contract,'*

*(3) It goes without saying i.e. the Officious Bystander Test;*

*(4) Capable of clear expression; and*

*(5) Must not contradict any express term of the contract. "*

(b) Nabha Power Ltd. v. Punjab State Power Corporation Ltd., (2018) 11

SCC 508 held as under:

*"49 ... The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract. "*

(c) Polymat India (P) Ltd. v. National Insurance Co. Ltd., (2005) 9 SCC 174

held as under:

*"19. In this connection, a reference may be made to a series of decisions of this Court wherein it has been held that it is the duty of the court to interpret the document of contract as was understood between the parties. "*



1.53. Further, though there is no ambiguity in the PPA, even otherwise the settled position of law is that in case of any ambiguity in the interpretation of the agreement, the rule of Contra Proferentem will apply. The rule of Contra Proferentem provides that in case of ambiguity or two possible interpretations, the Court will prefer that interpretation which is more favorable to the party who has not drafted the standard agreement. In this regard, SEPC relies upon following Judgments of the Hon'ble Supreme Court: -

(a) Bank of India & Anr. vs. K. Mohandas & Ors., (2009) 5 SCC 313 wherein it was held that :-

*"32. The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulations, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a well-known principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (verba chartarum<sup>21</sup> orties accipiuntur contra proferentem). "*

(b) United India Insurance Co. Ltd. vs. Pushpalaya Printers, (2004) 3 SCC 694 wherein the following was observed:-

*"6 .... In the absence of specific exclusion and the word "impact" having more meanings in the context, it cannot be confined to forcible contact alone when it includes the meanings "to drive close ", "effective action of one thing upon another" and "the effect of such action ", it is reasonable and fair to hold in the context that the word "impact" contained in clause 5 of the insurance policy covers the case of the respondent to say that*

*damage caused to the building and machinery on account of the bulldozer moving closely on the road was on account of its "impact". It is also settled position in law that if there is any ambiguity or a term is capable of two possible interpretations, one beneficial to the insured should be accepted consistent with the purpose for which the policy is taken, namely, to cover the risk on the happening of certain event. Although there is no ambiguity in the expression "impact", even otherwise applying the rule of contra preferentem, the use of the word "impact" in clause 5 in the instant policy must be construed against the appellant. Where the words of a document are ambiguous, they shall be construed against the party who prepared the document. This rule applies to contracts of insurance and clause 5 of the insurance policy even after reading the entire policy in the present case should be construed against the insurer. A Constitution Bench of this Court in General Assurance Society Ltd. v. Chandmull Jain [AIR 1966 SC 1644 : (1966) 3 SCR 500J has expressed that (AIRp. 1649, para 11)*

*"in a contract of insurance there is requirement of uberrima fides i.e. good faith on the part of the assured and the contract is likely to be construed contra proferentem, that is, against the company in case of ambiguity or doubt".*

1.54. A 'deeming provision' in a statute must be taken to its logical conclusion.

It is noteworthy that Hon'ble Supreme Court has held so in the following cases:

(a) State of A.P. v. Vallabtapuram Ravi, (1984) 4 SCC 410:

*"This Court while construing such deeming provision has adopted and applied in a number of cases the rule of construction expounded by Lord Asquith in East End Dwellings Co. Ltd. v. Finsbury Borough Council [J952AC 109,132: (1951) 2 All ER 587: 115 JP 477: (1951) 2 TLR 486 (HL)] in the following words:*

*"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so; also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of*

*these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs. It does not say that, having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs. "*

(b) *Ittiam v. Cherichi*, (2010) 8 SCC 612

*"15. It is well known that when the legislature uses a deeming provision to create a legal fiction, it is always used to achieve a purpose. In State of Travancore- Cochin v. Shanmugha Vilas Cashewnut Factory [AIR 1953 SC 333J ' the Constitution Bench opined, when a legal fiction is created, one is led to ask at once for what purpose it is created (see AIR p. 343, para 38). "*

1.55. In view of the above, purposive interpretation ought to be given to the provisions of the PPA which are in line with the TNERC Regulations, in order to compensate SEPC for the huge investment of about Rs.5100 Cr. made in the Project solely made for supply of power to TANGEDCO.

C. Necessary requirement/or regulatory intervention by the Commission

1.56. In case of non scheduling of power by TANGEDCO for reason beyond SEPC's control, the fixed charges ought to be reimbursed to SEPC failing which SEPC will be rendered- as a non performing asset ("NPA") for the reason of obligations of SEPC to fulfil debt service, operate and maintain the Project etc.

1.57. TANGEDCO has not paid heed to SEPC's commercial viability. SEPC has made all efforts towards supply of power to TANGEDCO in order to claim

the cost of investment made in developing the Project. TANGEDCO has failed to off take power from SEPC and has made no effort to maintain viability of the Project. It is noteworthy that TANGEDCO issued a tender for short term supply of power at a higher tariff than SEPC's. TANGEDCO in August 2022 issued a 'request for proposal' ("RFP") inviting tender for short term procurement of 500 MW power from 15.02.2023 to 28.02.2023 and 1500 MW power from 01.03.2023 to 20.05.2023 from intra state generators. This was done by TANGEDCO despite SEPC being ready to supply power. Copy of RFP dated August 2022 issued by TANGEDCO for short term supply of power is annexed herewith as Annexure-7. SEPC has also come to know that the supply of power that was carried out under this short term tender was at Rs.8.50/kWh where as SEPC's offer for the same time period was at a cheaper rate of Rs.7.65/kWh.

1.58. The above said demonstrates sheer unwillingness of TANGEDCO to support SEPC. It is in this view that it is apprehended that the above factors may render the Project as NPA. It is noteworthy that back in 2017, a high-level committee comprising Secretaries in MoP, Coal and Department of Financial Services and headed by NITI Aayog's CEO was formulated to address the problem of NPAs in India's power sector. The report states that:

(a) At the relevant point in time, about 58000MW of coal based power capacity was stressed and overall about 174GW of under construction power plants were stalled due to huge blockage of funds.

(b) One of the regulatory issues causing assets to be stressed is denial of compensatory tariff due to change in international market.

(c) Various initiatives were introduced by the Government to revive the stressed assets including launch of SHAKTI scheme to reform the bureaucratic and non-transparent process of coal allocation for power projects.

(d) Recommendations were given viz to allow flexible PPA terms and enable market play for fine tuning contracts, maintain, etc. There is certainty in revenue streams where PPAs are not terminated and off take commitments are met by power procurer, there is pass through of increases in input costs, Discom delinquencies may be reduced etc.

1.59. The Commission may exercise its regulatory power and direct TANGEDCO to compensate SEPC in terms of fixed cost for the investment made by SEPC in the Project.

D. Entitlement of fixed charges under the PPA are in line with TNERC Regulations

1.60. TNERC Regulations provide for payment of fixed costs to the generator based on its availability. Relevant provisions of the TNERC Regulations are as follows:

*Regulation 2(o): Declared Capacity or DC means the capability of the generating station to deliver ex-bus electricity in MW declared by such Generating Station in relation to any period of the day or whole of the day, duly taking into account the availability of fuel,*

*Regulation 36 - Components of Tariff:*

*(1) . The tariff for sale of power by the Generating Companies shall be of two part namely the Fixed Charges (recovery of annual capacity charges) and variable (energy) charges.*

*(2) The Fixed (annual capacity) charges shall consist of the following elements:*

*(a) Interest on Loan Capital;*

*(b) Depreciation;*

*(c) Return on Equity;*

*(d) Operation and Maintenance expenses; and*

*(e) Interest on Working Capital:*

*(3) The energy (variable) charges shall cover fuel cost.*

*Regulation 42 - Recovery of Capacity Charges:*

*(1) Full capacity charges (Fixed Charges) shall be recoverable at target availability specified in clause (1) of Regulation 37.*

*(2) Recovery of capacity charges below the level of target availability will be on pro rata basis. At zero availability, no capacity charges shall be payable.*

*(3) Payment of capacity charges (Fixed Charges) shall be on monthly basis in proportion to allocated / contracted capacity.*

*(4) Capacity (Fixed) charges per KWh in the month shall be worked out by dividing the capacity charges recoverable for the month by the quantum of ex-bus energy sent out in the month.*

1.61. A perusal of the aforesaid provisions clearly establishes that 'Tariff' includes Fixed Charges (recovery of annual capacity charges) and 'annual capacity charges' consist of components like Interest on loan capital, depreciation, return on equity, O&M and interest on working capital; and that the recovery of capacity charges is based on target availability i.e. average of declared capacities.

1.62. The PPA has been executed in line with TNERC Tariff Regulations. SEPC shall therefore be paid all sums due as fixed charges by TANGEDCO since the COD.

E. Payment of fixed charges for the period starting 01.12.2022 ought to be made based on the declared capacity

1.63. The Hon'ble APTEL in the following judgments has held that fixed charges payment is based on declared capacity:

(a) Indraprastha Power Generation Co. Ltd. v. Delhi Electricity Regulatory Commission, 2008 SCC Online APTEL 4

"19 .... The target availability of a station is based on the declared capacity during the year and not on the P LF achieved as claimed by the appellant. "

(b) Appeal no. 396 of 2018 titled as Arya Energy Ltd. v. Madhya Pradesh Power

Management Company Ltd. & Ors.:

*"8.1. ... The capacity charge for time block is paid for the declared MW output capacity of the station for that particular time block. The capacity charge is meant to cover the total fixed cost for the generating station i.e. interest on loan, return on equity, loan repayment provision or depreciation/amortization, fixed O&M Cost, insurance, tax etc. The Energy Charge is meant to cover the variable cost of the station that is the fuel cost component which goes up with amount of energy generated. Charges for deviation are those charges which are payable in terms of applicable Forecasting and Scheduling Regulation. "*

(c) Appeal No. 261 of 2013 titled Maharashtra State Electricity Distribution Co. Ltd. v. CERC & Ors. has held:

*"14 .... The respondent No.2 has rightly been held entitled to the capacity charges when the respondent No.2 remains in a position to generate electricity and accordingly has declared necessary availability of electricity when the appellant had chosen not to schedule quantum of electricity on the declared availability. We further note that this aspect decided by Central Commission in the impugned order has nothing to do with the relaxation of NAPAF for the non-availability of gas decided by the Central Commission in the earlier order. Thus the appellant / distribution licensee has rightly been held under the obligation to pay the capacity charges so long as the respondent No.2 generator has declared*



*available capacity, irrespective of whether the distribution licensee schedules the capacity offered by generator or not .... "*

1.64. It is also relevant to point out that PPA provides for the following:

*"9. COMPENSATION, PAYMENT AND BILLING*

*9.1 Payment Obligation*

*(a) TANGEDCO will make payments to the Company as determined in accordance with the Tariff and other provisions of the Agreement:*

*(i) .....*

*(ii) Beginning with the first year of operation, TANGEDCO shall make to the Company Monthly payments for the FCC, the VFC, the Monthly Adjustments and the Incentive Performance Payments as determined in accordance with the Tariff. The Other Charges (as defined in Schedule 3) shall not be included in the Monthly Tariff Payments and shall be invoiced separately and paid for by TNEB separately. "*

1.65. Further, Clause 3.2 of Schedule 3 to the PPA lays down the formula for determination of Fixed Capacity Charge. None of the elements as prescribed in the said formula constitute a reference to the FCC being dependent on scheduled or actual procurement of energy by TANGEDCO.

F. TANGEDCO ought to act in a reasonable manner

1.66. In view of the force majeure events, especially due to exponential rise in imported coal prices, SEPC on multiple occasions has requested TANGEDCO to:

(a) Off take power on pass through basis.

(b) Avail a discount of Rs.0.1 Per/unit for off take of power on pass through basis.

1.67. TANGEDCO has neither made an effort to off take power nor offered any viable solution to SEPC for operating the Project. This is contrary to principles of reasonableness and rationality enshrined in Article 14 of the Constitution. The principles of natural justice, being an integral part of Article 14 of the Constitution, mandate that every decision taken by a State entity has to be in compliance with natural justice and non-arbitrariness. In this regard, the following judgments are noteworthy:

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

1.68. SEPC has made an investment of about 5100 Cr. in the Project. SEPC is now operating the Project for supply of power to TANGEDCO and is incurring operating and maintenance expenses on a regular basis. The sums disbursed by SEPC include payment of money to the lenders for disbursement of loan which is a continuing liability, payment made to fuel supplier pursuant to TANGEDCO's direction dated 29.04.2022, regular payment for employee/

establishment/ overheads costs, operation and maintaining expenses etc .. In such situation TANGEDCO cannot be allowed to deviate from its obligations under the PPA. [Ref. to *State of Goa v. Reliance Infrastructure Ltd.*, 2021 SCC Online Born 306]

G. *The Commission ought to exercise its Regulatory Powers under Section 61 and 62 of the Act*

1.69. Sections 61 and 62 of the Act stipulate as follows:

*"Section 61. (Tariff regulations):*

*The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely.-*

*(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees,'*

*(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*

*(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments; ....*

*(g) that the tariff progressively reflects the cost of supply of electricity ...*

*(h) the promotion of co-generation and generation of electricity from renewable sources of energy;*

*(i) the National Electricity Policy and tariff policy"*

*Section 62. (Determination of tariff): --- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for -*

*(a) supply of electricity by a generating company to a distribution licensee:*

*(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution/or determination of tariff*

*(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.*

*(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.*

*(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee .. "*

1.70. The courts ought to exercise their powers within its jurisdiction and the extent of it is determined by the objective of the statute. Hon'ble Supreme Court in judgment dated 04.10.2019 in Nusli Neville Wadia v. Ivory Properties & Ors. has referred to the settled law that expanse of jurisdiction would take colour/rom its context. Therefore, both jurisdiction of the Commission and context are to be derived from the Act. 87. In addition to Section 6] which ensures commercial viability of the generating stations in the country, Section 3 of the Act provides that Central Govt. shall prepare a National Electricity Policy and tariff policy for development of power system based on optimal utilisation of resources such as

coal, natural gas, renewable sources etc. It is noteworthy that the National Electricity Policy provides for economic viability of ICB thermal power stations in the following manner:

*"Thermal Generation*

*5.2.12 Even with full development of the feasible hydro potential in the country, coal would necessarily continue to remain the primary fuel for meeting future electricity demand.*

*5.2.13 Imported coal based thermal power stations, particularly at coastal locations, would be encouraged based on their economic viability. Use of low ash content coal would also help in reducing the problem of fly ash emissions.*

*5.2. 14 Significant Lignite resources in the country are located in Tamil Nadu, Gujarat and Rajasthan and these should be increasingly utilized for power generation. Lignite mining technology needs to be improved to reduce costs.*

*5.2. 17 For thermal power, economics of generation and supply of electricity should be the basis for choice of fuel from among the options available.*

*5.2.18 Generating companies may enter into medium to long-term fuel supply agreements specially with respect to imported fuels for commercial viability and security of supply. "*

1.71. The fixed costs under the PPA are in the nature of take-or-pay liability, wherein TANGEDCO is required to pay fixed costs in normal circumstances, irrespective of whether the power is actually procured or not. The mandate of

the relevant clauses of the PPA provides that so long as SEPC is in a position to generate power or is capable of generating power, TANGEDCO has to necessarily pay the fixed costs irrespective of any event which impact the ability of TANGEDCO to procure power. In view of the above, it is submitted that SEPC ought to be compensated by payment of fixed charges for being ready to operate at TANGEDCO's directions. Besides entitlement of fixed charges under law, SEPC would have supplied power to T A NGEDCO had it not been for the force majeure events. SEPC respectfully craves leave to approach the Commission at an appropriate time with the relevant data of expenses already incurred on account of lack of payment of fixed charges by TANGEDCO.

1.72. The SEPC has not filed any other Petition before any other Court or forum seeking similar relief as prayed for in the present Petition. The Commission has inherent powers to grant relief to meet the ends of justice.

## **2. Counter Affidavit filed by the Respondent :**

2.1. The petitioner herein has filed the above Dispute Resolution Petition No.3 of 2024 to hold and declare that SEPC is entitled to fixed charges for non-supply of power in the FY 2021-22 (non- renewal of CTO period) and non-supply of power in FY 2022-23 (withdrawal of pass-through period) to a tune of Rs.243,59, 11,020 with interest till date of filing i.e., 08.01.2024.

2.2. At the outset the respondent deny all the averments and allegations contained in this petition except those that are specifically admitted hereunder. Before traversing into the contentions of the petitioner, it is necessary to set out brief facts about the history of the PPA with the petitioner and to show before the Commission, how the petitioner has caused inordinate delay in the Commission and operation of the proposed power plant right from its initial conception.

2.3. The petitioner and the Respondent originally entered into a PPA dated 12.02.1998 for a period of 30 years, which underwent subsequent amendments based on various orders of the Commission. Based on the Order of the Commission dated 10.01.2020 in M.P. No. 27 of 2016, Addendum #3 was entered into by which the Respondent was supposed to achieve COD by 08.04.2021 which was actually achieved Commercial Operation of 1 X 525 MW Power Plant located at Tuticorin only on 30.11.2021.

2.4. In the present petition, SEPC is claiming fixed charges for the non-supply period in FY 2021-22 i.e., 01.12.2021 to 28.03.2021 due to:

- (i) Expiration of CTO and non-issuance of CTO by TNPCB
- (ii) Exorbitant rise in global imported coal prices and mechanism of

ceiling on variable fuel charges ("VFC") in PPA.

2.5. The averments made in paragraph nos. 11 to 51 under the caption "II. Factual background" are denied as false and untrue and the facts of the case are mentioned hereunder.

2.6. M/s.SEPC initiated the Power Purchase Agreement (PPA) with TANGEDCO on 29.01.1997 for the Tuticorin Thermal Power Project Stage IV - 1X525MW (the "Project") pursuant to the Government Order (the "GO") issued by Government of Tamil Nadu (the "GoTN") vide GO (Ms) No.4 dated 07.01.1997. Subsequently, M/s. SEPC has obtained all the required clearances, executed the PPA on 12.02.1998 which was then approved by GoTN vide GO (Ms) No. 114 dated 13.07.1998. The PPA was thereafter amended on 30.10.1998 as Addendum#1 to the PPA to incorporate the terms of the GO dated 22.04.1998 of GoTN.

2.7. The petitioner and TANGEDCO have executed and delivered Addendum 1 to the PPA on 30.10.1988 in order to incorporate the conditions laid down by the Government of Tamil Nadu while according approval for the PPA and also certain technical conditions laid down by the Central Electricity Authority (CEA).



2.8. The petitioner vide its letter dated 03.08.2009 approached TANGEDCO and TANGEDCO vide its letter dated 18.8.2009 directed the petitioner to get approval from the Commission for necessary approval to establish the Facility as per the PPA.

2.9. Pursuant to above, the petitioner filed a Miscellaneous Petition in M.P.No.18 of 2010, seeking the direction of the Commission for establishing the Facility in accordance with the PPA.

2.10. The Commission in its order dated 09.05.2011 in M.P.No.18 of 2010, has given directions for establishing the Facility as per the PPA and further directed that the PPA be amended to incorporate certain norms in line with the TNERC (Terms and Conditions for Determination of Tariff) Regulations - 2005 (the "TNERC Tariff Regulations 2005") and thereafter to submit such amended PPA to the Commission for approval in terms of Section 86 of the Electricity Act 2003.

2.11. M/s.SEPC and TANGEDCO have executed and delivered Addendum 2 to the PPA on 10.01.2021 and the amended PPA was thereafter submitted on 13.01.2012 to the Commission for approval in terms of Section 86 of Electricity Act, 2003, which was numbered as PPAP No.5 of 2012.

2.12. The Commission in its Order dated 30.04.2015 in PPAP No.5 of 2012, approved the amended PPA in terms of Section of 86 of Electricity Act 2003, fixed the Provisional Capital Cost as Rs.3514 Crores in INR Terms, ordered the company to achieve the Financial closure for the project. within 3 months from the date of Order (i.e., before 30.07.2015) and to incorporate certain conditions in the amended PPA.

2.13. M/s. SEPC vide letter dated 10.11.2015 communicated TANGEDCO that they have achieved Financial Closure on 30.10.2015 and subsequently submitted draft Addendum on 08.12.2015 and 03.02.2016. TANGEDCO examined the draft Addendum and revised it in line with the TNERC order PPAP No.5 of 2012 and given to SEPC on 29.02.2016. Moreover, since the company has not achieved the Financial Closure within the stipulated period, i.e.30.07.2015, the TANGEDCO vide letter dated 14.10.2016 asked to get the approval of the Commission for the delayed achievement of Financial Closure.

2.14. The petitioner filed a petition before the Commission which was numbered as M.P.No.27 of 2016 seeking reckoning of the actual Financial Closure Date (FCD) as 30.10.2015. Thereafter, as directed by the Commission, the Company subsequently fulfilled the conditions precedent of the PPA such as execution of Coal Supply and Transport Agreement (hereinafter referred to as

"CSTA") & Coal Handling Agreement (hereinafter referred to as "CHA") and submitted the same to TANGEDCO for approval. Pursuant to which, the CSTA & CHA was submitted before the Commission for approval as ordered in PPAP No.5 of 2012. The Commission in its order in M.P.No.27 of 2016 dated 10.01.2020, ordered to reckon the financial closing date as 30.10.2015 and approved the CSTA & CHA amongst passing such other directions.

2.15. In continuation to the orders of the Commission passed on 30.04.2015 in PPAP 5 of 2012, on 10.01.2020 in MP 27 of 2016, and considering the various issues raised in Review Petition dated 10.08.2020 filed by TANGEDCO against the order in M.P.No. 27 of 2016 and considering the various developments that have taken place in the meanwhile, the Company and TANGEDCO have discussed and agreed on the various amendments to be made to the PPA so as to minimize the Tariff and have recorded the agreements as Minutes of Meeting (the "MOM") on Second day of September, 2020.

2.16. M/s. SEPC has submitted a petition in 2012 to approve the Addendum 21 Capital cost for the entire project which was inclusive of External Coal Handling System and accordingly EPC was entered into.

a. Subsequently, TNERC in its order dated 30.04.2015 in PPAP No.5 of 2012 approved the total Capital cost of the project as Rs.3514 Crores

based and directed the company to submit the Financial package to meet the Capital cost to the Commission after the financial closure.

- b. Accordingly, SEPC vide letter dated 30.09.2016 submitted the Financial package to the Commission in which EPC cost of the plant as RS.2697 Crores.
- c. Since, the proposal for construction of Coal Jetty dropped by SEPC, TANGEDCO insisted for the deduction of the cost of coal jetty from the approved capital cost of Rs.3514 crores.
- d. Thereafter, in a Negotiation Meeting held between M/s SEPC Power Private limited and TANGEDCO on 02.09.2020 consensus were reached to exclude the coal jetty cost of RS.155 Crores from the approved provisional capital cost of Rs.3514 Crores.
- e. Thus, now the petitioner cannot seek the cost of coal jetty separately.
- f. Accordingly, Addendum #3 was executed on 25.02.2021.

2.17. But in the petition, M/s SEPC has not deducted the coal jetty cost of RS.155 crores as per Addendum #3 from the capital cost. Further due to non-execution of coal jetty, SEPC accepted and acceded to exclude the cost of construction of coal jetty @ value of RS.155 Crores from Rs.3514 Crores, the

Provisional Capital 'cost approved by the Commission. Thus the amended provisional capital cost of the project as agreed by the Parties is Rs.3359 Cr, subject to truing up. The trued up Provisional Amended Capital cost is Actual Completed Capital Cost.

2.18. In the meeting dated 02.09.2020, TANGEDCO had highlighted that the fuel cost is the weighted average price of different coal indices pertaining to coal that could be utilized in the plant and formed a huge part of the variable cost and hence the cost of primary fuel was maximised casting a huge burden upon the TANGEDCO. Thereafter, the parties had jointly agreed to have a tripartite meeting along with M/s.BHEL, the manufacturer and supplier of Boiler to the plant, to finalise the coal indices to be used in the Boiler for the effective and beneficial operation of the power plant. It was agreed that the changes to the weighted average price of the primary fuel (Coal), CSTA, Operating norms relating to CSTA, if any could be incorporated through Addendum.

2.19. As per MoM dated 02.09.2020, a Joint meeting was held with M/s.BHEL, M/s.SEPC and TANGEDCO, wherein it is agreed to incorporate a coal with specifications suitable for boiler design of GCV 5000 to 6000 Kcal of suitable proportion as recommended by M/s.BHEL and to amend the CSTA accordingly wherein after discussion in the joint meeting held on 02.09.2020 on 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.270f 2016 and signed a minutes of meeting (the "MOM") for the agreement reached.

2.20. The Addendum#3 embodies the modifications to the PPA in the light of the orders of the Commission passed on 09.05.2011 in M.P.18 of 2010, 30.04.2015 in PPAP 5 of 2012, 13.06.2017 in M.P.36 of 2015, 10.01.2020 in MP 27 of 2016 and Minutes of the Meeting dated 02.09.2020 between the TANGEDCO and the Company, pursuant to which the parties hereto agreed to memorialize certain changes, undertakings, clarifications, Schedules and modifications with respect to the Agreement.

2.21. In view of the above discussions negotiation and agreements arrived by the parties, the review petition filed by TANGEDCO for review of TNERC order in MP.no.27 of 2016 is withdrawn with effect from the date of execution of Addendum3.

2.22. A formal approval for the amended CSTA and CHA had been given to M/s SEPC subject to the order of the Commission in M.P.No.27 of 2016 dated 10.01.2020 so that there shall not be any liability on the part of TANGEDCO in the CSTA and CHA other than the payment of the applicable VFC. Hence any Demurrage, Liquidated damages, Penalties and legal expenses between M/s

SEPC and M/s JERA or M/s Sea Port Logistics Private Limited shall be settled among them or borne only by M/s SEPC Power Private Limited and at any cost TANGEDCO shall not be liable for it, entirely or partially.

2.23. The onus is on the Petitioner to demonstrate before the Commission and to show on which dates or on when the price of Imported Coal price was hiked. The petitioner herein was also very well aware of the international coal pricing mechanism during signing the addendum 3 to the PPA. Without generating a single unit after COD the Petitioner herein cannot state that the hike of imported coal price is the reason for shut down of project.

2.24. As per the Schedule 7.2 of Addendum #3 of PPA, the Petitioner has to deliver a Capacity Notice to SLDC containing the Declared Capacity at the beginning of each Schedule Day. The Petitioner has not declared their capacity availability notice to the SLDC right from COD to 29.04.2022.

2.25. As per Schedule 3.1(d) of Addendum #3 of PPA, "Within thirty (30) days after the Commercial Operation Date, the Company shall estimate those amounts, which comprise the FCC for the remainder of the year in accordance with Section 3.2 of this Schedule 3. The Company shall recompute the FCC:

- (i) Atleast (30) days prior to the beginning of each year thereafter, effective as of the beginning of such year;
- (ii) Within thirty days (30) Days after there is any change to the Approved Capital Schedule effective as of the date the change was effected, or as otherwise to be agreed by the Parties; and
- (iii) Within thirty Days after and resetting of Capacity pursuant to Clause 4.4."

2.26. M/s SEPC on 27.01.2022 informed TANGEDCO that, application submitted by SEPC for extension of Consent To Operate (CTO) beyond 30.11.2021 is pending before TNPCB and the Company will declare availability as per PPA only after renewal of CTO.

2.27. The price and transportation of imported coal depends on many factors like political, non-political, and natural events and the petitioner should be well aware of the 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 and coal as ordered by the Commission.

2.28. M/s.SEPC was requested to supply power on pass through basis from 29.04.2022 as per the dispatch instructions of SLDC and M/s SEPC had



commenced their supply of power to TANGEDCO grid from 30.04.2022 onwards, using the coal purchased through stock on sales basis and e-auction tender and not from M/s. JERRA as per the FSA approved by Commission.

2.29. The Ministry of Power vide order No. 23/13/2021-R&R (Pt-1) dated 05.05.2022 (order valid upto 31.10.22) issued directions to operationalize the imported coal based power plants by ensuring the bench mark rates of power so worked out meets all the prudent costs of using imported coal for generating power, including the present coal price, shipping costs and O&M costs etc and a fair margin worked out by the above said committee constituted by the Ministry of Power (MoP) with representatives from MoP, CEA and CERC.

2.30. TANGEDCO vide its letter dated 23.11.2022 and 01.12.2022 intimated M/s SEPC that TANGEDCO has withdrawn the provisions of pass through with effect from 01.12.2022 due to lesser demand by giving prior notice as per the direction of MoP dated 28.06.2022. Also informed SEPC to supply power as per the provisions of PPA/ Addendum 3 and not at the Bench mark rate as it had withdrawn 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.

2.31. In this regard, the TANGEDCO had informed SEPC vide its letter dated 30.12.2022 that any modification/ change in the agreements regarding procurement of coal could only be as per the directions/ approval of the Commission. It was further informed that it was mandatory for the petitioner to maintain valid FSA till the term of PPA in order to declare the plant availability and raise invoices and the Monthly Fixed cost claimed by M/s SEPC from 30.04.2022 to 30.08.2022 (pass through period) were processed and payment were made accordingly.

2.32. The Commission in its order dated 31.08.2023 passed in M.P. No.3 of 2022 Ordered as follows:

“....

*10.26 In the result the petition is ordered in the following terms:*

- a. The SEPC is permitted to procure imported coal, as an interim arrangement, for the supply of power to the Respondent TANGEDCO.*
- b. The SEPC shall make all earnest endeavour to procure imported coal at the cheapest price prevailing in the market. Further the cost of the procured imported coal shall not exceed the Argus index price during that period.*
- c. The above referred interim arrangement for supply of power by the SEPC to the Respondent TANGEDCO shall be valid only until SEPC procures domestic coal linkage and commences supply of power using domestic coal supplied through the linkage.*
- d. For obtaining domestic coal linkage the SEPC shall take all the necessary steps in an expeditious manner. In this regard the SEPC and the Respondent*

are at liberty to approach this Commission within 3 months from the date of this Order and appraise the Commission about the status of domestic coal linkage.

*e. The SEPC and the Respondent TANGEDCO are directed to amend the relevant Power Purchase Agreement on the basis of interim orders passed by Commission on 09.03.2023; 13.06.2023 and 20.06.2023 and also the present order. The copy of the amended PPA shall be submitted before this Commission for approval within 15 days from the date of this order."*

2.33. It is pertinent to note that SEPC has not initiated the process for obtaining domestic coal linkage under the "SHAKTI"(Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India) Scheme notified on 22.05.2017 by the Ministry of Coal, Government of India.

2.34. In fact, the Commission had passed an interim order dated 09.03.2023 in M.P. No. 3 of 2022 which is reproduced below:

“ ...

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

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

*(2) The TANGEDCO shall give NOC to facilitate the 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.*

*SEPC shall commence supply of power to the 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 SEPC 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.*

2.35. The above order, the Commission allowed the prayer of SEPC to remove the ceiling price mechanism for variable Fuel Charge(VFC). The Commission had also permitted SEPC to procure imported coal as an interim arrangement. However, the Commission contemplated that SEPC shall enter into a domestic coal linkage within 3 months. Till date SEPC has not entered into a coal linkage.

2.36. As against the order of the Commission in M.P. No. 3 of 2022, TANGEDCO has filed an appeal in Appeal No. 910 of 2023 before the Hon'ble APTEL and the same is pending adjudication. TANGEDCO has filed the said appeal only against direction (a) and (b) of the order dated 31.08.2023 passed in M.P. No. 3 of 2022. TANGEDCO is not against the direction of the Commission to change the fuel to domestic coal.

2.37. TANGEDCO is aggrieved only to the extent that the said order permits SEPC to procure imported the cheapest available coal in the market. SEPC is

misinterpreting the term "cheapest available coal" as it is not possible for TANGEDCO to verify in a given month what is the cheapest available coal in the market and whether SPEC has procured only the cheapest available coal.

2.38. Further, SEPC was informed that the power will be supplied 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.

2.39. The SEPC claim is false and unsubstantiated. There is no provision in the PPA for the petitioner to claim fixed charges from 01.12.2022 till 31.03.2023

#### CONSENT TO OPERATE & DEEMED GENERATION:

2.40. The averments made in paragraph nos. 52 to 59 are denied as false and untrue. It is submitted that it is apparent from the sequence of events since the execution of the PPA that this Petitioner has repeatedly resorted to dilatory and delaying tactics, in respect of resolving issues arising under the PPA.

2.41. Based on the approval of this Respondent, the Petitioner has achieved Commercial Operation of 1 X 525 MW Power Plant located at Tuticorin only on

30.11.2021. However, without any prior intimation / approval of this Respondent, the Petitioner unilaterally desynchronised after 72 hours trial run test.

2.42. As per the Schedule 7.2 of Addendum #3 of PPA, the Petitioner has to deliver a Capacity Notice to SLDC containing the Declared Capacity at the beginning of each Schedule Day. The Petitioner has not declared their capacity availability notice to the SLDC right from COD to till date.

2.43. The Petitioner has suppressed the fact of 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 and only on 10.02.2022 the fact of CTO having expired was informed by the Petitioner. This shows the Petitioner's mala fide intention.

2.44. The 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;”

2.45. On achieving COD, M/s SEPC has to deliver a Capacity Notice to TANGEDCO containing the Declared Capacity at the beginning of each Schedule Day as per the Schedule 7 of Addendum #3 of PPA as follows:

#### Schedule 7 "Determination of Observed Capacity"

##### 7.1 Definitions

Capacity Notice has the meaning set forth in Section 7.2.1 of this Schedule

Declared Capacity (Declared Capacity' or (DC' means the capability of the generating station to deliver ex-bus electricity in MW declared by such Generating Station in relation to any period of the day or whole of the day, duly taking into account the availability of fuel.

##### 7.2 Capacity Notices

*7.2.1 As soon as practicable before the Commercial Operating Date and thereafter at the beginning of each Schedule Day, the Company shall deliver to TANGEDCO a Capacity Notice (the "Capacity Notice") containing the Declared Capacity of the Facility for each Settlement Period throughout the relevant Schedule Day (and where such Declared Capacity changes, the time at which any change is expected to take effect). The Company may issue a standing*

*notice which, until a subsequent Capacity Notice or Revised Capacity Notice is issued, shall be deemed to be the Capacity Notice for each Schedule Day.*

*7.2.2 Whenever the Company believes that any information that it has provided to TANGEDCO pursuant to this section 7.2 of this Schedule no longer accurately reflects its expectations, it shall promptly deliver to TANGEDCO a written notice (a "Revised Capacity Notice") revising that information. A Revised Capacity Notice that is delivered either after the Company's receipt of a Monitoring Notice or within 30 minutes prior to the effective time of a requested increase in output pursuant to a Dispatch Instruction shall not be effective with respect to the period of monitoring relating to such monitoring instruction or requested increase in dispatch.*

However, even after several reminders by TANGEDCO vide 10.2.2022, 05.02.22, SEPC has not given declaration till 30.04.2022.

#### DEEMED GENERATION

2.46. M/s. SEPC has not delivered the Capacity Notice containing plant availability as per PPA for want of renewal of Consent till March 2022. It is submitted that even after getting CTO, TANGEDCO was unable to schedule/issue Dispatch Instruction to the Company as per Clause 7.3(b) and



7.3(c) as the plant is not available for generating power. As per clause 1 (Definitions) of Addendum 3 Availability is defined as 'Availability' in relation to a thermal Generating Station for any period means the average of the daily average declared capacities (DCs) for all the days during that period expressed as a percentage of the installed capacity of the Generating Station minus normative auxiliary consumption in MW, and shall be computed in accordance with the following formula.

$$\text{Availability} = 10000 \times \sum_{i=1}^N \text{DC}_i / (N \times \text{IC} \times (1 - \text{Aux}_n)) \%$$

$i=1$

*Where,*

*IC= Installed Capacity of the Generating Station in MW,*

*DC<sub>i</sub> = Average declared capacity for the with day of the period in MW,*

*N= Number of days during the period, and*

*Aux<sub>n</sub>= Normative Auxillary Energy consumption as a percentage of gross generation;*

2.47. Deemed generation is applicable only when SEPC is available for Generation and TANGEDCO did not schedule. However, in the present scenario, SEPC is not available for Generation. Hence the claim made by the petitioner is against the terms of PPA and therefore the petitioner is not entitled

for the same. As per the Article 12.2 of PPA, the company is entitled to have deemed generation due to the event of force majeure. Whereas, in the case of SEPC, no force majeure event had occurred for SEPC for not declaring the availability after achieving CoD. Either the delay to get consent to operate or non supply of power due to termination of FSA with M/s. JERRA is not attributable to the event of force majeure. From the above, it is obvious that SEPC is trying to mis-interpret the terms of PPA without any valid justification. Therefore, the petitioner cannot seek a shelter under Force majeure.

2.48. TANGEDCO does not have any payment obligation as per the Article 12.5 as stated by SEPC on account of force majeure. The Hon'ble Supreme Court vide its judgement dated 11.04.2017 in Energy Watchdog Vs Central Electricity, Regulatory Commission and Ors. Etc. C.A No. 5399-5400 of 2016 made it clear that enactment of Indonesian Regulation did not constitute either change in law or Force majeure. The change in law clause is only applicable to Indian law. It is well established that the duty to mitigate as per Article 12.4 is applicable to TANGEDCO only when SEPC plant is affected due to force majeure event, which is not the case here.

2.49. As per the Article 12.6 of PPA, breach of contract is excusable only on the occurrence of force majeure event. So, when there are defaults on part of

the company, then TANGEDCO is not obligated to pay for the same. Therefore, the failure of SEPC to obtain and maintain a valid consent to Operate from the TNPCB is a default of the SEPC and breach of PPA conditions and TANGEDCO cannot be made to bear the liability for the same.

2.50. As per TNERC regulations,

(a) Regulation 36: The tariff for sale of power by the Generating Companies shall be of two part namely the Fixed Charges (recovery of annual capacity charges) and variable (energy) charges

(b) Regulation 37: The Norms of Operation for the Thermal Generating Stations, shall be as (i) Target availability for recovery of full capacity (fixed) charges (ii) Target Plant Load Factor for incentive, etc.

(a) Regulation 42(3) :Payment of capacity charges (Fixed Charges) shall be on monthly basis in proportion to allocated / contracted capacity.

The above Regulations of TNERC contemplates the payment of fixed charges for the generating stations which are readily available for generation as per the

terms of PPA. In case of SEPC, the plant is not at all readily available due to want of CTO/Fuel Supply Agreement (FSA).

2.51. M/s. SEPC from the date of achieving COD, did not give its availability declaration Notice to the Load Dispatch Centre. Hence TANGEDCO requested M/s SEPC to deliver a Capacity Notice to TANGEDCO containing the Declared Capacity at the beginning of each Schedule Day as per the Schedule 7.2 of Addendum 3 of PPA. M/s. SEPC is not eligible to claim fixed charges as per the provisions of PPA/TNERC regulation 42 for the period from December 2021 to April 29th 2022 and there is no term in PPA/TNERC regulations called "deemed availability". Hence the Monthly invoices claimed for the said period towards fixed charges were returned by TANGEDCO.

2.52. TANGEDCO had requested SEPC vide letter dated 10.02.2022 to furnish the estimated FCC as per Schedule 3.1(d) of Addendum #3 of PPA and Tariff so as to list M/s SEPC in MoD ranking. Only then, M/s SEPC vide its letters dated 11.02.2022 & 14.02.2022 had informed TANGEDCO that TNPCB by its letter dated 25.11.2021 had instructed SEPC not to operate the plant beyond 30.11.2021 until valid CTO is granted by TNPCB. Still, SEPC had declared that the said period shall be treated as deemed availability for the purpose of

claiming FCC and claimed that SEPC is eligible for payment of fixed charges.

The extract of TNPCB letter is as follows:

..... "As per the sl. no. 1 of the General Condition of the consent order issued to the unit) "The occupier shall make an application along with the prescribed consent fee for grant of renewal of consent at least 60 days before the date of expiry of the Consent Order along with all the required particulars ensuring that there is no change in production quantity and emission."

Whereas the application filed by the unit for renewal of consent was returned to the unit to furnish the additional details. But the unit had not resubmitted the application within stipulated time. Hence the application was deleted in OCMMS and the consent fee was forfeited automatically. Subsequently no application was received at TNPCB Corporate office in complete shape with all particulars with prescribed fee. This ensures that the unit has not complied the General Condition in Sl. No. 1 of the consent order issued. Unreasonable delay is due to the non-compliance of SEPC side and not on TNPCB side. M/s SEPC had disclosed the direction of TNPCB to TANGEDCO only after two and a half months from the receipt of letter from TNPCB and not even intimated to TANGEDCO during 72 hours trial run (Rated Capacity Acceptance test) approval. This shows mala fide intention on part of

SEPC not to adhere to PPA norms. Thus, SEPC is not entitled to fixed charges for this period.

2.53. M/s. SEPC has to renew the Consent To Operate (CTO) as per clause 5.2(g) of PPA

#### *5.2 Company Events of Default*

*(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;*

2.54. It was only due to the default of the petitioner that the petitioner was not able to obtain renewal of the CTO. Therefore, this respondent cannot be made to bear the fixed costs for default of SEPC. M/s.SEPC got Consent to Operate only on 28.03.2022 but even getting Consent to Operate from TNPCB, M/s SEPC did not give its Capacity Declaration. Since the non-renewal of CTO was Company Event of Default as per clause 5.2(g) of the PPA, TANGEDCO issued Default Notice to SEPC and intimated to renew the Consent To Operate (CTO) as per clause 5.2(g) of PPA. As per the Article 12.2 of PPA, the company is

entitled to have deemed generation due to Indirect Indian Political event and due to Non Political event of force majeure. But in case of SEPC, no force majeure event has occurred affected SEPC's to declare availability after achieving CoD. The default is solely attributable to SEPC's breach of its obligations .

2.55. The TANGEDCO does not have any payment obligation as per Article 12.5 quoted by SEPC on account of force majeure. Hon'ble Supreme court vide its judgement in C.A No. 5399-5400 of 2016 made it clear that enactment of Indonesian Regulation did not constitute either change in law or Force majeure. Further, the duty to mitigate as per Article 12.4 is applicable to TANGEDCO only when SEPC plant is affected due to force majeure event, which is not the case here. As per the Article 12.6 of PPA, breach of contract is not applicable only on the occurrence of force majeure event. From the above, it is obvious that SEPC is trying to misinterpret the terms of PPA.

2.56. MoP had issued directions dated 05.05.2022 to operationalize all the Imported Coal Based (ICB) plants in the State under Section 11 of Electricity Act, 2003 by reasonably compensating the hike in imported coal price as pass through as one time measure by deviating certain provisions of PPA. Accordingly SEPC had commenced supply of power to TANGEDCO from

30.04.2022. The payment of Fixed Capacity Charges as per PPA terms as follows:

### 3.2 Fixed Capacity Charge (FCC)

(a) The FCC with respect to any Month in any Year shall be:

$\{(FCC_y \times D \times (A/B)) / (\text{Number of days in such Year})\}$  minus C

Where:

A: PLF calculated (rounded to the fourth decimal place) over all Months between and including the first Month in such Year and to the end of the applicable prior Month (the Month for which FCC is being calculated) in such Year; provided, however, that for the ratios of "A/N" greater than 1, it shall be deemed to be 1.

B: (i) 63.5% during the Stabilisation Period; (ii) 80% thereafter and (iii) for any period that incorporated in part but not on whole of the Stabilisation Period;  $(63.5\% \times \text{number of days in Stabilisation Period}) + (80\% \times \text{number of days not in Stabilisation Period}) / \text{total number of days in such period}$  (the "Standard PLF"),



C: the sum of all FCC payments due for all prior Months in such Year D:  
the number of days elapsed in such Year through the last day of such  
Month.

*FCCY: is equal to the sum of the following (for Months following the Commercial Operation Date (and the Month in which this Agreement terminates), items (ii), (iii), (iv) and (v) below shall be pro-rated accordingly); The recovery of Capacity Charges, Fixed Capacity charges per KWh in the month shall be worked out by dividing the capacity charges recoverable for the month by the quantum of ex-bus energy sent out in the month plus deemed generation if any as per Regulation 42 of TNERC Tariff Regulation (as amended).*

- (i) Base Interest on Loan Capital;
- (ii) Adjusted O & M and Insurance Expenses;
- (iii) Depreciation;
- (iv) Base Return on Equity; and
- (v) Interest on Working Capital

as each of the above is projected hereunder by the Company at the times specified in Section 3.1 (d) of this Schedule 3 which projections shall be based on the following 2.57. As per the PPA,

## 10.2 Operating Period clearances:

| Sl.No. | Governmental Authorisation                        | Clearing authority    |
|--------|---|-----------------------|
| 1      | Statutory periodic clearance of pollution control | TNPCB                 |
| 2      | Periodic clearance of boiler pressure parts       | GOTN Boiler inspector |
| 3      | Electrical equipment clearance as required        | CEI to GOTN           |
| 4      | Fuel oil handling system                          | Explosive Inspector   |

Notwithstanding the above, any renewal/extension of approval from appropriate authority for the entire agreement period to run the facility is fully attributable to the Company. TANGEDCO shall not bear any monetary loss in this regard. Thus, when the failure of the Petitioner to renew the CTO cannot be attributed to TANGEDCO, TANGEDCO cannot be made to bear the monetary loss in the form of fixed costs.

2.58. Only after the receipt of TANGEDCO's letter, M/s SEPC intimated TANGEDCO that JERRA (Coal supply Agreement and Coal . Transport Agreement), issued a notice of termination of CSTA on 07.10.2022 and FSA got terminated on 21.11.2022. As per Addendum #3, SEPC can go for alternate fuel only when there is interruptions in supply of Primary Fuel due to default of the Fuel Supplier or due to Force Majeure or if any decrease in Market Price of coal than that of CSTA. Hence the price of procurement of coal through alternate arrangements shall have to be less than that of valid FSA. For the period from

01.12.2022 to 31.03.2023, SEPC has declared the plant availability on pass through basis (higher price) though TANGEDCO has withdrawn the pass through mechanism. Hence the declaration made by SEPC is not valid as per clause 16.1.1 & 16.2 since SEPC has to supply power as per PPA & Fixed charges has to paid as per the provisions of PPA. For the above said reasons operation wing has certified the deemed generation as zero for the period 01.12.2022 to 31.03.2023 for which TANGEDCO is not liable for Fixed charges.

#### INTENT OF TWO PART TARIFF

2.59. Averments made in paragraphs 63 is vehemently denied. The statement In the petition that "SEPC was ready to supply power to TANGEDCO" is false. SEPC was ready to supply power to TANGEDCO only on pass through basis and not in terms of PPA. SEPC is not entitled to claim fixed charges for non-supply period as SEPC's declaration of their plant availability was on pass through basis, i.e based on the stock purchased on stock on sale basis /e-auction only and not as per the terms of PPA. Hence SEPC is not entitled to claim deemed generation for the declaration made against the provisions of PPA from 01.12.2022 to 31.03.2023. Failure of SEPC to issue standby Letter of Credit or bank guarantee as required by CSTA to JERA which lead to the

termination of CSTA is not attributable to TANGEDO and beyond the scope of TANGEDCO.

2.60. Further averments made in paragraph 64& 65 is denied and baseless. Declared Capacity' or 'DC' in relation to a generating station means, the capability to deliver ex-bus electricity in MW declared by such generating station in relation to any time-block of the day as defined in the Grid Code or whole of the day, duly taking into account the availability of fuel. M/s. SEPC declaration without valid FSA/ Consent to operate is not as per the Regulations and terms of the PPA. In line with above, for other IPP Generator, namely M/s.PPN Power generating Company, TANGEDCO did not pay the fixed charges for the period without valid FSA, since fuel risk is the responsibility of the Generator.

#### BUY OUT CLAUSE IN THE PPA

2.61. The averments made in paragraph nos. 67 is denied as false and untrue. It is submitted that, after achieving CoD, M/s. SEPC plant did not supply power for a period of 150 days only (from 01.12.2021 till 29.04.2022) and after that plant was scheduled as per the MoD with the monthly PLF of more than normative PLF as detailed below.

| Month | Gross Capacity | Gross Gen | Monthly PLF | Deem Gen | Avail ability |
|-------|----------------|-----------|-------------|----------|---------------|
|-------|----------------|-----------|-------------|----------|---------------|

|                      | (Kwh)     |           |        |           | PLF    |
|----------------------|-----------|-----------|--------|-----------|--------|
| 01.04-30.04.2022     | 378000000 | 5676364   | 1.61%  | 0         | 1.61%  |
| 01.05. to 31.05.2022 | 390600000 | 176767273 | 48.53% | 126606981 | 83.29% |
| 01.06 to 30.06.2022  | 378000000 | 193512727 | 54.60% | 109047561 | 85.38% |
| 01.07 to 31.07.2022  | 390600000 | 155345455 | 42.42% | 208721057 | 99.42% |
| 01.08 to 31.08.2022  | 390600000 | 113247273 | 30.92% | 246707056 | 98.30% |
| 01.09 to 30.09.2022  | 378000000 | 188014546 | 53.05% | 166322657 | 99.99% |

From the above, it is obvious that the plant did not run in reduced PLF for a period of 277 days due to the force majeure event as stated by SEPC. Moreover, Hon'ble Supreme Court vide its judgement in C.A No. 5399-5400 of 2016 made it clear that enactment of Indonesian Regulation did not constitute either change in law or Force Majeure. SEPC contention for claiming the fixed charges is totally out of the terms of PPA. Hence could not be admitted.

2.62. It is submitted that averments made in paragraph nos. 60 to 62 and 68 to 75 are denied as false and untrue. It is pertinent to note that this petitioner had unilaterally selected higher grade imported coal as primary fuel and stoutly refused to use Indian coal during the talks on signing of Addendum-3 to the PPA. In fact, it was well open to this petitioner to seek use of Indian coal at that

stage. Therefore, this petitioner selected imported coal, knowing full well the consequences. This, in fact, was recorded during mutual negotiation and is duly approved by the Commission vide M.P.No.27 of 2016 order dated 10.01.2020. That SEPC has executed a long term power supply agreement for a period of 30 years from the date of CoD. The other long term Generators having PPA with TANGEDCO are supplying power at a reasonable tariff with a valid FSA (Refer MoD). The other imported coal based Generators who have long term PPA with TANGEDCO namely Coastal Energen, IL&FS and OPG are supplying power under Section 11 at the VFC tariff fixed by MoP and fixed charges are paid for the period of supply as per the PPA terms. Whenever TANGEDCO did not schedule power under the section 11 direction/ pass through provision, these Generators supplied power and tariff was paid as per the PPA terms only. Moreover, to meet out the summer demand in 2023, TANGEDCO has executed a short term tender during August 2022 for supply of power during March 2023 to May 2023 with the approval of the Commission based on the prevailing market condition. However, for the period between 16th April to May, 2023, power was scheduled from this petitioner. Therefore, the allegations of the Petitioner is unfounded.

2.63. TANGEDCO is facing several financial constraints as of now. In spite of that, TANGEDCO has executed Addendum 3 to the PPA so as to purchase power from SEPC. But SEPC diluted the mutually agreed terms of PPA. The SEPC herein has not run the plant after declaring COD (30.11.2021) since consent to operate issued by TNPCB 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 and did not give declaration from 01.12.2021 to 29.04.2022. Further, the FSA with M/s. JERRA was terminated due to default of SEPC and the same was intimated to TANGEDCO at a later date after termination. In view of the above, SEPC claim of fixed charges for the non supply period is not maintainable in law and cannot be excused either as force majeure or as per the terms of PPA.

#### ENTITLEMENT OF FIXED CHARGES UNDER THE PPA

2.64. Averments made in paragraph 8, 76 to 90 are denied as false and untrue. It is submitted that Para 8 (a) of the Petition, Regulation 36 - 'Components of Tariff is reproduced below (1) The tariff for sale of power. by the Generating Companies shall of two part namely the Fixed Charges (recovery of annual capacity charges) and variable (energy) charges. (2) The Fixed (annual capacity) charges shall consist of the following elements:

- (a) Interest on Loan Capital;
  - (b) Depreciation
  - (c) Return on Equity
  - (d) Operation and Maintenance expenses; and
  - (e) Interest on Working Capital
- (3) The energy (variable) charges shall cover fuel cost.

As per TNERC Regulation 36, tariff for sale of power by Generating Companies is of two part namely Fixed Charges and Variable charges accordingly, the period of supply of power by SEPC / sale of power by SEPC to TANGEDCO in the FY from 30.04.2022 to 30.11.2022 the pass through period the two part tariff was complied by TANGEDCO and payment were made as per MoP directions i.e the weekly VFC at the bench mark rate fixed by MoP and Fixed Capacity charges were paid as per PPA (two part tariff complied). Other than pass through period SEPC has not supplied single unit of power under PPA terms also does not have a valid fuel supply agreement for coal to keep the plant available for generation of power under

PPA /TNERC Regulations.



2.65. TNERC Tariff Regulation 37 provides the only the norms of operation for how much capacity the plant should be available at maximum. i.e the capacity at which the plant should be operated and Fixed charges cannot be claimed beyond target availability. Regulation 37 clearly states in respect Independent Power producers is as per PPA which is reproduced below:

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 - 50%

(Till Renovation and Modernization works in all units are completed)

(c) In respect of Generating Stations of .... As per PPA

Independent Power Producers

(d) New Thermal Stations

2.66. Averments made in paragraph 8 (c) of the Petition is denied. TNERC Regulation 42 - Recovery 0/ Capacity Charges

(1) Full Capacity charges (Fixed Charges) shall be recoverable at target availability specified in clause (1) of Regulation 37

(2) Recovery of capacity charges below the level of target availability will be on pro rata basis. At zero availability, no capacity charges shall be payable.

(3) Payment of capacity charges (Fixed Charges) shall be on monthly basis in proportion to allocated / contracted capacity.

(4) Capacity (Fixed) Charges per KWh in the month shall be worked out by dividing the capacity charges recoverable for the month by quantum of ex- bus energy sent out in the month.

2.67. As per TNERC Regulation 42 (2) Fixed charges below the target availability will be on pro rata basis and at zero availability no capacity charges shall be payable. Accordingly for the FY 2022-23 against the target availability of 80% PLF M/s SEPC has achieved only 55.9110% PLF for which Fixed charges are paid by TANGEDCO. Hence SEPC is not eligible to claim full fixed charges at 80% PLF for the year 2022-23 as per PPA/TNERC Regulations. As per TNERC regulation I Addendum 3:

"Declared capacity' or 'DC' means the capability of the generating station to deliver ex-bus electricity in MW declared by such Generating Station in

relation to any period of the day or whole of the day duly taking into account the availability of fuel; Hence the non availability of FSA is non availability of fuel only.

2.68. If SEPC is giving declaration without valid FSA/without valid tariff and without plant being available for generation, TANGEDCO cannot place SEPC in the MoD list and cannot schedule power from SEPC which will result in payment of fixed charges without buying a single unit. At present, SEPC is supplying based on the tariff fixed by MoP. SEPC has also filed D.R.P No. 17 of 2023 for "actual cost of generation" under section 11 (2) of the Electricity Act, 2003. On withdrawing the pass through provision under Section 11, SEPC has to supply power as per the PPA terms only.

2.69. TANGEDCO has executed Addendum-3 only to get power at a reasonable tariff than that of prevailing market rates. But SEPC is driving TANGEDCO to buy power at a higher tariff by continuously violating the terms of PPA. The sanctity of the PPA has been completely violated by SEPC.

2.70. When SEPC requested TANGEDCO to make arrangements for coal, a meeting was held with Coal division and found that the coal of GCV 6000KCal/ 5500 Kcal NAR is not at all utilised in any of the Power plants in TANGEDCO

and the same was intimated to SEPC. In spite of that, SEPC failed to switch to domestic coal but insisted on retaining the said international coal grade.

2.71. In spite of heavy financial crunch, TANGEDCO made payments for the power purchased as per the terms of PPA on pass through basis so as to fulfill its obligations but at the same time, TANGEDCO has been put to grave loss due to the continuous breach of the PPA terms by SEPC. The fixed cost under the PPA are to meet out the expenses the generating plant will incur to maintain the plant as available for scheduling. The result is that when the plant is not available for generation, fixed costs cannot be paid. However, SEPC is claiming fixed costs for such period when the plant was not available for scheduling. Such claims cannot be countenanced in law.

2.72. TANGEDCO did not make fixed charge payments to other IPPS like Pioneer and Lanco for the period when plant is not available due to non-availability of gas as per FSA. When the said action was challenged by Pioneer, the Hon'ble Supreme Court upheld TANGEDCO's action in its judgement dated 15.03.2023 in C.A. No. 706 of 2012 holding that the responsibility of fuel linkage is on the generator and TANGEDCO cannot be held responsible for the same.

2.73. In fact SEPC has benefitted from supplying power under Section 11 instead of the terms of PPA for almost 2 years. However, during the non-pass through period, SEPC cannot shirk its responsibility to supply power under the terms of the PPA.

### 3. Rejoinder Affidavit on behalf of the Petitioner :-

3.1. M/s. SEPC is filing the present Rejoinder to the Counter Affidavit filed by Tamil Nadu Generation and Distribution Corporation ("**TANGEDCO**") dated 11.06.2024. 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:

| S.No. | TANGEDCO's Objections  | SEPC's Rejoinder Submissions  |
|-------|--|---|
| I.    | <b>Declaration of Availability/ issuance of Capacity Notice by SEPC</b>  |   |
| 1.    | SEPC did not deliver Capacity Notice to SLDC containing Declared Capacity as per Schedule 7.2 of Addendum # 3 of the Power Purchase Agreement (" <b>PPA</b> ") from Commercial Operation | (a) SEPC <i>vide</i> letter dated 11.02.2022 informed TANGEDCO regarding Tamil Nadu Pollution Control Board's (" <b>TNPCB</b> ") letter dated 25.11.2021 directing SEPC |

| S.No. | TANGEDCO's Objections   | SEPC's Rejoinder Submissions   |
|-------|---|--|
|       | <p>Date ("COD") i.e. 30.11.2021 till 29.04.2022. [<b>Para 25, 43, 46 and 47 and 53 of TANGEDCO's Reply</b>]</p>   | <p>to not operate the plant beyond 30.11.2021 without valid Consent to Operate ("CTO"). Due to the instructions of TNPCB to not operate the plant beyond COD, SEPC could not declare availability.</p> <p>(b) Immediately after receiving CTO, SEPC informed TANGEDCO that it is capable of generating the power at PLF of 80% per day <i>vide</i> letter dated 28.03.2022.</p>  |
| 2.    | <p>Even after obtaining the CTO, TANGEDCO could not schedule/issue despatch instruction to SEPC as per Article 7.3 (b) and 7.3 (c) as the plant is not available for generating power. [<b>Para 47 of TANGEDCO's Reply</b>]</p> | <p>(a) Clause 7.3 (b) provides that SEPC's plant is a base load plant which is designed to generate electricity at the full rated capacity. SEPC shall however follow instructions of TANGEDCO for back down and resume generation in case the same is consistent with SEPC's technical limits, prudent utility practices and the PPA.</p> <p>(b) Clause 7.3 (c) provides for minimum limits for SEPC to despatch power like no despatch instruction will require SEPC to operate below 262 MW.</p> <p>(c) TANGEDCO has simply stated that it could not schedule as per Clauses 7.3 (b) and (c) even after SEPC obtained CTO. TANGEDCO has provided no</p> |

| S.No. | TANGEDCO's Objections   | SEPC's Rejoinder Submissions  |
|-------|---|---|
|       |   | <p>reason for non-scheduling of power from SEPC. The Commission in Order dated 31.08.2023 in M.P. No. 3 of 2022 [SEPC v. TANGEDCO] has already acknowledged the unviability of power supply under Addendum #3. TANGEDCO during the proceedings of this petition i.e. M.P. No. 3 of 2022, did not deny the fact of increase in imported coal prices and agreed for SEPC to switch to domestic coal. In this view, TANGEDCO could have scheduled the power from SEPC on pass through basis after SEPC received the CTO.</p> |
| 3.    | <p>There is no term in the PPA called 'deemed availability' and SEPC cannot claim fixed charges as per TNERC Regulation 42, for the period starting 01.12.2021 till 29.04.2022. [<b>Para 54 of TANGEDCO's Reply</b>]</p>  | <p>I say that 'deemed generation' has been defined in the PPA. It is clarified that SEPC has not claimed Fixed Charges for the period between 01.12.2021 to 29.04.2022. In prayer (c), SEPC has merely sought for extension of term of PPA by 4 months.</p>   |
| 4.    | <p>SEPC was ready to supply power to TANGEDCO only on pass through basis and not in terms of PPA. SEPC is not entitled to claim fixed charges for non-supply period as SEPC's declaration of their plant availability was on pass through basis, i.e based on the</p> | <p>(a) I say that SEPC was not in a position to declare availability and operate the Project as per the PPA due to factors beyond its control. Non-supply of power in terms of Addendum # 3 of the PPA has been acknowledged by</p>   |

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|            | <p>stock purchased on stock on sale basis/ e-auction only and not as per the terms of PPA. [<b>Para 64, 65 and 77 of TANGEDCO's Reply</b>]</p>  | <p>the Commission <i>vide</i> Order dated 31.08.2023 in M.P. No. 3 of 2022 [SEPC v. TANGEDCO]. Order of the 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 the Commission.</p> <p>(b) Owing to TANGEDCO's abrupt withdrawal from supply arrangement on 23.11.2022 and consequent non-scheduling since 01.12.2022, SEPC was left with 90,700 MT of coal. The said coal stock was procured at a price less than that under CSTA.</p> |
| <b>II.</b> | <b>Declaration of availability in view of termination of CSTA / FSA</b>   |   |
| 1.         | <p>It was mandatory for SEPC to maintain valid Fuel Supply Agreement ("<b>FSA</b>") till the term of PPA to declare the plant availability and raise invoices. SEPC does not have a valid FSA for coal to keep the plant available for generation of power under PPA/TNERC Regulations. [<b>Para 32 and 72 of TANGEDCO's Reply</b>]</p> | <p>(a) Clause 16 of the PPA does not mandate existence of FSA for declaration of availability. As per Addendum # 3 of PPA, SEPC is required to procure fuel either by way of long-term arrangement or by way of alternate arrangements as specified. In both scenarios, SEPC is entitled to declare its availability.</p> <p>(b) Clause 16.2 clearly provides for a situation where SEPC is mandated to make alternate fuel</p>   |



| S.No. | TANGEDCO's Objections   | SEPC's Rejoinder Submissions   |
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|       |   | <p>arrangements with TANGEDCO's consent where there are interruptions in supply of primary fuel.</p> <p>(c) The aforesaid factors have already been highlighted to TANGEDCO <i>vide</i> letter dated 13.01.2023. Copy of SEPC's letter dated 13.01.2023 is annexed herewith as <b>Annexure-1</b>.</p>  |
| 2.    | <p>(a) Only after the receipt of TANGEDCO's letter, SEPC intimated TANGEDCO that JERA issued a notice of termination of CSTA on 07.10.2022 and FSA got terminated on 21.11.2022.</p> <p>(b) Failure of SEPC to issue standby Letter of Credit or bank guarantee as required by CSTA to JERA which lead to the termination of CSTA is not attributable to TANGEDCO.</p> <p>(c) As per Addendum #3, SEPC can go for alternate fuel only when there is interruption in supply of Primary Fuel due to default of the Fuel Supplier or due to Force Majeure or if any decrease in Market Price of coal than that of CSTA. Hence, the price of procurement of coal through alternate arrangements shall have to be less than that of valid FSA.</p> <p><b>[Para 64 and 65 of TANGEDCO's</b></p> | <p>I say that the issues raised by TANGEDCO are not the subject matters within the scope of the present Petition. However, in this regard, following is noteworthy:</p> <p>(a) Clause 16.2 of the PPA enables SEPC to opt for cheaper alternate available coal. SEPC procured coal at lesser rates than that provided in the CSTA.</p> <p>(b) TANGEDCO in its Counter Affidavit dated 23.03.2022 conveyed its no-objection to termination of CSTA. The same has also been approved by the Commission <i>vide</i> Order dated 09.03.2023 in M.P. No. 3 of 2022 [<i>M/s. SEPC Power Pvt. Ltd. v. TANGEDCO</i>]. TANGEDCO cannot be allowed to re-agitate the same issues.</p> <p>(c) SEPC did not furnish the Letter</p> |

| S.No. | TANGEDCO's Objections   | SEPC's Rejoinder Submissions   |
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|       | <i>Reply]</i>   | of Credit to JERA due to no commitment of scheduling by TANGEDCO. SEPC cannot be faulted in this regard.   |
| 3.    | <p>For the period from 01.12.2022 to 31.03.2023, SEPC has declared the plant availability on pass through basis (higher price) though TANGEDCO has withdrawn the pass-through mechanism. Hence the declaration made by SEPC is not valid as per Clause 16.1.1 &amp; 16.2.</p> <p><b>[Para 64 of TANGEDCO's Reply]</b></p> | <p>(a) The Commission in Order dated 31.08.2023 in M.P. No. 3 of 2022 has acknowledged the unviability of supply of power under Addendum # 3 of PPA and held that rise in price of imported coal was beyond SEPC's control.</p> <p>(b) In view of high prices of imported coal, SEPC had no option but to declare availability on pass-through basis. Accordingly, SEPC's declaration of availability cannot be faulted with on this ground. Copies of SEPC's Capacity Declarations for the months of December 2022 to March 2023 are annexed herewith as <b>Annexure-2</b>.</p> <p>(c) It is noteworthy that as per MoP's Section 11 direction and Ld. CERC's Order dated 03.01.2023 in Petition No. 128/MP/2022 [<i>Tata Power Company Ltd. v. GUVNL &amp; Ors.</i>], fixed charges are required to be paid during subsistence of Section 11 directions.</p> |

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|       |  |   |
| III.  | <b>Renewal of CTO</b>  |   |
| 1.    | <p>TANGEDCO had requested SEPC <i>vide</i> letter dated 10.02.2022 to furnish the estimated FCC as per Schedule 3.I(d) of Addendum #3 of PPA. Only then, SEPC <i>vide</i> its letters dated 11.02.2022 &amp; 14.02.2022 informed TANGEDCO about TNPCB's direction to not operate the plant beyond 30.11.2021 without a valid CTO.</p> <p><b>[Para 44 and 55 of TANGEDCO's Reply]</b></p> | <p>(a) I say that it is baseless to suggest that SEPC informed TANGEDCO about expired CTO only after TANGEDCO's letter dated 10.02.2022.</p> <p>(b) SEPC <i>vide</i> letter dated 03.08.2021 informed TANGEDCO regarding expiration of CTO on 30.11.2021. The same was also taken note of by TANGEDCO <i>vide</i> letter dated 21.01.2022. Copies of SEPC's letter dated 03.08.2021 and TANGEDCO's letter dated 21.01.2022 have been annexed herewith as <b>Annexure-3</b>.</p> |
| 2.    | <p>(a) Non-renewal of CTO by SEPC has to be treated as a default under Clause 5.2 (g) of the PPA.</p> <p>(b) As per TNPCB's letter dated 25.11.2021, it is evident that unreasonable delay is due to non-compliance of SEPC. SEPC was not able to obtain renewal of CTO due to its own default.</p> <p><b>[Para 45, 51, 55, 56 and 57 of TANGEDCO's Reply]</b></p>                       | <p>It is incorrect on part of TANGEDCO to contend that it was SEPC's failure to obtain the CTO. In this regard, following is noteworthy:</p> <p>(a) SEPC applied to TNPCB on 11.03.2021 for renewal of CTO.</p> <p>(b) On 11.04.2021, TNPCB through its online portal i.e. Online Consent Management and Monitoring System ("<b>OCMMS</b>") requisitioned documents from SEPC.</p> <p>(c) However, due to ongoing COVID-19 pandemic, TNPCB <i>vide</i> Office Order dated</p>   |

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|       |                       | <p>13.05.2021 extended all CTO's including SEPC's CTO, till 30.11.2021.</p> <p>(d) TNPCB also informed SEPC that its application will be considered post November 2021. This was recorded by SEPC in its letters dated 27.01.2022 and 21.03.2022 to TANGEDCO along with its letter dated 01.02.2022 to TNPCB.</p> <p>(e) Therefore, even if SEPC submitted the application for renewal/issuance of CTO nearly 9 months prior to the COD/date of expiration of the earlier existing CTO, the same was considered only later. Copy of SEPC's application dated 11.03.2021 and TNPCB's Office Order dated 13.05.2021 are annexed herewith as <b>Annexure-4</b>. Copies of SEPC's letters dated 27.01.2022, 01.02.2022 and 21.03.2022 are annexed herewith as <b>Annexure-5</b>.</p> <p>(f) Accordingly, after November 2021, SEPC responded to TNPCB's requisitions dated 11.04.2021. Thereafter, TNPCB sought more clarifications <i>vide</i> letters dated 29.12.2021 and</p> |

| S.No. | TANGEDCO's Objections  | SEPC's Rejoinder Submissions  |
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|       |  | <p>16.02.2022. SEPC provided clarifications to such requisitions. Post this process, the CTO was granted on 28.03.2022. Copies of TNPCB's requisitions and SEPC's responses are annexed herewith as <b>Annexure-6</b>.</p> <p>(g) SEPC also wrote follow up letters dated 01.02.2022 and 17.03.2022 to TNPCB and requested TNPCB to expedite renewal of CTO. Copy of SEPC's letter dated 17.03.2022 is annexed herewith as <b>Annexure-7</b>.</p> <p>(h) In view of the above, non-grant of CTO until 28.03.2022 was not attributable to SEPC since SEPC's application itself was considered post November 2021 by TNPCB.</p> |
| 4.    | <p>Any renewal/extension of approval from appropriate authority for the entire agreement period to run the facility is fully attributable to SEPC. TANGEDCO shall not bear any monetary loss in this regard.</p> <p><b>[Para 63 of TANGEDCO's Reply]</b></p> | <p>(a) It is admitted that it was SEPC's obligation to maintain relevant approvals from appropriate authorities during the entire term of the agreement. Accordingly, SEPC had timely applied for CTO renewal on 11.03.2021.</p> <p>(b) However, TNPCB caused unreasonable delay in processing SEPC's application. This has been clearly recognized as a</p>  |

| S.No.      | TANGEDCO's Objections   | SEPC's Rejoinder Submissions   |
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|            |   | <p>Force Majeure event under the PPA (<i>Ref. Clause 12.1(b)(2)(ii)(A) of the PPA</i>).</p> <p>(c) Therefore, in terms of Clause 12.6(a) of PPA, the non-renewal of CTO does not qualify as SEPC's Event of Default.</p> <p>(d) Ld. CERC in Order dated 26.07.2023 in Petition No. 402/GT/2019 [<i>NTPC Ltd. v. MPPMCL &amp; Ors.</i>] held the delay in CTO renewal as beyond generator's control. (<i>Ref. Para 48 and 49</i>).</p> <p>(e) Further, Ld. CERC in Order dated 03.04.2018 in Petition No. 110/MP/2016 (<i>Purulia and Kharagpur Transmission Company Ltd v. PGCIL &amp; Ors.</i>) – <i>Para 36,38</i> and Hon'ble APTEL in Judgment dated 04.02.2014 in Appeal No. 123 of 2012 (<i>GUVNL v. GERC</i>) – <i>Para 55(i)</i> have also held that the delay in obtaining government approvals/authorisations are beyond the control of the applicant.</p> |
| <b>IV.</b> | <b><i>Deemed Generation in terms of PPA</i></b>   |  |
| 1.         | (a) Deemed Generation is applicable only when SEPC is available for Generation and TANGEDCO did not | (a) As per the definition of 'Deemed Generation' under the PPA, SEPC's plant had to be capable of  |

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|           | <p>schedule. However, in the present scenario, SEPC is not available for Generation.</p> <p>(b) Onus is on the Petitioner to demonstrate before the Commission and to show on which dates or on when the price of Imported Coal price was hiked.</p> <p><b>[Para 24 and 48 of TANGEDCO's Reply]</b></p> | <p>generating of power but could not generate due to conditions beyond SEPC's control.</p> <p>(b) During the period when CTO renewal was pending, TNPCB had directed SEPC to not operate the plant. Accordingly, despite being ready and capable of generating power, SEPC could not generate power between 01.12.2021 to 28.03.2022.</p> <p>(c) During the period between 01.12.2022 to 31.03.2023, SEPC could not generate power due to non-scheduling by TANGEDCO. It has been admitted by TANGEDCO that SEPC declared the plant availability during this period (<i>Ref. Para 65 of TANGEDCO's Counter</i>).</p> <p>(d) SEPC has adequately discharged its obligation to demonstrate the rise in prices of imported coal and unviability of supply of power under PPA. The Commission has acknowledged the same and has declared Addendum # 3 to PPA as unviable in Order dated 31.08.2023 in M.P. No. 3 of 2022 [<i>SEPC v. TANGEDCO</i>].</p> |
| <b>V.</b> | <b><i>Force Majeure event</i></b>   |   |
| 1.        | (a) As per the Article 12.2 of PPA, the   | i. The PPA recognizes any event or  |

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|       | <p>company is entitled to have deemed generation due to the event of force majeure. Whereas, in the case of SEPC, no force majeure event had occurred for SEPC for not declaring the availability after achieving CoD.</p> <p>(b) Delay to get consent to operate or non-supply of power due to termination of FSA with M/s. JERA is not attributable to the event of force majeure.</p> <p>(c) Hon'ble Supreme Court in Energy Watchdog judgment clarified that enactment of Indonesian Regulation did not constitute either Change in Law or Force Majeure. Change in law is only applicable to Indian law.</p> <p>(d) Duty to mitigate as per Article 12.4 is applicable to TANGEDCO only when SEPC plant is affected due to force majeure event, which is not the case here.</p> <p>(e) As per the Article 12.6 of PPA, breach of contract is excusable only on the occurrence of force majeure event. The failure of SEPC to obtain and maintain a valid Consent to Operate from the TNPCB is a default of the SEPC and breach of PPA conditions.</p> <p>(f) In view of Hon'ble Supreme Court's decision in Energy Watchdog</p> | <p>circumstance, beyond reasonable control of the party, which materially and adversely affects, prevents or delays any party in performance of its obligations, as a Force Majeure event. The Force Majeure clause in the PPA is an inclusive provision.</p> <p>The Commission in Order dated 31.08.2023 has already held as follows:</p> <p><i>“ 10.8 On a conspectus evaluation of the evidence placed on record through documents this Commission decides that the unprecedented rise in the price of imported coal has rendered the supply of power by the petitioner to the respondent under the Power Purchase Agreement as amended on 25-02-2021 vide Addendum 3 with the existing price mechanism an unviable one as contended by the petitioner.</i></p> <p>...</p> <p><i>10.24 In view of the above, this Commission hold that since SEPC is not</i></p> |



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|       | <p>judgment, there is no payment obligation of TANGEDCO to pay SEPC.</p> <p><b>[Para 49 to 51 and 59 to 60 of TANGEDCO's Reply]</b></p> | <p><i>accountable for the change in circumstances where imported coal prices have risen multi fold leading to exorbitant increase in energy charges, SEPC is entitled to some relief in accordance with Section 61 and 62 of the Electricity Act."</i></p> <p>i. In view of the above it has already been held that SEPC is not accountable for change in circumstances of rise in imported coal. This qualifies as a force majeure event under Clause 12.2.</p> <p>v. So far as delay in obtaining CTO is concerned, the same was also beyond SEPC's control. Clause 12.1(b)(2)(ii)(A) of the PPA expressly recognizes any government agency's unreasonable delay in grant of renewal of license as a Force Majeure event.</p> <p>. Hon'ble Delhi High Court in <i>TGV Projects &amp; Investments Pvt. Ltd. v. National Highways Authority of India</i>, 2018 SCC Online Del 13264, interpreted the term 'analogous' in Force Majeure clauses and held the following</p> |

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|       |                       | <p>viz:</p> <p><i>“22. The term ‘analogous’ is understood, in common parlance as also in law, to mean that there is resemblance, proportion or correspondence of one thing with another. In law, we also understand ‘analogous’ in the sense of the phrase ejusdem generis or ‘of the same kind’. In the present case, the term ‘analogous’ would therefore be applicable to events and circumstances that, though not specifically mentioned in the other provisions of the clause, are akin to or of the same kind as those referred to in such other provisions.”</i></p> <p>i. In view of the Commission’s acknowledgment of unviability of power supply under Addendum # 3 due to unprecedented rise in price of imported coal (Ref. Order dated 31.08.2023 in M.P. No. 3 of 2022), it is no longer open to TANGEDCO to insist on supply of power under PPA.</p> <p>i. SEPC’s case is differentiable on facts from the judgment of the Supreme Court in Energy</p> |

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|            |   | <p>Watchdog case. In that case, the Supreme Court dealt with generators who executed PPA through transparent tariff bidding process under Section 63 of the Act and not the MoU route as that of SEPC's Unit which is governed under Section 62 of the Act. SEPC is not citing rise in price of imported coal as a Force Majeure event. Instead, SEPC's inability to supply power was due to existence of ceiling price mechanism in the PPA and TANGEDCO's unwillingness to agree to any alternate arrangement.</p> <p>i. In view of the above, Clauses 12.2, 12.4, 12.5 and 12.6 are squarely applicable to SEPC's case, as contended in the Petition.</p> |
| <b>VI.</b> | <b><i>TNERC Regulations</i></b>   |  |
| 1.         | <p>(a) TNERC Regulations contemplates payment of fixed charges for the generating stations which are readily available for generation as per the terms of PPA. In case of SEPC, the plant is not at all readily available due to want of CTO/FSA. SEPC declaration without valid FSA / CTO is not as per the Regulations and terms of the PPA.</p> <p>(b) Regulation 37 provides only the</p> | <p>(a) It is false to suggest that SEPC's Plant was not ready to generate as per the provisions of PPA. As demonstrated above, SEPC was constrained to not operate the plant during 01.12.2021 to 28.03.2022 pending renewal of CTO under direction of TNPCB.</p> <p>(b) Further, the unviability of supply of</p>   |

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|             | <p>norms of operation for how much capacity the plant should be available at maximum; i.e the capacity at which the plant should be operated and Fixed charges cannot be claimed beyond target availability.</p> <p>(c) There is no term in PPA/TNERC regulations called "deemed availability".</p> <p><b>[Para 52, 54 and 73 of TANGEDCO's Reply]</b></p>  | <p>power under PPA for the period 01.12.2022 to 31.03.2023 due to rise in price of imported coal has already been acknowledged by the Commission.</p> <p>(c) SEPC's claim of Fixed Charges is strictly in terms of the PPA, which is in line with the TNERC Tariff Regulations. "Deemed Generation" has expressly been recognized both under PPA as well as the TNERC Regulations.</p>   |
| 2.          | <p>As per Regulation 42 (2) Fixed charges below the target availability will be on pro rata basis and at zero availability no capacity charges shall be payable. Accordingly for the FY 2022-23 against the target availability of 80% PLF, SEPC has achieved only 55.9110% PLF for which Fixed charges are paid by TANGEDCO. Hence SEPC is not eligible to claim full fixed charges at 80% PLF for the year 2022-23.</p> <p><b>[Para 75 of TANGEDCO's Reply]</b></p> | <p>As per Clause 7.3 of PPA, SEPC's PLF is required to be calculated as summation of Net Electrical Output, Auxiliary Consumption and Deemed Generation. All these factors when considered together show that SEPC's PLF was 86.0979% for the FY 2022-23, thus entitling SEPC to recover full Fixed Cost in terms of Regulation 42(2) and the PPA. Copy of calculation sheet demonstrating SEPC's PLF for FY 2022-23 is annexed herewith as <b>Annexure-8</b>.</p> |
| <b>VII.</b> | <b>Cost of coal jetty as a part of Capital Cost for Fixed Charges calculation</b>   |  |
| 1.          | <p>Ld. TNERC in Order dated 30.04.2015 in P.P.A.P. No. 5 of 2012 [<i>SEPC v. TANGEDCO</i>], approved the total Capital Cost of the Project as Rs. 3514 Cr., which included cost of coal jetty. In Minutes of Meeting ("<b>MoM</b>") dated</p>   | <p>(a) It is wrong to suggest that SEPC has calculated the Fixed Charges by including the cost of External Coal Handling System ("<b>ECHS</b>"), which included the conveyor and the coal jetty, as a part of Capital</p>  |

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|              | <p>02.09.2020, consensus was reached to exclude coal jetty cost of Rs. 155 Cr. Thus, SEPC cannot seek the cost of coal jetty separately. The amended provisional capital cost of the project as agreed by the Parties is Rs. 3359 Cr., subject to triung up.</p> <p><b>[Para 18 of TANGEDCO's Reply]</b></p>   | <p>Cost.</p> <p>(b) SEPC's determination of final Capital Cost is sub-judice before the Commission in M.P. No. 6 of 2023 [SEPC v. TANGEDCO]. The components to be considered as a part of Capital Cost shall be appropriately determined by this Hon'ble Commission therein. SEPC's claim of Fixed Charges shall be revised/amended basis the determination of Capital Cost by the Commission.</p>   |
| <b>VIII.</b> | <b><i>Ensuring fuel supply was SEPC's responsibility</i></b>   |  |
| 1.           | <p>TANGEDCO did not make fixed charge payments to other IPPs like Pioneer and Lanco for the period when plant is not available due to non-availability of gas as per FSA. When the said action was challenged by Pioneer, the Hon'ble Supreme Court upheld TANGEDCO's action in its judgement dated 15.03.2023 in C.A. No. 706 of 2012 holding that the responsibility of fuel linkage is on the generator and TANGEDCO cannot be held responsible for the same.</p> <p><b>[Para 82 of TANGEDCO's Reply]</b></p> | <p>(a) SEPC's case is factually differentiable from M/s. Pioneer Power Limited's on more than one count. Accordingly, Hon'ble Supreme Court's Judgment dated 15.03.2023 in Civil Appeal No. 706 of 2014 (M/s. Penna Electricity Limited v. Tamil Nadu Electricity Board &amp; Ors.) has no application on SEPC.</p> <p>(b) It is admitted that under the PPA, procurement of fuel was SEPC's obligation. Accordingly, SEPC procured coal on spot basis for fulfilling TANGEDCO's requirements and declared availability. At the time of withdrawal of Section 11</p> |

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|            |  | <p>directions effective from 01.12.2022, SEPC had a left-over stock of approx. 90,700 MT of coal, based on which SEPC declared availability.</p> <p>(c) However, TANGEDCO insisted on supply under PPA instead of pass-through basis. In view of the Commission's declaration of unviability of supply of power under Addendum # 3, it is no longer open to TANGEDCO to contend that supply of power in the period 01.12.2022 to 31.03.2023 did not happen due to non-availability of fuel.</p> |
| <b>IX.</b> | <b>Buy-Out Clause</b>  |   |
| 1.         | <p>SEPC plant did not supply power for a period of 150 days only (<i>from</i> 01.12.2021 till 29.04.2022) and after that plant was scheduled as per the MoD with the monthly PLF of more than normative PLF. The plant did not run in reduced PLF for a period of 277 days due to the force majeure event as stated by SEPC.</p> <p><b>[Para 67 of TANGEDCO's Reply]</b></p> | <p>It is clarified that SEPC in the Petition has merely derived the intent of the parties from the 'Buy Out' clause, which demonstrates that the Project was made solely for TANGEDCO. SEPC has shown that payment of fixed charges to SEPC ought to be interpreted as 'tranche payments made by TANGEDCO for the Project made for its own purpose'.</p>  |

3.3. In addition to the aforesaid objections, TANGEDCO in its Counter Affidavit has raised objections on issues which are not a part of subject matter of the present Petition. Without prejudice, following are SEPC's Rejoinder.

3.4. Re: Choice of imported coal as against domestic coal at the stage of Addendum # 3.

TANGEDCO's objection that SEPC despite being aware of risks associated with procuring imported coal decided to purchase imported coal for its plant. TANGEDCO further submits that SEPC be estopped from using the same as an excuse to not perform the contract. This is incorrect and denied at the outset as not being part of subject matter of this petition. This petition relates to payment of fixed charges to SEPC. Contentions of TANGEDCO regarding usage of imported coal therefore do not concern with the subject matter in issue. Be that as it may, following is noteworthy:

- (a) Imported coal prices till 2020 were almost equal to domestic coal prices. It is for this reason TANGEDCO approved the PPA (Addendum No. 3) along with CSTA. After approval of the said documents which form basis of procurement of fuel for SEPC's plant, TANGEDCO cannot take a u turn to object to usage of imported coal.
- (b) SEPC had appointed CRISIL and Price Waterhouse Coopers to advise on the coal linkage for the Project. Based upon their research, they advised SEPC to go for imported coal. This was also informed to

TANGEDCO vide letter dated 15.03.2022. Letter from SEPC to TANGEDCO can be brought on record if required by the Commission.

3.5. TANGEDCO has contended that it is SEPC's onus to prove when the price of imported coal rose. It is submitted that this petition relates to payment of fixed charges to SEPC. Contentions of TANGEDCO regarding usage of imported coal therefore do not concern with the subject matter in issue. Be that as it may, the said concern is addressed in the Commission's Order dated 31.08.2023 in M.P. No. 3 of 2022 [*SEPC v. TANGEDCO*],

3.6. TANGEDCO has wrongly contended that SEPC stopped the supply of power under PPA as per Addendum # 3. In this regard the following is noteworthy:

(a) VFC of Addendum #3 became unviable for SEPC in view of exorbitant rise in imported coal prices from June 2021 onward. This fact has never been denied by TANGEDCO. The 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.



(b) In fact, it is TANGEDCO's own admission that there has been an unprecedented rise in imported coal prices. This is evident from TANGEDCO's letter dated 29.04.2022 to SEPC directing SEPC to supply power under Section 11 of the Act. The same was ratified by the MoP and the Commission. TANGEDCO ought not be allowed to approbate and reprobate.

In view of the above, SEPC could not operate its plant as per VFC determined in Addendum #3. This however does not disentitle SEPC to fixed charges under the PPA for non-operation of plant due to no fault of SEPC.

3.7. TANGEDCO's objection that SEPC has not initiated the process for obtaining domestic coal linkage under the "SHAKTI" Scheme is unfounded. Change of fuel is not a subject matter of the present petition. SEPC reserves its right to respond to such contentions in the appropriate proceedings before the Commission.

3.8. TANGEDCO's objection that SEPC is misinterpreting the term "cheapest available coal" in TNERC's Order dated 31.08.2023 in M.P. 3 of 2022, as it is not possible for TANGEDCO to verify, is baseless and unfounded. It is submitted that this petition relates to payment of fixed charges to SEPC.

Contentions of TANGEDCO regarding usage of imported coal or VFC therefore do not concern with the subject matter in issue.

**Re: Delay in COD of Project**

3.9. TANGEDCO's objection that SEPC delayed execution of the Project is unwarranted and unfounded. 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 the Commission. [*Ref. to the Commission's Orders dated 09.05.2011 in M.P. No. 18 of 2010 (SEPC v. TANGEDCO), 10.01.2020 in M.P. No. 27 of 2016 (SEPC v. TANGEDCO), 09.11.2021 in M.P. No. 26 of 2021 (SEPC v. TANGEDCO) and 31.08.2023 in M.P. No. 3 of 2022 (SEPC v. TANGEDCO) – Para 10.10*]

**Re: Heavy financial burden on TANGEDCO due to non-supply as per PPA**

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. TANGEDCO's contentions are denied as being misconceived. VFC under Addendum #3 was unviable, which has already been upheld by the Commission. Unviability arose due to rise in prices of imported coal, which was accepted by TANGEDCO. In this view, supply of power by SEPC as per VFC under Addendum #3 was not possible. SEPC cannot be held

accountable for TANGEDCO's purchase of power at a tariff higher than Addendum #3 VFC.

3.11. TANGEDCO was duty bound to reimburse SEPC for actual VFC. In fact, SEPC with the petition submitted that TANGEDCO purchased power at a higher tariff than SEPC's actual VFC [Para 73 of the petition]. This was done despite SEPC being available to sell power to TANGEDCO at a VFC which was lower than TANGEDCO's tender price. Despite such, TANGEDCO in its reply has submitted that the tender was floated due to shortfall in supply of power. This is untenable and hence denied.

3.12. TANGEDCO cannot evade its obligation to pay fixed charges in case it fails to schedule any power from SEPC, during subsistence of PPA. The PPA between SEPC and TANGEDCO expressly recognises TANGEDCO's obligation to pay fixed charges for deemed generation.

3.13. SEPC is not filing a detailed para-wise reply to the Counter Affidavit filed by TANGEDCO. SEPC craves leave of the Commission to file detailed para-wise Reply, if so directed or required. 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.

3.14. In view of the above, TANGEDCO's Reply submissions deserve to be rejected and SEPC's relief as prayed for in the Petition and the present Rejoinder may be granted.

4. Arguments advanced on either side heard. Evidence placed on record through documents perused. Relevant provisions of the Electricity Act 2003 and connected Regulations considered. Written submissions of both parties traversed.

5. The vital points that arise for determination in the present case are enumerated as follows:-

- 1) Whether the petitioner is entitled for the relief of declaration as prayed for in the petition?
- 2) Whether the petitioner is entitled for payment of full capacity charges for the periods mentioned in Table 2 of the petition?
- 3) Whether the petitioner is entitled to have the term of the PPA extended by four months as prayed for in the petition?
- 4) To what relief the petitioner is entitled to ?

## **6. Findings of the Commission:-**

### **6.1. Point No.1:-**

The declaratory relief sought for by the petitioner SEPC pertain to its entitlement to fixed costs for non-supply of power to the respondent TANGEDCO for the periods mentioned in Table 2 of the petition. According to the petitioner since the situation of non-supply of power during the relevant period arose due to factors which were beyond the control of the petitioner, the petitioner is entitled for payment of fixed costs for the said period under the concept of “Deemed Generation.”

6.2. The claim of the petitioner is resisted by the respondent, TANGEDCO, the Distribution Licensee, contending inter alia that colossal failure on the part of the petitioner to obtain the requisite “Consent to operate” letter from the Transportation Pollution Control Board coupled with termination of coal supply and Transportation Agreement by JERA as early as on 21.11.2022 are the primary reasons for the non-supply of power by the petitioner to the respondent in tune with terms agreed between the parties through Addendum 3 dated 25.02.2021. According to the respondent since the above events at no stretch of imagination can be construed, even remotely, as a “Force Majeure” events, the petitioners prayer for declaration for entitlement of fixed charges and

consequent payment of fixed charges claimed in the petition is not legally sustainable.

6.3. The petitioner's claim pertain to the following periods:-

- i) From 01.12.2021 to 27.03.2022
- ii) From 28.03.2022 to 29.04.2022
- iii) From 01.12.2022 to 31.03.2023

This Commission deem it seemly to evaluate the merit of the petitioners claim for each one of the periods one by one for convenience and clarity.

**6.4. A. Period 01.12.2021 to 27.03.2022**

The crucial facts which are necessary and germane for arriving at just and proper decision can be encapsulated as follows:-

The period in question (i.e) 01.12.2021 to 27.03.2022 pertain to the pre-pass through period. The petitioner SEPC achieved commercial operation date on 30.11.2021. Vide letter dated 25.11.2021, the TNPCB informed the petitioner SEPC that the petitioner's request for renewal of the earlier CTO had been refused and that the petitioner shall not operate the unit beyond 30.11.2021 without obtaining valid consent from TNPCB. The commercial operation date of the petitioner's unit was declared on 30.11.2021.

6.5. The learned counsel for the petitioner argued with vigour that the sudden and exorbitant rise of the price of imported coal rendered supply of power by the petitioner to the respondent TANGEDCO in terms of Addendum 3 (i.e) sale of power at VFC mentioned with a ceiling and discount, unviable and as such the petitioner cannot be expected to fulfill its contractual obligation as the same would inflict huge financial loss to the petitioner. The learned counsel by referring to clause 12.7 of the PPA argued with intensity that since the sudden rise in the price of coal is a Force Majeure event extension of time for achievement of commercial operation date is very much permissible.

6.6. The learned counsel further submitted that since the petitioner's company is a generating company coming within the purview of Section 62 of the Electricity Act and as the primary coal under the PPA is imported coal, even though the petitioner is under obligation to procure coal, the petitioner cannot be expected to mitigate the losses out of its own pocket as procurement of coal at a price which is reasonably close to the ceiling price stipulated in Addendum 3 was a remote possibility. On the edifice of the above arguments, the learned counsel contended that the above situation was well beyond the control of the petitioner and hence a Force Majeure event warranting extension of time for

achievement of commercial operation date as provided under clause 12.7 of the PPA.

6.7. The above argument so industriously advanced by the petitioner's counsel is sought to be jettisoned by the counsel for the respondent bringing to the notice of this Commission vital clauses stipulated in the PPA and ratio laid down by our Hon'ble Supreme Court in the Energy Watch Dog and M/s Penna Electricity Ltd cases.

6.8. The respondent's counsel vehemently argued that as per clause 5.2 of the PPA the onus to obtain the requisite CTO is upon the petitioner, and that the failure on the part of the petitioner in having the earlier CTO extended by the CTO cannot be termed as a Force Majeure event clothing right upon the petitioner to have the commercial operation date extended by resorting to clause 12.7 of the PPA.

6.9. The fact that the earlier CTO obtained by the petitioner from the TNPCB came to be expired on 30.11.2021 as the petitioner's request for renewal happened to be refused by TNPCB for not furnishing the required particulars and that CTO was ultimately extended by the TNPCB only on 28.03.2022 is not put to challenge by the petitioner and the same is borne out from the material records.



6.10. The definition clause 7.1 of the PPA defines “Declared Capacity” as hereunder:-

Declared Capacity of ‘DC’ means capability of the generating station to deliver ex-bus electricity in MW declared by such Generating Station in relation to any period of the day of the whole day duly taking into account the availability of fuel.

6.11. Deemed Generation is defined in the PPA as follows:-

“Deemed Generation” means the energy which the generating station was capable of generating but could not generate due to the conditions of grid or power system etc beyond the control of the generating station or on receipt of backing down instructions from the State Load Despatch Centre based on merit order principle laid down by TNERC from time to time.

6.12. Clause 1 of Addendum 3 defines the term “availability” as hereunder :-

*"As per clause 1 (Definitions) of Addendum 3 Availability is defined as 'Availability' in relation to a thermal Generating Station for any period means the average of the daily average declared capacities (DCs) for all the days during that period expressed as a percentage of the installed capacity of the Generating Station minus normative auxiliary consumption in MW, and shall be computed in accordance with the following formula.*

N

$$\text{Availability} = 10000 \times \frac{\sum_{i=1}^N DC_i}{N \times IC \times (100 - \sum_{n=1}^N AUX_n)}\%$$

Where,

*IC* = Installed Capacity of the Generating Station in MW,

*DC<sub>i</sub>* = Average declared capacity for the *i*th day of the period in MW,

*N* = Number of days during the period, and

*Aux<sub>n</sub>* = Normative Auxiliary Energy consumption as a percentage of gross generation;

6.13. A cursory reading of the above referred definitions make it abundantly clear that energy which a generating station was capable of generating but could not generate due to the conditions of the grid or power system beyond the control of the generating system is construed as deemed generation. The non-extension of CTO does not come within the purview of the definition of grid condition or power control beyond the control of the generating station. In the present case the non-extension of the CTO by the petitioner is solely attributable to the gross failure of the petitioner to prefer the required application with TNPCB in the prescribed format along with supporting documents. As far as issuance of capacity notice by the petitioner is concerned, since CTO was not extended by the TNPCB beyond 30.11.2021, the petitioner was not in a position to issue the capacity notice. Both the above said lapses on the part of the petitioner, by no stretch of imagination, are attributable to the respondent TANGEDCO or SLDC or grid conditions. Situated thus the claim of the

petitioner that the period between 01.12.2021 to 27.03.2022 must be considered as deemed generation, in the considered opinion of this Commission, is absolutely not sustainable both on law and facts.

6.14. In the upshot of the above elaborate discussions and conclusion arrived at thereon, this Commission has no hesitation in rendering a finding that the petitioner SEPC is not entitled to the relief of declaration in respect of the period 01.12.2021 to 27.03.2022.

6.15. **B. Period 28.03.2022 to 29.04.2022**

From the averments made in the petition and the arguments advanced by the counsel for the petitioner it is crystal clear that for the period 28.03.2022 to 29.04.2022 admittedly the petitioner had neither declared the capacity nor issued the requisite capacity notice to the respondent TANGEDCO or SLDC. As already pointed out in the earlier part of this order, a generating station can be construed to be available within the meaning of the PPA entered into between the petitioner and the respondent only when the generating station declares capacity for a given day, the said generating station can be held to be "available". When no capacity is declared by the generating station, the units declared capacity is presumed to be zero and as a consequence the availability

also becomes zero within the meaning of the formula prescribed in this regard in Addendum 3.

6.16. In the present case since the petitioner has not declared capacity and also has not issued capacity notice to the respondent. Hence the deemed generation from the petitioners plant for the period 28.03.2022 to 29.04.2022 can be construed only at zero. Hence it is pellucid that the prayer of the petitioner for declaration in regard to the period 28.03.2022 to 29.04.2022 is not sustainable under law and as a sequel the conclusion that the petitioner is not entitled for the relief is inevitable.

6.17. **C) Period between 01.12.2022 to 31.03.2023**

Relevant factual matrix in regard to the period 01.12.2022 to 31.03.2023 is as follows:-

TANGEDCO on 29.04.2022 gave its directions akin to those under Section 11 of the Act for SEPC to supply power in deviation of the PPA on temporary basis till December 2022. TANGEDCO stated that in view of the precarious shortfall of availability of power in the State of Tamil Nadu, SEPC is to supply power on pass through basis in deviation of the PPA. TANGEDCO also 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 this Commission on the basis of documents submitted by SEPC.

6.18. SEPC commenced power supply to TANGEDCO under Section 11 (1) on 30.04.2022. SEPC used coal procured through alternate arrangements. Thereafter SEPC 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. It is known to both parties that the CSTA thereafter was terminated on 07.10.2022. No objection was conveyed by TANGEDCO to termination of CSTA so long as no financial liability arising out of such termination is imposed on TANGEDCO.

6.19. Ministry of Power (MoP) issued Section 11 directions vide its memorandum/order dated 05.05.2022. On the same date, MoP constituted a 'committee' for notification of benchmark rates temporary in nature, which may be paid by procurers for power supplied by imported coal based plants under Section 11. MoP acknowledged rise in imported coal prices and 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 SEPC as per the PPA for the duration in which TANGEDCO requisitioned power from SEPC under Section 11 directions.

6.20. On various dates thereafter, MoP's constituted committee notified benchmark rates. For the duration of Section 11 directions by TANGEDCO, the VFC paid by TANGEDCO to SEPC has been as per benchmark rates notified by MoP's committee. SEPC filed D.R.P.No.17 of 2023 seeking compensation for adverse impact under Section 11(2) due to power supply to TANGEDCO under Section 11 directions.

6.21. In November, on 23.11.2022 TANGEDCO withdrew the Section 11 requisition w.e.f. 01.12.2022 and SEPC was asked to supply power as per the PPA. SEPC by way of its letter dated 07.12.2022 objected to such withdrawal contending that coal stock arrangement for December 2022 was already made. SEPC continued to declare capacity from 01.12.2022 till 15.04.2023 i.e. the date after which Section 11 power supply commenced again in FY 2023-24.

6.22. For this duration of declaration of capacity i.e. from 01.12.2022 till 31.03.2023, submissions of SEPC and TANGEDCO in the pleadings along with hearings dated 02.07.2024 and 04.07.2024, are as follows:

(a) SEPC's submissions for fixed charges claim in FY 2022-23:

i. PPA provides for payment of fixed charges as per the following provisions:

(a) 'Availability' means:

*“Availability’ in relation to a thermal Generating Station for any period means the average of the daily average declared capacities (DCs) for all the days during that period expressed as a percentage of the installed capacity of the Generating Station minus normative auxiliary consumption In MW, and shall be computed in accordance with the following formula:...”*

(b) 'Deemed Generation' means:

*“Deemed Generation’ means the energy which a generating station was capable of generating but could not generate due to the conditions of grid or power system, etc. beyond the control of generating station or on receipt of backing down instructions from the State Load Despatch Centre based on merit order principle laid down by TNERC from time to time.”*

(c) 'Declared Capacity' means:

*“Declared Capacity’ or ‘DC’ means the capability of the generating station to deliver ex-bus electricity in MW declared by such Generating Station in relation to any period of the day or whole of the day, duly taking into account the availability of fuel’*

(d) *‘Plant Load Factor’ or ‘PLF’ for a given period means:*

*“Under ABT, ‘Plant Load Factor’ or ‘PLF’ for a given period means the total sent out energy corresponding to scheduled generation during the period, expressed as a percentage of sent out energy corresponding to installed capacity in that period and shall be computed in accordance with the following formula:*

*N*

$$PLF = 10000 \times \sum_{i=1}^N SG_i / \{N \times IC \times (100 - AUX_n)\} \%$$

*i=1*

*.....*

*SG<sub>i</sub> = Scheduled Generation in MW for the ith time block of the period, (If not covered under ABT, SG<sub>i</sub> shall be substituted with the Energy delivered (ex-bus) for the months in kWh) plus any deemed Generation in accordance with clause 7.3 (a) (ii)” ....*



(e) 'Standard PLF' or 'Target PLF' means:

*“Standard PLF or Target PLF shall be 80% during the Post-Stabilisation Period and 63.5% during the Stabilisation Period (or) as may be modified by the TNERC from time to time.”*

(f) 'Tariff' means:

*“The rates to be charged by the Company and payable by TANGEDCO under this agreement, all as set forth in Schedule-3, which are as per Sections 86 and 62 of the Electricity Act, 2003 and in line with Regulation of the Commission including the (Terms and Conditions of Determination of Tariff) Regulations, 2005 as amended and TNERC orders with respect to SEPC.”*

(g) Article 2.3 - Wheeling

*If a TNEB Event of Default occurs, the Company shall have the right, at any time after the Company delivers a Notice of Default which indicates that the Company may exercise its rights under this Clause 2.3, to the extent permitted by law (which permission shall not be unreasonably withheld or delayed), to sell any portion of Capacity and/or Energy to any customer of TNEB or any other purchaser within Tamilnadu....*

(h) Article 4.1.2 – TANGEDCO's Obligations

*“(c) ... It shall also be the responsibility of TANGEDCO to study the grid system and make alterations or improvements thereof so as to enable the Company to evacuate the entire capacity and energy from the Facility in compliance with the power evacuation scheme provided by TANGEDCO/TANTRANSCO.”*

(i) Clause 5.2 – Company Events of Default

*The following events, unless occurring as a result of a breach by TNEB of its obligations under this Agreement shall constitute an event of default by the Company (a "Company Event of Default"):*

*(a) the Company, except when it is permitted to do so under this Agreement, sells or purports to sell electricity to a third party without TNEB's prior written consent;*

(j) Clause 7.3 - Operations

*“(a). ...*

*(ii). TANGEDCO shall be obligated to purchase electrical energy (or to pay FCC for Deemed Generation) for the PLF of the current Year less than or equal to 80% (assuming that the PLF for the*

*remaining part of the Year is 0%). For example, if the Rated Capacity during the year is 525 MW, TANGEDCO's obligation to purchase Net Electrical Output and to pay for Deemed Generation, shall cease for such year once the sum of Net Electrical Output, Auxiliary Consumption and Deemed Generation for such year has reached 3,679,200 mega watt hours. TANGEDCO shall not be required to purchase electrical energy in excess of 100% of the Rated Capacity, and an instruction by TANGEDCO to reduce the output to Rated Capacity shall not be subject to limitations in Clause 7.3 (c). The Company is obligated to generate and sell power to TANGEDCO even when the PLF (actual generation plus the Deemed Generation) equals or exceeds 80% and such generation is first applied to replace the already included Deemed Generation in the PLF calculation.”*

(k) Schedule 3 – Clause 3.2 Fixed Capacity Charge (FCC)

(a) *The FCC with respect to any Month in any Year shall be:*

$$\{(FCC_y \times D \times (A/B)) / (\text{Number of days in such Year})\} \text{ minus } C$$

*Where:*

....

*FCCy: is equal to the sum of the following (for Months following the Commercial Operation Date (and the Month in which this Agreement terminates), items (ii), (iii), (iv) and (v) below shall be pro-rated accordingly); The recovery of Capacity Charges, Fixed Capacity charges per KWh in the month shall be worked out by dividing the capacity charges recoverable for the month by the quantum of ex-bus energy sent out in the month plus deemed generation if any as per Regulation 42 of TNERC Tariff Regulation (as amended).*

- i. Base Interest on Loan Capital;*
- ii. Adjusted O&M and Insurance Expenses;*
- iii. Depreciation;*
- iv. Base Return on Equity; and*
- v. Interest on Working Capital.*

*as each of the above is projected hereunder by the Company at the times specified in Section 3.1(d) of this Schedule 3 which projections shall be based on the following.*

- ii. Commission's Regulations i.e. TNERC (Terms and Conditions for Tariff) Regulations 2005 provide for payment of fixed charges in the following manner:

(a) Regulation 2(o) and 2(q) define Declared Capacity and Deemed

Generation:

(i) *“Declared Capacity or DC means the capability of the generating station to deliver ex-bus electricity in MW declared by such Generating Station in relation to any period of the day or whole of the day, duly taking into account the availability of fuel;”*

(ii) *“Deemed Generation means the energy which a generating station was capable of generating but could not generate due to the conditions of grid or power system, etc. beyond the control of generating station;”*

(b) Regulation 36 provides for components of fixed charges:

*“36..(1) The tariff for sale of power by the Generating Companies shall be of two part namely the Fixed Charges (recovery of annual capacity charges) and variable (energy) charges.*

*(2) The Fixed (annual capacity) charges shall consist of the following elements:*

*(b) Interest on Loan Capital;*

*(c) Depreciation;*

*(d) Return on Equity;*

*(e) Operation and Maintenance expenses; and*

*(f) Interest on Working Capital:*

*(3) The energy (variable) charges shall cover fuel cost.*

(c) Regulation 42 provides for payment of full FCC based on 80% availability:

*(1) Full capacity charges (Fixed Charges) shall be recoverable at target availability specified in clause (1) of Regulation 37.*

*(2) Recovery of capacity charges below the level of target availability will be on pro rata basis. At zero availability, no capacity charges shall be payable.*

*(3) Payment of capacity charges (Fixed Charges) shall be on monthly basis in proportion to allocated / contracted capacity.*

*(4) Capacity (Fixed) charges per KWh in the month shall be worked out by dividing the capacity charges recoverable for the month by the quantum of ex-bus energy sent out in the month.*

iii. Fixed cost is payable as per 'availability' of the plant. 'Availability' is the sum of declared capacities given by SEPC. SEPC maintained its availability to generate power for TANGEDCO in FY 2022-23 and FY 2021-22. Despite availability, SEPC could not generate power due to supervening factors. This constitutes as 'deemed generation' under the PPA. It is settled position of law that deeming fiction is to be carried to its logical end. SEPC relied on the following judgments:

(a) *Consolidated Coffee Ltd. & Anr. v. Coffee Board, Bangalore, (1980) 3 SCC 358 – Para 11*

(b) APTEL's Judgment dated 09.07.2024 in Appeal No. 261 of 2021 [*Adani Power Maharashtra Ltd. v. MERC &Anr.*]

iv. CERC has recognised payment of fixed charges during non supply of power which occurred due to reasons beyond generator's control. SEPC relied on the following judgments:

(a) *Uttar Bharat Hydro Power Pvt. Ltd. v. Uttarakhand Power Corporation Limited, 2024 SCC On Line APTEL 17*

(b) *GMR Vemagiri Power Generation Ltd. v. APPCC & Ors., 2020 SCC On Line CERC 129*

v. It is settled law that fixed charge payment is based on 'availability'/declared capacity of a generating plant. SEPC relied on the following judgments:

(a) *Arya Energy Ltd. & Anr. v. MPPMCL & Anr.*, 2019 SCC OnLine APTEL 90

*"63. ... The capacity charge for time block is paid for the declared MW output capacity of the station for that particular time block. The capacity charge is meant to cover the total fixed cost for the generating station i.e. interest on loan, return on equity, loan repayment provision or depreciation/amortization, fixed O&M Cost, insurance, tax etc. ..."*

(b) *Indraprastha Power Generation Co. Ltd. v. Delhi Electricity Regulatory Commission*, 2008 SCC On Line APTEL 4

*"19.... The target availability of a station is based on the declared capacity during the year and not on the PLF achieved as claimed by the appellant."*

vi. SEPC is seeking fixed charges recovery for the periods of deemed generation. Deemed generation in the PPA is defined as an event where the generator was 'capable' of generating but could not be generated



due to conditions of grid etc. beyond the control of the generating stations or on account of backing down instructions from the SLDC. Since SEPC could not generate power from 01.12.2022 till 31.03.2023 due to factors beyond the control of SEPC, this period of non supply ought to be considered as the period of deemed generation.

- vii. SEPC was forced to discontinue supply of power due to withdrawal of TANGEDCO's Section 11 requisition w.e.f. 01.12.2022. SEPC at that time was suffering on account of VFC under Addendum #3 being unviable. This Commission vide Order dated 31.08.2023 in M.P. No. 3 of 2022 in Paragraph 10.8 also held VFC in Addendum #3 to be unviable. It is for this reason, SEPC could not supply power to TANGEDCO as per the PPA, as requested by TANGEDCO. The event of rise in imported coal prices is an event beyond SEPC's control. The period of non supply of power due to rise in imported coal prices and TANGEDCO's non inclination to schedule power on the imported coal procured by SEPC on spot, ought to be considered as a period of deemed generation for which SEPC is entitled to fixed charges.
- viii. SEPC ought not to be made to suffer on account of usage of a particular type of fuel. Hon'ble Supreme Court has set at naught the issue of

entitlement of fixed charges due to non scheduling of power by the DISCOM for the reason of a particular type of fuel used by the generator which is not agreeable to the DISCOM. SEPC's submissions in this regard are as follows:

- (a) An identical situation has been dealt with by the Hon'ble Supreme Court in judgment dated 09.11.2023 in *MSEDCL v. Ratnagiri Gas and Power Pvt. Ltd. &Ors.*, (2024) 1 SCC 333 ("*Ratnagiri Judgment*"). In this judgment, Hon'ble Supreme Court upheld the entitlement of Ratnagiri, a gas based power generator, to receive fixed charges from its distribution licensee. The present case between SEPC and TANGEDCO is similar to the issue between Ratnagiri and its distribution licensee i.e. Maharashtra Discom.
- (b) There was a domestic gas shortage in the country during years 2011 to 2013. Ratnagiri i.e. a gas based power generator, stopped receiving domestic gas supply as a result of the shortage. Ratnagiri thereafter executed a gas supply arrangement with GAIL for 'Regasified Liquefied Natural Gas' ("*RLNG*") and started declaring capacity based on RLNG fuel. This RLNG fuel was a permitted fuel in the power purchase agreement between Ratnagiri and its distribution licensee i.e.

Maharashtra Discom. Maharashtra discom disputed Ratnagiri's entitlement to FCC since Ratnagiri declared its capacity based on RLNG instead of domestic gas. Maharashtra Discom contended that since Ratnagiri, as per the provisions of the power purchase agreement did not take Maharashtra Discom's permission to execute the gas supply arrangement based on RLNG, Maharashtra was not obligated to take power from Ratnagiri and therefore not obligated to pay FCC to Ratnagiri.

(c) This dispute was first adjudicated by CERC and then Hon'ble APTEL.

Both the fora decided that Maharashtra Discom's consent for gas supply arrangement was required as per the power purchase agreement. However, the entitlement of FCC cannot depend on the gas supply arrangement. Hon'ble Supreme Court upheld the order/judgment by CERC and APTEL.

ix. Be that as it may, Section 11 directions by MoP were valid till 31.12.2022. Even TANGEDCO committed to purchase power from SEPC till 31.12.2022 vide its board resolution dated 16.06.2022. For the duration in which Section 11 direction from the Central Government persisted, SEPC is entitled to fixed charges. Ld. CERC in its Section 11

Order dated 31.12.2022 in Tata Power Company Ltd. v. GUVNL &Ors. 2023 SCC Online CERC 266 has held in Paragraph 86 that PPA holders who are not scheduling power from the generating stations shall be liable to pay capacity charges. It is to be noted that SEPC sought TANGEDCO's permission for grant of open access vide letters dated 11.05.2022 and 28.12.2022. However TANGEDCO did not grant the permission. In the absence of open access, SEPC could not sell power in the exchange. TANGEDCO is therefore liable to pay fixed charges for the Section 11 duration.

- (b) TANGEDCO's submissions for fixed charges claim in FY 2022-23:
- (i) The definition of declared capacity in the PPA takes into consideration availability of fuel. SEPC did not declare capacity in the period between 28.03.2022 to 29.04.2022 (33 days) citing high prices of imported coal. SEPC failed to maintain its long term power supply arrangement with JERA due to its own fault. During this period, no capacity notice was furnished by SEPC. As per the definition of deemed generation in the PPA, mere rise in price of imported coal cannot give rise to a situation of deemed generation.

- (ii) For the period between 01.12.2022 till 31.03.2023, SEPC was ready to supply only on the basis of pass through and not as per PPA as required by TANGEDCO. SEPC is not entitled to claim fixed charges for non supply period.
- (iii) SEPC does not have a valid FSA for coal to keep the plant available for generation under the PPA or this Commission's Regulations. SEPC belatedly informed TANGEDCO regarding JERA's termination notice dated 07.10.2022 and termination w.e.f 21.11.2022. The price of procurement of coal through alternate arrangement shall have to be less than the valid FSA.
- (iv) PPA or this Commission's regulations do not provide for a term 'deemed availability'. Since there was no valid FSA, SEPC's plant cannot be said to be available. SEPC achieved only 55.9110% PLF in FY 2022-23. There is no full fixed cost entitlement. FCC is to be pro rata reduced as per Regulation 42 of TNERC Tariff Regulations 2005.
- (v) Deemed generation is only applicable when SEPC is available for generation and TANGEDCO does not schedule power. Although the DC notice was issued by SEPC but the same was not in accordance with PPA. As per Article 7.3 (a) (ii), the clause is valid only if SEPC has a

valid FSA in force. As per Article 16.1.2, other than payment of VFC, SEPC has no liability under the CSTA/CHA. Since SEPC procured coal on spot market, no liability arises for TANGEDCO.

- (vi) As per MoP's direction dated 28.06.2022, TANGEDCO can notify the generator in advance regarding the proposed non procurement of power. Once TANGEDCO notified the same to SEPC, SEPC was well within its right to sell power to any other distribution licensee. TANGEDCO does not have an obligation to pay fixed charges for the said period.
- (vii) In reference to TANGEDCO's letter dated 01.12.2022 to SEPC, SEPC acquiesced to TANGEDCO's letter and agreed to supply as per PPA norms. TANGEDCO's letter has not been challenged by SEPC.
- (viii) TANGEDCO is not able to place SEPC's plant in the merit order despatch to procure power on pass through basis. The directions to purchase on pass through basis were withdrawn w.e.f. 01.12.2022.
- (ix) As per Hon'ble Supreme Court's judgment in GRIDCO v. GMR, the generator prayed for force majeure relief for rise in imported coal prices. Hon'ble Supreme Court held that mere increase in price of imported coal does not qualify as force majeure event. The force majeure clause in the judgment is similar to force majeure clause in the present PPA.

- (x) SEPC would not be in the present situation if SEPC had maintained the CSTA with JERA. CSTA was terminated due to SEPC's fault completely attributable to SEPC i.e. failure to furnish letter of credit.
- (xi) SEPC argues that TANGEDCO released a short term tender in August 2022 for procurement of power in February and March 2023. However, the tender was released for a period of April and May 2023. This period is not concerned with SEPC's supplied periods mentioned in the petition.
- (xii) As per Hon'ble Supreme Court's judgment in Penna Electricity v. TNEB, the generator was denied fixed charges. Hon'ble Court held that deficiency in availability of fuel which was generator's responsibility, will not entitle the generator to full fixed charges. In the present case, PPA itself states that in case of fuel supply TANGEDCO will have no liability and it was SEPC's responsibility to arrange for fuel. Since the FSA was SEPC's responsibility and it was terminated, TANGEDCO is not liable to pay fixed charges.
- (xiii) This Commission vide Order dated 31.08.2023 in M.P. No. 3 of 2022 did not declare the PPA unviable. The said order only altered the position of coal procurement i.e. imported or domestic, and removes ceiling price. There is no variance in the terms of PPA.

(xiv) CERC's Tata Power Order is not applicable to the present case since the said judgment awarded fixed cost only for the pass through period. In the present case, pass through period was not applicable to the disputed periods.

6.23. It is SEPC's submission that during this period from 01.12.2022 till 31.03.2023, SEPC declared capacity and was available to generate power for TANGEDCO on pass through basis. SEPC has placed on record the data regarding declared capacities furnished to the SLDC in this period. SEPC declared its capacity based on the fuel available with it which was purchased on spot market. This period immediately succeeds the period of Section 11 supply made by SEPC to TANGEDCO from 30.04.2022 till 30.11.2022 i.e. 7 months. TANGEDCO vide its notice dated 23.11.2022 withdrew the Section 11 requisition by stating as follows:

*"TANGEDCO vide references cited above have allowed imported coal based plants in Tamil Nadu having long term power purchase agreements to supply power on pass through basis under Section 11 of the Electricity Act 2003 till 31.12.2022 as one time measure deviating the provisions of PPA to mitigate the power crisis.*

*The power crisis is expected to reduce considerably during December 2022 and the average market power price from Power exchanges has fallen below the bench mark rate of the imported coal plant and hence TANGEDCO has proposed to withdraw the approval given to supply RTC*



*power on pass through basis under Section 11 of the Electricity Act 2003 with effect from 01.12.2022 @00:00 hrs.*

*In this regard, M/s.SEPC Power Private Limited is hereby informed that the power shall be procured only as per the provisions of Power Purchase Agreement/ Addendum from 01.12.2022 onwards.”*

6.24. TANGEDCO therefore withdrew the Section 11 requisition since power crises was expected to reduce considerably during December 2022 and the average market price from Power Exchanges had fallen below the benchmark rate determined by the Ministry of Power for SEPC. TANGEDCO thereafter requested SEPC to supply power as per the PPA/Addendum w.e.f. 01.12.2022.

6.25. Since supply as per PPA was unviable for SEPC as contended by SEPC, the supply was promised by SEPC to TANGEDCO only as per pass through mechanism. Based on this commitment SEPC declared its capacity from 01.12.2022 till 31.03.2023. TANGEDCO failed to schedule any power during this period since the power was not offered as per VFC stipulated in Addendum #3 i.e. with a ceiling and discount. Certain facts in relation to Addendum #3 VFC being unviable are recapitulated:

- (a) On 02.02.2022 SEPC filed a Petition i.e. M.P. No. 3 of 2022 seeking relief in the nature of change in source of coal and supply in the meantime based on pass through, due to exorbitant rise in imported coal prices. On 29.04.2022,

TANGEDCO admitted to the fact of rise in imported coal prices and TANGEDCO was facing power crisis where demand was more than supply of power. TANGEDCO on the same day directed SEPC to supply power akin to a direction under Section 11 of the Act, on pass through basis in deviation to the PPA.

(b) SEPC continued to supply power to TANGEDCO for 7 months in FY 2022-23 i.e. from 30.04.2022 till 30.11.2022 and thereafter for about 11 months in FY 2023-24.

(c) On 31.08.2023, this Commission passed its final Order in M.P. No. 3 of 2022 and held as follows:

*“10.8 On a conspectus evaluation of the evidence placed on record through documents this Commission decides that the unprecedented rise in the price of imported coal has rendered the supply of power by the petitioner to the respondent under the Power Purchase Agreement as amended on 25-02-2021 vide Addendum 3 with the existing price mechanism an unviable one as contended by the petitioner.”*

6.26. This Commission by way of its final Order dated 31.08.2023 after analysing facts and law, held that the VFC under Addendum #3 having ceiling and discount was unviable considering the fact of rise in imported coal prices as also admitted by TANGEDCO. We see no reason to deviate from the understanding in Order dated 31.08.2023, that VFC under Addendum #3 was unviable for SEPC. We have been informed that this Order though challenged

has not been stayed or set aside by Hon'ble APTEL. In this view, it is not out of place for SEPC to contend that since non supply of power as per VFC of Addendum #3 was unviable, SEPC committed to supply of power even after withdrawal of Section 11 requisition by TANGEDCO, on pass through basis.

6.27. This brings us to the point where we have to analyse whether declaration of capacity by SEPC and availability of SEPC's plant from 01.12.2022 till 31.03.2023 even if it was not in accordance with VFC under the Addendum #3, entitles SEPC to fixed/capacity charge payment.

6.28. In order to address the present issue, we note that SEPC's tariff is a two part tariff comprising of Capacity Charges and Energy Charges.

6.29. CERC issued its tariff regulation dated 26.03.2001 and notified norms of operation in the following manner:

*"2.4. Norms of Operation*

*(i) Target Availability for recovery of full Capacity (Fixed) charges*

*(a) For all thermal Stations except those covered under clause (b) below - 80%*

*(b) For NLC (TPS-II, Stage I&II) Stations - 72%*

*(ii) Plant Load Factor based on scheduled energy beyond which Incentive shall be payable*

*(a) For all Thermal Stations except those covered under clause (b) below - 77%*

*(b) For NLC (TPS-II, Stage I&II) Stations - 72%"*

*2.8. Full Fixed Charges shall be recoverable at "Target Availability" specified in clause 2.4 (i). Recovery of Capacity (Fixed) Charges below the level of Target Availability shall be on pro-rata basis. At zero availability, no Capacity Charge shall be payable."*

6.30. So far as the State directive on ABT is concerned, the National Electricity Policy 2005 under Clause 5.7.1 envisaged intra state ABT. The Tariff Policy notified by the Government of India in 2006 also stipulated that two part tariff should be adopted for all long term contracts to facilitate merit order dispatch. This Commission also enacted the 2005 Tariff Regulations and included the ABT mechanism of tariff. This Commission issued draft ABT Regulations 2016 where capacity charges were linked to plant availability and variable charges were linked to scheduled energy.

6.31. It is clear from the above that in case of two part tariff, the Capacity and Energy charges are separate where Capacity charges are fully dependent on plant availability. This concept is not unknown. Therefore prima facie, fixed charges are to be paid to a generating company so long as the generating company has declared capacities. In fact it is relevant to note that Hon'ble Supreme Court in judgment dated 17.08.2007 in *Central Power Distribution Company Ltd. & Ord. v. CERC* (2007) 8 SCC 197, affirmed CERC's Order dated

04.07.2005 which made ABT applicable. In the said judgment Hon'ble Supreme Court notes that *prior to introduction of ABT, the fixed charges were payable by purchasers based on the units of electricity actually drawn by them. The scheme of recovery of fixed charges based on drawl of electricity was not considered appropriate and rationale particularly from the point of view of grid safety and security. The scheme of fixed charges liability based on drawls allowed the purchasers of electricity to draw electricity from the Grid at their pleasure with no control.* By observing this Hon'ble Supreme Court remarked that it was only before the ABT mechanism that fixed charges were dependent on withdrawal of power.

6.32. Upon analysis of the above, it is abundantly clear that fixed charges are payable on plant availability and it is only at zero availability that no capacity charges are payable.

6.33. Let us now analyse the provisions of the PPA along with provisions of this Commission's Tariff Regulations i.e. TNERC (Terms and Conditions for Determination of Tariff) Regulations 2005 (amendment from time to time):

(a) Provisions in TNERC Tariff Regulations 2005:

(i) Regulation 2(o) and 2(q) define Declared Capacity and Deemed

Generation:

1. *“Declared Capacity or DC means the capability of the generating station to deliver ex-bus electricity in MW declared by such Generating Station in relation to any period of the day or whole of the day, duly taking into account the availability of fuel;”*
2. *“Deemed Generation means the energy which a generating station was capable of generating but could not generate due to the conditions of grid or power system, etc. beyond the control of generating station;”*

(ii) Regulation 36 provides for components of fixed charges:

*“36..(1) The tariff for sale of power by the Generating Companies shall be of two part namely the Fixed Charges (recovery of annual capacity charges) and variable (energy) charges.*

*(2) The Fixed (annual capacity) charges shall consist of the following elements:*

*(b) Interest on Loan Capital;*

*(c) Depreciation;*

*(d) Return on Equity;*

*(e) Operation and Maintenance expenses; and*

*(f) Interest on Working Capital:*

*(3) The energy (variable) charges shall cover fuel cost.*

(iii) Regulation 42 provides for payment of full FCC based on

80% availability:

*(1) Full capacity charges (Fixed Charges) shall be recoverable at target availability specified in clause (1) of Regulation 37.*

*(2) Recovery of capacity charges below the level of target availability will be on pro rata basis. At zero availability, no capacity charges shall be payable.*

*(3) Payment of capacity charges (Fixed Charges) shall be on monthly basis in proportion to allocated / contracted capacity.*

*(4) Capacity (Fixed) charges per KWh in the month shall be worked out by dividing the capacity charges recoverable for the month by the quantum of ex-bus energy sent out in the month.*

(b) Provisions of the PPA:

*“‘Availability’ in relation to a thermal Generating Station for any period means the average of the daily average declared capacities (DCs) for all the days during that period expressed as a percentage of the installed capacity of the Generating Station minus normative auxiliary consumption In MW, and shall be computed in accordance with the following formula:...”*

*“‘Deemed Generation’ means the energy which a generating station was capable of generating but could not generate due to the conditions of grid or power system, etc. beyond the control of generating station or on receipt of backing down instructions from the State Load Despatch Centre based on merit order principle laid down by TNERC from time to time.”*

*“‘Declared Capacity’ or ‘DC’ means the capability of the generating station to deliver ex-bus electricity in MW declared by such Generating Station in relation to any period of the day or whole of the day, duly taking into account the availability of fuel’*

*“Under ABT, ‘Plant Load Factor’ or ‘PLF’ for a given period means the total sent out energy corresponding to scheduled generation during the period, expressed as a percentage of sent out energy corresponding to installed capacity in that period and shall be computed in accordance with the following formula:*

*N*

$$PLF = 10000 \times \sum_{i=1}^{N} SG_i / \{N \times IC \times (100 - AUX_n)\} \%$$

*i=1*

*.....*

*SG<sub>i</sub> = Scheduled Generation in MW for the i<sup>th</sup> time block of the period , (If not covered under ABT, SG<sub>i</sub> shall be substituted with the Energy delivered (ex-bus) for the months in kWh) plus any deemed Generation in accordance with clause 7.3 (a) (ii)”*

### *“7.3 Operations*

*(a). ...*

*(ii). TANGEDCO shall be obligated to purchase electrical energy (or to pay FCC for Deemed Generation) for the PLF of the current Year less than or equal to 80% (assuming that the PLF for the remaining part of the Year is 0%). For example, if the Rated Capacity during the year is 525 MW, TANGEDCO's obligation to purchase Net Electrical Output and to pay for Deemed Generation, shall cease for such year once the sum of Net Electrical Output, Auxiliary Consumption and Deemed Generation for such year has reached 3,679,200 mega watt hours. TANGEDCO shall not be required to purchase electrical energy in excess of 100% of the Rated Capacity, and an instruction by TANGEDCO to reduce the output to Rated Capacity shall not be subject to limitations in Clause 7.3 (c). The Company is obligated to generate and sell power to TANGEDCO even when the PLF (actual generation plus the Deemed Generation)*



*equals or exceeds 80% and such generation is first applied to replace the already included Deemed Generation in the PLF calculation.”*

- (a) *The FCC with respect to any Month in any Year shall be:*  
$$\{(FCCy \times D \times (A/B)) / (\text{Number of days in such Year})\} \text{ minus } C$$

*Where:*

*....*

*FCCy: is equal to the sum of the following (for Months following the Commercial Operation Date (and the Month in which this Agreement terminates), items (ii), (iii), (iv) and (v) below shall be pro-rated accordingly); The recovery of Capacity Charges, Fixed Capacity charges per KWh in the month shall be worked out by dividing the capacity charges recoverable for the month by the quantum of ex-bus energy sent out in the month plus deemed generation if any as per Regulation 42 of TNERC Tariff Regulation (as amended).*

- (i) Base Interest on Loan Capital;*
- (ii) Adjusted O&M and Insurance Expenses;*
- (iii) Depreciation;*
- (iv) Base Return on Equity; and*
- (v) Interest on Working Capital.*

*as each of the above is projected hereunder by the Company at the times specified in Section 3.1(d) of this Schedule 3 which projections shall be based on the following.*

6.34. Regulations of this Commission are clear on the following aspects:

- a. Full capacity charges are recoverable at target availability. Recovery of capacity charges below the level of target availability will be on pro rata basis. [Regulation 42 (1) and (2)]
- b. Deemed generation means the power that could be generated but not generated due to reasons beyond the control of the generating company.
- c. Recovery of fixed charges is not dependent on payment of Energy Charges.

Even as per the provisions of the PPA, SEPC is to receive two part tariff out which Capacity Charges/FCC are recoverable on plant availability i.e. deemed generation. The definition of FCC in Schedule 3.2 provides that FCC is the sum of (i) Base interest on loan (ii) Adjusted O&M and Insurance Expenses (iii) Depreciation (iv) Base Return on Equity and (v) Interest on Working Capital. The PPA does not make the FCC dependent on cost of coal or VFC. Further, formula for computation of fixed capacity charges includes the element of PLF which in turn includes 'deemed generation' i.e. non generation not attributable to the generator.

6.35. SEPC has contended that non supply of power occurred due to refusal on part of TANGEDCO to off take power at pass through tariff. TANGEDCO has

contended that since SEPC was not 'available' as per the PPA, it was not entitled to any fixed charges for the period 01.12.2022 till 31.03.2023. In addition, TANGEDCO contends that due to the fact that SEPC does not have a valid FSA, no fixed charges are payable. Regrettably TANGEDCO's contentions cannot be considered. In order to address the disputed question of fact i.e. whether SEPC's commitment to supply of pass through basis instead of VFC under Addendum #3, disentitles SEPC of fixed charges from 01.12.2022 till 31.03.2023 we refer to provisions of the PPA providing for declaration of capacity and issuance of capacity notices:

*Capacity Notice has the meaning set forth in Section 7.2.1 of this Schedule.*

*Declared Capacity 'Declared Capacity or 'DC means the capability of the generating station to deliver ex-bus electricity in MW declared by such Generating Station in relation to any period of the day or whole of the day, duly taking into account the availability of fuel.*

## *7.2 Capacity Notices*

*7.2.1 As soon as practicable before the Commercial Operating Date and thereafter at the beginning of each Schedule Day, the Company shall deliver to Capacity Notice (the "Capacity Notice") containing the Declared Capacity of the Facility for each Settlement Period throughout the relevant Schedule Day (and where such Declared Capacity changes, the time at which any change is expected to take effect). The Company may issue a standing notice which, until a subsequent Capacity Notice or Revised Capacity Notice is issued, shall be deemed to be the Capacity Notice for each Schedule*

*7.2.2 Whenever the Company believes that any Information that it has provided to TANGEDCO pursuant to this Section 7.2 of this Schedule no longer accurately reflects its expectations, it shall promptly deliver to TANGEDCO a written notice (a "Revised Capacity Notice") revising that information. A Revised Capacity Notice that is delivered either after the Company's receipt of a Monitoring Notice or within 30 minutes prior to the effective time of a requested increase in output pursuant to a Dispatch Instruction shall not be effective with respect to the period of monitoring relating to such monitoring instruction or requested increase in dispatch.*

*7.2.3 The Company shall take reasonable care in preparing Capacity Notices and Revised Capacity Notices with a view to declaring accurately the Company's expectations regarding the performance of the Facility in accordance with this Agreement.*

*7.2.4 No Capacity Notice or Revised Capacity Notice shall exceed the Rated Capacity during a Deemed Generation Event, and any such notice shall, if necessary, be deemed to be reduced to the Rated Capacity while such Deemed Generation Event continues.*

*7.2.5 As per TNERC grid code, the generating stations shall be responsible for power generation generally according to the daily schedule provided to them by the distribution licensee and also in accordance with Merit Order Dispatch and Connectivity Agreements. However, the generating stations may deviate from the given schedules depending on the plant and system conditions with the prior approval from SLDC.*

6.36. Upon perusal of the PPA it is fairly obvious to conclude that procedure for declaration of capacity is distinct and separate from VFC stipulated in the PPA which is dependent on cost of coal etc. PPA does not provide for declaration of capacity only when the generator is agreeable to receive the VFC as stipulated.

6.37. In addition we refer to our decision in the Order dated 31.08.2023 in M.P. No. 3 of 2022 where we held as follows:

*“10.4 The above data disclose that as per Argus Index, which is the Global price index indicator for imported coal, the price of the imported coal has risen manifold from Rs.2.61 per unit to as high as Rs.10.07 per unit. In the month of June 2023 the price of imported coal stood at Rs.4.39 per unit. Thus it is evident that the difference between the ceiling limit stipulated in the PPA that was entered into by the Petitioner and the Respondent and the current price of one unit of imported as per the Argus Index is still Rs.2 per unit. Apposite to point out that even the Respondent TANGEDCO has not disputed the factum of rise in the price of the imported coal during the relevant period...”*

*10.6 From the above letters, it is explicit that there is a categorical recognition by all concerned, which include the Respondent TANGEDCO, of the fact that rise in the prices of imported coal has seriously affected the supply of power by the imported coal based plants include the Petitioner SEPC's 525 MW Tuticorin Project. Since the PPA between the Petitioner SEPC and the Respondent TANGEDCO is based on usage of imported coal as primary fuel for the supply of power, there can be no escape from the logical conclusion that the rise in the price of the imported coal has led to rise in VFC for the Petitioner. The loss, as calculated by the Petitioner, on account of cost of VFC on account of increase in the price of imported coal is Rs.120 crore per month, which, needless to say, is a substantial one...*

*10.7 A prudent man, leave alone the petitioner, would be least inclined to suffer such a huge loss which is bound to be occasioned due to sudden surge in the price of imported coal. Section 61 and 62 of the Electricity Act, 2003 mandates that commercial principles be considered for the supply of electricity. To protect all the parties from suffering any loss the above referred provisions have been incorporated in the Electricity Act. This Commission cannot be oblivious of the noble object enshrined in Section 61 and 62 of the Electricity Act, while deciding this issue.*

*10.8 On a conspectus evaluation of the evidence placed on record through documents this Commission decides that the unprecedented rise in the price of imported coal has rendered the supply of power by the petitioner to the respondent under the Power Purchase Agreement as amended on 25-02-2021 vide Addendum 3 with the existing price mechanism an unviable one as contended by the petitioner.”*

6.38. We are bound by our decision which holds that SEPC cannot be faulted with non-supply of power at ceiling VFC in case of multi-fold rise in imported coal prices. Cumulatively, non-scheduling of power by TANGEDCO only for the reason of uncertainty of VFC cannot deprive SEPC of fixed charge payment which is the cost met by the generator for keeping the plant available. There is no dispute to the fact that SEPC's plant was available to generate power with adequate fuel availability. It was pointed out by the Counsel for SEPC that the present case is similar to the issue dealt with by the Hon'ble Supreme Court in judgment dated 09.11.2023 titled as *MSEDCL v. Ratnagiri Gas and Power Pvt. Ltd. &Ors.* (2024) 1 SCC 333. In this case, the issue was with respect to Ratnagiri Gas Plant using Regasified Liquefied Natural Gas (RLNG) instead of domestic natural gas which was approved by Maharashtra Distribution licensee. Hon'ble Supreme Court interpreted the provisions of the power purchase agreement therein and upheld Ratnagiri Gas Plant's entitlement to fixed charges for the period of non supply of power due to the issue on fuel. Relevant details of Ratnagiri Case are provided below:

- (a) *There was a domestic gas shortage in the country during years 2011 to 2013. Ratnagiri stopped receiving domestic gas supply as a result of the shortage. Ratnagiri thereafter executed a gas supply arrangement with GAIL for RLNG and started declaring capacity based on RLNG fuel. This RLNG fuel was a permitted fuel in the power purchase agreement between Ratnagiri and its distribution licensee disputed*

*Ratnagiri's entitlement to FCC since Ratnagiri declared its capacity based on RLNG instead of domestic gas. Maharashtra Discom contended that since Ratnagiri, as per the provisions of the power purchase agreement did not take Maharashtra Discom's permission to execute the gas supply arrangement based on RLNG, Maharashtra was not obligated to take power from Ratnagiri and therefore not obligated to pay FCC to Ratnagiri.*

(b) Hon'ble Supreme Court upheld the order/judgment by CERC and APTEL which upheld Ratnagiri's entitlement to fixed charges. Hon'ble Supreme Court held as follows:

- "26. The first respondent has consistently stated that the alternate arrangement in the form of GSA/GTA with GAIL and capacity declarations based on RLNG were necessitated on account of the unprecedented nationwide shortage of domestic fuel. But for such an alternate arrangement, the first respondent would have been unable to meet the target availability, which would have in turn affected their ability to recover fixed costs, and jeopardized the viability of the project. The appellant does not dispute the shortage of domestic fuel but merely objects to the "unilateral" decision to declare capacity based on RLNG, which the appellant states violated the mandatory approval requirement under clause 5.9 of the PPA, thereby exonerating it of the liability to pay fixed capacity charges.*
- 29. In accordance with settled principles governing the interpretation of contracts, the PPA is required to be read as a whole. Clause 4.3 has two parts: according to the first, primary fuels include LNG/Natural gas and/or RLNG; according to the second, the appellant's agreement is required in case liquid fuels are to be employed. A bare reading of the clause indicates that the requirement to seek such an agreement does not attach to the first part of the clause which envisages RLNG as a primary fuel. An arrangement involving a transition from one primary fuel to another primary fuel is permissible by the clause, even without the appellant's agreement. ..*

32. *The first respondent was compelled to make alternate arrangements in view of the country-wide shortage of domestic gas, making RLNG a viable and contractually permissible alternative. Notably, the appellant has not disputed the circumstances in which this need arose...*
34. *Capacity charges mandated under Clause 5.2 hinge on the declared capacity that the Station is capable of delivering to its beneficiaries. Energy Charges, on the other hand, are payable only against the actual energy delivered. The appellant's liability for the former is actual delivery agnostic. It arises as long as the declared capacity is made in terms of the PPA i.e. Clause 4.3.*
35. *Clause 2.2.2 of the PPA prescribes that even in case MSEDCL is unable to utilize the entire allocated capacity of RGPPL, or in case MSEDCL fails to comply with the payment obligations in accordance with the PPA, RGPPL shall be entitled to sell power to other parties, without prejudice to its claim for recovery of capacity charges from MSEDCL subject to the provisions of Clause 2.2.2. Clause 2.2.2 indicates the intention of the parties to the PPA to put the capacity charges beyond the realm of actual energy supplied. The appellant's reading implies that such a fixed charge can be avoided and made subject to the consent of the appellant. Such a reading goes against the apparent intention of the parties to treat capacity charges as fixed charges under the PPA.*
36. *A commercial document cannot be interpreted in a manner that is at odds with the original purpose and intendment of the parties to the document. A deviation from the plain terms of the contract is warranted only when it serves business efficacy better. The appellant's arguments would entail reading in implied terms contrary to the contractual provisions which are otherwise clear. Such a reading of implied conditions is permissible only in a narrow set of circumstances.*
37. *In the present context, bearing in mind the background of the establishment of the first respondent, and the shortfall of domestic gas for reasons beyond the control of the first respondent, such a deviation from the plain terms is not merited and militates against business efficacy as it has a detrimental impact on the viability of the first respondent."*



6.39. SEPC in addition to the above has submitted that CERC in *GMR Vemagiri Power Generation Ltd. v. APPCC & Ors.* 2020 SCC OnLine 129 also allowed deemed capacity charges for declared capacity by Vemagiri on deep water gas which was not approved by the concerned distribution licensee.

6.40. As submitted by SEPC, its availability was 86.0979% in FY 2022-23 including the period from 01.12.2022 till 31.03.2023. In fact it can be ascertained that TANGEDCO paid fixed charges to SEPC for the month of November 2022 where no power was taken. There is no dispute to the said fact. It seems that since TANGEDCO was agreeable to supply of power by SEPC based on pass through mechanism under Section 11 directions in November 2022, TANGEDCO continued to pay fixed charges in the said month despite no off take of power. TANGEDCO's dispute on VFC starting 01.12.2022 led to non-payment of fixed charges which cannot be permitted, especially as per the decision by Hon'ble Supreme Court in the Ratnagiri case (supra).

6.41. TANGEDCO has submitted that due to non availability of a valid FSA, SEPC is not entitled to fixed charges. Upon perusal of PPA it does not come to fore that a valid FSA is required for declaration of capacity. However this argument augments the logic that availability of fuel is necessary to declare 'availability' of the plant. In this case, SEPC had the fuel stock which was

procured on spot market for Section 11 supply. So far as validity of CSTA is concerned, in case the same was valid it would have ensured availability of coal through a third party seller. Source of coal is not relevant for the present subject matter. As per the PPA, declaration of capacity by SEPC is not dependent on a valid CSTA. As per Article 16.1.2, relevance of CSTA for TANGEDCO arises only for payment of VFC to SEPC. This is an admitted position by TANGEDCO. Besides, TANGEDCO having conveyed no objection to termination of SEPC's CSTA which is recorded in Order dated 09.03.2023 in M.P. No. 3 of 2022, cannot now insist on validity of the same.

6.42. TANGEDCO's contention that in the absence of term 'deemed availability' no fixed charges are payable to SEPC, is rejected. PPA provides for payment of fixed charges for 'Deemed Generation' which is intrinsically linked to SEPC's plant's availability. 'Deemed Availability' would be required if 'availability' of the plant itself was hampered due to an event not attributable to the generator.

6.43. SEPC submitted that it is entitled to fixed charges for December 2022 in terms of Order dated 03.01.2023 passed by CERC in Petition No. 128/MP/2022 where CERC held that in case of Section 11 supply, whichever procurer does not off take power is liable to pay fixed charges to the generator as per the PPA. TANGEDCO contended that as per MoP's direction dated 28.06.2022,

TANGEDCO could notify the generator in advance regarding the proposed non procurement of power. Once TANGEDCO notified the same to SEPC, SEPC was well within its right to sell power to any other distribution licensee. TANGEDCO does not have an obligation to pay fixed charges for the said period. We are inclined to note that SEPC sought open access permission from TANGEDCO vide letters dated 11.05.2022 and 28.12.2022. In view of no response from TANGEDCO and no NOC granted, SEPC could not have sold power in the power exchange or to any other beneficiary. In terms of the facts herein, TANGEDCO's contentions are rejected.

6.44. On a conspectus evaluation of all facts and circumstances in the background of relevant Regulations, orders and principle of law laid down by the Hon'ble APTEL and Hon'ble Supreme Court on the subject, this Commission decides that the petitioner is entitled to the relief of declaration in regard to the period 01.12.2022 to 31.03.2022.

Accordingly this point is determined.

7. **Point No.2:-**

7.1. This Commission has rendered a finding in Point No. 1 that the petitioner is not entitled to the relief of declaration in regard to the periods 01.12.2021 to

27.03.2022 and 28.03.2022 to 29.04.2022 mentioned in Table 2 of the petition. Hence it is manifest that the petitioner is not entitled to claim full capacity charges for the above referred periods.

7.2. As far as the period covering 01.12.2022 to 31.03.2023 this Commission has rendered a categorical finding in Point No.1 that the petitioner SEPC is entitled for the relief of declaration and that the petitioner is entitled to fixed costs for non-supply of power as it was established that non-supply of power situation arose due to factors which were beyond the control of the petitioner and analogous to that of Force Majeure event. In the light of the above said finding the conclusion that the petitioner is entitled for payment of fixed charges for the period 01.12.2022 to 31.03.2023 is imperative. Situated thus, this Commission decides that the petitioner, under law and equity is entitled to fixed charges for the above referred period.

Accordingly this point is determined.

8. **Point No.3:-**

8.1. This Commission has rendered a categorical finding in point No.1 that failure on the part of the petitioner SEPC to obtain the requisite CTO; declare capacity and issue of capacity notice to the respondent for the period 30.11.2021 to 29.04.2022 were attributable to the conduct of the petitioner and

as such cannot be construed as a Force Majeure event. The above referred specific finding navigated this Commission to render a finding in Point No. 1 and 2 that the petitioner SEPC is not entitled for the relief of declaration and payment for fixed charges for the period 01.12.2021 to 27.03.2022 mentioned in Table2 of the petition.

8.2. The sustainability of the prayer of the petitioner to have the term of the PPA extended by four months (period between 01.12.2021 to 31.03.2022) depends upon the petitioner's entitlement for the relief of declaration and consequent payment of fixed charges claimed by the petitioner in regard to the said period. Since the petitioner is held to be not entitled to the relief of declaration and for payment of fixed charges for the period in question, it is nothing but natural that the petitioner's prayer to have the period of PPA extended by four months has to necessarily fail.

Accordingly this point is determined.

9. **Point No.4:-**

In view of the findings rendered on point No.1 to 3, this Commission decides that the petitioner is entitled to the relief of declaration and payment of fixed charges for the period 01.12.2022 to 31.03.2023 alone.

Accordingly this point is determined.

10. In the result the Commission orders as follows:-

- (a) The prayer for declaration that the petitioner is entitled to fixed costs for the non-supply of power to the respondent for the periods (i) 01.12.2021 to 27.03.2022 and (ii) 28.03.2022 to 29.04.2023 mentioned in Table 2 of the petition is dismissed.
- (b) It is hereby declared that the petitioner is entitled to fixed costs for non-supply of power to the respondent for the period 01.12.2022 to 31.03.2023 mentioned in Table 2 of the petition.
- (c) The respondent is directed to pay the appropriate fixed charges to the petitioner for the period 01.12.2022 to 31.03.2023 by applying the relevant formula.
- (d) The fixed charges so quantified/assessed shall carry interest at the rate of 12% per annum from the date on which they were due till the date of actual payment.
- (e) The prayer of the petitioner to have the term of PPA extended by four months is dismissed.
- (f) This order of the Commission shall be complied with by the respondent within two months.

(g) Considering the nature, scope and amplitude of the dispute, parties directed to bear their respective costs.

Petition thus stand allowed partly.

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

(Sd.....)  
Member

(Sd.....)  
Chairman

/True Copy /

**Secretary  
Tamil Nadu Electricity  
Regulatory Commission**