

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

**Present: Shri. R. Preman Dinaraj, Chairman
Adv. A.J. Wilson, Member (Law)**

OP.No.44/2020

In the matter of : Dispute with Kerala State Electricity Board Ltd. relating to Non-payment of Invoice dated 13.07.2020 raised by Indsil Hydro Power & Manganese Ltd for banked energy.

Petitioners : M/s. Indsil Hydro Power and Manganese Ltd.
Indsil House, T.V. Samy Road (West), R.S. Puram, Coimbatore

(Represented by Shri. Joseph Kodianthara, Sr. Advocate).

Respondents : M/s. Kerala State Electricity Board Ltd. (KSEB Ltd)
Thiruvananthapuram.

(Represented by Smt. Latha, S.V Asst. Exe. Engineer, TRAC).

Date of Hearing : 25-01-2021

Order dated 06..07..2021

1. M/s. Indsil Hydro Power and Manganese Ltd (*previously Indsil Electrosmelts Ltd. hereinafter referred to as the Petitioner or Indsil*) filed the instant petition against KSEB Ltd regarding the dispute between KSEB Ltd (*hereinafter referred to as the respondent or KSEB Ltd*). and the petitioner in connection with the non-payment of invoice raised by the petitioner for banked energy as per the provisions of Clause 11 of the Agreement executed on 30.12.1994. The prayers in the petition are :

- Direct KSEB Ltd. to settle and pay the petitioner's invoice dated 13.07.2020 in full with interest at the rate at which the respondent charges interest on its consumers in accordance with Clause 11 of the Agreement executed between the petitioner and the erstwhile Kerala State Electricity Board on 30.12.1994.
- Pass such orders as are deemed just and necessary in the facts and circumstances of the case.

Circumstances leading to the petition are as given below:

2. The petitioner Indsil pursuant to an Order passed by the Government of Kerala announcing the Policy of encouraging private participation in setting up of Hydro Electric Projects in the State had set up a small hydro-electric project at Kuthungal in Idukki district with a capacity of 21MW. After obtaining all necessary approvals, the petitioner executed the project at a cost of Rs.55 crore and the first unit of electricity was generated on 15-05-2000.
3. On 30.12.1994, the petitioner (*previously Indsil Electrosmelts Ltd.*) entered into an Agreement with the erstwhile Kerala State Electricity Board laying down the terms and conditions for establishment, operations and other conditions of the Kuthungal SHEP. As per Agreement Clause 1, the operations of the project shall be governed by the provision of the said Agreement and the cost of the project is to be entirely funded by the petitioner. Clause 2 of the Agreement required the project implementation to be done strictly in accordance with the Project Report, Designs and Specifications as approved by KSEB.
4. In this instant petition, the petitioner has contended that the respondent KSEB Ltd. has violated Clause 11 of the Agreement executed on 30.12.1994. They submitted that the respondent KSEB Ltd. was not paying the invoice amount of Rs.639.63 lakh raised by the petitioner against the respondent. This invoice was raised by the petitioner on account of the energy generated and banked by the petitioner from his hydro-generating plant at Kuthungal for the accounting period from 01.07.2019 to 30.06.2020. The petitioner has contended that as per Clause 11 of the Agreement dated 30-12-1994, the respondent KSEB Ltd. is liable to pay for the energy banked with them at the rate at which the KSEB Ltd. sells the energy to the EHT consumers.
5. The petitioner further pleaded that as per the Agreement, they had no other option, but to sell the excess generated energy only to KSEB Ltd. The summary of issues involved is as below:
 - i. The petitioner had issued an invoice dated 13.07.2020 for an amount of Rs.6.39,63,157/- towards the supply of excess energy till the end of the settlement period i.e., 30th June 2020 against KSEB Ltd. The banking of this energy was necessitated on account of the Covid-19 situation and consequent less consumption at the petitioner's factory at Palakkad, which was under compulsory lockdown in the months of April and May 2020.
 - ii. The bill was raised by the petitioner as per the provisions of Clause -11 of the Agreement dated 30.12.1994.

- iii. The bill was raised for 1,16,29,665 units of net energy, banked with the respondent KSEB Ltd. for the period from 01.07.2019 to 30.06.2020 and billed at the tariff at EHT level of Rs. 5.50 per unit as per Clause 11 of the Agreement.
 - iv. The payment for the bill was denied by the respondent KSEB Ltd. which was communicated to the petitioner vide letter dated 16-09-2020. The respondent cited their inability to absorb the excess energy due to low demand during the lockdown period and also the high storage in the reservoirs. Further, they also pointed out in the said letter that no intimation whatsoever was passed on to KSEB Ltd. on the lack of demand at the petitioners' factory to facilitate KSEB Ltd. to restrict the generation from the Kuthungal Small Hydro-Electric Plant (SHEP)
 - v. In their response to the Commission, vide letter dated 16-02-2021, the respondent contended that the absorption of excess energy in the said situation would result in the violation of merit order scheduling rights extended to the respondent KSEB Ltd vide Clause 12 of the Agreement and hence the provisions of Clause-11 of the Agreement are not applicable.
 - vi. The respondent also mentioned in their letter dated 16-09-2020 that the surplus energy banked with the respondent included the energy availed by the petitioner through open access during the period from July-2019 to June-2020, which is not envisaged as per the Agreement.
 - vii. Aggrieved by the action of the respondent, the petitioner filed the instant petition before the Commission with a prayer to direct the respondent to settle the bill raised in full along with interest.
6. The Commission conducted hearing on this matter through video-conference on 25.01.2021 at 11.00 AM. Shri. Joseph Kodianthara, Sr. Advocate appearing for the petitioner explained the circumstances under which the banking of 1,16,29,665 units of energy took place. He also explained the petitioner's right to claim the amount raised in the invoice citing Clause 11 of the Agreement signed between the petitioner and the respondent in connection with the setting up and operation of the 21 MW Hydro Electric Project at Kuthungal, Idukki. He further submitted that as per the provisions of the Agreement the petitioner was left with no option but to sell all the energy produced in excess of their requirement to the respondent KSEB Ltd only.
7. On the other hand, the respondent, KSEB Ltd argued that the petitioner had intimated them regarding the excess generation only on 16.05.2020 and neither KSEB Ltd. nor the SLDC was aware of the excess generation of energy by the petitioner. The respondent also submitted that, as per the Agreement, banking of excess energy is only an option given to the petitioner, and is not mandatory.

Hence there is no obligation on the part of the respondent to buy the energy generated and banked by the petitioner company in excess of their requirement. The respondent further claimed that the petitioner had not complied with the provisions of Regulations 77 and 78 of the KSERC (Terms and conditions for determination of Tariff) Regulations, 2018.

8. After the hearing, the Commission vide Daily Order dated 02-02-2021 directed both the parties to furnish detailed written note of arguments not later than 15-02-2021.
9. In their response submitted before the Commission vide counter affidavit dated 16.02.2021, KSEB Ltd presented a brief background of the issues involved in the case. In support of the arguments, KSEB Ltd quoted Clauses 9 and 10 of the Policy Guidelines of the Government of Kerala on setting up of Small/Mini/Micro hydel Schemes by Private Agencies issued vide Government Order No. G.O.(Ms) No.23/90/PD dt.07-12-90 in relation to a captive hydro plant. According to KSEB Ltd, the Policy directions are part and parcel of the Agreement. The salient points of the guidelines as given by the respondent are as follows:
 - a. The generator has to utilise the generation from the captive plant for adjusting its consumption after deducting 12% towards wheeling charges and T&D loss.
 - b. In case energy in excess of the petitioner's requirement is generated from the SHEP during one accounting year (1st July to 30th June), such excess energy shall be fed into the State grid at rates to be mutually agreed upon.
 - c. Under no circumstances shall the agency be entitled for the sale/transfer of any excess energy or any energy produced from the scheme to any party other than the Government/ Board.
 - d. The accounting of the energy fed into the grid by the petitioner and the energy drawn from the grid by the petitioner will be settled on an annual basis, the year being reckoned from 1st July to 30th June of the succeeding year.
 - e. In case the State Grid is not in a position to absorb the energy generated from the scheme for any reason, this generation will have to be temporarily stopped as directed by the Board.
10. KSEB Ltd further submitted that as per Clause 10 of the Govt. Policy guidelines, the pattern of power generation from the scheme shall be as directed by the Regional Load Despatch Centre of the KSEB.
11. According to KSEB Ltd, the Agreement dated 30.12.1994 was executed between M/s Indsil and KSEB for the setting up, operation and maintenance of the Kuthungal SHEP. The Policy guidelines issued by GoK in 1990 and 1992 forms a part of the Agreement.

12. The respondent also explained the Clauses 10 to 13 of the Agreement and cited an Order of the Commission dated 02.06.2017, disposing of the petition connected to the sale of banked energy generated from Kuthungal SHE project. In the said Order, the Commission has taken a view that many of the provisions of the Agreement dated 30.12.1994 were not in line with the provisions of the Electricity Act, 2003.
13. KSEB Ltd stated that the petitioner vide letter dated 16-05-2020 has intimated that due to the lockdown announced by the State Government, they had closed their factory from 24-03-2020, but continued to generate power at Kuthungal SHEP which could not be consumed. In the said letter, the petitioner requested KSEB Ltd that, as on 30-04-2020, the petitioner has fed excess energy of 5.70MU and requested for adjusting this excess against their consumption during the months of February & March 2020. They also requested KSEB Ltd for adjusting the balance banked energy as on June 2020 (after this adjustment) be allowed to be adjusted in future consumption or be purchased as per Clause 11 of the Agreement dated 30-12-1994. KSEB Ltd submitted that the above request of the petitioner could not be admitted in view of the following:
- a. As per the Clause 11 of the Agreement, the accounting and billing of energy is to be settled on a monthly basis. Hence, the petitioner is not eligible for adjustment of energy against the already billed units of previous months (February & March) with the generation of the subsequent months. KSEB Ltd communicated this information vide letter dated 17-08-2020 in reply to the petitioner's request dated 16-05-2020.
 - b. As per the Agreement, if the energy banked is not utilized by the petitioner and their associates during one accounting year, it shall not be carried over to the next accounting year and shall be treated as lapsed. The Agreement also states that the petitioner has however the option to sell the excess banked energy to KSEB on the terms specified in Agreement. Otherwise, the petitioner has no claim over the energy banked. Also, there is no provision in the Agreement enforcing KSEB Ltd to purchase the excess banked energy of the petitioner. KSEB Ltd can purchase the excess banked energy only if it requires and the authority to purchase this energy lies entirely with KSEB Ltd. The purchase of energy by KSEB Ltd. is based on the Merit Order Principle.
 - c. As per 86(1) (b) of the Electricity Act, 2003, and the Commission's Regulations, the power procurement of the KSEB Ltd. is regulated by the Commission including its quantum and rate. The power procurement of KSEB Ltd for the year 2019-20 and 2020-21 are approved by the Commission vide the MYT order dated 08.07.2019. However, in this Order, there is no approval

for the purchase of this excess banked energy from the petitioner's plant. Therefore, KSEB Ltd argued that without the explicit approval of the Commission, they cannot purchase the excess banked energy generated by the petitioner.

- d. There was no requirement for KSEB Ltd to purchase this excess banked energy since the power demand of KSEB Ltd had come down during the lock down period.
 - e. KSEB Ltd further submitted that as per Clause 12 of the Agreement, if the KSEB grid is not in a position to absorb the excess energy generated from the project for any reason such as high level of storage in the reservoirs, or for any reason beyond the control of KSEB Ltd., the generation from the project will have to be restricted to the extent of generation for captive consumption, as directed by KSEB Ltd.
 - f. No intimation was passed on to KSEB Ltd. on the lack of demand at the petitioner's factories so as to restrict the generation from Kulathungal SHEP. On a co-joint reading of Clause-11 with this situation, the petitioner is well aware that if the excess banked energy is not utilized by the petitioner and their associates during one accounting year, it shall not be carried over to the next accounting year and shall be treated as lapsed. Being so, the petitioner ought to have intimated SLDC of their situation and plant shut down, so that excess energy is not generated and banked. KSEB Ltd submitted that in the situation of surrendering tied up power and high storage level in their reservoirs, absorbing the generation from the petitioner's project at EHT tariff would result in violation of the Merit Order Scheduling.
 - g. Power procurement of KSEB Ltd is regulated by the Commission and thus without explicit approval of the Commission, the power from the plant cannot be procured by KSEB Ltd.
 - h. The petitioner had availed energy during the period through open access to the tune of 6,75,973 units during the period from July 2019 to May 2020 and in such cases, the surplus energy is a result of open access and self-generation. Procuring excess energy banked due to the combined result of open access and own generation is not envisaged in the Agreement.
14. KSEB Ltd also pointed out that the Commission has notified the KSERC (Renewable energy and net metering) Regulations, 2020 on 05-06-2020. As per Regulation 1(2), the provisions of the said Regulations shall apply to all existing and new grid interactive renewable energy systems, consumers, prosumers, captive consumers, generating companies, distribution licensees and obligated entities, in the matter of determination of tariff of Renewable energy, RPO, net metering, banking, generation based incentives and related matters.

15. In compliance to the Commission's direction to submit clarifications on scheduling details of Indsil and control of inflow into the weir of Indsil, KSEB Ltd also submitted a copy of the letter dated 10-02-2021 issued by Chief Engineer (System Operation) to the Deputy Chief Engineer (TRAC) KSEB Ltd. In this letter, Chief Engineer (Systems Operation) has mentioned that the Indsil factory consumption is almost round the clock, whereas the generation from Kuthungal SHEP depends on water availability in the weir constructed for Kuthungal SHEP. The Chief Engineer (System Operations) also clarified that there is no link between the generation at Kuthungal SHEP and the consumption at Indsil factory premises as far as SLDC is concerned as no such information is passed on from the Indsil factory/Kuthungal SHEP. He also mentioned that there is no correlation between the generation at Kuthungal SHEP and consumption at Indsil factory premises in the daily operations as far as SLDC is concerned. Information on the consumption at Indsil's factory premises is never informed to SLDC and SLDC is allowing generation from Kuthungal SHEP when the plant is ready and availability of water in the weir is confirmed by Kuthungal SHEP operator, subject to real time technical constraints in absorbing the power by the grid.

16. In the detailed argument note dated 09.02.2021 submitted by the petitioner, they reiterated all their arguments made during the hearing. The petitioner also submitted a statement showing the generation, consumption, banking and open access purchase for the period from July 2019 to June 2020. According to the petitioner, the Open access purchases were resorted to only in July and August 2019, with 5,66,113 units in July and 1,09,860 units in August 2019. The banked energy in September 2019 was 35,49,724, which increases thereafter to 52,50,801 units in November 2019. The petitioner pointed out that in February and March 2020, there is no banked energy, since the entire banked energy till January 2020 was consumed by February 2020. Thus, the petitioner did not bank any excess energy with KSEB Ltd during February and March 2020 and the energy balance during these months were Zero. The issue of the excess banked energy arose from the petitioners' generation during the months of April, May and June 2020 which was fed into the KSEB Ltd grid. This was a result of the Covid 19 lockdown, which necessitated the banking of nearly the entire energy generated in April, May and June 2020. The details furnished by the petitioner as Annexure 5 on the generation and banked energy are shown below:

**Details of Generation and Banked energy details for water year 2019-20
(Annexure-5)**

Year & Month	Net Generation after wheeling kWh	Open access purchase kWh	Consumption kWh	Banked Power Detailed Account			
				OB kWh	Addition kWh	Withdrawal kWh	CB kWh
Jul-19	4,88,400	5,66,113	60,44,610	0	0	0	0
Aug-19	65,71,840	1,09,860	55,42,110	0	11,28,194	0	11,28,194

Sep-19	59,92,800	0	35,46,810	11,28,194	24,21,530	0	35,49,724
Oct-19	56,34,640	0	48,60,750	35,49,724	7,65,884	0	43,15,905
Nov-19	58,23,280	0	48,68,940	43,15,905	9,34,896	0	52,50,801
Dec-19	38,65,840	0	50,29,620	52,50,801	1,56,103	13,21,460	40,85,444
Jan-20	10,63,920	0	51,48,030	40,85,444	0	32,84,110	8,01,334
Feb-20	4,28,560	0	32,46,240	8,01,334	0	8,01,334	0
Mar-20	17,87,280	0	21,02,550	0	0	0	0
Apr-20	57,76,320	0	17,430	0	57,01,301	0	57,01,301
May-20	43,95,280	0	16,320	57,01,301	42,36,170	0	9,93,7471
Jun-20	3,15,920	0	16,290	99,37,471	2,96,634	0	102,34,104
Total	4,21,44,080	6,75,973	404,39,700		156,40,712	54,06,904	

17. The petitioner further contended that KSEB Ltd's liability to pay for energy banked in the present case as on June 2020 is based on the Commission's Order in OP No.2 of 2017 dated 02-06-2017. In the said Order, the petitioner contended that the Commission had ordered the respondent KSEB Ltd. to pay at EHT rate for the banked energy as per the provisions of Clause 11 of the Agreement dated 30.12.1994. The said Order was also affirmed by the Hon. APTEL.

18. The petitioner contended that as per Clause 11, the excess energy after the requirement of the petitioner during an accounting year can be banked and sold to KSEB Ltd. The sale is deemed to be effected at the EHT terminal, where the power generated by the petitioner is fed into the KSEB Ltd grid at EHT rate. They further submitted that under no circumstances, they can sell or transfer any excess energy to any other party other than KSEB Ltd and their associates. Also, the energy banked but not utilised shall not be carried forward to the next accounting year and shall be treated as lapsed. According to the petitioner, since this excess energy can be sold only to KSEB Ltd, the sale is automatic and deemed to have been taken place, KSEB Ltd is obliged to pay for this excess energy banked as on 30-06-2020.

19. The Petitioner has also challenged the arguments of the respondent that KSEB Ltd. was not aware of the excess generation. According to the petitioner, this contention of KSEB Ltd is incorrect since the petitioner had vide their letter dated 16-05-2020 informed KSEB Ltd of this and KSEB Ltd too had replied to this vide letter dated 17-08-2020.

20. Further, KSEB Ltd's contention that they were not in a position to absorb the power generated by the petitioner due to the high storage level is also absolutely wrong and incorrect both in law and on facts. To this, the petitioner pointed out that Clause 12 of the Agreement contemplates restriction of generation by the petitioner only on a direction from KSEB Ltd. However, no such intimation was received by the petitioner in this regard and is also not at all contemplated. They

pointed out that the fact that the petitioner's factories were not consuming power is not relevant in the context of imposition of restriction by KSEB Ltd. Even in fulfilment of Clause 12, KSEB Ltd did not issue any intimation or direction for restriction of generation and hence cannot KSEB Ltd's arguments is not correct or valid in this regard.

21. The petitioner also challenged the claim of the respondent, that the State Load Despatch Centre (SLDC) was not aware of the fact that the petitioner's factories were under lock down due to Covid-19. They argued that since SLDC was monitoring the generation by the petitioner's SHEP and the consumption by their factories, this fact was fully known to the respondent KSEB Ltd. Further, the petitioner also argued that the respondent KSEB Ltd. has already accepted and utilized the power generated by the petitioner not only for the needs of Neriamangalam power house, but also for fulfilling the needs of the local area. The petitioner submitted that for this purpose, KSEB Ltd has constructed a substation in the same premises as the petitioner to supply power to the nearby areas of Senapathy etc.,

22. The power banked by the petitioner is considered as per Clause 11 of the Agreement as a deemed sale. Hence, the question of any formal acceptance (or even offer) does not arise in this context. According to the petitioner, KSEB Ltd having accepted and distributed this banked power is duty bound to pay for the 'banked' energy as per Clause 11 of the Agreement and the invoice raised in this regard by the petitioner.

23. The petitioner also filed a rejoinder dated 02-03-2021 on the counter affidavit of KSEB Ltd. dated 16-02-2021. In the rejoinder, the petitioner stated that the reference to the Commission's Order dated 06-02-2017, reiterates and obliges KSEB Ltd. to pay EHT rate as per Clause 11 of the Agreement. KSEB Ltd. is misinterpreting the clauses in the Agreement and KSEB Ltd. is obliged to purchase the petitioner's banked energy and pay for the same at EHT rates. Further, the consumption of power at the petitioner's factories has no relevance to the generation of power by the petitioner's Kulathungal SHP, which is as per Clause 12 of the Agreement.

24. Vide letter dated 05-03-2021, the petitioner also stated the following:

- a. *The power that is generated at Kuthungal also results in conveniences and benefits of KSEB Ltd*
- b. *It is pertinent to note that KSEB has established a 110 kV substation in the same premises where Indsil's Power generating plant is situated. The above substation feeds part of the generated power to KHPP for distribution of power to the nearby areas of Rajakkad and Senapathy by KSEB Ltd*

- c. *The consuming units at Palakkad is an independent unit having power connection from KSEB Ltd from 1994 onwards. It is paying MD charges and is drawing power from Kanjikode substation. It is independent of the power generation at Kuthungal.*

25. The petitioner, also furnished the following additional submissions vide letter dated 09.03.2021, which according to the petitioner, is an elaboration of the facts furnished by them as per their letter dated 05-03-2021. The submission of the petitioner is reproduced below:

1. *One major factor that cannot be overlooked is that fact that KSEBL uses the generated power from the Kuthungal power house for the needs of not only the Neriamangalam power house, but also for the needs of the local area. For this purpose, KSEB specially has established a new substation in the year 2015, with a separate Supplemental Agreement with the Company for the establishment and operation of such a substation. The generated power from Kuthungal power house is fed into this substation as well for distribution of power in Rajakumari / Senapathi/ Rajakkad/ Udumpanchola and surrounding areas.*

We would like to touch upon the sequence of events that led to the formation of the new substation. The documents referred to herein below are produced herewith.

- 1) *Vide letter dated 14.05.2010, the KSEBL sends a letter to the Company with a proposal to setup a 110/33KV, 16 MVA substation. This letter states that “ Installation of a 110/33 KV transformer at Kuthungal will also help to reduce the overloading of Neriamangalam – Pala 110 KV feeder and also improve the availability and voltage in an around Senapathy & Rajakkad.”*
- 2) *Vide letter dated 27.05.2010, the Company agrees to the KSEBL proposal.*
- 3) *Vide letter dated 30.06.2010, KSEBL intimates the sanction of the proposal and asks for confirmation from the Company.*
- 4) *Vide letter dated 17.12.2011, the Company sends a letter of confirmation.*

All the above communications are marked as Annexure – 1 for immediate reference.

FURTHER PURSUANT STEPS:

- 1) On 24.08.2012, KSEB sends a letter to the Company asking the Company to sign a Supplementary Agreement to take over the land for setting up of the proposed 110/33 KV substation.
- 2) On 13/07/2012, the Company and the KSEBL enter into a Supplementary Agreement for commissioning and operation of the new substation in the Kuthungal power house.

Specific attention is drawn to point 7 & 8 of the Agreement, of which, a special note is made in point No. 8.

“The Company will provide 110 KV supply as per the request of the concerned official to KSEBL, if the station condition permits”

The above 2 documents are enclosed as **Annexure – II** for immediate reference.

COMMISSIONING AND INAUGURATION:

- 1) On 27.12.2015, the substation was inaugurated and was accompanied by a function wherein the Director of KSEBL presented a report on the benefits of the substation for the local area. A copy of the report is given as **Annexure III** for immediate reference.

Also enclosed is a single line diagram that shows power generation from Kuthungal first goes to a 110KV switch yard and then based on KSEBL's instructions, some quantum of power goes to Neriamangalam power house and some quantum of power goes to the new substation which in turn feeds the power to Rajakumari / Senapathy / Rajakkad / Udumanchola and surroundings areas.

*A single line diagram is enclosed as **Annexure III***

In general, around 3 to 5mw of power generated by Kuthungal is being taken through the new substation to the Senapathy area and the balance alone is fed into the Neriamangalam power house.

The above facts will clearly establish the following:

- a) *The power generation from the Kuthungal power house is also a direct benefit to KSEBL for supply and distribution of power to local areas.*
- b) *The generation from Kuthungal power house as instructed by KSEBL does not depend on the consumption at the Palakkad unit. Rather, it (Kuthungal Power Generation) depends on water availability and KSEBL's needs in both Neriamangalam as well as Senapathy and local areas. This is precisely the reason why a new substation was built which goes on to prove that the generation from Kuthungal is*

squarely looked at from a supply and distribution point of view to the local areas rather than looking at it as a source of power for the Palakkad plant.

The Palakkad consuming plant has its own HT consumer code and has been paying fixed MD charges ever since its inception since 1994 and is an independent power consuming unit.

The Palakkad consuming plant operates its plant based on its production needs and power consumption is first adjusted against any generation from Kuthungal and power in excess of the generation in Kuthungal is drawn from KSEBL grid which is paid at the prevailing tariffs.

To buttress the above point, even if the Kuthungal power house does not have any power generation in any given month, the Palakkad unit buys its power from KSEBL, pays for it including relevant MD charges as well and continues to maintain its status as a consuming unit.

Kuthungal, being a run of the river scheme, can generate power only based on water availability and cannot generate power looking at the needs of the Palakkad consuming unit on a daily basis.

The power generation from Kuthungal is being taken by KSEBL based on the local area needs of power consumption and the KSEBL, does not, on a daily basis, look at the Palakkad consuming plant's needs while giving load despatch instructions to Kuthungal.

Therefore it would be highly erroneous to say that generation from the Kuthungal power house has to be tempered and modulated to fit the needs of the Palakkad consuming unit because such a stand would only defeat that entire purpose of having set up the hydroelectric power station as a 'RUN OF THE RIVER SCHEME' in the first place and further defeat the purpose of setting up a new substation to cater to the needs of the local area on a continuous basis.

26. As shown above, the petitioner has also furnished the relied documents along with the above submission. The Commission has forwarded the submissions of the petitioner dated 02-03-2021, 05-03-2021 and 09-03-2021 to KSEB Ltd for reply giving time till 29-03-2021. However, KSEB Ltd furnished the reply vide letter only on 17-04-2021.

27. In their reply, KSEB Ltd stated that the averments of the petitioner dated 02-03-2021, 05-03-2021 and 09-03-2021 is the same as that raised in the petition OP

33/2020 filed by KSEB Ltd. seeking modification in the Agreement executed by KSEB Ltd. Hence, the reply furnished by KSEB Ltd in OP 33/2020 was furnished as the reply of KSEB Ltd in the present matter also and the Commission was requested to take the same into records. However, the said reply of KSEB Ltd was in fact the response of KSEB Ltd. on the directions issued by the Commission vide daily Order dated 08-03-2021.

28. KSEB Ltd. in their response stated that the substation established by KSEB Ltd. in the land of the petitioner is not meant to evacuate the power from Kuthungal, but to provide supply to nearby areas, as part of network expansion. Regarding the extension of the terms of the Agreement dated 30-12-1994, beyond a period of 30 years, KSEB Ltd. stated that the authority to do the same is vested with the State. The above responses given by KSEB Ltd. is however, not directly related to the matter contested in the petition.

Analysis and decision of the Commission:

29. The instant petition filed by M/s Indsil Hydro Power and Manganese Ltd is regarding the deemed sale of banked energy to KSEB Ltd. pursuant to an Agreement dated 30-12-1994 and its payment by KSEB Ltd.

30. The Commission has noted that in line with Clause 11 of the said Agreement, the petitioner had raised an invoice dated 13-07-2020 for the deemed sale of banked energy of 116.30 lakh units as on 30th June, 2020 at an EHT rate of Rs.5.50/kWh amounting to Rs.639.63 lakh. According to the petitioner, the excess energy was as a result of generation during April to June 2020. Due to Covid 19 lockdown of factory of the petitioner, the energy generated by the petitioner from their plant at Kuthungal could not be utilised by the petitioners' factories. As per Clause 11 of the said Agreement, the excess/banked energy at the end of the accounting period (30-06-2020) is deemed to have been sold to KSEB Ltd. at EHT Rates.

31. In reply to the petitioner's invoice for Rs. 639.63lakh, dated 13-07-2020, the respondent KSEB Ltd. vide letter dated 16-09-2020, declined the payment for the banked energy, stating the reason that KSEB Ltd. grid was not in a position to absorb the energy generated from the Kuthungal SHEP due to high level of storage in the reservoirs and no intimation whatsoever was passed on to KSEB Ltd. on the lack of demand at the factory of the petitioner to facilitate KSEB Ltd to restrict the generation from Kuthungal SHEP in terms of Clause 12 of the Agreement. The main objections of KSEB Ltd as per the letter dated 16-09-2020 and the counter affidavit dated 16-02-2021 are as follows:

- a. KSEB Ltd. was not in a position to absorb the power generated from the Kuthungal SHEP during the lock down period due to high storage level in the

reservoir and surrender of already tied up power. Absorbing the generation from the plant at EHT tariff would result in violation of Merit Order Scheduling.

- b. There is no intimation whatsoever given to KSEB Ltd. on the lack of demand for the petitioner so as to facilitate KSEB Ltd to restrict generation.
- c. KSEB Ltd. can purchase power only if KSEB Ltd requires it and the authority to purchase power entirely lies with KSEB Ltd. There is no obligation for KSEB Ltd. to purchase excess energy.
- d. In the MYT Order dated 08-07-2019, the Commission has not approved the excess energy purchase from the petitioner's plant.
- e. Power procurement of KSEB Ltd. is regulated by the Commission and without explicit approval, power from the plant cannot be procured by KSEB Ltd.
- f. The surplus energy is as a result of open access energy. The procuring of banked energy due to the combined result of open access and own generation is not envisaged in the Agreement.

32. The Commission has examined in detail the petitions, the additional submissions filed by the parties, the arguments made during the hearing, the provisions of the Agreement dated 30-12-1994 in question, the Orders of the Commission dated 02-06-2017 (in OP No.2/2017), Judgment of the Hon. APTEL dated 20-07-2019 (in Appeal No.293 of 2017) and the relevant Regulations. Based on the above and examination of the details on record, the Commission has framed the following issues in the matter:

1. Whether the Commission has the jurisdiction to adjudicate on the matter?
2. Whether the generation from Kuthungal SHP is to be based on the petitioner's power consumption at their Palakkad units and whether such consumption is the prime factor taken by SLDC while deciding the scheduling and generation from Kuthungal SHEP?
3. Whether the petitioner is required to issue advance notice to KSEB Ltd for restriction of generation from Kuthungal SHEP by KSEB Ltd?
4. Whether the petitioner has the obligation to sell the excess banked energy and whether KSEB Ltd. has the obligation to purchase the excess banked energy at the end of the accounting year?
5. Whether the energy purchased through open access by the petitioner has resulted/contributed to the excess banked energy?
6. Whether the banked energy at the end of the accounting year is required to be sold to KSEB Ltd.?

7. Whether KSEB Ltd's purchase of banked energy would tantamount to violation of merit order schedule?
8. Which rate should be applicable for the purchase of banked energy by KSEB Ltd ?

Each of these issues are examined below:

Issues No. 1 : Whether the Commission has the jurisdiction to adjudicate on the matter?

33.The Commission has carefully examined the Agreement dated 30-12-1994. Clause 25 of the Agreement states that:

“In case any dispute and/or difference between company and the KSEB arises, the matter would be referred to the Government of Kerala and their decision shall be final and binding on both the parties”.

34.Taking note of this Clause, the Commission has examined the maintainability of the petition. The petitioner is not only a consumer of the Respondent but also has a captive generating plant within the meaning of Section 2(28) of the Electricity Act 2003. Hon. APTEL in various decisions has held that a captive power plant is also a Generating Company as per Section 2(28) of the Act and the dispute between the Captive Generating Plant and the Licensee falls within the ambit of Section 86 (1)(f) of the Act and the State Electricity Regulatory Commission has the necessary jurisdiction to entertain and adjudicate upon disputes arising between the Captive Power Plant and the distribution licensee (Appeal No. 120 of 2009, Chattisgarh State Power Distribution Company Ltd. Vs. Godawari Power & Ispat Limited);

Section 86 (1)(f) of the Act states that :

“Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -

*.....
.....*

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;”

35.Accordingly, the State Commission has been entrusted with the function of adjudication of the disputes between the licensees and the generating companies. The Commission also noted that the Agreement has been entered into during December 1994 i.e., before the Electricity Act, 2003. However, the transitional

provisions under Section 172(b) of the Electricity Act, 2003 which is given below also affirm the jurisdiction of the Commission in this regard:

(b) all licences, authorisations approvals, clearances and permissions granted under the provisions of the repealed laws may, for a period not exceeding one year from the appointed date or such earlier period, as may be notified by the Appropriate Government, continue to operate as if the repealed laws were in force with respect to such licences, authorisations, approvals, clearances and permissions, as the case may be, and thereafter such licences, authorisations, approvals, clearances and permissions shall be deemed to be licences, authorisations, approvals, clearances and permission under this Act and all provisions of this Act shall apply accordingly to such licences, authorizations, approvals, clearances and permissions;

36. Hence, with the coming into effect of the Electricity Act, 2003 and as per Section 86 (1)(f) and Section 172(b) of the Act, the jurisdiction of the Government to adjudicate on disputes between the licensee and the petitioner is inconsistent with the provisions of the Act and therefore is not valid. As per the Section 86(1)(f), the task of the adjudication of the dispute between the generating companies and the licensees is entrusted with the Commission.

37. The Commission also noted that a similar matter involving the same parties on the same issue (sale of banked energy) had earlier been adjudicated by the Commission (in OP No.02/2017). Even though the Commission's decision was challenged before the Hon. APTEL, the Commission decision was upheld by the Hon. APTEL in the Judgment dated 27-09-2019 in Appeal No.293 of 2017.

38. Hence, the Commission is of the considered view that it has the necessary jurisdiction to adjudicate on this petition and accordingly the matter has been taken up by the Commission.

Issue No. 2 Whether the generation from Kuthungal SHP is to be based on the petitioner's power consumption at their Palakkad units and whether such consumption is the prime factor taken by SLDC while deciding the scheduling and generation from Kuthungal SHEP?

39. KSEB Ltd. has contended that the petitioner did not inform them about the lack of consumption at the factory site at Palakkad, so as to restrict the generation from Kuthungal SHEP. According to KSEB Ltd, there was no advance notice from the petitioner on the lack of consumption at their factory, so as to enable KSEB Ltd. to restrict the generation from the plant.

40. Admittedly, if there is generation from the station and no factory consumption, banking of energy is bound to take place. In this context, Chief Engineer (System Operations), KSEB Ltd vide letter dated 10-02-2021 has categorically stated that:

“From the above, it is clear that there is no correlation between generation at Kuthungal SHEP and consumption at INDSIL factory premises in daily operations as far as SLDC is concerned. Information on the consumption at INDSIL factory premises is never informed to SLDC. SLDC is allowing generation from Kuthungal when the plant is ready and availability of water in the weir is confirmed by Kuthungal SHEP operator, subject to real-time technical constraints in absorbing the power by the grid”.

41. The above statement by Chief Engineer (System Operation) of KSEB Ltd makes it amply clear that generation by the petitioner’s SHEP at Kuthungal and consumption of energy by the petitioner’s factory are independent of each other. The Commission also notes the Chief Engineer (Systems Operation) submission that SLDC has been allowing generation from the Kuthungal SHEP based on water availability and plant readiness. Hence, there is no correlation between the generation at Kuthungal SHEP and the consumption at the petitioner’s factory. Further, this lack of correlation is evident from Clause 12 of the Agreement which is given below:

*12. If the KSEB grid is not in a position to absorb the energy generated from the project for any reason such as high level of storage in reservoirs, breakdown of transmission lines and/or other reasons beyond the control of KSEB, the generation from the project will have to be restricted to the extent of generation for captive consumption **as directed by KSEB. The schedule of power generation from the project shall be as directed by the KSEB. (emphasis added)***

42. The above Agreement Clause very clearly states the restriction of generation is as per the directions of KSEB Ltd and the circumstances under which KSEB Ltd can restrict the generation from the petitioner’s SHEP and its extent. The Commission further notes that as required under Clause 12 of the Agreement quoted above, KSEB Ltd. did not issue any instruction to restrict the generation from the Kuthungal SHEP even to the extent of captive consumption required by the petitioner’s factories.

43. The Commission took note of the petitioner’s additional clarification submitted vide letter dated 09.03. 2021 which mentioned that:

“One major factor that cannot be overlooked is the fact that KSEBL uses the generated from the Kuthungal powerhouse for the needs of not only the Neriamangalam powerhouse, but also for the needs of the local area. For this purpose, KSEB specifically has established a new substation in the year 2015, with a separate supplemental agreement with the company for the establishment and operation of such a substation. The generated power from the Kuthungal powerhouse is fed into this substation as well for distribution of power in Rajakumari/ Senapati/ Rajakkad/ Udumpanchola and surrounding areas”.

44. In addition, the events which unfolded subsequent to the setting up of the Kuthungal SHEP, such as the establishment of a new substation in the premises of Kuthungal SHEP by KSEB Ltd to feed the nearby areas such as Senapathy, Rajakkad etc, supports the contention that consumption in the petitioner’s factory is not correlated with the generation at the Kuthungal Plant. Instead, the Commission noted that the generation from the Kuthungal SHEP was being utilised at the Neriamangalam Power House and in Rajakumari, Senapati, Rajakkad, Udumpanchola and surrounding areas.

45. From the above facts and the documents furnished by KSEB Ltd and the petitioner, it is established that ***power consumption at the petitioner’s Palakkad units and the scheduling of power by SLDC and its generation from the petitioner’s Kuthungal SHEP are not co-related, but independent of each other.***

Issue No.3 : Whether the petitioner is required to issue advance notice to KSEB Ltd. for restriction of generation from Kuthungal SHEP by KSEB Ltd?

46. In this issue, the Commission has carefully examined Clause 12 of the Agreement quoted above. The Commission notes that this Clause provides for restriction in the generation from the Plant. However, this restriction of generation has to be as per the direction of KSEB Ltd. and that too for the reasons stated in the Agreement, such as the KSEB Ltd grid not being in a position to absorb the energy generated from the project or due to high level of storage in reservoirs, breakdown of transmission lines and/or other reasons beyond the control of KSEB Ltd.

47. Further, this restriction is not absolute and can be resorted to, only to the extent of captive consumption. In other words, the restriction in generation provided for as per Clause 12 of the Agreement places limitations in generation from the Kuthungal SHEP, only if the KSEB grid is not in a position to absorb the energy for reasons such as high level of reservoir, breakdown of transmission line or other reasons beyond control of KSEB Ltd, that too as directed by KSEB Ltd.

48. Further, Clause 12 of Agreement requires KSEB Ltd. to direct the schedule of power generation from the petitioner's SHEP. In their submission, KSEB Ltd. has contended that the KSEB grid was not in a position to absorb this energy during the period on account of large storage in the reservoirs. If this was indeed the case, then KSEB Ltd. was required to issue instructions to the petitioner to limit their generation to the extent of their captive consumption.
49. However, the Commission notes that no such instruction or direction was ever given either by KSEB Ltd. or State Load Dispatch Centre (SLDC) to the petitioner's SHEP to restrict generation. Further, no documents have been placed before the Commission to establish the reasons such as high level of reservoir, breakdown of transmission lines or other reasons beyond the control of KSEB Ltd, so as to restrict the generation from the plant as envisaged in the Agreement. The Commission also notes that as contended by the petitioner, KSEB Ltd has accepted the energy generated from the plant and distributed it in the surrounding areas during this period. Hence, KSEB Ltd's contention that the grid was not in a position to absorb this energy during the period is also not borne by facts.
50. From the records placed before the Commission, it is seen that the petitioner in their letter dated 16.05.2020 addressed to Special Officer (Revenue) KSEB Ltd., Trivandrum mentioned that in the month of March 2020, due to the threat of Covid 19 and under instructions from the Government, they were forced to shut down their factory from 24th March onwards. They also mentioned that they continued to generate power from the Kuthungal SHEP, which they could not consume due to the lockdown. Since this generated power had already been fed into the KSEB Ltd's grid, they requested that this infused power to the extent of 57,01,301 units be adjusted against the petitioner's factory consumption of 31,31,616 units and be exempted from electricity duty, surcharge and these units adjusted against their own consumption. They also mentioned that the generation was continuing and the surplus banked units after the adjustments, as requested, will be added to the generated power in the month of May 2020.
51. Further, in June 2020, with the predictions of a good monsoon they were expecting surplus generation, which they would not be in a position to consume under the present circumstances. The petitioner therefore requested KSEB Ltd. that the banked power as of 30th June 2020 be allowed to be adjusted against the future consumption of their factory. Alternatively, the banked power at the end of the year that is June 30 may be purchased as per Clause 11 of the Agreement.
52. From this letter, it is clear that the petitioner had already brought to the notice of KSEB Ltd. the issue that the generation from the Kuthungal SHEP was continuing, and the little consumption at their factory was leading to a surplus power situation. They had also proposed that in case KSEB Ltd. did not agree for adjustment of this excess power in their future consumption, i.e. consumption subsequent to June 2020, then KSEB Ltd. can purchase it as per Clause 11 of the Agreement.

From this, it is clear that as early as in May 2020, the petitioner had already made an offer to sell this excess energy to KSEB Ltd.

53. However, KSEB Ltd did not react to the petitioner's letter for three months and thereafter on 17.08.2020, Special Officer (Revenue) intimated the petitioner that since the accounting and billing of the energy fed into the grid by the Company and/or supplied by KSEB to the Company for operating the factories are settled on monthly basis, the petitioner is not eligible for adjustment of the billed units of February and March 2020 with the generation of the subsequent months. However, KSEB Ltd remained silent regarding the petitioner's proposal to purchase these excess units.

54. It is also pertinent to note that the petitioner's SHEP is located in the down stream of the Anayirnakal reservoir and has a capacity of 21 MW. KSEB Ltd is having their Panniyar (32.4MW) generating station downstream, which uses the water flowing from the petitioner's plant to the Ponmudi reservoir. The Chief Engineer (System Operations) vide letter dated 10-02-2021 stated that during the monsoon season, when the Anayirinkal dam is closed, if the water is available in the weir, generation is permitted. During summer, once the Ponmudi reservoir level falls, Anayirankal reservoir is opened for controlled release of water to Ponmudi. It is therefore not reasonable for KSEB Ltd. to release water in the first instance and then blame the petitioner for generating electricity from Kuthungal plant which is located in the downstream. Further, Kuthungal plant is a Small Hydro Plant having the status of a "must run" plant.

55. After careful examination of Clause 12 of the Agreement and the submissions above, the Commission is of the firm view that restriction if any, has to be imposed by KSEB Ltd and for the reasons mentioned in the Agreement. No obligation as per the Agreement, is cast upon the petitioner to inform KSEB Ltd to enable restrictions on the generation from the plant. The Chief Engineer (Systems Operations) in his letter has also confirmed that the generation from the plant is dependent upon availability of water in the weir etc. Since generation from the Kuthungal SHEP is independent of consumption at the petitioner's factory at Palakkad as informed by Chief Engineer (System Operations), and the generation from the plant is scheduled by KSEB Ltd and is dependent on the release of upstream water by KSEB Ltd, the argument that the petitioner has not informed KSEB Ltd about the lack of consumption at the factory so as to restrict the generation, cannot be sustained. It is also a fact that KSEB Ltd. accepted the energy generated from the Kuthungal SHEP and distributed it in the surrounding areas during this period.

Issue No. 4 : Whether the petitioner has the obligation to sell the excess banked energy and whether KSEB Ltd. has the obligation to purchase the excess banked energy at the end of the accounting year?

56. Next pertinent issue is whether the petitioner is obliged to sell the excess banked energy to KSEB Ltd and whether KSEB Ltd has the obligation to purchase the excess banked energy from the Kuthungal SHEP. According to KSEB Ltd., there is no obligation for KSEB Ltd, to purchase the excess banked energy.

57. In this context, Clause 10 and 11 of the Agreement is pertinent and is reproduced below:

“10. The energy from Kuthungal Phase I & Phase II project fed into the KSEB grid will be metered at a location as detailed above (using meter calibrated by KSEB) and this quantum of energy less 12% (twelve percent) towards wheeling charges and T&D losses will be delivered free of cost to the company and their associates M/s. Sun Metals & Alloys Pvt. Ltd. Kanjikode, Palaghat at the EHT terminals at the point of supply in their installations if any, or it will be banked by the KSEB, if the company so desires. The KSEB will collect 1% (one percent) of the energy so banked as its commission. This will be in addition to wheeling and loss towards transmission and distribution charges.

11. If the energy in excess of the requirement of the Company is generated from the project during one accounting year is not utilized by the Company and their associates during that accounting year, the Company may sell the excess banked energy to KSEB. The sale shall be deemed to be effected at the EHT terminals of the KSEB where the power generated by the Company is fed into the KSEB grid. The energy fed into the KSEB grid less banking commission, royalty and/or other levies shall be deemed to be the energy sold to the KSEB. The wheeling charge and loss towards transmission and distribution shall not be taken into account to determine the energy sold. The rate at which the KSEB shall pay to the company for such sale will be at the rate at which the KSEB sell the energy to the EHT consumers in the same voltage clause at which the KSEB receives the energy from the company. The KSEB shall not pay to the Company for the maximum demand component of the energy sold to KSEB. Under no circumstances shall the Company be entitled to sell or transfer any excess energy or any energy produced from the project to any party other than the KSEB and their associates. The accounting and billing of the energy fed into the grid by the Company and/or supplied by KSEB to the company for operating its factories, if any, in Kerala will be settled on monthly basis. The year of accounting will be reckoned from 1st of July to 30th June. In the case of supply or receipt made in LT lines of the Company the charges for losses will be extra as stipulated by the KSEB. If the energy banked is not utilized by the Company and their associates during one accounting year, it shall not be carried over to the

next accounting year and shall be treated as lapsed. The Company has however the option to sell the excess energy to KSEB on the terms specified in the agreement. Otherwise, the company has no claim over the energy banked”.

58. From the above, it is clear that Clause 10 casts the obligation on KSEB Ltd. to deliver the energy free of cost to the petitioner’s factory and their associates at Palakkad, after deducting the 12% wheeling charges. In case the company so desires, KSEB Ltd. will bank the energy after collecting the 1% banking commission.

59. Clause 11 provides the conditions for banking and sale of energy to KSEB Ltd. As per Clause 11 of the Agreement, if the energy in excess of the requirement of the petitioner is generated from the project during one accounting year and is not utilized by the petitioner and their associates during that accounting year, the Company may sell the excess banked energy to KSEB Ltd. The sale shall be deemed to be effected at the EHT terminals of the KSEB Ltd., where the power generated by the Company is fed into the KSEB Ltd grid i.e., at 110kV level. The energy fed into the KSEB Ltd. grid less banking commission, royalty and/or other levies shall be deemed to be the energy sold to the KSEB Ltd. Accordingly, the energy fed into the grid less consumption, banking commission, royalty and/or other levies shall be deemed to be the energy sold to the respondent KSEB Ltd, without taking into account the wheeling charge and loss towards transmission and distribution.

60. Clause 11 further specifies that:

‘Under no circumstances shall the Company be entitled to sell or transfer any excess energy or any energy produced from the project to any party other than the KSEB and their associates’.

From this, it is clear that excess energy, if any, shall not be sold or transferred to any party other than KSEB Ltd. or its associates. Further, Clause 11 specifies that excess energy shall also not be allowed to be carried forward to the next year. Thus,

“.....if the energy generated by Kuthungal SHP is in excess of the requirement of the Company during one accounting year is not utilized by the Company and their associates during that accounting year, the Company may sell the excess banked energy to KSEB”.

61. Hence, in case of excess banked energy, the Company has only the option of selling it to KSEB Ltd and not to any other party. In case, this option is not exercised, then the said energy is to be treated as lapsed at the end of the

accounting year, as per the Agreement. Hence, as per the terms of the Agreement, KSEB Ltd. has the obligation to purchase the excess banked energy, in case the Company exercise such an option.

62. The next question that arises is whether the petitioner had offered this excess banked energy to KSEB Ltd on sale basis. As per the records furnished to the Commission, the petitioner in their letter dated 16.05.2020 proposed that :

“We request that the banked power as of June 30th may please be allowed to be adjusted against the further future consumption. Alternatively the banked power at the end of the water year (ie., June 30) may be purchased by KSEB as per clause 11 of our agreement dated 30-12-1994”

63. The above statement makes it clear that the petitioner had also given the option to KSEB Ltd. to purchase the banked energy at the end of the water year, i.e. 30th June 2020, as per Clause 11 of the Agreement. Hence, it is clear that the petitioner had exercised the option of selling the excess banked energy to KSEB Ltd. as pointed out in the preceding paragraphs.

64. However, KSEB Ltd. did not offer any response to the petitioner’s suggestions made in this letter till 17.08.2020. Even in the letter dated 17-08-2020, KSEB Ltd addressed only the option of adjustment of the billed units of February and March 2020, with the generation of subsequent months. It remained silent regarding the petitioner’s proposal for purchase of this excess banked energy by KSEB Ltd as per Clause 11 of the Agreement. Since no reply was forthcoming from KSEB Ltd., and on completion of the water year, the petitioner issued an invoice dated 13.07.2020 for an amount of Rs.6.39,63,157/- towards the supply of excess banked energy till the end of the settlement period i.e., 30th June 2020 to KSEB Ltd.

65. The Commission further noted that since the petitioner had exercised the option of selling the excess energy to KSEB Ltd, as per the terms of the Agreement, the same has to be treated as a deemed sale.

66. KSEB Ltd in their counter affidavit dated 16-02-2021 claimed that there is no approval of the Commission, for the purchase of power from this plant for the year 2020-21. It is however relevant to note that in the ARR&ERC Petition, KSEB Ltd. did not make any estimate of any such ad-hoc purchases as per the Agreements in vogue. The Commission also notes that the validity of the Agreement has not been questioned by either of the contending parties. Since KSEB Ltd. too has not questioned the validity of the Agreement, it cannot ignore the fact that the energy fed into the KSEB Ltd. grid by the petitioner has been distributed and probably billed by KSEB Ltd.

67. An important point to be considered is whether a Government owned PSU can avail the excess banked energy, distribute it to their consumers and bill it while denying payment to the petitioners, as per the terms of Agreement. In this context, it is pertinent to note that all instrumentalities of the Government are expected to be 'models' in their transactions. ***Hence, the Commission is of the firm view that KSEB Ltd. having availed the banked energy from the petitioner and sold it to its consumers cannot at the same time deny payment to the petitioner.***

Issue No.5 : Whether the energy purchased through open access by the petitioner has resulted/contributed to the excess banked energy?

68. KSEB Ltd has also objected to the payment for the banked energy stating that the petitioner has resorted to the purchase of energy through open access. According to KSEB Ltd, the petitioner had availed 6,75,973 units of energy through open access from July 2019 to May 2020. Hence, the banked surplus energy is in part a result of the open access purchases and self-generation.

69. The Commission has noted this arguments of KSEB Ltd. The issue of purchase of open access energy resulting in excess banked energy has been the subject matter of contention in OP No. 2/2017 in relation to the non-payment for the banked energy on the invoice dated 29-07-2016 for the year 2015-16, and the subsequent appeal before the Hon. APTEL in Appeal No.293 of 2017.

70. The Commission, after considering the possibility of inclusion of energy purchased through open access in the banking transactions and other related issues had directed KSEB Ltd. to submit proposals for modification in the Agreement. Hon. APTEL too had noted the concern in their judgment dated 29-07-2019 in Appeal No.293 of 2017.

“..... The factual situation reveals that the Appellant started obtaining power through open access without consuming the energy from the captive power plant even though there was energy banked. It started purchasing power through open access facility without using the power generated from captive power plant thereby it did not consume the required power generated from captive power plant for its factories. On the other hand, it accumulated the said power as banked energy by resorting to method of open access facility provided in the Electricity Act 2003.

28. Since the Respondent – KSEB Ltd had to purchase unutilised excess banked energy at EHT rate at which KSEB Ltd sells to

similar consumers, this would affect the interest of larger sections of consumers of the State by way of tariff, the Respondent – Commission opined that KSEB Ltd shall approach the Commission with a proposal for modifying the Agreement dated 30.12.1994.

71. In this context, the Commission has further noted that in spite of the above direction issued by the Commission vide Order number OP No. 2/2017 dated 02-06-2017, KSEB Ltd did not file any compliance petition for over 3 years. The Commission also noted the fact that it is only after the petitioner had presented their invoice dated 13.07.2020, for Rs.6,39,63,157 that KSEB finally woke up and filed the petition numbered OP.33/2020 on 02-11-2020 seeking approval for modifying the terms and conditions of the Agreement entered into between KSEB and INDSIL in line with the provisions of KSERC (Renewable Energy and Net metering) Regulations, 2020.

72. With this background, the Commission had called for the details of generation, open access purchases, consumption and energy banked for the period in question. The petitioner vide Argument Note dated 09-02-2021 furnished as Annexure-5, submitted the details of generation, wheeling, open access purchase, consumption and banked energy for the period July 2019 to June 2020 as shown in the table below:

**Details of Generation and Banked energy details for water year 2019-20
(Annexure-5)**

Year & Month	Net Generation after wheeling kWh	Open access purchase kWh	Consumption kWh	Banked Power Detailed Account			
				OB kWh	Addition kWh	Withdrawal kWh	CB kWh
Jul-19	4,88,400	566113	6044610	0	0	0	0
Aug-19	65,71,840	109860	5542110	0	1128194	0	1128194
Sep-19	59,92,800	0	3546810	1128194	2421530	0	3549724
Oct-19	56,34,640	0	4860750	3549724	765884	0	4315905
Nov-19	58,23,280	0	4868940	4315905	934896	0	5250801
Dec-19	38,65,840	0	5029620	5250801	156103	1321460	4085444
Jan-20	10,63,920	0	5148030	4085444	0	3284110	801334
Feb-20	4,28,560	0	3246240	801334	0	801334	0
Mar-20	17,87,280	0	2102550	0	0	0	0
Apr-20	57,76,320	0	17430	0	5701301	0	5701301
May-20	43,95,280	0	16320	5701301	4236170	0	9937471
Jun-20	3,15,920	0	16290	9937471	296634	0	10234104
Total	4,21,44,080	675973	40439700		15640712	5406904	

73. The Commission notes that the Table above clearly shows that the petitioner had resorted to open access purchase of power totalling 6.76 lakh units, during the months of July and August, 2019. No open access purchase is seen to have been made for the rest of the accounting period. The Commission further noted that during the month of March 2020, while there was no open access purchase, generation from the plant was the tune of 17,87,280 units only, whereas the consumption by the petitioners company was 21,02,550 units. Hence, at the end of March 2020, there was no banked energy to the credit of the petitioner. It is also pertinent to note that KSEB Ltd. has neither raised any dispute over the quantity of energy as presented in Annexure 5 of the petition nor raised any question regarding the quantity of energy banked and invoiced in their letter dated 13-07-2020.

74. As can be seen from the Table above, there is no open access purchase after August 2019 and there was 'Nil' banked energy as on March 2020. Hence, it can be safely concluded that there was no contribution of open access energy in the energy banked and billed as on 30-06-2020. This is due to the fact that the entire banked energy from the period July 2019 to February 2020 was adjusted against the consumption from the plant and therefore there was "Nil" closing balance of banked energy in the months of February and March 2020. Hence, the entire energy billed by the petitioner was based on the generation from April to June 2020, which was banked. ***It can therefore be safely concluded that KSEB Ltd.'s argument regarding the contribution of Open Access energy in the excess banked energy is incorrect and there was no open access energy involved in the banked energy account at the end of the accounting period. Instead the entire banked energy was on account of generation during April 2020 to June 2020.***

Issue No.6: Whether the banked energy at the end of the accounting year is required to be sold to KSEB Ltd?

75. Another relevant issue which the Commission examined is whether the banked energy at the end of the accounting period is required to be sold to KSEB Ltd. This issue is pertinent, considering the argument advanced by KSEB Ltd. that at the time of banking, the reservoirs were full and there was lack of demand in the system. The petitioner has also admitted to the fact that the banked energy is on account of the lack of consumption at their factories due to the lockdown. Hence it can be safely concluded that this excess energy is directly the result of generation during the months of April to June, 2020 and lack of consumption at the petitioner's factories.

76. In this context, the Commission examined the issue as to whether the energy so banked on account of generation during the months of April to June and close down of factories during the same period is eligible for "deemed sale". The

Commission notes that though the petitioner's factory was closed, there was indeed some consumption during this period ranging from 16,290 units to 17,430 units and the banked energy was arrived at, after deducting the minimum level of consumption at the petitioner's factories. As evidenced by the preceding discussions, the Commission noted that there is no constraint as per the provisions of the Agreement, on the generation from the plant, even if the petitioner's factories are not working and there is no consumption at the factories.

Issue No. 7: Whether KSEB Ltd's purchase of banked energy would tantamount to violation of Merit Order Schedule ?

77. KSEB Ltd. in their counter affidavit dated 16-02-2021, stated that the purchase of excess banked energy would result in violation of the Merit Order principle and such a purchase is not approved in the Commission's MYT Order dated 08-07-2019.

78. However, the Commission is not in agreement with such arguments. According to KSEB Ltd. itself, the Agreement with the petitioner is valid. Hence, any such purchase as per the terms of a valid Agreement is also to be treated as valid. The petitioner's generating plant is a Small Hydro Station, having the status of 'Must Run' stations, which are excluded from the Merit Order purchases. Further, such purchases are not uncommon and in fact the issue dealt with, in the Commission's Order dated 02-06-2017 itself relates to such purchases.

79. Hence, the argument that the purchase of banked energy will tantamount to the violation of the Merit Order purchase cannot be accepted.

Issue No. 8: Which rate should be applicable for the purchase of banked energy by KSEB Ltd ?

80. From the above discussion, the Commission has concluded that during the period April to June 2020, the petitioner has banked their excess energy with KSEB Ltd. Having examined the relevant clauses in the Agreement signed between KSEB and the petitioner dated 30-12-1994, the Commission has also arrived at the conclusion that there is an obligation on the part of KSEB Ltd to purchase this excess banked energy. The Commission has also noted that the petitioner vide their letter dated 16-05-2020 had among other options offered to sell the excess banked energy to KSEB Ltd, in case KSEB Ltd. was not agreeable to adjust the excess banked energy against their future consumption or carry forward these balances to the next accounting year.

81. The Commission has also noted that since no reply was forthcoming from KSEB Ltd, to the petitioner's letter dated 16-05-2020, the petitioner on conclusion of the water year, on 13-07-2020 issued an invoice for Rs. 639.63 lakh for the deemed sale of the excess energy banked with KSEB Ltd. The Commission also noted the

fact that the generation at the Kuthungal SHEP is not correlated to the consumption at the petitioner's factories at Palakkad. Further, in spite of the petitioner's letter dated 16-05-2020 and their invoice dated 13-07-2020, KSEB did not respond to these notices promptly. In fact, had KSEB Ltd. desired, they could have regulated the generation from Kuthungal SHEP as early as in May 2020 as per Clause 12 of the Agreement.

82. From the above discussion it emerges that there has indeed been excess energy generated by the petitioner which was banked with KSEB Ltd. It is also a fact that as per the terms of the Agreement, KSEB has the obligation to purchase this banked energy, especially when the petitioner has exercised the option of selling the excess banked energy to KSEB Ltd. Further, KSEB Ltd. had indeed accepted this excess generation and distributed it among its consumers in the nearby areas of the petitioner's plant. These being the facts, it is obligatory for KSEB Ltd. to pay for the energy so purchased. Hence, the next logical question that arises is the rate at which KSEB Ltd. is required to pay for the banked energy to the petitioner. In this context, Clause 11 of the Agreement assumes significance:

83. Clause 11 states that :

*“If the energy in excess of the requirement of the Company is generated from the project during one accounting year is not utilized by the Company and their associates during that accounting year, the Company may sell the excess banked energy to KSEB. The sale shall be deemed to be effected at the EHT terminals of the KSEB where the power generated by the Company is fed into the KSEB grid. The energy fed into the KSEB grid less banking commission, royalty and/or other levies shall be deemed to be the energy sold to the KSEB. The wheeling charge and loss towards transmission and distribution shall not be taken into account to determine the energy sold. **The rate at which the KSEB shall pay to the company for such sale will be at the rate at which the KSEB sell the energy to the EHT consumers in the same voltage clause at which the KSEB receives the energy from the company. The KSEB shall not pay to the Company for the maximum demand component of the energy sold to KSEB**”.*
(emphasis added)

84. The above Clause clearly mentions the rate which is to be paid for by KSEB Ltd. for the energy banked by the petitioner. In this context, the petitioner has relied upon the Commission's Order dated 02-06-2017 in OP No.02/2017 in the matter. The petitioner has pointed out that as per the said Order, the matter regarding settlement and payment for the banked energy has already being determined by the Commission.

85. On the other hand, KSEB Ltd has cited the Commission's directions in the same Order that the clauses in the said Agreement have to be modified to bring it in line with Electricity Act, 2003. Besides, KSEB Ltd has also pointed out that Regulation 1(2), of KSERC (Renewable energy and net metering) Regulations, 2020 shall apply to all existing and new grid interactive renewable energy systems, consumers, prosumers, captive consumers, generating companies, distribution licensees, and obligated entities, in the matter of determination of tariff of Renewable energy, Renewable Purchase Obligations, net metering, banking, generation based incentives and related matters.

86. The Commission has taken note of the submissions by both the parties and also the directions issued in the matter in the OP 2/2017, which was also in relation to the non-payment by KSEB Ltd. for the banked energy, raised vide the petitioner's invoice dated 29-07-2016 for the year 2015-16. In the said Order, the Commission has ordered as follows:

“Order of the Commission

32. After carefully examining the petition and the additional affidavit filed by the petitioner, the counter affidavit filed by the respondent KSEB Ltd, the arguments raised by the petitioner and respondent during the hearing held on 03.04.2017, the additional clarification provided by the petitioner and the respondent, the Commission issues the following orders.

(1) The net banked energy from the Kuthungal plant of the petitioner INDSIL as on 31.03.2016 of the accounting year 2015-16, shall be sold to KSEB Ltd @Rs 3.14/unit, the average pooled cost of power purchase of KSEB Ltd.

(2) During the period from 01.04.2016 to 30.06.2016 of the accounting year 2015-16, total power consumption of the factories of the petitioner and their associates shall be settled against the electricity generated from Kuthungal plant and the power supplied from KSEB Ltd, as per the clause-13 of the Agreement dated 30.12.1994.

87. The Commission notes that in the above Order, two separate rates have been arrived at, that is Rs.3.14 per unit up to 31-03-2016 and thereafter for the period 01-04-2016 to 30-06-2016 of the accounting year 2015-16, the settlement shall be as per Clause 11 of the Agreement dated 30-12-1994. This is due to the fact that for the period from 01-04-2016 to 30-06-2016 i.e., period subsequent to the petitioner becoming ineligible for benefits under the REC regime, the Commission directed KSEB Ltd. to settle the payment for the petitioner's banked energy as per the terms of the Agreement dated 30-12-1994.

88. The Commission further observed in the said Order that, the Agreement dated 30-12-1994, between the petitioner INDSIL and the respondent KSEB was signed much before the enactment of the Electricity Act, 2003 and some of the clauses of the Agreement dated 30-12-1994 is to be modified in line with the provisions of the Electricity Act, 2003. The Commission had also directed KSEB Ltd. to approach the Commission with a proposal for modifying the Agreement dated 30-12-1994. Though the petitioner company preferred an appeal before the Hon. APTEL (Appeal No.293 of 2017) against the Commission's Order dated 02-06-2017, this appeal was dismissed by the Hon. APTEL vide judgment dated 29-07-2019.
89. As shown above, in the Order dated 02-06-2017, the Commission has decided the rate to be charged for the petitioner's excess banked energy. As per the said Order, the rate for the excess banked energy from 01-04-2016 onwards (i.e., the period from which the plant is excluded from REC scheme) has to be at EHT rates as per Clause 11 of the Agreement. KSEB Ltd., in their reply dated 16-02-2021 has rightly pointed out that the Agreement is still valid.
90. Though the Commission had directed KSEB Ltd. to approach the Commission with proposals for modifying the Terms of the Agreement, KSEB Ltd. filed this petition only on 02-11-2020 (OP.No.33/2020) after a delay of over 3 years after the Commission's direction. This petition has since been disposed off by the Commission.
91. Since the matter under adjudication in the current petition pertains to a period prior to the filing of petition by KSEB Ltd. for modification of the Terms of the Agreement, a decision on that petition is not expected to have any bearing on the outcome of the present petition. Further, the validity of the Agreement having been established, the Commission is left with no other option than to follow the relevant portion of Clause 11 of the Agreement for deciding the rates which reads as follows:
- “ the rate at which the KSEB shall pay to the company for such sale will be at the rate at which the KSEB sell the energy to the EHT consumers in the same voltage clause at which the KSEB receives the energy from the company. The KSEB shall not pay to the company for the maximum demand component of the energy sold to KSEB”*
92. Hence, as already decided in the Commission's Order dated 02-06-2017, the rate of energy after 01-04-2016, shall be as per Clause 11 provisions of the Agreement i.e., at the EHT (110kV) rate. The Commission further notes that the KSERC (Renewable Energy and Net Metering) Regulations, 2020 have been notified and the said Regulation is effective from the date of publication in the Official Gazette i.e. 05-06-2020.

Regulation 29(4) of the said Regulation reads as follows:

“29. Accounting and settlement of Renewable Energy consumed by prosumer/ captive consumer under Regulation 26 and 27 above.-

.....
.....
(4) The licensee shall pay for the net electricity banked by the prosumer/ captive consumer at the end of the settlement period, at the Average Power Purchase Cost, (APPC) approved by the Commission;

As has been held by the Hon. Supreme Court in PTC Vs CERC (2010) 4 SCC 603, the provisions of the Regulations will override the Terms of the Agreement. The relevant portion of the judgment is as follows:

“Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j)”

93.As mentioned above, since KSERC (Renewable Energy and Net metering) Regulations, 2020 is effective from 5th June, 2020, the Commission is of the view that for the energy banked from this date, the rate applicable shall be the APPC as per the provisions of the Regulations. For the energy banked prior to the said period, i.e. between 01-04-2020 to 04-06-2020, the rate as per Clause 11 of the Agreement shall be applicable i.e. at the rate at which KSEB Ltd. sells energy to the EHT consumers in the same voltage (110 kV) at which KSEB Ltd receives the energy from the company.

Orders of the Commission

94. Based on the above discussion, the Commission hereby orders that:

- (1) KSEB Ltd. is obliged to purchase the excess banked energy from Kuthungal SHEP of the petitioner as on 30-06-2020 as per the Agreement dated 30-12-1994.
- (2) Considering the Order of the Commission dated 02-06-2017, the rate applicable for the sale of energy banked by the petitioner till 04-06-2020 shall be as per Clause 11 of the Agreement, that is at the EHT rate at 110kV level of Rs.5.40/kWh.
- (3) For the energy banked by the petitioner between 05-06-2020 and 30-06-2020, the rate applicable shall be as per the provisions of the KSERC (Renewable Energy and Net Metering) Regulations, 2020 that is the average Power purchase cost applicable for the relevant financial year i.e., 2020-21.
- (4) The Commission further directs KSEB Ltd. to file the details of power purchase cost for the financial year 2020-21, by 30-07-2021, so that the Commission is able to notify the APPC for the financial year 2020-21

95. Petition disposed of. Ordered accordingly.

Sd/-
Adv. A.J. Wilson
Member (Law)

Sd/-
Preman Dinaraj
Chairman

Approved for issue

Sd/-
Secretary