



February 2025

## The Appellate Tribunal for Electricity settles dispute on modification of tariff under the power purchase agreement between a Section 62 generator and Tamil Nadu Generation and Distribution Corporation Limited

The Appellate Tribunal for Electricity (“APTEL”) in the case of *Tamil Nadu Electricity Generation and Distribution Company Ltd. vs. Tamil Nadu Electricity Regulatory Commission & Anr.*<sup>1</sup> disposed of the matter by granting a path-breaking relief to an imported coal based (“ICB”) thermal power generating company which set up its power plant under Section 62 of the Electricity Act, 2003 (“Act”). APTEL allowed modification of terms of power purchase agreement (“PPA”) including terms related to tariff by in effect upholding the order passed by the Ld. Tamil Nadu Electricity Regulatory Commission (“TNERC”) i.e., order dated [August 31, 2023](#)<sup>2</sup> (“Order”). The Order relied upon *GUVNL vs. Tarini Infrastructure Ltd.*<sup>3</sup> (“GUVNL Judgement”) and considered global price rise of imported coal. Due to the price rise, the thermal power generator was suffering on account of a stifling ceiling price mechanism prescribed in the PPA. TNERC appreciated the issue and *inter alia* allowed removal of ceiling on tariff.

TNERC’s Order was challenged before APTEL by Tamil Nadu Generation and Distribution Corporation Limited (“TANGEDCO”). Before APTEL, TANGEDCO primarily argued against the removal of ceiling on tariff by TNERC. Without prejudice to the settled law by Hon’ble Supreme Court in the GUVNL Judgement<sup>4</sup>, it was brought to APTEL’s notice (by the ICB thermal power generator) that TANGEDCO had submitted to the jurisdiction of TNERC to determine the tariff afresh, thereby giving up on tariff under the PPA. APTEL agreed with the said understanding. It is in this view APTEL passed its final judgment dated [January 27, 2025](#), deciding on the aspects of implementation of arrangement of power supply between the ICB generator and TANGEDCO.

With APTEL’s judgment disposing of the above matter, findings of TNERC on the aspect of modification of tariff forming part of the PPA executed under Section 62 of the Act are final.

JSA represented the ICB thermal power generator before TNERC as well as before APTEL.

<sup>1</sup> Judgment dated January 27, 2025 in Appeal No. 910 of 2023

<sup>2</sup> In M.P. No. 3 of 2022 (*SEPC vs. TANGEDCO*)

<sup>3</sup> (2016) 8 SCC 743

<sup>4</sup> In this judgment, the Hon’ble Supreme Court dealt with the question of whether the tariff fixed under a PPA is sacrosanct and inviolable and beyond review and correction by the State Electricity Regulatory Commission. The Hon’ble Supreme Court then decided that Section 86(1)(b) of the Act empowers Regulatory Commission to regulate price of sale and purchase of electricity between generating companies and distribution licensees through agreements and that the Regulatory Commission has power to re-determine the tariff rate when the tariff rate mentioned in the PPA between generating company and distribution licensee was fixed by the Regulatory Commission in exercise of its statutory powers.

## Brief facts

1. SEPC Power Private Limited (“**SEPC**”) is an imported coal based thermal power plant of a 1 x 525 Mega Watt capacity (“**Project**”). SEPC has a PPA with TANGEDCO i.e., the distribution licensee of the State of Tamil Nadu. The PPA was executed on February 12, 1998, through a Memorandum of Understanding (“**MoU**”) route which was later approved by TNERC under Section 62 of the Act. The PPA was last amended on February 25, 2021 (“**Addendum #3**”) which introduced a ceiling and discount on variable fuel charge (“**VFC**”) viz:
  - a) Ceiling on VFC was linked with domestic coal prices i.e., regardless of actual imported coal price (per unit), the entitlement of SEPC’s VFC would be the price of domestic coal from Talcher mines.
  - b) Discount of INR 0.225 (Indian rupees zero point two two five)/unit on VFC was made conditional i.e., discount was to be made applicable only in case the actual price of imported coal was lower than the ceiling on VFC.
2. This ceiling and discount on tariff were implemented pursuant to TNERC’s order dated January 10, 2020, in M.P. No. 27 of 2016 in the case of *SEPC vs. TANGEDCO*.
3. After execution of Addendum #3, the imported coal prices rose multi-fold starting June 2021. This price rise made the ceiling and discount on VFC unviable. SEPC’s Project achieved commissioning on November 30, 2021. SEPC could however not commence operation due to high price of international coal.
4. Recognising the issue of price rise and many ICBs being stranded in the country, the Ministry of Power issued directions on May 5, 2022, to all ICBs under Section 11 of the Act i.e., for them to operate at full capacity subject to certain conditions specified. TANGEDCO also issued directions akin to Section 11 directions, to SEPC on April 29, 2022, and requested power on pass through basis as a one-time measure. SEPC accordingly commenced Project operations from April 30, 2022, under Section 11 directions. Meanwhile, SEPC filed a petition before TNERC seeking appropriate directions including a direction for removal of ceiling and discount on VFC.

## Issue

Whether a Section 62 thermal power generator *inter alia* was entitled to modification of the PPA including removal of ceiling and discount on VFC in view of global price rise of international coal?

## Contentions of TANGEDCO

1. TANGEDCO broadly contended as follows:
  - a) the PPA has to be implemented in its existing form;
  - b) the current situation has arisen due to SEPC’s delay in completing the Project; and
  - c) imported coal price rise cannot lead to amendment of tariff under the PPA as per *Energy Watchdog v. CERC*<sup>5</sup>.

## Findings by TNERC

TNERC held as follows in its Order dated August 31, 2023, by formulating 2 (two) questions in order to answer the aforementioned issue:

1. Whether the contention of SEPC that the unprecedented rise in the price of the imported coal has rendered the supply of power under the PPA with the existing price mechanism an unviable one is sustainable under law and facts of the case?

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<sup>5</sup> 2017 (14) SCC 80

- a) as per the data submitted by SEPC, the global price index of imported coal i.e. Argus Index, demonstrates manifold rise in price. The difference between ceiling limit under the PPA and the current per unit price is about INR 2 (Indian Rupees two)/unit;
  - b) TANGEDCO has not disputed the factum of rise in prices;
  - c) since the PPA 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 SEPC. The loss on account of cost of VFC is a substantial one;
  - d) Section 61 and 62 of the Act mandate that commercial principles be considered for the supply of electricity. It is to protect all the parties from suffering any loss that the said provisions have been incorporated in the Act; and
  - e) on a conspectus evaluation of the evidence placed on record through documents it is decided that the unprecedented rise in the price of imported coal has rendered the supply of power under the PPA with the existing price mechanism an unviable one.
2. To what relief, if any, SEPC is entitled to?
- a) ceiling price mechanism in the PPA has now become unviable in view of rise in international prices of coal. SEPC has relied on Hon'ble Supreme Court's GUVNL Judgment to pray for the relief of removal of ceiling on VFC. The Supreme Court's judgment holds as under:
    - i) fixation and determination of tariff is a statutory function performed by the State Electricity Regulatory Commissions ("**SERC**") constituted under the Act;
    - ii) the power to determine tariff is statutory. Tariff incorporated in the PPA is the tariff fixed by an SERC in exercise of its statutory powers;
    - iii) tariff agreed by and between parties, though finds mention in the contractual context, is not an act of volition of the parties which can in no case be altered except by mutual consent; and
    - iv) Section 86 (1) (b) of the Act empowers SERCs to regulate the price of sale and purchase of electricity between generating companies and distribution licensees through agreements of power purchase;
  - b) in view of the settled law, TNERC exercises its regulatory powers under the Act to ameliorate the crisis faced by the generator for non-supply of power due to factors which are beyond its control. Since SEPC is not 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 Act;
  - c) SEPC is entitled to a permission to procure the imported coal at the cheapest price together with other related reasonable restrictions as an 'interim arrangement' for the supply of power to TANGEDCO; and
  - d) long term solution for SEPC is to obtain domestic coal linkage. The interim arrangement for supply through imported coal shall be valid only until SEPC procures domestic coal linkage and commences supply of power using domestic coal supplied through the linkage.

## Findings by APTEL

- 1. TANGEDCO challenged the abovesaid Order passed by TNERC on the primary ground that removal of ceiling on tariff was untenable. During arguments before APTEL, we (on behalf of SEPC) pointed out the following aspects:
  - a) ceiling stipulated in the PPA was never insisted upon by TANGEDCO i.e. it was not TANGEDCO's case to insist SEPC to supply power on ceiling VFC linked with domestic coal prices;
  - b) TANGEDCO in fact submitted to the jurisdiction of TNERC to determine the tariff afresh; and

- c) TNERC accordingly stipulated the interim arrangement of supply of power based on procurement of imported coal on Argus Index prices i.e. at Argus index price of indices specified in the PPA.
2. Upon APTEL's observation on TANGEDCO never having argued sanctity of contracts, TANGEDCO submitted a 'proposal' for the 'interim arrangement' between parties. SEPC agreed to the proposal in part. The contentious issue which remained was regarding continuation of 'discount on VFC' [Ref. to Para 1(d) under Findings by TNERC].
3. APTEL based on arguments on both sides, passed the following directions in its judgment dated January 27, 2025:
  - a) SEPC to supply power to TANGEDCO as per the 'interim arrangement' decided in accordance with the proposal i.e. for SEPC to procure coal as per indices specified in Addendum #3 (without ceiling);
  - b) the index price of the cheapest indices shall be adjusted to the grade of coal actually procured by SEPC as per the provisions of the PPA;
  - c) discount on VFC to not continue since the discount offered by SEPC earlier was valid only for the period of 3 (three) years which ended on November 30, 2024. Discount cannot be continued without going through 'Review Mechanism' under the PPA;
  - d) 'interim arrangement' to continue 12 (twelve) months beyond the date on which SHAKTI Policy (revamped) comes into force. In case any proceedings are initiated by TANGEDCO regarding procurement of domestic coal linkage, SEPC is also at a liberty to initiate the required proceedings afresh; and
  - e) Both parties to execute Addendum #4 to the PPA based on the above directions, within three (3) months from the date of the judgment i.e., by April 27, 2025.

## Conclusion

While passing the GUVNL Judgment, the Supreme Court dealt with the question of whether the tariff fixed under a PPA is sacrosanct and inviolable. The power producer in that case had sought revision of tariff on the ground of increase in cost due to longer distance to which the power was to be evacuated than the one envisaged. In that context, the Supreme Court held that the tariff determination being a statutory exercise is not inviolable. The law laid down in GUVNL Judgment has been given effect to by the APTEL. Hence, law which holds the ground today so far as Section 62 projects are concerned, is as follows:

1. the power to determine tariff is undoubtedly statutory. In case tariff incorporated in the power purchase agreement is the tariff fixed by State Commission in exercise of its statutory powers then it is not possible to hold that the said tariff agreed by and between parties, though finding mention in the contractual context, is the result of an act of volition of the parties which can in no case be altered except by mutual consent;
2. through tariff, recovery of cost of electricity in a reasonable manner is also to be ensured;
3. Section 86 (1) (b) of the Act empowers SERC to regulate the price of sale and purchase of electricity between generating companies and distribution licensees through agreements of power purchase. The power regulation is of wide import; and
4. in view of Section 86 (1) (b) of the Act, the court must lean in favor of flexibility and not read inviolability in terms of PPA in so far as tariff stipulated therein as approved by the concerned SERC.

TANGEDCO though voraciously argued on maintaining ceiling and discount on VFC, however, such contentions were disallowed. TNERC and APTEL considered the intricate facts involved in the case and effectively adjudicated on the right of a generating company under Section 61 of the Act.

## Power Sector

JSA is the leading national practice in the power sector – conventional and non-conventional. JSA provides legal services at all stages of the value chain in the sector - across the spectrum of contractual, commercial, policy, regulatory and legal issues. We represent clients in all segments: generation, transmission, distribution and trading. JSA serves its clients by transaction-specific integrated teams across various locations and practice areas (Banking & Finance, Mergers & Acquisition and Private Equity, Projects and project related contracting, Dispute Resolution, Taxation, Regulatory proceedings and Policy advisory).

JSA has been regularly engaged in; (a) providing policy advice to Governments of Bangladesh and Maldives, as also the Government of India besides various Indian states. Also, JSA partners have presented expert testimony to the Parliamentary Standing Committees and the Forum of Regulators on challenges faced by the power sector and proposed legislative and policy changes, development financial institutions like the World Bank, the Asian Development Bank, DfID, USAID regulatory authorities and industry bodies; (b) advising project developers, investors, suppliers and contractors on commercial / transactional issues and all aspects of licensing, market structures, competition, performance standards and tariffs; (c) advising financial institutions and borrowers in relation to financing transactions; (d) Advising clients on sustainable development issues like clean development mechanism and environmental compliances; and (e) specialized dispute resolution.

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