

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APL No. 910 OF 2023 & IA No. 1546 OF 2024 & IA No. 2341 OF 2023

Dated: 27.01.2025

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)**

In the matter of:

**THE TAMIL NADU GENERATION AND DISTRIBUTION CORPORATION
LIMITED (TANGEDCO)**

Through its Chairman cum Managing Director

Mr. Rajesh Lakhoni

Registered office at

N.P.K.R.R MAALIGAI,

No.144, Anna Salia,

Chennai – 600002.

... Appellant No.1

VERSUS

1. TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Through its Secretary,

4th Floor, SIDCO Corporate Office Building

Guindy, Chennai – 600 032

...Respondent No.1

2. M/S. SEPC POWER PRIVATE LIMITED

Through its Chief General Manager (CGM),

MEIL House, First Floor,

395, Anna Salai, Teynampet

Chennai – 600 018.

...Respondent No.2

Counsel on record for the Appellant(s) : Anusha Nagarajan for App. 1

Counsel on record for the Respondent(s) : S. Shivshankari
Sethu Ramalingam for Res. 1

Poonam Verma Sengupta

Gayatri Aryan
Rajesh Jha
Priyankshi Bhatnagar
Saunak Kumar Rajguru
Sakshi Kapoor
Shubham Bhut for Res. 2

JUDGMENT

PER HON'BLE SMT. SEEMA GUPTA, TECHNICAL MEMBER (ELECTRICITY)

1. The present Appeal is being filed by the Appellant-**Tamil Nadu Generation and Distribution Corporation Limited ("TANGEDCO")**, challenging the order dated 31.08.2023 ("**Impugned Order**") passed by the Tamil Nadu Electricity Regulatory Commission ("**TNERC/ State Commission**") in M.P. No. 3 of 2022. By the impugned order, State Commission has allowed termination of Coal Supply and Transportation Agreement ("**CSTA**") dated 09.02.2018, execution of Fuel Supply Agreement ("**FSA**") with CIL /any domestic Coal Supplier and removal of ceiling price mechanism; procurement of Coal from alternate source in the interim period between termination of the CSTA and execution of the FSA without ceiling price mechanism and the consequent amendment of the PPA to incorporate the above changes, reliefs as claimed by Respondent.

The facts required to be dealt with for the disposal of this appeal are stated here as under:

2. The Appellant - **TANGEDCO** is a distribution licensee engaged in the business of distribution of electricity in the State of Tamil Nadu. The Respondent No. 1, **Tamil Nadu Electricity Regulatory Respondent**

Commission (hereinafter referred to as the “**TNERC/ State Commission**”) is a statutory body and is responsible for discharging the statutory functions prescribed under the Electricity Act 2003. The State Commission *inter alia* approves all power purchase of the distribution licensees under Section 86(1)(b) of the Act. Respondent No. 2, **M/s. SEPC Power Private Limited** (hereinafter referred to as “**SEPC/ Respondent No. 2**”) is a power generating company as defined under section 2(28) of the Act.

3. The Appellant and Respondent No. 2 executed the Power Purchase Agreement (“**PPA**”) on 12.02.1998 for supply of power from proposed 525 MW Tuticorin Thermal Power Project – Stage IV of Respondent No 2, which was approved by Govt of Tamil Nadu (“**GoTN**”) vide its G.O. dated 13.07.1998. Thereafter, the PPA was amended on 30.10.1998 as Addendum # 1 to the PPA to incorporate the terms of the GO dated 22.04.1998 of GoTN.

4. The PPA was signed in the year 1998 but financial closure for the project was not achieved for next 12 years, and then pursuant to letter dated 18.08.2009, Respondent No. 2 filed a petition being M.P. No. 18 of 2010 before the State Commission seeking directions for implementing the Project.

5. The State Commission vide its order dated 09.05.2011 issued directions to implement the Project and to amend the PPA in line with the TNERC (Terms and Conditions for determination of tariff) Regulations 2005 and also issued further directions for finalizing the EPC Contract through International Competitive Bidding, and to submit financing plan, amended PPA and cost to the State Commission for approval. In the said Order dated 09.05.2011, the State Commission while stating that the project remained on paper for 12 years has predicted that the project would be commissioned in

2015 or 2016. Thereupon, the Parties signed Addendum # 2 to PPA on 10.01.2012 and filed P.P.A.P. No. 5 of 2012 for approval before the State Commission and represented that the financial closing date shall be within 6 months of the approval of the PPA and COD shall be achieved within 39 months of the Financial Closure.

6. In the meantime, the EPC Contract through ICS and the revised estimated capital cost were submitted by Respondent No. 2 to the State Commission, pursuant to which, the State Commission passed an order dated 30.04.2015 and approved the capital cost of Rs. 3514 Crore subject to the condition that Respondent No. 2 shall achieve financial closure within 3 months from the date of the order and Commercial Operation shall be achieved within a period of 39 months from such financial closure. The State Commission had also given directions to Respondent No. 2 to firm up the Coal Supply Agreement and to amend the PPA in accordance with the Order dated 30.04.2015. The Appellant, vide letter dated 11.08.2016, to the Respondent No. 2, stated that the Respondent No. 2 did not achieve financial closure on or before 31.07.2015, therefore put the Respondent No. 2 on notice stating that any increase or decrease in cost or commercials shall be strictly in accordance with the provisions of the PPA. The Appellant had further stated that the approval of Coal supply agreement will be examined after approval of revised date of financial closure by the State Commission and signing of amendment thereon. In response to the letter of Respondent No. 2 dated 16.09.2016, the Appellant addressed another letter dated 14.10.2016 stating that Respondent No. 2 had still not achieved the financial closure and that the revised Addendum #3 submitted by Respondent No. 2 by its letter dated 16.09.2016 was not in accordance with the State Commission's Order dated 30.04.2015.

7. Respondent No. 2 filed petition M.P. No. 27 of 2016 for reckoning of Financial Closure date as 30.10.2015 and prayed for certain other directions to the Appellant.

8. On 09.02.2018, Respondent No. 2 executed the Coal Supply and Transportation Agreement (CSTA) with Jera Global Markets Ltd. ("JERA") and on 26.02.2018, Respondent No. 2 executed the Coal Handling Agreement (CHA) with M/s Seaport Logistics Private Limited.

9. On 10.01.2020, the State Commission issued an order in M.P. No. 27 of 2016 directing the parties to amend the CSTA, CHA and PPA as per the Order dated 10.01.2020 and submit the same for approval of the State Commission.

10. Subsequently, after prolonged discussion and negotiation, the Appellant and Respondent No 2 executed Addendum # 3 to the PPA on 25.02.2021. Addendum #3 contains the ceiling mechanism in which ceiling VFC is determined based on the annual merit order cut off, and where no such cut-off is determined or published, then on the basis of domestic coal price from Talcher mines. The said mechanism was subject to review at the end of three years of operation and a fixed discount of Rs.0.225 per unit for the first three years of the variable cost. Under Addendum # 3 to the PPA, the Respondent No. 2 committed to achieve COD within six months from the date of Start-up power i.e., 09.10.2020. Subsequently, the relevant portion of the CSTA was amended by way of Amendment Agreement No. 9 on 27.04.2021. As per the Amendment #9 of CSTA, Respondent No. 2 had the option to select the lowest price of coal indices among the approved coal indices of API3, API5, ICI2 and average of (API3, API5, ICI2 and ICI3). The Appellant accorded its formal approval vide its letter dated 10.05.2021 for

the amended CSTA subject to the order of the State Commission in M.P.No.27 of 2016 dated 10.01.2020, such that there shall not be any liability on the part of the Appellant in the CSTA and CHA other than payment of the applicable VFC. On 23.05.2021, the Respondent No. 2 also gave an Undertaking assuring to nominate low cost coal from the approved grades for the entire term of the PPA.

11. The petition in M.P. No. 26 of 2021 was filed to take on record the Addendum #3 to the PPA in compliance with the orders of the State Commission in P.P.A.P.No.5 of 2012, M.P.No.36 of 2015 and M.P.No.27 of 2016, in which State Commission passed the order on 09.11.2021. Respondent No. 2 achieved COD on 30.11.2021. On the same day, the Consent to Operate (CTO) issued by the Tamil Nadu Pollution Control Board (TNPCB) was also expired.

12. Thereafter, on 02.02.2022, Respondent No. 2 filed a petition bearing M.P. No. 3 of 2022 alongside I.A. for interim relief before the State Commission with the following prayer:

“(i) Direct and/or Permit the Respondent No. 2 to terminate the Coal Supply and Transportation Agreement (CSTA) dated 09.02.2018;

(ii) Permit the Respondent No. 2 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 Respondent No. 2 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; and

(iv) Amend the PPA to incorporate the above changes and such other changes as the Respondent Commission may deem fit.”

13. Respondent No. 2 vide its letter dated 11.02.2022 informed the Appellant that TNPCB vide their letter dated 25.11.2021 instructed the Respondent No. 2 not to operate the plant from 01.12.2021 until valid CTO is granted by TNPCB and said clearance from TNPCB was received on 30.03.2022. Appellant, considering high demand and to avoid load shedding during summer and post Covid, allowed for supply of power by the Respondent No. 2 on pass-through basis in deviation from the PPA, as a one-time measure, for a period of one month, extendable up to 31.12.2022. The Respondent No. 2 commenced supply of power to the Appellant from 29.04.2022 onwards by purchasing coal through stock on sales basis and e-auction tender on pass through basis from 30.04.2022 to till 30.11.2022.

14. On 05.05.2022, the Ministry of Power, Government of India (“**MoP**”) issued directions directing imported coal based generating plants to generate electricity up to their full capacity and they were required to supply power under their respective PPAs at benchmark rates of energy charges to be determined by a Committee constituted by MoP. Several notifications were also issued by MoP setting out further terms and conditions for such supply, and notifying benchmark rates as contemplated. In terms of such notifications, distribution licensees were given an option to refuse to requisition power at the benchmark rates, however, the power generator was then free to sell the power to other procurers including the power exchanges.

15. In the meantime, JERA terminated its agreement with Respondent No 2 vide letter dated 07.10.2022 stating the reasons such as failure of the Respondent No. 2 to provide a stand by letter of credit by the deadline i.e. 17.08.2022, which amounted to non-compliance of clause 10.5.

16. The Appellant vide letters dated 23.11.2022 and 01.12.2022 intimated

Respondent No. 2 that due to lesser demand it had withdrawn the provisions of pass through allowed up to 31.12.2022, with effect from 01.12.2022, by giving prior notice as per the direction of MoP dated 28.06.2022. Respondent No. 2 was also 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. In the meantime, on 17.12.2022, Respondent No. 2 also intimated the Appellant that the agreement with JERA stood terminated on 21.11.2022.

17. The State Commission vide its Interim Order dated 09.03.2023 in M.P. No. 3 of 2022 allowed prayer (i) and (ii) of the Respondent No.2. On 31.08.2023, the Respondent Commission passed the final order in M.P. No. 3 of 2022 (Impugned Order) confirming the Interim Order dated 09.03.2023 and further allowing prayers (iii) and (iv) of the Respondent No. 2. Being aggrieved by some of the findings in the impugned order, like removal of ceiling price-mechanism and consequent obliteration of the discounts that were offered by the Respondent No. 2 linked to such ceiling price mechanism, the Appellant has filed present Appeal.

Appellant submissions

18. Mr. P. Wilson, learned Senior counsel for the Appellant submitted that Appellant and Respondent No 2 had signed PPA on 12.02.1998, however project did not take off for considerable time. Respondent No.2, originally basing the PPA on domestic coal, opted transition to imported coal and filed MP No. 27 of 2016, seeking a direction to the Appellant to provide its comments on the coal supply and transportation agreement proposed to be executed between Respondent No.2 with JERA (the coal supplier). The

Appellant was not inclined to continue with the PPA, due to high Variable Fuel Charge (“VFC”), which rendered power from Respondent No.2’s plant unlikely to be dispatched under the Merit Order Ranking. Learned Senior counsel further submitted that given the delay in operationalisation of the plant, the Appellant was forced to procure power at high cost. Orders in MP 27 of 2016 were reserved on 30.11.2018, however Respondent No.2 subsequently on 04.01.2019, through its written submissions sought for reopening of proceedings, proposing a ceiling on the VFC along with a fixed discount of Rs. 0.225 per unit for a period of three years, at the end of which the norms may be reviewed.

19. Learned senior counsel for the Appellant contended that the State Commission in its order dated 10.01.2020 in MP 27 of 2016 acknowledged the Appellant’s concerns regarding the high variable cost of power generation. As a resolution, Respondent No.2 proposed concessions on the variable cost and the VFC ceiling price and a discount of Rs. 0.225 per unit were adopted. Based on this arrangement, the State Commission granted approval to the CSTA and directed the execution of Addendum 3 to the PPA, which was executed on 25.02.2021, providing *inter alia* for ceiling price and discount and approved by the State Commission on 09.11.2021.

20. Learned senior counsel for the Appellant submitted that on 02.02.2022, Respondent No.2 filed M.P. No. 3 of 2022, seeking permission to terminate the CSTA and procure domestic coal, and as an interim arrangement, procure coal from alternate sources, without any ceiling price. The Appellant was agreeable to termination of the CSTA, but it was categorically submitted that it would not bear any additional cost on account of such termination. The State Commission, by its interim order dated 09.03.2023, in M.P No 3 of 2022 permitted Respondent No.2 to terminate

the CSTA and directed the Appellant to issue a NOC to facilitate Respondent No 2 to procure domestic coal. Final order in M.P. No 3 of 2022 was passed by the State Commission on 31.08.2023 (the "Impugned Order") and held that until Respondent No.2 secures a domestic coal linkage, it may procure imported coal, not exceeding the Argus index price. The Appellant is aggrieved by the Impugned Order, inasmuch as: (i) there is no timeline stipulated for the interim arrangement; (ii) there is no cap on the cost of coal.

21. Learned senior counsel for the Appellant further submitted that in the present proceedings, the Appellant proposed an interim arrangement, suggesting that the VFC may be capped at the Argus index price corresponding to the cheapest of the coal indices specified in Addendum #3, namely API3, API5, ICI3, and ICI2. The index price of the cheapest of these indices shall be adjusted to reflect the grade of coal actually procured by Respondent No.2. This proposal has been accepted by Respondent No.2. However, Respondent No.2 has contended that in the absence of a ceiling under the PPA, discount could not be applied, as the discount was applicable only when the VFC was below the ceiling price. This contention is misconceived, as a ceiling was agreed upon as part of the interim arrangement. Therefore, the discount of Rs. 0.225 per unit, as offered by Respondent No.2 and accepted, ought to be applied if the VFC is less than the ceiling under the present interim arrangement. Regarding the contention of Respondent No.2 that the ceiling and discount were, in any event, subject to review within three years, learned senior Counsel for the Appellant submitted that this argument is flawed as (i) the Impugned Order was not passed in exercise of such review; it was passed much before the period of 3 years; and (ii) Respondent No.2 has not till date, supplied power in terms of the pricing mechanism under the PPA – Respondent No.2 commenced

supply of power in terms of the directions issued by the Ministry of Power under Section 11 of the Electricity Act, 2003 at the rates specified in the notifications issued from time to time. Effectively, the ceiling and discount mechanism has not been operated at all.

22. Learned Senior counsel for the Appellant further pointed out that Respondent No.2 did not participate in the coal linkage auctions held in December 2023, on the ground that the PPA did not provide for domestic coal. However, Respondent No.2 insisted on incorporating the interim arrangement pertaining to imported coal as an integral part of the PPA to facilitate the execution of the Addendum to the PPA. Learned senior counsel for the Appellant submitted that until Respondent No.2 obtains a domestic coal linkage, it may be directed to procure coal subject to the ceiling price agreed upon, as recorded in the order dated 07.11.2024, along with the applicable discount factor of Rs. 0.225 per unit. However, any such interim arrangement cannot be permitted to operate indefinitely. Accordingly, a specific timeline may be prescribed for the same. Upon the expiry of such timeline, if Respondent No.2 fails to secure a domestic coal linkage, the Appellant will be entitled to exercise its remedies as provided under the PPA.

Respondent No.2 submissions

23. Mr. Sanjay Sen, learned Senior counsel for the Respondent No.2 submitted that after execution of Addendum # 3 to the PPA, effective from June 2021, the fundamental basis of the amended PPA changed when imported coal prices rose manifold and ceiling became unviable. The Respondent No.2 approached the State Commission vide Petition TNERC M.P. No. 3 of 2022 seeking appropriate reliefs. In response, the Appellant, through an Affidavit dated 22.02.2023, consented to State Commission fixing Respondent No.2's tariff for the interim period, i.e., till the

commencement of power supply through domestic coal. Pursuant to this, State Commission issued the Impugned Order dated 31.08.2023, providing relief as given under:

(a) **Long term:** Permission to Respondent No 2 (“SEPC”) to procure domestic coal linkage. Liberty granted to both parties to apprise State Commission about the status of linkage.

(b) **Interim:** Existing price mechanism is unviable. To supply using imported coal at price not exceeding Argus Index.

24. Accordingly, on 12.09.2023, Respondent No.2 submitted Draft Addendum 4 to the PPA to the Appellant for its consent, which included terms for both interim and long-term supply arrangements. This was pursuant to directions issued by the CEA on 19.06.2023, which required Respondent No.2 to submit a PPA incorporating terms for the use of domestic coal in order to participate in auctions under Category B (ii) of the SHAKTI Coal Policy. However, the Appellant declined to grant consent to the draft Addendum 4, thereby disabling Respondent No.2 from participating in the SHAKTI Policy auction for domestic coal linkage. Consequently, the Appellant’s Prayer merits rejection to enable Respondent No.2 to take necessary steps for securing a domestic coal linkage at the earliest.

25. Learned Senior counsel for the Respondent No.2 submitted that on 28.10.2024, the Appellant proposed a 4-point interim arrangement. While accepting the said proposal in part, Respondent No.2 point-wise response to the Appellant’s proposal is as follows:

(a) **Proposal at Sr. No. 1** – Respondent No 2 (“SEPC”) is agreeable to supply power under Section 11(1) till 31.12.2024 i.e. end date of Section 11

(1) direction, so long as SEPC's statutory right under Section 11 (2) is protected.

(b) **Proposal at Sr. No. 2 and 3** – Respondent No 2 (“SEPC”) is agreeable to receiving VFC as per Appellant's proposal at Sr. No. 2 without any “discount” provided the formula for procurement of imported coal is computed as per Appellant's prayer (c) viz: Lowest amongst (i) the approved indices of API3, API5 and ICI2, and (ii) Average of API3, API5, ICI2 and ICI3. Appellant's Prayer (c) (without discount) is same as formula prescribed under Addendum #3 - also part of SEPC's undertaking.

(c) **Proposal at Sr. No. 4** – SEPC is not agreeable to offer any discount on VFC as the discount was offer based linked to domestic ceiling; discount was offered subject to conditions of plant maintaining 80% PLF, regular timely payments by TANGEDCO; Discount was incorporated *vide* State Commission Order dated 10.01.2020 - applicable only for first three years. Also recorded in PPA - subject to 'Review Mechanism' Three years are admittedly over on 30.11.2024. SEPC has already filed petition before TNERC under Review Mechanism. SEPC is in no position to offer discount as it is in a precarious financial position due to unpaid sums from TANGEDCO which amounts to about Rs 1063 Crore, loan from parent entity to bridge gap of operational expenses and on account of various other aspects.

26. Learned senior counsel further submitted that even if there were no dispute/no proceedings, TANGEDCO would not have gotten the benefit of Discount since the VFC never dipped below domestic ceiling. There was never a guarantee of flat discount on VFC, a fact which TANGEDCO is aware. VFC computed as per TANGEDCO proposal No. 2 &3 includes concession, which SEPC has agreed, to receive VFC computed as per the

lowest Coal cost even though the actual VFC is more. This is a concession in itself. Discount earlier linked to domestic price cannot now be linked to market driven Formula: SEPC will procure as per cheapest price of market.

27. Learned Senior counsel for the Respondent No.2 submitted that the Appellant itself had agreed for modification of the tariff under the PPA before the State Commission. The Appellant had also agreed to the offtake of power under Section 11 of the Electricity Act, 2003 as per the MoP tariff. Respondent No.2 has supplied power to the Appellant at less tariff i.e. MoP tariff, by being at its constant beck and call. Respondent No.2 is now in agreement with the tariff formula suggested by the Appellant, except for the proposed discount, which was, in any event, subject to review under the terms of the PPA. Learned senior counsel submitted that Respondent No.2 is committed to go for domestic coal linkage but no definitive time frame can be committed, as the SHAKTI Policy is currently undergoing revamp, and the auction methodology under the revised policy is not known.

DISCUSSION AND ANALYSIS

28. Heard Mr. P. Wilson, learned Senior counsel for the Appellant, and Mr. Sanjay Sen, learned Senior counsel for the Respondent No 2 at length. Through the impugned order dated 31.08.2023, the State Commission has allowed Respondent No 2 to terminate the CSTA dated 09.02.2018 and to procure coal from domestic sources; the State Commission has also allowed Respondent No 2 to procure imported coal with cost not exceeding August index price, as an interim arrangement for supply of power to the Appellant till Respondent No 2 procures domestic coal linkage and commences supply of power using domestic coal supplied through linkage. The Appellant is aggrieved by the said interim arrangement with regard to removal of ceiling price mechanism for Variable Fuel Charge (VFC) and the ceiling mechanism

has been specified as Argus Index without specifying the exact indices or the quality of coal, with no consideration to formula stipulated in Addendum #3 of the PPA and agreed discount.

29. We are saved from the exercise to adjudicate all these issues inasmuch as during the proceedings, Appellant made following proposal for the Interim arrangement, part of which has been agreed by the Respondent.

“1. For the period during which TANGEDCO requisitions power under the Ministry of Power's ("MoP") directions under Section 11 of the Electricity Act, 2003 (for the time they are in force), the benchmark tariff notified by the Committee constituted by the MoP will be the ceiling VFC. This is in line with the notification dated 20.02.2023 of the MoP under Section 11 itself, which provides that the ECR will be capped at the benchmark ECR calculated by the Committee or the actual cost of generation, whichever is lower. This notification has not been challenged by SEPC.

For the period after expiry of the Section 11 directions, TANGEDCO proposes the following methodology for price calculation:

2. SEPC shall furnish the details of the indices of the available coal along with prices, 5 days prior to placing of order and TANGEDCO may verify and approve the same. In case there is no agreement reached, the cost of the imported coal shall not exceed the Argus index price of the cheapest of the indices of coal specified in the PPA (as amended by Addendum 3) - that is, API3, API5, ICI2, and ICI3 [Schedule 1 @ Pg. 801 of Appeal]. The index price of the cheapest of the said indices shall be adjusted to the grade of coal actually procured by SEPC.

3. The above will give effect to the Impugned Order, which provides for the Argus index price as the ceiling for coal price, in addition to preserving the provisions of the PPA. Such a provision is essential considering that SEPC does not have a firm long-term arrangement

for purchase of imported coal, and has been procuring coal of varying indices, beyond the indices permitted in the PPA.

4. Clarification that the discount of INR 0.225 per kWh offered by SEPC and made part of the PPA (by way of Addendum 3) shall continue to apply. It is pertinent that the Impugned Order does not do away with the discount factor.”

30. The Respondent No 2 has agreed for the arrangement at Sr. No 2 &3 and has also agreed for Sr. No 1 as long as their rights under Section 11(2) of the Act to approach the State Commission are protected, which was found to be reasonable by this Tribunal in its order dated 07.11.2024 passed in the present appeal, being their statutory right as well as considering the Appellant's right to invoke jurisdiction of this Tribunal, if aggrieved by the Order passed by the State Commission under Section 11(2) of the Electricity Act. Thus, the dispute mainly pertains to the discount of 0.225 per kWh offered on VFC by Respondent No 2 in Addendum 3 of the PPA.

31. Learned senior counsel for the Respondent No 2 – SEPC has contended that the discount was earlier given for three years subject to review after that, the said three years period are complete, and as such, at that time domestic coal price ceiling was applicable; present ceiling based on Argus index and further indices agreed now, as per the proposal of the Appellant for interim arrangement, itself is a concession, and presently Respondent No 2 is in precarious financial condition due to huge unpaid sums from the Appellant and they are not agreeable to offer any discount on VFC.

32. We observe from the order of the State Commission dated 10.01.2020 in M.P. No 27 of 2016, that Respondent No 2, after the order being reserved on 30.11.2018, vide their written submission besides other things offered a

discount of Rs .225 /unit on tariff being passed on as discount in the VFC for the first three years; this discount was offered subject to prompt payment, 80% dispatch and for a period of three years subject to mutual discussion and agreement in between the parties; the per unit VFC, on which this discount was offered, was to be determined in accordance with the formula provided in the PPA, applying the landed coal costs from CSTA & CHA. The State Commission in its order dated 10.01.2020, adopted the VFC of Rs 2.40 per unit along with associated CSTA and CHA as well as the fixed discount of Rs 0.225/ unit for first three years. As per the said order, the revised norms, the fixed discount and ceiling on variable costs was to be reviewed and re-fixed at the end of three years based on actual operation for the past years. Pursuant to the above order of the State Commission, Respondent No 2 and the Appellant signed the Addendum # 3 of the PPA on 25.02.2021 and Clauses with respect to Ceiling VFC and Discount in Tariff are reproduced below :

*“**Ceiling VFC** means the annual Merit Order cut off determined every year by the Commission upfront and in case no such Merit Order cut off is determined or published for the Year upfront, then the cap shall be on the basis of domestic coal (from Talcher mines) based variable cost applicable to the Company's Facility. However, the revised value of ceiling price for VFC shall be reviewed and mutually re-fixed at the end of 3 years under review mechanism.*

***A fixed discount** of Rs.0.225/unit is applicable for first 3 years for the variable cost up to the ceiling VFC. For the variable costs beyond the ceiling VFC, the ceiling VFC shall alone be charged/payable without discount. The revised value of discounts shall be reviewed and mutually re-fixed and Incorporated at the end of 3 years subjected to Review Mechanism.”*

33. The State Commission vide its order dated 09.11.2021 in M.P. No 26 of 2021, approved the Addendum # 3 of the PPA dated 25.02.2021, and with

regard to the discount applicable on VFC it noted that such a discount be valid for three years and shall be subject to review as per Review Mechanism. Thus, there was an understanding and agreement between the parties, as also approved by the State Commission that such a fixed discount is for three years and to be reviewed in terms of the Review mechanism, and we are informed that the said three years period was completed on 30.11.2024. It has also been contended by the Respondent No 2, that even if there was no dispute, the Appellant would not have got the benefit of discount since VFC never dipped below domestic ceiling.

34. The main issue, which emerged in passing of the Impugned Order was related to the prevailing very high rate of coal in international market as compared to the ceiling of VFC based on domestic coal price; by virtue of Addendum # 3 of the PPA and vide Impugned Order, the State Commission allowed termination of fuel supply agreement (CSTA) and has allowed Respondent No 2 to obtain domestic coal linkage with no ceiling price on the Indian coal, and the Appellant was directed to issue NOC and the amendment to the PPA was also directed to be carried out based on the interim orders issued by State Commission. For the Interim arrangement, the State Commission has removed the ceiling price mechanism applicable on Variable Fuel cost, on which the flat discount was applicable, and which was devised as per order dated 10.01.2020 and incorporated in the Addendum #3 of the PPA. We note that the flat discount offered by the Respondent and as adopted by the State Commission was for a period of three years, and the same was to be reviewed based on the operating parameters, which have also been accepted by the Appellant. As such, the period of three years for the applicability of flat discount got over on 30.11.2024.

35. In view of the above deliberations, and considering that the interim arrangement for VFC in the Impugned Order has been agreed to be modified by Respondent No 2, as per the proposal of the Appellant regarding calculation of ceiling of VFC based on the indices of coal specified in the PPA, we do not find merit in the contention of the Appellant for continued flat discount on VFC on this interim arrangement without going through the review mechanism, more so when Respondent No 2-SEPC has already filed petition before TNERC under Review Mechanism and thus this contention of Appellant is rejected.

36. We find merit in the submission of the Appellant that such an interim arrangement cannot run indefinitely and some time lines need to be fixed, by which time, Respondent No 2 shall ensure obtaining of domestic coal linkage. However, it has been submitted by learned Senior counsel for the Respondent No 2, that the Respondent No 2 could not participate in the auctions under B(ii) category of Shakti Coal Policy, in the absence of PPA for domestic coal procurement, draft of which (Addendum #4 to the PPA) incorporating both interim and long term arrangement of supply was shared by Respondent No 2 with the Appellant for their consent and signature. Learned counsel for Respondent No 2 further submitted that no time frame for domestic coal linkage can be committed as currently SHAKTI policy is under revamp. Thus, signing of addendum to the PPA as well as availability of revamped Shakti Policy is an important milestone, for securing domestic coal linkage. From the submission of Respondent No.2, we understand that presently coal auctions for domestic coal are not carried out under B(ii) category of SHAKTI POLICY which is being revamped and may take some time. Finding merit in the submissions of Appellant to fix a time line for this interim arrangement to continue, we feel it appropriate that this interim arrangement, to allow Respondent No 2 to procure imported coal to supply

power to the Appellant from their project till they secure domestic coal linkage be permitted for a time period of 12 months beyond the date on which SHAKTI Policy (revamped) comes into force or the date on which the domestic coal linkage is secured by the Respondent No.2, whichever is earlier.

37. In view of the forgoing discussion, we hold that with the consent of the Appellant and Respondent No 2, the Interim arrangement made in the Impugned order for procurement of imported coal for supply of power to the Appellant till Respondent No.2 secures domestic coal linkage, stands modified as “the Respondent No 2 shall furnish the details of indices of the available coal along with prices, 5 days prior to placing the order and the Appellant-TANGEDCO may verify and approve the same. In case no agreement is reached for calculation of VFC, the cost of imported coal shall not exceed the Argus index price of the cheapest of the indices of coal specified in the Addendum # 3 of the PPA that is API3, API5, ICI2 and ICI3. The index price of the cheapest price of the said indices shall be adjusted to the grade of coal actually procured by Respondent No 2-SPEC as per the provisions of the PPA”. As the only objection which the second Respondent has with respect to signing of Addendum # 4 of PPA has now been resolved by this order, both parties shall enter into Addendum # 4 of PPA, in terms of the aforesaid direction within 3 months from the date of receipt of the copy of this order.

38. Further, the interim arrangement to allow Respondent No.2 to procure imported coal to supply power from their project to Appellant, till the domestic coal linkage is secured, shall continue up to a period of 12 months beyond the date on which SHAKTI Policy (revamped) comes into force or the date on which the domestic coal linkage is secured by the Respondent No.2,

whichever is earlier.

39. Needless to state that in case domestic coal linkage is not secured by the Respondent No.2, within the aforesaid time stipulated, the Appellant shall be at liberty to take such action as it is available to them under law. In case any such action is taken, it would also be open for Respondent No.2 to initiate legal proceedings afresh before the State Commission. With this direction, that Caption appeal and all associated IAs are disposed of.

Pronounced in open court on this 27th Day of January, 2025

(Seema Gupta)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE/~~NON-REPORTABLE~~

ts/ag