

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 349/MP/2022  
and  
Petition No. 350/MP/2022**

**Coram:  
Shri I.S. Jha, Member  
Shri Arun Goyal, Member  
Shri P. K. Singh, Member**

**Date of Order: 23<sup>rd</sup> December, 2022**

**Petition No. 349/MP/2022**

**In the matter of**

Petition under Section 79 of the Electricity Act, 2003 read with Section 11(2), along with Regulation 111-113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking quashing of impugned letters dated 23.11.2022 and 30.11.2022 issued by TANGEDCO qua discontinuation of power procurement, contracted under long-term on pass through basis w.e.f. 1.12.2022, in contravention to the Directions issued by the Ministry of Power, Government of India.

**And**

**In the matter of**

**Coastal Energen Private Limited**

7<sup>th</sup> Floor, Buhari Towers,  
4, Moores Road, Chennai – 600 006

..... **Petitioner**

**Vs**

**1. Tamil Nadu Generation and Distribution Corporation Limited**

6<sup>th</sup> Floor, Eastern Wing,  
144, Anna Salai,  
Chennai – 600 002.

**2. Union of India**

Shram Shakti Bhawan  
Rafi Marg, New Delhi - 110 001

.....**Respondents**

**Petition No. 350/MP/2022**

**And**

**In the matter of**

Petition under Section 79 of the Electricity Act, 2003 read with Section 11(2), along with Regulation 111-113 of the Central Electricity Regulatory Commission (Conduct of

Business) Regulations, 1999 seeking quashing of impugned letters dated 23.11.2022 and 30.11.2022 issued by TANGEDCO qua discontinuation of power procurement, contracted under long-term on pass through basis w.e.f. 01.12.2022, in contravention to the Directions issued by the Ministry of Power, Government of India.

**And  
In the matter of**

**IL & FS Tamil Nadu Power Company Limited**

4<sup>th</sup> Floor, KPR Tower,  
Old No. 21, New No. 2  
1<sup>st</sup> Street, Subba Roa Avenue,  
College Road, Chennai – 600 006.

..... **Petitioner**

**Vs**

**1. Tamil Nadu Generation and Distribution Corporation Limited**

6<sup>th</sup> Floor, Eastern Wing,  
144, Anna Salai,  
Chennai – 600 002.

**2. Union of India**

Shram Shakti Bhawan  
Rafi Marg, New Delhi - 110 001

.....**Respondents**

**The following were present:**

Shri Basava Patil, Sr. Advocate, CEPL & IL&FS  
Shri Hemant Singh, Advocate, CEPL & IL&FS  
Shri Biju Mattam, Advocate, CEPL & IL&FS  
Ms. Ankita Bafana, Advocate, CEPL & IL&FS  
Shri Lakshayajit Bagdwal, Advocate, CEPL & IL&FS  
Ms. Lavanya Panwar, Advocate, CEPL & IL&FS  
Shri M.G. Ramachandran, Sr. Advocate, TANGEDCO  
Ms. Anusha Nagarajan, Advocate, TANGEDCO  
Ms. Aakanksha Bhola, Advocate, TANGEDCO  
Shri Rahul Ranjan, Advocate, TANGEDCO

**ORDER**

The present Petitions have been filed by the Petitioners, Coastal Energy Private Limited ('CEPL') and IL & FS Tamil Nadu Power Company Limited ('IL&FS'), *inter-alia*, seeking quashing of the letters dated 23.11.2022 and dated 30.11.2022 whereby Respondent No. 1, Tamil Nadu Generation and Distribution Corporation Limited ('TANGEDCO') has arbitrarily and unlawfully proposed to discontinue the procurement

of 558 MW and 540 MW RTC power respectively, contracted under long-term on pass through basis, at the Energy Charges Rate (ECR)/benchmark tariff notified by the Respondent No.2, Ministry of Power ('MoP') and instead has proposed to procure the power at ECR mentioned in the Power Purchase Agreements ('PPAs') in contravention to the direction of MoP dated 5.5.2022, 13.5.2022, 20.5.2022 and 27.5.2022 issued under Section 11(1) of the Electricity Act, 2003 ('the Act' for short), which obliges the Procurer - TANGEDCO to receive the power at the benchmark tariff as determined by the Committee constituted by MoP. Since, the prayers made by the both the Petitioners are similar except for the difference in the quantum of contracted capacity with TANGEDCO as already noted above, both the Petitions are being dealt with together. The prayers made by the Petitioner, CEPL in Petition No. 349/MP/2022 are as under:

*“(a) Quash the impugned letters dated 23.11.2022 and 30.11.2022 issued by TANGEDCO/ the Respondent No. 1 to the Petitioner;*

*(b) Direct TANGEDCO to procure the contracted power of 558 MW, under long-term on pass through basis as per the directions issued by the Ministry of Power/ Respondent No. 2 vide notifications dated 05.05.2022, 13.05.2022 and the subsequent notifications/ directions;*

*(c) In the interim, stay the operation of impugned letter dated 23.11.2022 and 30.11.2022 issued by TANGEDCO, and consequently, further direct that TANGEDCO shall pay for the contracted power of 558 MW under long-term on pass through basis, at the ECR/ benchmark tariff notified by the Ministry of Power/ Respondent No. 2 vide Directions dated 05.05.2022, 13.05.2022 and subsequent directions; and*

*(d) Pass any other orders, as this Commission may deem fit and proper in the light of the facts and circumstances of the instant case.”*

2. The Petitioners have submitted that as per the direction of MoP dated 5.5.2022, 13.5.2022 read with 28.9.2022, issued under Section 11(1) of the Act, all imported coal-based power plants shall supply power, in the first instance, to the Power Purchase Agreement holders, until 31.12.2022 either according to the benchmark rate worked out by the Committee constituted by MoP or at a rate mutually negotiated by

the generating company. Accordingly, TANGEDCO vide letters dated 30.4.2022 and dated 16.6.2022 had intimated the Petitioners to continue to supply of 558 MW and 540 MW RTC power, contracted under long-term, on pass through basis at the ECR notified by MoP and thus, it is evident that TANGEDCO had agreed to procure the power from the Petitioners till 31.12.2022 at the benchmark tariff/ ECR notified as per the direction of MoP. Despite MoP directions under Section 11 being in force till 31.12.2022, TANGEDCO, in contravention to the such directions, issued a letter dated 23.11.2022 proposing to discontinue the procurement of RTC power on pass through basis as per the direction of MoP with effect from 1.12.2022 and instead compelled CEPL & IL&FS to supply power as per the ECR mentioned in the PPAs. The Petitioners have submitted that such discontinuation of power procurement by TANGEDCO at the ECR/benchmark tariff is in violation of the direction of MoP, which are statutory in nature. The Petitioners have further stated that, based on the representation of TANGEDCO *qua* procurement of power under MoP directions, the Petitioners have already made huge investments in advance towards sourcing of imported coal and such sudden withdrawal of power procurement by TANGEDCO in terms of direction of MoP will lead to huge financial losses to the Petitioners. The Petitioners vide their letters dated 24.11.2022 (CEPL) & 30.11.2022 (IL&FS) had brought the above aspects to the attention of TANGEDCO. However, TANGEDCO without considering the response of the Petitioners, issued another letter dated 30.11.2022 reiterating the withdrawal of the power procurement w.e.f. 1.12.2022. Accordingly, being aggrieved by the above unlawful and arbitrary proposal for discontinuation of power procurement by TANGEDCO and insistence on CEPL & IL&FS to supply power as per the ECR mentioned in the PPAs, in violation of direction of MoP, the Petitioners have filed the present Petitions.

### **Hearing dated 1.12.2022**

3. Citing urgency in the matter, Petition No. 349/MP/2022, which was at the Diary Stage, was mentioned by the learned senior counsel for the Petitioner on 1.12.2022 and after hearing the learned senior counsel at length the Commission vide Record of Proceedings for hearing dated 1.12.2022, directed to list the Petition on 12.12.2022. The Petition No. 350/MP/2022, being identical in nature, at the request of the Petitioner therein was also taken up for hearing on 12.12.2022.

### **Hearing dated 12.12.2022**

4. On 12.12.2022, both these matters were taken-up for hearing. During the course of hearing, learned senior counsel for the Petitioners reiterated the submissions made in the Petitions.

5. The learned senior counsel for the Respondent No. 1, TANGEDCO mainly submitted as under:

(a) TANGEDCO, vide letters dated 23.11.2022 & 30.11.2022, has categorically communicated to the Petitioners its withdrawal to the approval given to supply the RTC power on pass-through basis under Section 11 directions w.e.f. 1.12.2022.

(b) TANGEDCO has not compelled the Petitioners to supply the power at the PPA rates but has merely stated that in case the power is supplied to TANGEDCO, it will be only at the PPA rates and not as per the pass-through rates. The issue of deemed capacity charges in case of not availing of supply under Section 11 Directions is already under consideration of this Commission in Petition No. 128/MP/2022.

(c) MoP's clarifications dated 28.6.2022 clearly permit the PPA holder not to requisite the power under Section 11 regime and accordingly, to intimate the generator at least three days in advance. In the present case, TANGEDCO had clearly communicated its intention of non-requisition of supply under Section 11

regime for the month of December, 2022 seven days in advance vide its letter dated 23.11.2022.

(d) Similar issue was raised by another generator before the Hon'ble High Court of Judicature at Madras in W.P No. 32824 of 2022, which was disposed of by the Hon'ble High Court taking into the account the submission of TANGEDCO that word 'shall' occurring in 3<sup>rd</sup> paragraph of letter dated 30.11.2022 be read as 'may' and that TANGEDCO will not insist upon power supply as per the PPA till the time directions under Section 11 are in force. These matters may also be disposed of on the similar lines in view of the aforesaid clarification.

6. Learned senior counsel for the Petitioners pointed out that TANGEDCO has been scheduling the power from the Petitioners generating station from 1<sup>st</sup> December, 2022 onwards and such supply has to be treated as supply under Section 11 regime. Learned senior counsel also submitted that the above-mentioned offer to read term 'shall' as 'may' in its communications have been provided during the course of hearing itself and as such do not flow from its letters and such a reading of letter amounts to substitution of meaning w.e.f. the date of such offer i.e., today, and not mere clarification. In response, the learned senior counsel for TANGEDCO submitted that despite having clearly conveyed the non-requisition of supply under Section 11 regime and any supply by the Petitioners will be as per the terms of PPA only, the Petitioners continued to declare their availability qua TANGEDCO. The learned senior counsel also added that in any case these issues are not the subject matter of these Petitions and in view of the above clarification, the prayers made in the petitions do not survive and accordingly, may be disposed of these Petitions without prejudice to rights & obligations of both the sides.

### **Analysis and Decision**

7. We have heard the learned senior counsels for parties and perused documents available on record. At the outset, we find it appropriate to note that the Procurers/PPA holders having liberty not to requisition the power under Section 11 regime in terms of MoP's clarifications dated 28.6.2022, albeit subject to consequence arising out of such non-requisition as per the direction of MoP, is not under dispute between the parties.

Admittedly, the Petitioners main grievances, in these Petitions, are to quash the letters of TANGEDCO dated 23.11.2022 and dated 30.11.2022, as according to them, by the language used therein especially the expression 'shall', TANGEDCO is insisting upon the supply of power at the PPA rates even during the subsistence of direction of MoP and the same, being in violation of direction of MoP, is impermissible. However, during the course of hearing, learned senior counsel for TANGEDCO clarified that vide letters dated 23.11.2022 and dated 30.11.2022, TANGEDCO has only communicated to the Petitioners its withdrawal to the approval given to supply the power on pass-through basis under direction of MoP w.e.f. 1.12.2022 and has not insisted upon the Petitioners to supply the power at PPA rates during the subsistence of Section 11 direction of MoP. The learned senior counsel for TANGEDCO referred to the order of Hon'ble High Court of Judicature at Madras in W.P No. 32824 of 2022 filed by another generator raising a similar issue, which was disposed of by the Hon'ble High Court taking into the account the submission of TANGEDCO that word 'shall' occurring in 3<sup>rd</sup> paragraph of letter dated 30.11.2022 be read as 'may' and that TANGEDCO will not insist upon power supply as per the PPA till the time the direction issued by MoP under Section 11 of the Act are in force. The learned senior counsel for TANGEDCO urged that these matters may be disposed of on the similar lines.

8. The relevant extract of the order of the Hon'ble High Court of Judicature at Madras dated 6.12.2022 in W. P No. 32824 of 2022 (*OPG Power Gen Private Ltd. v. TANGEDCO and Ors.*) reads as under:

*"9. The question that begs the attention of the Court is as to whether the TANGEDCO can compel the petitioner to sell power at the Power Purchase Agreement rates till such time the notification under Section 11 by the 3<sup>rd</sup> respondent is in force. The answer has to be a firm No. Clause h and I of the notification dated 05.05.2022 extracted above would lead to a definite conclusion that while it is open to the TANGEDCO to refuse to purchase power at the bench mark rate fixed by the Committee, it cannot compel the generator to sell at the lesser rate as per the Power Purchase*

*Agreement. It is open to the parties to agree upon a price. Such an agreement has not been reached. Therefore, the TANGEDCO will have to allow the generator to sell power at the Power Exchanges and seek a share in the profit as per clause i of the notification dated 5th May 2022.*

*10. Mr.Rahul Balaji, learned counsel appearing for the petitioner is more concerned with the language used in the letter of the TANGEDCO dated 30.11.2022, wherein, it is stated that the petitioner shall supply power as per the provisions of the Power Purchase Agreement following the despatch instructions of State Load Despatch Centre without any deviation.*

*11. Mr.P.Wilson, learned Senior Counsel appearing for the 1st and 2nd respondents would upon instructions from the Assistant Executive Engineer submit that the word 'shall' occurring in 3rd paragraph of the letter dated 30.11.2022 be read as 'may' and the TANGEDCO will not insist upon power supply as per the Power Purchase Agreement till such time the directions under Section 11 are in force. In the light of the above, the apprehension of the petitioner is addressed.*

*12. Hence, the writ petition is disposed of giving liberty to the petitioner to sell the power produced by it in accordance with the notification issued by the Ministry of Power from time to time. The TANGEDCO will also comply with the directions of the Ministry of Power from time to time....”*

9. In view of the categorical submissions made by the learned senior counsel for TANGEDCO including to take on record the clarification made by TANGEDCO before the Hon'ble High Court of Madras, as recorded in paragraph 11 of the order dated 6.12.2022, i.e. the word 'shall' occurring in 3<sup>rd</sup> paragraph of letters dated 23.11.2022 and 30.11.2022 be read as 'may' and that TANGEDCO will not insist upon power supply as per PPA till the such time the direction of MoP are in force, in the present cases also, we are of the view that the prayers made by the Petitioners in these Petitions no longer survive and have become infructuous.

10. Insofar as the aspects of TANGEDCO having already scheduled the power from the Petitioners from 1<sup>st</sup> December, 2022 onwards and applicable rates for such supply as raised during the course of arguments, we are of the view that such aspects are beyond the subject matter of these Petitions and it would not be appropriate to stretch the scope of these cases beyond what have been prayed for by the Petitioners. In case of the any grievances in relation to the charges to be payable by/receivable



from TANGEDCO for such supply by the Petitioners during the subsistence of direction of MoP, the Petitioners are at liberty to approach the Commission with fresh Petitions and contentions of both the sides, on these aspects, are kept open. However, both parties, the Petitioners and TANGEDCO, are directed to scrupulously comply with the direction issued by MoP under Section 11 of the Act read with subsequent clarifications thereto as long as they are in force.

11. In view of the foregoing observations, present Petitions are disposed of at the admission stage.

Sd/-  
**(P.K. Singh)**  
Member

sd/-  
**(Arun Goyal)**  
Member

sd/-  
**(I.S.Jha)**  
Member