

**TAMIL NADU ELECTRICITY REGULATORY COMMISSION**  
**(Constituted under section 82 (1) of the Electricity Act, 2003)**  
**(Central Act 36 of 2003)**

**PRESENT:-**

Thiru S. Akshayakumar ..... Chairman

and

Thiru.G.Rajagopal ..... Member

**M.P.No.35 of 2015**

Tamil Nadu Generation and Distribution Corporation Ltd.  
144, Anna Salai  
Chennai – 600 002.

... Petitioner

Vs.

Nil

.... Respondent

**I.A.No.2 of 2015 in M.P.No.35 of 2015**

M/s.ARKAY Energy (Rameswaram) Limited  
Having its Corporate Office  
at No.20, Old No.129, Chamiers Road  
Nandanam, Chennai – 600 035  
Rep. by its Vice-President (Trading & Operations)

.... Intervening Applicant in I.A.No.2  
of 2015 in M.P.No.35 of 2015

Vs

Tamil Nadu Generation and Distribution Corporation Ltd.  
144, Anna Salai  
Chennai – 600 002.

..... Respondent in I.A.No.2 of 2015  
in M.P.No.35 of 2015

**Dates of hearing : 05-10-2015 and 13-11-2015**

**Date of order : 28-01-2016**

The M.P.No.35 of 2015 filed by TANGEDCO came up for final hearing on 13-11-2015. M/s. ARKAY Energy (Rameswaram) Limited has filed the Intervening Application in the said M.P. claiming to be an interested party in the matter of the

said M.P. Therefore, I.A.No.2 of 2015 filed by the said Intervener has also been heard along with M.P. The Commission upon perusing the above petitions and the connected records and after hearing submissions of the Petitioners in the M.P. and the I.A. No.2 of 2015 therein passes the following order:-

**ORDER**

**1 Prayer of the Petitioner:-**

The Prayer of the Petitioner in M.P.No.35 of 2015 is:

- (i) to float a tender for short term power purchase pending approval of the Commission, in view of urgency.
- (ii) for floating the Tender 07-2015 for the purchase of 1200 MW RTC power for a period from October 2015 to May 2016 by incorporating the following deviations:-
  - (a) to modify the billing cycle as monthly billing.
  - (b) to fix EMD of Rs.5.00 lakhs irrespective of quantum and sources of power offered as notional EMD.
  - (c) to delete payment security clause and contract performance guarantee clause in lieu of each other.
  - (d) to treat LOA as PPA.
  - (e) to fix the validity of the tender as 30 days excluding the date of bid submission

**Prayer of the Intervening Applicant in I.A.No.2 of 2015 in the above M.P.No.35 of 2015:-**

The Prayer of the Intervening Applicant in I.A. No.2 of 2015 in M.P.No.35 of 2015 is:

- (a) to refuse to grant deviation with respect to the furnishing of Revolving Letter of Credit (LC) or to alternatively direct TANGEDCO to make payments for power

supply by treating the supply of power pursuant to Tender 7 of 2015 on par with Long Term IPPs and other IPPs and not discriminate between various generators in effecting payment; and

(b) pass any such further orders, as may be directed by the Hon'ble Court.

## **2. Contentions of the Petitioner in M.P.No.35 of 2015:-**

2.1. The Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) is incorporated under the Companies Act, 1956, and being the successor entity of erstwhile Tamil Nadu Electricity Board is engaged in the business of Generation, Distribution activities and is a Distribution Licensee in the State of Tamil Nadu for distribution of electricity to various categories of consumers in the State of Tamil Nadu and the electricity so required is availed from various sources such as its own generating stations, and purchase of power from various Central Generating Stations of its share, Independent Power Plants, Captive Power Plants, Wind generators, Co-generation Plants, Bio-Mass Plants, Merchant Power Plants, Power Exchanges etc.

2.2. The demand of electricity in Tamil Nadu State is steadily increasing and all time high demand of 13775 MW was met on 24-06-2014 and all time high consumption of 303.039 MU was supplied on 08-07-2015.

2.3. A quantum of 500 MW has been tied up with interstate traders through Case I bidding medium term tender for a period of 5 years. Among the three MTOAs, one MTOA for 200 MW expires on 30-11-2015, second MTOA for 200 MW expires on 31-12-2015 and the third MTOA for 100 MW expires on 31-05-2016. All the 3 MTOAs are expiring one after another during the year and renewal of the MTOA will

be subject to availability of corridor from WR to SR after allocating to LTAs and chances are not bright in the present condition. However, the power tied up under Case 1 bidding long term tender has not been fully operationalized in view of non-completion of Narendra–Kholapur 765 kV transmission line and other pending Associated Transmission System of Sholapur-Raichur transmission corridor connecting the SR and NEW grids.

2.4. The 3330 MW of power under Case I bidding was tied up for 15 years. Out of this, only 1310 MW of power is realized now. (OPG power Gen Limited–74 MW, Coastal Energen Pvt. Ltd.-558 MW, DB Power Ltd. – 117 MW, Jindal Power Ltd. – 224 MW, KSK Mahanidhi Ltd – 281 MW and Balco-56 MW). Though the new Sholapur-Raichur 765 kV DC has been commissioned, there are few associated transmission elements facing severe ROW problems and hence PGCIL is operating the ISTS with reduced ATC of Sholapur-Raichur corridor. Besides, the other inter regional corridor viz. Narendra-Kholapur is yet to be commissioned. Only after commissioning of Narendra-Kholapur corridor, PGCIL will operationalize the remaining interstate LTA quantum.

2.5. A quantum of 540 MW of power contracted under Long Term Case 1 bidding is to flow from M/s.IL & FS from within Tamil Nadu. The first unit of IL & FS project has been synchronized only during first week of September 2015 and may achieve COD shortly. It may get stabilized in due course.

2.6. The proposed capacity additions in the year 2015-16 (1000 MW Kudankulam Nuclear Power Station, Unit II – TNEB share 462 MW and 3 x 800 MW Kudgi STPP Stage I – TNEB share 532 MW) are getting delayed for various reasons.

2.7. The power position has been reviewed by TANTRANSCO to meet out the deficit for the months from October 2015 to May 2016 and requested to make arrangements for procurement of 1200 MW from 1<sup>st</sup> October 2015 to 31<sup>st</sup> May 2016. In view of the above, a fresh tender namely Tender 07-2015 has to be floated for procurement of 1200 MW RTC power for the period October 2015 to May 2016.

2.8. In the previous year, TANGEDCO sought approval for deviations from the MOP guidelines in the short term tender floated (Tender No.5 of 2012 and Tender No.6 of 2014) in respect of billing cycle from weekly to monthly, deletion of payment security clause viz opening of Letter of Credit, deletion of Contact Performance Guarantee clause and collection of fixed EMD irrespective of quantum. The Commission has approved the above deviation for the short term tender floated during 2012.

2.9. The tender is called for with Tamil Nadu periphery as Delivery Point and tariff as all inclusive fixed price. Therefore, the process of evaluation has been eliminated. Only rate comparison will decide the granting of tender. The clause wise deviations are submitted in detail for approval of the Commission as below:-

Sl. No.	Guideline	Details of Terms and Conditions to be incorporated in NIT
1	Bidders may raise bills on weekly basis or at the end of the contract period for the energy scheduled.	Supplier shall raise monthly bill followed by REA based final monthly bill for inter-state generators and in case of intrastate generators, the billing will be on monthly basis based on JMR taken from SEM (CMRI downloaded data)

2	<p>a) The procurer may be required to provide revolving Letter of Credit (LC) equivalent to 100% of the weekly energy corresponding to contracted capacity at the tariff indicated in PPA. LC shall be opened prior to commencement of supply of power.</p> <p>b) The successful bidder may be required to furnish CPG within 7 days from the date of selection as successful bidder.</p>	TANGEDCO will not insist CPG vis-à-vis Bidder shall not insist LC from TANGEDCO i.e. LC clause and CPG clause mutually stands deleted.
3	<p>a) The bidder may be required to submit EMD of Rs.30,000/- per MW per month of offered capacity.</p> <p>b) The EMD of the successful bidders should be refunded after furnishing CPG.</p>	Rs.5.00 lakhs irrespective of quantum and sources of power offered as notional EMD for generators / traders, and EMD will be refunded after completion of the contract satisfactorily.
4	PPA proposed to be entered with the selected bidder.	The LOA issued to the successful bidder itself shall be deemed as having entered into an agreement for purchase of contracted power for the duration / period as mentioned in the LOA.
5	Validity of tender 10 days	Validity of tender 30 days excluding date of bid submission.

2.10. The Petitioner will approach the Commission on finalizing the tender with the quantum and rate offered by the bidder, etc. for tariff adoption by the Commission.

**3. Contentions of the Intervening Applicant in I.A.No.2 of 2015 dated 30-09-2015:-**

3.1. The intervening Applicant has its Gas based Power Generating Plant at Valentiravai, Ramnad District, State of Tamil Nadu with installed capacity of 149 MW. The Petitioner has been supplying energy to TANGEDCO for the past 4 years on the basis of Short Term Power Purchase Agreements, from time to time.

3.2. The Petitioner being one of the bidders of the subject tender, is a person interested and is therefore entitled to file the present application for intervention and directions. Pursuant to G.O. Ms. No.77, Energy, dated 10-10-2014 issued under section 11 (1) of the Electricity Act, 2003 all generating stations are mandated to supply all exportable electricity generated to the State Grid for supply either to the TANGEDCO or to any other Open Access consumers within the State of Tamil Nadu as per the Regulations notified in this regard by the Commission. The said G.O. has been passed citing acute power shortage in the State and the necessity to procure and distribute the entire power that is generated within the State by TANGEDCO itself. As such, the Petitioner is forced to supply the entire energy generated in its plant only to the State Grid for supply to TANGEDCO or any other Open Access consumers. The Petitioner cannot sell the energy generated outside the State of Tamil Nadu.

3.3. TANGEDCO has now issued a Tender Notification bearing Tender No.07/2015 calling for offers for supply of 1200 MW of RTC power for the period 01-10-2015 to 31-05-2016. The Petitioner has submitted its bid.

3.4. Eligibility criteria for participating in the tender are provided for in Clause 1 of the tender. It enables Inter-State source, generating companies / Electricity trader having valid trading license issued by the Central Electricity Regulatory Commission and in case of Intra-State source (within the State of Tamil Nadu) generating companies as defined under the Electricity Act, 2003 as eligible among other sources.

3.5. Relevant clauses contained in the said tender are narrated below:

As per Clause 2 (ii) (f) of the tender, All Intra-State Generators (located within Tamil Nadu) shall furnish an Undertaking to abide by the Indian Electricity Grid Code (IEGC), Tamil Nadu Electricity Grid Code (TNEGC) and Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006.

As per Clause 13 – Inter-State source get prior approval to supply from alternate source of supply. Intra-State (Sources within Tamil Nadu) supply from alternate source is not permitted.

**Clause 20 (v)**–So far as Intra-State generators are concerned, technical minimum is not provided for and a power station / whole time generator is not contracted and only some power offered by tenderer is contracted. No such restriction of making technical minimum inapplicable is made in so far as Inter-State generators / suppliers are concerned.

In other words, so far as Intra-State generators / suppliers are concerned, no technical minimum is guaranteed; whereas for Inter-State generators / suppliers, technical minimum as applicable in the Central Electricity Regulatory Commission is made applicable.

**Clause 24**–It provides that “Intra State ABT Regulations have been notified in Tamil Nadu and that non-implementation of any such ABT Regulations will not be a ground for freedom to disobey SLDC’s instruction about injection of power and it will not be a ground for objection to check the 15 minutes block-wise energy injected during the billing cycle.

This is also only with regard to Intra-State generators within the State of Tamil Nadu and there is no such clause or impact in respect of Inter-State generators / suppliers.



**Clause 25 (a)** provides for billing cycle of one month for all generators within the State of Tamil Nadu. However, Clause 25 (b) provides for billing and payment, but however, the same is not in accordance with the statutory Regulations framed by Central Electricity Regulatory Commission.

**Clause 28 (iv)**, inter-alia, provides that any excess injection of power over and above the SLDC's dispatch instructions will not be paid; whereas compensation will be levied in case there is supply less than the SLDC's instructions.

This is made applicable to Intra-State generators / suppliers; whereas in so far as Inter-State generators / suppliers are concerned, the situation is governed by the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related matters) Regulations, 2014 and the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010.

3.6. Apart from the above discriminatory clauses contained in the tender conditions, the provisions of the Revolving Letter of Credit (LC) and Contract Performance Guarantee (CPG) which are required as per the Guidelines of Ministry of Power, Government of India framed under section 63 of the Electricity Act, 2003 have been conspicuously found omitted.

3.7. The Applicant in the I.A. submitted a letter by way of a representation to the TANGEDCO on 26-09-2015 pointing out that on account of the discriminatory clauses and application of different yardsticks for the measurement of deviations, levy of compensation for supply less than or in excess of the instructed quantity etc. there was a lack of level playing field for the bidders and the Intra-State bidders who are compelled to generate and sell the Electricity within the State are put to disadvantageous position as they would not be able to compete with the Inter-State

generators / suppliers. TANGEDCO was requested to remove the discriminatory points and issue necessary amendments and also to include the conditions with regard to the LC and CPG.

3.8. Pursuant to the said letter addressed by the Applicant, TANGEDCO has put up clarifications to the queries on its website by which it has only sought to justify the illegalities writ large in the Tender 07 of 2015 and failed to address the discrepancies pointed out by the Petitioner in a legal manner. Unless the aforesaid issues are addressed and the amendments are made and a level playing field is brought in, the tender ought not to be conducted on the scheduled date and time and ought to be postponed.

3.9. The Electricity Act, 2003 provides for constitution of the Central Electricity Regulatory Commission (CERC) under section 76 of the Act. The powers and functions of the Central Electricity Regulatory Commission are provided for in section 79. So far as the present application is concerned, it is pertinent to State that the Central Electricity Regulatory Commission has got the power inter-alia to specify Grid Code having regard to Grid Standards under section 79 (1) (h) of the Act. Section 79 (4) provides that in discharge of its functions, the CERC shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy which are published under section 3 of the Act.

3.10. The Act provides under section 82 for constitution of the State Electricity Regulatory Commission. Section 86 of the Act provides for functions of State Commission. Sec 86 (1) (h) provides “the State Electricity Regulatory Commission

may proceed for a State Grid Code consistent with the Grid Code specified under Clause (h) of sub-section 1 of section 79.

3.11. Section 63 of the Act provides that notwithstanding anything contained under section 62, the appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. The Ministry of Power, Government of India, in exercise of the powers conferred under section 63 as stated hereinabove, has framed the Guidelines for Short Term (for a period of less than or equal to one year) Procurement of Power by the Distribution Licensee through tariff based bidding process on 15-05-2012.

3.12. The CERC, in exercise of powers under section 79 (1) (h) of the Act, has framed the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 and in exercise of powers under section 178 of the Act, has framed the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related matters) Regulations, 2014). The CERC has also brought in (4<sup>th</sup> Amendment)Regulation, 2015 to the Central Electricity Regulatory Commission (Indian Electricity Grid Code). The CERC has also framed the Central Electricity Regulatory Commission (Unscheduled Inter Change Charges and related matters) Regulations, 2009 and brought in an amendment to the same on 02-04-2012.

3.13. The Commission has framed the Tamil Nadu Electricity Grid Code, 2005 in exercise of its powers under section 86 (1) (h) of the Electricity Act, 2003. So far as the CERC's Regulations are concerned, under Part 6 of the Indian Electricity Grid

Code Regulations, 2010, Clause 6.4.10 provides the ISGS would normally be expected to generate power according to the daily schedules advised to them. The ISGS may also deviate from the given schedules within the limits specified in the CERC UI Regulations of CERC, depending on the plant and system conditions. In particular, they may be allowed to generate beyond the given schedule under deficit conditions as long as such deviations do not cause system parameters to deteriorate beyond permissible limits and / or do not lead to unacceptable line loading. Deviations, if any, from the ex-power plant generation schedules shall be appropriately priced in accordance with UI Regulations. In addition, deviations, from schedules causing congestion, shall also be priced in accordance with the Regulations of CERC.

3.14. The UI Regulations and the Deviations Settlement Mechanism and Related matters Regulations provide for injection of supply in excess or less than the contracted quantity. The Indian Electricity Grid Code (4<sup>th</sup> Amendment) Regulations, 2015 provides for a technical minimum to be prescribed, below which a Generator cannot be compelled to back down.

3.15. Clause 8 (4) (iii) under Chapter VIII of TNERC Grid Code—Scheduling and Despatch, provides “the Generating stations shall be responsible for power generation generally according to the daily schedule provided to them by the SLDC on the basis of the drawal schedules received from the beneficiaries / Distribution Licensee and also in accordance with the Merit Order Despatch 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. Clause 8 (4) (v) provides “all entities shall abide by the concept of frequency

linked load dispatch and pricing of deviations from schedule, i.e. unscheduled inter charges. It does not provide for any technical minimum.

3.16. In the light of the above statutory provisions, so far as the Inter-State Generators / Suppliers are concerned, the following advantages are available, which correspondingly are disadvantageous for the Intra-State generators / suppliers:

- a. The Intra-State generators/suppliers are bound to give an Undertaking to abide by IEGS, TNEGC, CEA Regulations, 2006 under Clause 2 (ii) (f) of the tender conditions. No such condition is imposed for Inter-State generators / suppliers.
- b. The Inter-State Power Generators / Suppliers are entitled to supply power from alternate sources; whereas the said enabling facility is not made available to Intra-State Generators / Suppliers.
- c. The technical minimum is applicable in so far as Inter-State Generators / Suppliers are concerned as they are governed by the CERC Regulations which provide for technical minimum. Clause 20 (v) of the tender conditions state that no such technical minimum is applicable for Intra-State Generators / Suppliers.
- d. Clause 28 of the tender conditions imposes an additional condition with regard to compensation for additional supply or reduced supply insofar as Intra-State Generators/Suppliers are concerned.

3.17. The Inter-State Generator / Supplier is entitled to a technical minimum below which, it cannot be compelled to back down. In case of failure of supply from the offered sources, it is open to the Inter-State Generator / Supplier to provide the supply from alternate sources. In case the supply is more than the contracted

quantity or more than the instructed quantity, the Inter-State Generator / Supplier is entitled to UI charges as per the UI Regulations and whereas, the above are not made applicable to Intra-State Generator / Supplier. As such, there is an assured quantity below which, the generation and supply will not be allowed to be backed down in the case of Inter-State Generators / Suppliers and whereas, there is no such guarantee in respect of Intra-State Generator / Supplier. The situation is very fluid and as per the Tamil Nadu Grid Code, directions may be given to back down even to zero. However, the same is contrary to the statutory scheme under Electricity Act inasmuch as section 79 (1) (h) provides power to the Central Electricity Regulatory Commission to frame the Regulations with regard to Grid Code and section 86 (1) (h) provides that the State Electricity Regulatory Commission may proceed for the State Grid Code consistent with the Grid Code specified under clause (h) of sub-section 1 of section 79. In the instant case, there is a clear inconsistency between the two inasmuch as there is no technical minimum provided for in the State Regulations. Whereas, there is a technical minimum prescribed in the Central Regulations. The Inter-State Generators / Supplier would have more assurance about the quantity and the duration for supply and will have advantage over the Intra-State Generator / Supplier. The Intra-State Generator / Supplier is denied a level playing field for the aforesaid reasons.

3.18. The tender conditions are not in accordance with the guidelines issued by the Ministry of Power (MoP), Government of India under section 63 of the Electricity Act, 2003. The MoP, in its guidelines, has mandated that Contract Performance Guarantee should be obtained from the supplier of energy and similar guarantee should also be given by the Procurement / Distribution Licensee and there should be a revolving Letter of Credit to assure the payment. The billing cycle, as per the

guidelines of MoP, is one week. However, the billing cycle, as per the impugned tender conditions, is one month. There is no provision for LC or CGP. However, no prior approval has been obtained from TNERC by the TANGEDCO permitting such deviations. Further the TANGEDCO does not follow any policy for settlement of invoices and different generators are paid in an ad-hoc manner suiting their whims and fancies. It is essential that this Commission direct uniform treatment of all IPPs in settlement of payments and payments made every month is required to be on a pro-rata basis.

3.19. The guidelines of the MoP provides that procurement shall be as per the guidelines and in accordance with the Commission unless any deviation is such that the same is essential and even if so, it can be done only with the prior approval of the appropriate Commission. In the instant case, permission has not been secured for any such deviations and even without the same, TANGEDCO has filed the present Miscellaneous Petition for permission to float the tender and has already received the bids even prior to grant of approval.

3.20. The Applicant in the I.A. had immediately approached the High Court of Madras by way of W.P. No.30617 of 2015 by which it had sought the relief of a Certiorarified Mandamus to quash the Tender Notification bearing No.07/2015 of the Respondents 2 and 3 therein relating to procurement of 1,200 MW of RTC power and quash the same and direct the Respondent TANGEDCO to float tender afresh for procurement of Short Term power with a level playing field for both Inter-State Generators / Suppliers and Intra-State Generator / Suppliers. When the said matter was listed for admission on 28-09-2015, the learned Judge directed the Petitioner to quote without prejudice and posted the matter on 9<sup>th</sup> October 2015. The Applicant in

the I.A. has also participated in the said tender on 29-09-2015 and submitted its bid and is therefore vitally interested in the outcome of the present proceedings.

**4. Written Submissions filed by TANGEDCO on the direction of the Commission:-**

4.1. On a review of the power position, TANTRANSCO advised about a deficit between expected demand and net availability of power for the months from October 2015 to May 2016 and requested that arrangements be made for procurement of 1200 MW from 1<sup>st</sup> October 2015 to 31<sup>st</sup> May 2016.

4.2. The following factors also pointed to the forthcoming deficit:-

- (a) Of 3 MTOAs for a quantum of 500 MW that had been tied, one for 200 MW was expiring on 30-11-2015 and another for 200 MW on 31-12-2015.
- (b) The power tied up under long term tender had not been fully operationalized on account of non-completion of Narendra-Kholapur 765 KV transmission line.
- (c) 540 MW of power was yet to flow from IL & FS project.
- (d) The term of the contracts under short term Tender No.6 of 2014 was ending on 30<sup>th</sup> September 2015.

In view of above factors, necessity arose for floating a fresh tender namely Tender 07-2015 for procurement of 1200 MW RTC power for the period October 2015 to May 2016.

4.3. While there was substantial compliance with the guidelines of the MoP for short term procurement, there were some deviations as in the previous year. In the



previous year TANGEDCO had sought approval from the Commission for deviation from the MoP guidelines in the short term tender floated (Tender No.5 of 2012 and Tender No.6 of 2014) in respect of billing cycle from weekly to monthly, deletion of payment security clause viz opening of Letter of Credit, deletion of Contract Performance Guarantee clause and collection of fixed EMD irrespective of quantum. The Commission had approved the above deviations for 2012. Hence, considering the very short term available and due to the urgent need, TANGEDCO floated this tender in anticipation of approval of the same deviations. There is no new deviation for which approval is sought by TANGEDCO.

4.4. While processing the tender, some bidders raised queries such as technical minimum, slot wise energy accounting and opening of LC. The same points were raised by one of the bidders M/s.Arkey Energy (Rameswaram) Ltd. in W.P.No.30617 of 2015 before the High Court of Madras. The bidders were replied before opening the tender and the reply was also uploaded in the website.

4.5. The bidders raised an issue that technical minimum is to be made applicable to Intra-State Generators. It is submitted that MoP guidelines for Short Term power procurement does not envisage any technical minimum. As per the Short Term tender guidelines, a power station is not contracted and only power offered by the tenderer is contracted by single part tariff. Therefore, technical minimum is not applicable to any bidder whether Intra-State or Inter-State sources even if entire power of a station is offered in the tender. Hence, there is no discrimination in terms and conditions framed among Intra and Inter-State Generators.

4.6. The bidders raised another issue that LC has to be provided by TANGEDCO in view of payment security mechanism. It is submitted that the LC clause and CPG clause as per the MoP guidelines are sought to be mutually deleted. This is what has been usually followed by TANGEDCO. The Commission had also approved this deviation for the Short Term tender floated during 2012. This is applicable for both Inter and Intra-State Generators. Hence, there is no discrimination in terms and conditions framed among Intra and Inter-State Generators.

4.7. Some bidders raised slot wise energy accounting issue stating that the slot wise energy accounting procedure is specifically given for Intra-State Generators only. It is not correct. Already slot wise energy accounting is being carried out in case of Inter-State sources. Similarly for Intra-State sources also slot wise energy accounting ought to have been carried out as per IEGC / TNEGC, since slot wise energy scheduling / dispatching are already envisaged in TNEGC issued in the year 2005 itself. Slot wise energy accounting has to be followed for which special energy meters have to be provided as per CEA's Metering Regulations 2006. Therefore, there is no discrimination among Intra-State and Inter-State Generators. It is not a new prescription, but only an explanatory reiteration of the provision of IEGC / TNEGC.

4.8. M/s.Malco Energy Ltd. raised this issue in W.P.No.21020 of 2015 before the High Court, Madras. The High Court by order in M.P.No.2 and 3 in W.P.No.21020 of 2015 ordered, "As for as the supplies made by the Petitioner are concerned, the Respondents are directed to process the payment made to the Petitioner, subject to the result of the Writ Petition. As for as the application of the impugned circular is concerned, it can be considered prospectively".

4.9. The supply from alternate source is not applicable to Intra-State Generators. In the case of Inter-State Generators, their injection point and delivery point are different. In the case of Intra-State Generators injection point itself becomes delivery point. In the case of Inter-State Generators whatever may be the source, a single Regional Energy Accounting Statement is issued. In the case of Intra-State Generators energy accounting has to be made at the respective circles. Too many changes in Intra-State source will make the accounting very complicated. Even for short duration of breakdown of any source will give room for trying up alternate source and accounting will become very difficult as it involves accounting at too many places. Further, it may give room for manipulation by clubbing different sources, its accounting and apportioning energy for captive consumers and third party consumers. Therefore, to make the energy accounting properly, it is not possible to grant the option of alternate source to Intra-State Generators. This issue seems to have been raised without understanding the technical considerations, ignoring the fact of injection point becoming delivery point, energy accounting clubbed with various categories like captive users, third party consumers etc. taking place at different circles. The above complications are not applicable in the case of Inter-State sources.

**5. Written Submissions filed on behalf of the Intervener as directed by the Commission:-**

5.1. The present petition is a gross abuse of the process and procedures contemplated under the provisions of the Electricity Act, 2003 with regard to procurement of power through bidding. The provisions of section 63 of the Electricity Act, 2003 read as under:-

*“Determination of tariff by bidding process- Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if*

*such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government”.*

5.2. Section 63 contemplates adoption of tariff, if the guidelines have been strictly adhered to. In the present case, it would be evident from the petition filed that it relates to approval of deviations and the same has been brought up for approval much after opening of the bid and even issuance of LOI which is a wholly illegal procedure that is being adopted by TANGEDCO.

5.3. In the State of Tamil Nadu, by virtue of Government Order issued under section 11 of the Act, Generators within the State are not permitted to export power outside the State. As such, under the terms of the G.O., the Generators are required to maintain maximum generation capacity and also sell the power only within the State.

5.4. Due to various reasons, including the fact that Cross Subsidy Surcharge within the State of Tamil Nadu is about Rs.3.50, it is almost impossible to sell power to any H.T. consumers directly as the purchase rate for such H.T. consumers would be unviable.

5.5. By reason of the fact that sale outside the State is banned and sale within the State to any other third parties is commercially not viable, the TANGEDCO is the only entity, which can procure power from Generators which are having substantial capacity within the State.

5.6. The Generators within the State form a separate category that cannot be equated with Generators outside the State and as such, TANGEDCO ought to have presented the full facts before the Commission even to initiate the tender process by demonstrating several aspects, including the exact availability of excess capacity within the State which is available for purchase by TANGEDCO and only after arranging to procure such power, can TANGEDCO even contemplate importing power from outside the State.

5.7. The corridor availability for HT power through outside State is too close to “Nil” and this important fact has not been disclosed to the Commission. In view of the position that TANGEDCO has commenced scheduling of power even in respect of Tender No.7 of 2015 for 1200 MW RTC power even prior to get approval from the Commission, despite issuing LOISs for quantum in excess of 1000 MW, only about 6 MW was actually ever supplied from sources outside the State.

5.8. TANGEDCO is failing to disclose such important facts solely to create a position on record that it has gone in for procurement from outside the State, when in fact, no such power is being scheduled from outside State and even what is capable of coming into the State through Inter-State corridor is of miniscule quantity.

5.9. TANGEDCO is adopting such unfair practices of calling for tenders on All India basis and forcing local generators to compete with generators outside the State and forcing the generators within the State to match prices of generators outside the State when, in fact, it is common knowledge which have been demonstrated by subsequent facts that out of State generators though have participated in the bids and quoted very low rates, did not, in fact, supply power at all. Such being the case,

the quotation submitted by the generators outside the State under the bids is solely for the purpose of driving down the price and forcing the shutdown of generators within the State by making them economically unviable to generate and supply power at such rates. Thus, TANGEDCO is playing an active role in destroying the generators within the State when, in fact, it is its legal obligation to procure all of the power from generators within the State.

5.10. Several generators like the intervener herein are generating power through dedicated generating stations and do not have any captive use of such power. Insofar as various other entities such as cement and sugar companies are concerned, they are only contracting for their surplus capacity and as such, their costs involve only certain variables. The TANGEDCO is, therefore, incorrectly seeking to project as if there are willing generators who are supplying when the true facts are different, since the generators who are supplying are principally captive generators selling a small portion of their surplus capacity. Whereas IPPs like the intervener are at a severe disadvantage.

5.11. The entire tendering process is vitiated for these reasons. TANGEDCO has committed a serious illegality in failing to approach the Commission to first demonstrate the need and requirement of issuing the tenders after disclosing all the facts and justifying the quantum with respect to its requirement. The Commission under section 86 has the exclusive role, insofar as procurement policy of Distribution Licensees is concerned. The TANGEDCO is seeking to take the Commission for granted by not getting any prior approval of the quantum requirement or even for determining the sources of power.

5.12. The objectionable and presumptuous approach of the TANGEDCO is evident from the fact that merely after filing the petition seeking for deviations, it has already concluded the tender process and also started scheduling the power without even waiting for getting the approval of the Commission.

5.13. It is well settled that whenever a tender is issued, prior approval for any deviation will have to be obtained, even prior to issuance of tender. In the present case, not only no such approval for quantum of deviation being obtained but even the deviations in respect of which approvals have been sought for are only selective and several other deviations that are not contained in the guidelines of MoP have not even been brought to the notice of the Commission. No proper explanation for any of the deviations has been brought out in the intervening application. The entire tender process stand vitiated for reasons set out above.

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

6.1. We have heard the Petitioner, TANGEDCO. Apart from the petition filed by TANGEDCO two intervening applications have also been filed. The interveners, namely, PESOT represented by Thiru S.Gandhi in I.A. No.1 of 2015 and M/s.Arkey Energy (Rameswaram) Limited in I.A. No.2 of 2015 in the above M.P. raised objections to the present power procurement on various grounds. While orders have been passed in regard to the I.A.No.1 of 2015 filed by PESOT separately on 06-01-2016 stating that the petition was not admitted, the other I.A. namely that of M/s.Arkey Energy (Rameswaram) was withdrawn on 11.1.2016 through its Counsel Thiru.Rahul Balaji by way of communication to the Secretary of the Commission. Inasmuch as separate order has been passed on the intervening application filed by PESOT and the other Application filed by M/s.Arkey Energy (Rameswaram) has

since been withdrawn, it is not necessary to traverse the averments made in the said intervening applications anymore and render findings thereon. It would suffice, if the prayer of the petitioner TANGEDCO for the approval sought for the deviation is examined on merits in the present order. Therefore, we confine ourselves to the prayer of the petitioner, TANGEDCO in M.P.No.35 of 2015 in the present order. In order to appreciate the fact of the case much better, it is necessary to go into the averments made by the Petitioner, TANGEDCO in the petition filed for approval of 1200 MW RTC power.

6.2. On a careful consideration of the facts set out in the petition filed by the TANGEDCO, it is seen that all the 3 MTOA which had been tied up for a quantum of 500 MW is likely to expire before 31-05-2016. It is seen that 200 MW of MTOA would expire on 30-11-2015 and second 200 MW of MTOA would expire on 31-12-2015, the final and third MTOA would expire on 31-05-2016. The power tied up under Case-I bidding for long term tender has not been fully operationalized in view of the non-completion of Narendra-Kolapur 765 transmission lines.

6.3. It is further stated by the Petitioner, TANGEDCO that only 1310 MW of power contracted under the Case-I bidding for 3330 MW power has been realised and that 540 MW of power under long term Case-I bidding is yet to flow from M/s.IL & FS within Tamil Nadu. The capacity additions for 2015-16 in respect of Kudankulam Nuclear Power Station and TNEB's shares of 462 MW and 532 MW are getting delayed. They have given month-wise demand / availability projections estimated upto May 2016. Thus the Petitioner contends that the present procurement of 1200 MW of RTC under short term procurement has become absolutely necessary. In



view of the same, we find that there is justification for procurement of power on short term basis.

6.4. The only question that arises for consideration is whether the deviation from the Standard Bidding documents notified by the GOI sought for can be approved by the Commission. For settling the said issue, it is necessary to examine the prayers of the Petitioner, TANGEDCO. Accordingly, we have gone through the prayers of the petitioner in the present petition which are as follows;

(1) to float a tender for short term power purchase pending approval of the Hon'ble Commission, in view of urgency.

(2) for floating the Tender 07-2015 for the purchase of 1200 MW RTC power for a period from October 2015 to May 2016 by incorporating the following deviations.

(a) to modify the billing cycle as monthly billing.

(b) to fix EMD of Rs.5.00 Lakhs irrespective of quantum and sources of power offered as notional EMD.

(c) to delete payment security clause and contract performance guarantee clause in lieu of each other.

(d) to treat LOA as PPA.

(e) to fix the validity of the tender as 30 days excluding the date of bid submission and

(3). Pass any other orders as this Hon'ble Commission may deem fit in the interest of justice in the facts and circumstances of the present case.

6.5. It is to be seen that all these proposals for deviations are certainly not new and have been approved in the earlier tender. Our attention has been drawn to the approval granted in Tender No.5 of 2012 and Tender No.6 of 2014 in which all the subjects raised herein namely, challenging of billing cycle from weekly to monthly,

deletion of payment guarantee class namely Letter of Credit and Contract Performance Guarantee fixing of EMD irrespective of the quantum etc., have already been dealt with.

6.6. We do not see any other new proposal for which approval has been sought except for treating the LOI as PPA. In other words, as rightly submitted by the TANGEDCO, the approval for all proposals which are set out herein are not new and approval has been granted earlier for the same set of deviations proposed now. There is nothing new in the present tender conditions or the deviations. In view of the same, we are inclined to grant approval for all the aforesaid deviations in the present procurement of power.

6.7. However, before proceeding to approve the procurement process, other important issues which require to be considered are 1) whether the procurement process is in line with the GOI guidelines and 2) whether the power is procured after considering whether there is any other avenue(s) available for procuring power at lower cost. On the first issue, we have gone through the details competitive bidding set out by the petitioner and also examined the prayers. The GOI guidelines which set out the procedures, are to be followed for adoption of the rates except for the deviations which require the approval of the Commission.

6.8. The guidelines also provide that prior approval should be sought for the quantum of energy to be procured which means that before setting in motion the process of competitive bidding, the approval for the procurement is necessary. In the instant case, we find that TANGEDCO has made an averment in the prayer to the effect that there is an urgency in the procurement of power. We are also

conscious of the fact that there is an urgent need to procure power to maintain the uninterrupted supply of power in view of the fact that there is delay in realization of full power contracted through LTOA and uncertainty in getting the share of power from Kudankulam Nuclear Power Plant commissioning of which is indefinitely delayed. However, prior approval of the Commission is required for the quantum and the same is mandatory. Therefore, we would like to make it clear that in the future prior approval shall be obtained before initiating the bidding process.

6.9. As regards the second issue of reasonableness of the cost of power to be procured and the availability of cheaper source of power, we have examined the position with regard to the availability of power from other sources, importantly, the wind. Indisputably, wind is the clean and renewable energy as compared to the conventional energy though by its nature, it is infirm. We have also given direction to the effect that the wind power shall be harnessed to its maximum potential subject to grid security and the same is also the view held by the APTEL. In the instant case, we notice that the period for the procurement is sought to be made does not pertain to wind season or the period in which the wind is active. Therefore, we are inclined to approve the present proposal. Even though, the Petitioner would have made all efforts to ensure they contract power at the least cost possible at the point of time, the Commission desires to insist that in all cases of procurement, every effort shall be made to buy the least cost of power or to examine the possibility of procuring power from sources of energy which are less costlier before setting in motion the procurement and dispatch of costlier power from conventional sources and the Merit Order Dispatch (MOD) enunciated by the Commission shall be strictly followed. While the supply of power to the consumers at the minimum cost shall be the motto of the licensee, we also hasten to add that TANGEDCO shall endeavor to consider

the following aspects in respect of determination of prices of the procurement of power.

- a) State Policy in respect of power supply
- b) power availability within the State vis-à-vis the demand during the period of procurement
- c) availability of other cheaper sources of power
- d) prevailing trend of power purchase by neighbouring States.

6.10. Incidentally, our attention has also been drawn to the order of the Hon'ble High Court of Madras dated 28.9.2015 in W.P.No.30617 of 2015 wherein the High Court of Madras refused to stay the procurement process in public interest. Considering the public interest involved in the present procurement and the absolute necessity to provide uninterrupted supply in the State of Tamil Nadu, we are inclined to approve the present proposal for procurement of 1000 MW RTC.

6.11. However, there is an issue with regard to treatment of LOA as PPA, it is seen from the petition that reasons have not been adduced for seeking treatment of LOA as PPA for the purpose of the present approval. However, inasmuch as the issue has been raised before this Commission, we deem it fit to render our findings thereon. We have gone through the Government of India guidelines, in this regard, which state in Clause (v), the manner in which the PPA should be executed and the guidelines to be borne in mind in drafting of the PPAs. The relevant portion of the said guidelines are reproduced here below for reference.

*PPA proposed to be entered with the selected bidder. The PPA shall include necessary details.*

- a) *Risk allocation between parties*

- b) *Force Majeure Events shall mean the occurrence of any of the following events;*
- *Any restriction imposed by RLDC / SLDC in scheduling of power due to breakdown of Transmission / Grid constraint shall be treated as Force Majeure without any liability on either side.*
  - *Any of the events or circumstances, or combination of events and circumstances such as act of God, exceptionally adverse weather conditions, lightning, flood, cyclone, earthquake, volcanic eruption, fire or landslide or acts of terrorism causing disruption of the system.*

*The contracted power will be treated as deemed reduced for the period of transmission constraint. The non/part availability of transmission corridor should be certified by the concerned RLDC.*

- c) *Change in Law – Change in Law shall include*
- *Any change in transmission charges and open access charges*
  - *Any change in taxes (excluding income tax), duties, cess for introduction of any tax, duty, cess made applicable for supply of power by the Seller.*
- d) *Billing Cycle – Bidders may raise bills on weekly basis or at the end of the contract period for the energy scheduled.*
- e) *Payment of Liquidated Damages for failure to supply the instructed Capacity:*
- *Both the parties would ensure that actual scheduling does not deviate by more than 15% of the contracted power as per the approved open access on monthly basis.*
  - *In case deviation from Procurer side is more than 15% of contracted energy for which open access has been allocated on monthly basis, Procurer shall pay compensation at 20% of Tariff per KWh for the quantum of shortfall in excess of permitted deviation of 15% while continuing to pay open access charges as per the contract.*
  - *In case deviation from seller side is more than 15% of contracted energy for which open access has been allocated on monthly basis. Seller shall pay compensation to Procurer at 20% of Tariff per KWh for the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied and pay for the open access charges to the extent not availed by the Procurer.*
- f) *Payment term / Payment security to be made available by the Procurer;*
- *The Procurer (s) may be required to provide revolving Letter of Credit (LC) equivalent to 100% of the weekly energy corresponding to Contracted Capacity at the tariff indicated in PPA. LC shall be opened prior to commencement of supply of power.*

*The RFP shall provide the maximum period within which the selected bidder must commence supplies after the PPA becomes effective, subject to the obligations of the Procurer being met.*

6.12. In this connection, the relevant portions of the terms and conditions for procurement of power are also reproduced for better understanding of the issue.

*(A) Change in Law:*

*(i) Change in law shall include any change in transmission charges and Open Access charges.*

*(ii) Any change in taxes (excluding income tax) duties, cess or introduction of any tax, cess made applicable for supply of power by the seller. (This is not applicable to tariff for this tender as tender is invited for supply at Tamil Nadu periphery at firm single tariff).*

*(B) Unrequisitioned/Unauthorised Injection (Applicable to Intra-State Sources)*

*(i) Generators shall scrupulously adhere to the dispatch instruction given by TNSLDC.*

*(ii) Any injection over and above the dispatch instruction given by SLDC or injection of power without any valid LOA / Contract will be treated as unauthorized injection.*

*(iii) No payment will be made for the supply of power over and above the dispatch instruction given by TNSLDC.*

*(iv) No payment will be made for the power injected in excess of their contracted quantum.*

*(v) No payment will be made for the unauthorized injection after expiry of contract period.*

*(C) Scheduling:*

*The successful bidder will schedule the power in full except in case of transmission constraints. The scheduling and dispatch of the power shall be coordinated with the respective RLDCs as per the relevant of the provisions of IEGC and frame work of ABT and the decisions of RLDCs and RPCs.*

*The Intra-State sources shall submit day ahead declaration of their capability for the next day to SLDC. Whenever downward revision is required, TNSLDC, will give instruction for downward revision for injection. All generators shall scrupulously adhere to TNSLDC's instruction.*

*Billing and Payment term:-*

*a. For the power scheduled from interstate :-*

*Supplier shall raise monthly bill followed by REA based final monthly bill. If bill is received after working hours (17:00 Hrs), the next working day will be reckoned as the date of receipt of bill. . The due date of bill will be the 7th day after the issuance*

*of provisional REA by SRPC OR the date of bill raised by the trader, whichever is later. If the bills are received on holidays/Sundays the next working day only shall be reckoned as the date of receipt of the bill for all payment purpose.*

*b. For the power scheduled in the intrastate:-*

*In case power injected from local generator in Tamil Nadu, the billing cycle will be calendar monthly billing cycle. Generators shall raise bills once in a month. The supplier shall furnish the bill to the Superintending Engineer of the EDC concerned (Jurisdiction in which the Generating plant is located) on any working day of the EDC office within the office working hours. If received after working hours, the bill shall be deemed to have been received on the following working day.*

- i) The energy bills will be scrutinised, passed and paid by the Superintending Engineer/ Electricity Distribution Circle concerned.*
- ii) A copy of down loaded data for the relevant billing parameters shall be enclosed with the bill.*
- iii) The downloaded data shall be compared and checked with respect to LOA conditions and SLDC's instructions.*
- iv) After accounting the energy to third party and captive use, the quantum of energy supplied by the generator to TANGEDCO network under this contract/agreement for during 15 minutes block will be verified with respect to LOA conditions and SLDC's despatch instructions. The summing up of 96 blocks per day for the entire calendar month is the monthly billing period. Monthly billing cycle does not mean taking the initial and final reading of the month and making payment without checking 15 minute block wise injection with respect to LOA condition and SLDC's instructions. The energy pumped in over and above the SLDC's despatch instruction will be treated as unrequisioned power and no payment will be made.*

*Force Majeure:*

*No party shall be liable for any claim of any damage whatsoever arising out of failure to carry out the terms of the agreement due to the reasons governed by Force Majeure conditions as given below:*

- 1) Any restriction imposed by RLDC/SLDC in scheduling of power due to break down of transmission / gird constraint shall be treated as force majeure without any liability on either side.*
- 2) The contracted power will be treated as deemed reduced for the period of transmission constraint. The non /part availability of transmission corridor should be certified by the concerned RLDC.*

*Where a non performing party is unable to perform its obligations under the above reasons of Force Majeure, the non performing party shall notify the other party within five days of the above occurrence of Force Majeure, identifying the nature of*

*the event or circumstances of Force Majeure, the expected duration of such Force Majeure for which such obligations are expected to be affected.*

**Note to Intrastate generators (Sources within Tamil Nadu):**

*SLDC's instruction for reduced injection of power for Demand-Supply management (other than grid constraint) is not a force majeure. Therefore, the intrastate generators are instructed not to send such SLDC's instruction to Head Quarters Office.*

**Compensation:-**

*Without prejudice to the provisions of force majeure, the successful bidder shall supply the full contracted quantum on Round The Clock basis to TANGEDCO. In case of failure by the Bidder to supply the requisitioned quantum the following liquidated damages for failure to supply the instructed capacity shall be levied.*

- i. Both the parties would ensure that actual scheduling does not deviate by more than 15% of the contracted power as per the approved open access on monthly basis.*
  - ii. In case deviation from procurer side is more than 15% of contracted energy for which open access has been allocated on monthly basis, procurer shall pay compensation at 20% of tariff per kwh for the quantum of shortfall in excess of permitted deviation of 15% while continuing to pay open access charges as per the contract.*
  - iii. In case deviation from seller side is more than 15% of contracted energy for which open access has been allocated on monthly basis, seller shall pay compensation to procurer at 20% of tariff per kwh for the quantum of short fall in excess of permitted deviation of 15% in the energy supplied and pay for the open access charges to the extent not availed by the procurer.*
- iv. Note to Intrastate Generators (sources within Tamil Nadu)*

*The compensation will be arrived as explained below. The energy supplied into the grid will be verified for each 15 minute block with respect to LOA condition and TNSLDC's despatch instruction. If TNSLDC despatch is less than the contracted quantum, the deviation is accounted as Procurer/TANGEDCO side deviation. If the supply by the generator/seller is less than the TNSLDC's despatch instruction, then the deviation is accounted as seller /generator side deviation. Whenever generator supplies less than the SLDC's despatch instruction, TANGECO/Seller side deviation will become nil during that period and generator side deviation alone will be accounted. The deviation will be calculated for each 15 minute block and summed up for the entire month and accordingly compensation will be levied monthly. Any excess injection over and above the SLDC's despatch instruction will not be paid.*



6.13. It may be seen that the requirements of the Government of India guidelines in regard to execution of PPAs have been duly incorporated in the terms and conditions for procurement of power. The important issues which may give rise to dispute between the parties such as Risk Allocation, Force Majeure, Transmission Constraint, Change-in-Law, Billing Cycle, Liquidated Damages and other issues find place in the terms and conditions. We find that, all the ingredients which are necessary for a PPA as laid down in the GOI guidelines have been duly incorporated in the terms and conditions and therefore, we are inclined to approve the prayer for treatment of the LOA as PPA. However, this is not to suggest that formal execution of PPA would not be necessary and in future TANGEDCO may ensure that PPAs are executed in line with the GOI guidelines.

**ORDER:**

With these observations, the approval is accorded for the deviation sought for in the present petition. The tender which has already been floated for purchase of 1000 MW RTC for a period from October 2015 to May 2016 is also hereby approved.

**7. Appeal:-**

An appeal against this order shall lie before the Appellate Tribunal for Electricity under section 111 of the Electricity Act, 2003 within a period of 45 days from the date of receipt of a copy of this order by the aggrieved person.

(Sd.....)  
**(G.Rajagopal)**  
**Member**

(Sd.....)  
**(S.Akshayakumar)**  
**Chairman**

/ True Copy /

Secretary  
Tamil Nadu Electricity  
Regulatory Commission