

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

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

OP No 31/2020

In the matter of : Petition seeking approval for procurement of 300 MW Solar Power from Inter State Transmission System Grid Connected Solar Photo Voltaic projects through Solar Energy Corporation Limited (SECI) on long term basis.

Petitioner : Kerala State Electricity Board Ltd (KSEB Ltd)
KSEB Ltd represented by : Sri. K.G.P. Namboothiri, EE, KSEB
Smt Latha S.V, AEE.

Respondent : Solar Energy Corporation of India Ltd (SECI)
Respondent represented by : Mr. M G Ramachandran, Sr. Advocate
Smt. Tanya Sareen, Advocate
Sri. Mudit Jain, SECI

First Hearing on : 18.11.2020
Second hearing on : 11.12.2020
Third hearing on : 19.03.2021
Fourth hearing on : 15.04.2021
Fifth hearing on : 25.05.2021
Sixth hearing on : 14.07.2021
Seventh hearing on : 16.08.2021
Eighth hearing on : 14.09.2021
Ninth hearing on : 23.09.2021
Tenth Hearing on : 08.10.2021

Order dated 15.11.2021

1. Kerala State Electricity Board Ltd (hereinafter referred as KSEB Ltd, or the Petitioner) on 27.10.2020 filed a petition before the Commission with the following prayers:

“to grant an interim order approving the procurement of 200MW solar power from ISTS grid connected solar photo voltaic projects selected by SECI as per their offer letter dated 7-8-2020”.

2. The Commission admitted the petition as OP 31/2020. First hearing of the

petition was held on 18.11.2020 at 11 AM through video conference.

M/s Solar Energy Corporation of India (SECI) during the deliberations of the subject petition submitted that, SECI offered 200 MW from 1st Tranche of 6000 MW ISTS connected Solar PV projects linked with Manufacturing plant in India on 'Build Own Operate' Basis to KSEBL. M/s SECI, during the deliberations of the subject petition clarified that, out of the 6200MW in 1st Tranche, 3000 MW is from Solar Manufacturing Plants (Solar plants installed by Solar Cell Manufactures for sale) and 3200MW from other ISTS connected Solar Plants. The tariff quoted in the 1st Tranche ranges from Rs 2.36/unit to Rs 2.92/unit. Rs 2.66 per unit is the weighted average rate of the quoted tariff of all bidders in Tranche-I on capacity basis. SECI further submitted that, this rate may vary if all the capacity out of the 6200MW in the 1st Tranche is not materialised. However, the final rate will be in between Rs 2.36 per unit to Rs 2.92/unit, and in any case it will not exceed Rs 2.92/unit.

Based on the deliberations during the hearing, the Commission directed the petitioner and the respondent the following for immediate compliance.

- (1) M/s SECI shall submit the detailed affidavit as discussed in the hearing, including the details of the bids finalized in the 1st Tranche of ISTS IX tender, with copy to KSEB Ltd on or before 30.11.2020.
 - (2) Both KSEB Ltd and SECI may discuss and modify the draft PSA to give more clarity to the provisions of the PSA.
 - (3) KSEB Ltd shall submit the additional comments, by 07.12.2020.
3. In compliance of the direction of Commission vide daily Order dated 23-11-2020, the respondent M/s SECI vide affidavit dated 4-12-2020 submitted the details of the bids finalised in the 1st Tranche of manufacturing scheme, ISTS Tranche VIII and ISTS Tranche IX schemes.
4. Second hearing on the petition was held on 11.12.2020 through video conference. Based on the deliberations, the Commission issued an interim order on 18.12.2020, with the following directions to the petitioner KSEB Ltd and the respondent SECI for immediate compliance.
- (1) KSEBL may submit the comments on the affidavit dated 04.12.2020 filed by the respondent SECI, on or before 05.01.2021, with a copy to the respondent.
 - (2) KSEBL and SECI, may proceed with the procurement of 200 MW Solar power from the SECI's manufacturing linked tender, subject to the following;
 - (i) The maximum pooled tariff of the 200 MW solar power supplied to KSEB Ltd shall not exceed Rs 2.66/unit plus trading margin.
 - (ii) The Power Sale Agreement to be signed between the petitioner KSEB Ltd. and the respondent SECI shall be jointly initial and submitted to the Commission for its formal approval. The Power

Sale Agreement shall be effective only after its formal approval by this Commission.

5. The third hearing on the petition was conducted through video conference on 19.03.2021. Smt. Latha S.V appeared for the hearing on behalf of KSEB Ltd and Smt. Tanya Sareen, Advocate, appeared on behalf of the respondent SECI. Summary of the deliberations during the hearing is given below.

- (1) SECI had given a revised offer dated 10th February 2021, for supplying 500MW ISTS connected Solar Power under Tranche-IX at tariff of Rs 2.44/kWh including SECI's trading margin @Rs 0.07/unit. The capacity offered is scheduled to be commissioned by December 2022. The power offered under the scheme is eligible for waiver of ISTS transmission charges for 25 years from the date of commissioning of the project, as per the notifications of MoP dated 5th August 2020 and 15th January 2021.

SECI further submitted that, KSEB Ltd vide letter dated 15.03.2021 intimated their interest to procure 300MW power from the Tranche-IX scheme instead of 200 MW Solar Power earlier offered from manufacturing linked 1st Tranche @Rs 2.66/unit plus trading margin @7 paise/kWh).

- (2) KSEB Ltd also confirmed during the hearing that, they intimated the willingness for procuring 300MW ISTS connected Solar Power under Tranche-IX at tariff of Rs 2.44/kWh including SECI's trading margin @Rs 0.07/unit. KSEB Ltd further submitted that, once KSEB Ltd receives the modified PSA from SECI incorporating the modifications suggested based on the Order of the Commission in the earlier offers, it shall submit the revised petition before the Commission for the approval.

Based on the deliberations during the hearing, the Commission vide daily Order dated 23.03.2021 issued the following directions to the parties for immediate compliance:

- (1) KSEB Ltd shall, file an amendment to the original petition, for procuring 300MW ISTS grid connected Solar PV Power Projects, from Tranche IX of SECI @ Rs 2.44/unit (inclusive of trading margin of 7 paise/kWh) instead of 200 MW Solar power earlier offered from manufacturing linked 1st Tranche @Rs 2.66/unit plus trading margin @7 paise/kWh).
- (2) KSEB Ltd shall also submit draft initialled PSA jointly by KSEB Ltd and SECI, incorporating the suggestions ordered by the Commission earlier.

6. The fourth hearing on the petition was conducted on 15.04.2021 through video conference. Both the parties requested for further time for finalizing the PSA to be signed between the parties. Based on the deliberations during the hearing, the Commission vide the daily order dated 16.04.2021 issued the

following directions to the parties for immediate compliance.

- (i) SECI shall finalise the draft PSA incorporating the comments of KSEB Ltd and forward to KSEB Ltd, latest by 4th May 2021.
 - (ii) KSEB Ltd shall file the amendment to the original petition and also the draft initialled PSA for approval as per the Order of the Commission dated 23.03.2021.
7. The fifth hearing on the petition was conducted on 25.05.2021 through video conference. However, due to the second spread of Covid-19 pandemic, both the parties requested for further time extension for finalizing the PSA and for submitting the amendment to the original petition dated 27.10.2020. Based on the deliberations during the hearing the Commission vide the daily order dated 28.05.2021 issued the following directions for immediate compliance.
 - (i) SECI shall finalise the draft PSA incorporating the comments of KSEB Ltd and forward to KSEB Ltd, latest by 22nd June 2021, with copy to the Commission.
 - (ii) KSEB Ltd shall file the amendment to the original petition with draft initialled PSA by SECI and KSEB Ltd, for its approval as per its order dated 23.03.2021, on or before 10th of July 2021.
8. The sixth hearing on the petition was conducted on 14.07.2021 through video conference. Since the parties could not finalize the draft PSA, the Commission issued the following directions to the parties for immediate compliance.
 - (i) SECI shall finalise its comments on the remarks of KSEB Ltd on the modified PSA and forward the same to KSEB Ltd, latest by 26th July 2021, with a copy to the Commission.
 - (ii) KSEB Ltd shall submit the amendment to the original petition with draft initialled PSA by SECI and KSEB Ltd for its approval, along with comments, if any latest by 6th August 2021.
9. The seventh hearing on the petition was conducted on 16.08.2021 through video conference. Sri K G P Nampoothiri, Executive Engineer represented KSEB Ltd and Sri. M G Ramachandran, Senior Advocate represented the respondent SECI. During the hearing, the Commission raised its serious concern on prolonging the subject matter and the delay from both the parties to finalise the PSA for procuring 300 MW Solar Power through intermediary trader SECI @Rs 2.44/unit. The Commission directed the parties to finalise the matter before next hearing, if they are interested to proceed with the solar power procurement. Based on the deliberations during the seventh hearing, the Commission vide the daily order dated 18.08.2021, issued the following directions to the SECI and KSEBL for immediate compliance.
 - (1) *Respondent SECI shall finalize the modifications in the PSA latest by 6th September 2021.*
 - (2) *KSEB Ltd shall, submit the amendment to the original petition dated 27.10.2020, latest by 10th September-2021.*
 - (3) *KSEB Ltd shall look into the possibility to tie-up additional solar power at*

competitive rates through SECI or other measures for meeting its Solar RPO.

10. The eighth hearing on the petition was held on 14.09.2021 at 11 AM through video conference. Sri. M.G. Ramachandran, Senior Advocate represented SECI and Smt. Latha S V represented KSEB Ltd. During the hearing, SECI submitted that, it had forwarded the modified documents on 9th of September 2021. KSEB Ltd submitted that, since they had received the modified documents only on 13.09.2021, KSEBL requested for additional two weeks time to file the amended petition. SECI further submitted that, in view of the proposed imposition of Basic Custom Duty (BCD) from 1st April 2022, the PPA is to be signed before 30th of September 2021. If the PSA and PPA are signed in time, it will save the additional liability of Rs 0.30/unit to Rs 0.40/unit, on account of imposition of BCD. The developer has agreed to waive the BCD, if PPA is signed before 30th September 2021. The signing of PPA is a condition precedent. Hence the SECI requested for an early signing of PSA to avail the BCD waiver.

SECI clarified during the hearing that, the price offered is without BCD. Once the BCD is imposed it will be treated as change in law and the developer can claim it from SECI and SECI will naturally claim from KSEB Ltd. Once PPA is signed before 30th September 2021 and even if the purchase is delayed beyond 1st April 2022, it will be the developer's burden. This can be incorporated in PSA and PPA also.

Based on the discussions during hearing, the Commission, vide Daily Order dated 14.09.2021 directed KSEB Ltd to file the amended petition along with the initialled PSA before the Commission by return.

11. KSEB Ltd submitted the amended petition on 22.09.2021, with the following prayer.

“Grant approval for procurement of 300MW solar power under ISTS connected Solar projects (Tranche IX) through Solar Energy Corporation Limited on long term basis to meet the Renewable Purchase Obligation of KSEB Ltd. as specified in KSERC (Renewable Energy & Net Metering) Regulations, 2020 as amended from time to time. It is also requested that approval may kindly be granted for adoption of the tariff and approval of the initialed PPA between SECI and KSEBL”.

KSEB Ltd also forwarded the initialed PSA between the KSEB Ltd and SECI.

12. The Ninth hearing on the petition was held on 23.09.2021 at 11 AM through video conference. Smt. Latha S.V, AEE represented KSEB Ltd and Senior Advocate M. G. Ramachandran, M/s SECI. The summary of the deliberations during the hearing is given below.

- (1) KSEB Ltd during the hearing submitted that, SECI incorporated almost all the comments of KSEBL except the following
- (i) Regarding Clause 5.1.8, the modified Clause proposed by SECI for Liquidated Damages is extracted below.

‘Subject to the Article 6.4(c), any damages/dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of the SPD under Buyer-SPD PPA, shall be passed on by Buyer to the Payment Security Fund maintained by the Buying Utility.’

KSEB Ltd submitted that, as maintaining Payment Security Fund is optional as per Clause 6.4 (C) of the PSA, and as there is ‘Letter of Credit’ and ‘State Government Bank Guarantee’ as Payment Security Mechanism for KSEB Ltd as the ‘Buying Entity’, KSEB Ltd has not opted for maintaining ‘Payment Security Fund’. Therefore, KSEB Ltd suggested that Clause 5.1.8 may be modified as,

‘Subject to the Article 6.4(c), any damages/dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of the SPD under Buyer-SPD PPA, shall be passed on by Buyer to the Buying Entity’. ~~to the Payment Security Fund maintained by the Buying Utility.~~

SECI during the hearing submitted that, clauses 5.1.8 are incorporated as per the bidding guidelines notified by the MNRE, GoI. The clause 6 (4) (C) of the PSA provides an option for KSEB Ltd to open a Payment Security Fund or not. Clause 6 (4) (C) of the draft initialled PSA provides as follows:

“6.4 C Payment Security Fund

In addition to provisions contained in Article 6.4 (A) and 6.4. (B) Above, the Buying Utility may also choose to provide Payment Security Fund, not later than the commencement of supply of Power to the Buying Utility under this Agreement, which shall be suitable to support Payment of at least 3 (three) months’ billing of all the Projects tied up with such fund.”

SECI further submitted that, it is not compulsory and provides option to KSEB Ltd to open the ‘Performance Security Fund’ till the commencement of supply. KSEB Ltd can choose and take any appropriate decision on it before the commencement of supply.

Based on the deliberations, Commission directed KSEB Ltd to intimate its decision on whether ‘Payment Security Fund’ can be maintained or not after financial diligence check. Commission further directed that, regarding keeping clause 5.1.8 in the PSA. KSEB Ltd shall submit its decision latest by 04.10.2021.

- (2) The second point raised by KSEB Ltd is on the definition of the Appropriate Commission. The definition in the draft PSA as proposed by SECI is as follows:

“ Appropriate Commission : Unless otherwise stated, Appropriate Commission shall mean Central Electricity Regulatory Commission”

KSEB Ltd submitted that the definition of the Appropriate Commission should include the State Commission also and proposed to modify the definition of the 'Appropriate Commission' as follows.

“ Appropriate Commission : Unless otherwise stated, Appropriate Commission shall mean Central Electricity Regulatory Commission /KSERC as the case may be”

SECI submitted that the PSA is to be approved by this Commission, but disputes are to be dealt by the Central Commission. The authority to regulate the power purchase of Discoms lies with the State Commission. The Appropriate Commission was defined in such a way only to have clarity/distinction in the jurisdiction of the two Commissions. It starts with “ *unless otherwise stated ...*”

Commission directed the respondent SECI to submit a detailed note in support of the claim that, the jurisdiction for dispute resolution lies with the Central Commission.

13. In compliance of the deliberations during the hearing, SECI submitted its legal note dated 24.09 2021, where in SECI submitted as follows.

“The exercise of powers by the State Commission under section 86 (1) (b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules,2005 is to decide on whether the quantum of power should be purchased by the distribution licensees or not at the Tariff including Trading Margin determined/adopted by the Central Commission. The Jurisdiction under section 86(1)(b) of the Act is to regulate the power purchase and procurement process including the price at which the electricity shall be procured through agreement for purchase. It therefore refers to the initial stage of approval to be granted to the Power Purchase Agreement providing for purchase of power at the price terms and conditions specified therein. This provision is not for ongoing regulation of the implementation of power purchase agreement and dealing with adjudication of disputes in regard to generating company covered by section 79(1)(a) or (b) of the Act selling power to KSEBL. In such cases of agreement with a generating company falling under section 79(1)(a) or (b), Section 86(1)(f) of the Act will have no application but Section 79(1) (f) of the Act will apply. The jurisdiction to regulate the tariff in such cases being with the Central Commission, the jurisdiction to oversee the implementation of the PPA and adjudication of the disputes has also to be with the same Commission namely the Central Commission.”

14. KSEB Ltd, vide letter dated 04.10.2021 submitted the following.

- (1) Based on the financial diligence check, creating payment security fund is not financially prudent to KSEB Ltd.
- (2) There is lack of clarity in Clause 11.2 of the Guidelines of MoP regarding passing on of damages/dues recovered by the intermediary procurer by encashing the PBG. Hence it is decided to take up with MoP for clarification of this clause, and on the passing of the damages recovered to the buying entity.

KSEB Ltd decided to modify clause 5.1.8 of the PSA as follows:

“5.1.8 ‘Subject to the Article 6.4(C), any damages/dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of the SPD under Buyer-SPD PPA, shall be passed on by the Buyer to the Buying Entity to the ~~Payment Security Fund maintained by the Buying Utility~~ subject to the clarifications issued by MoP/MNRE.”

- (3) KSEB Ltd decided to modify clause 6.4(c) regarding Payment Security Fund by clearly specifying that KSEB Ltd does not intend to choose Payment Security Fund as a Payment Security Mechanism as follows:

“6.4 (C) Payment Security Fund

*‘In addition to provisions contained in Article 6.4 (A) and 6.4. (B) Above, the Buying Utility may also choose to provide Payment Security Fund, not later than the commencement of supply of Power to the Buying Utility under this Agreement, which shall be suitable to support Payment of at least 3 (three) months’ billing of all the Projects tied up with such fund. **KSEBL does not intend to choose Payment Security Fund as a Payment Security Mechanism.**”*

- (4) KSEB Ltd further submitted that, SECI on 30.09.2021, concurred for the modifications of the two clauses as proposed by KSEB Ltd.
- (5) Hence KSEB Ltd requested that, the clause 5.1.8 and 6.4(c) of the initialised PSA submitted by KSEB Ltd before the Commission may be amended as submitted above.

KSEB Ltd also requested to direct SECI to sign Power Purchase Agreement (PPA) with SPD within 30 days of signing of Power Sale Agreement (PSA) to avoid inordinate delay in execution of PPA between SPD and SECI.

15. The tenth hearing on the petition was held on 08.10.2021 through video conference. Smt. Latha S.V, appeared before the Commission on behalf of the petitioner and Sri. M. G. Ramachandran, Senior Advocate appeared on behalf of the respondent SECI. The summary of deliberations is given below:

- (1) KSEB Ltd submitted that, as directed by the Commission, it had done a diligent check on prudent to keep payment security fund as per Clause 6.4 (C) of the PSA and found that the opening payment security fund to claim damages in case of delay in commissioning of the project and observed that it is not financially prudent.

KSEB Ltd had decided to seek clarification from Ministry of Power on passing of liquidated damages to the end procurer. Hence the parties to the agreement decided to seek clarification from the MNRE, and modified the Clause 5.1.8 of the PSA as follows.

“5.1.8 ‘Subject to the Article 6.4(C), any damages/dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of the SPD under Buyer-SPD PPA, shall be passed on by the Buyer to the Buying Entity subject to the clarifications issued by MoP/MNRE.”

- (2) The Senior Counsel appeared on behalf of SECI submitted that the issue of liquidated damages comes only after scheduled date of commercial operation. SECI and KSEB Ltd may pursue with MNRE for getting clarification on the liquidated damages. Hence SECI suggested to add a sentence at the end of the clause 5.1.8 to the effect that, *“till clarification is obtained from MNRE, the guidelines will prevail”*.

SECI requested for an early decision of the subject matter.

- (3) Commission directed the parties to submit the additional comments by return.

16. KSEB Ltd vide letter dated 18.10.2021 submitted as follows:

- (1) Duly considering the suggestions of the SECI, KSEB Ltd has decided to modify clause 5.1.8 of the amended initialed PSA as follows:

‘Subject to the Article 6.4 (C), any damages/dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of the SPD under Buyer-SPD PPA, shall be passed on by the Buyer to the Buying Entity **subjected to the clarifications issued by MoP/MNRE. Till any clarification is issued by MOP/MNRE, the amount of such liquidated damages shall be dealt as per the Guidelines.**

- (2) Further, in the hearing held on 8-10-2021, the Commission had directed KSEBL to point out the clauses in the guidelines of MOP, where the terms ‘Intermediary procurer’ and ‘Procurer’ are used interchangeably. In this regard KSEB Ltd submitted the following:

As per clause 2.1(c) of the guidelines, in case of an intermediary, between the distribution licensees and the generator is required either to aggregate the solar power purchased from different Solar Power Generators and sell it to the distribution licensee(s), in such cases, the “Procurer” would be a trader, buying power from the Solar Power Generators and selling the same to one or more distribution licensees, and such distribution licensees shall be the “End Procurer” and the trader shall be “Intermediary Procurer” for the purpose of these Guidelines. However, the guidelines use the term ‘Procurer’ in place of ‘Intermediary Procurer’ as well as ‘End Procurer’ in many clauses. Some of the clauses are clause 5.2.1(a), 5.2.1(b), 5.2.2, 5.2.3, 5.5, 5.6 etc. In these clauses the ‘Procurer’ specified therein actually means ‘End procurer’, however the term ‘Procurer’ alone is used.

17. SECI, vide affidavit dated 20.10.2021 submitted that SECI and KSEB Ltd has finalized the PSA and hence requested for approval of the PSA. Based on the

execution of PSA, SECI will be signing the PPA. Regarding the comments of KSEB Ltd on the usage of procurer and intermediary procurer, SECI submitted as follows:

The Guidelines for Tariff Based Competitive Bidding Process for procurement of power from Grid Connected Solar PV Power Projects (hereinafter 'Guidelines') has been issued by the Government of India and any interpretation of the terms of the Guidelines has to be consistent with the objective and purpose of the Guidelines issued by the Government of India and it is for Ministry of New and Renewable Energy to clarify the position. Neither KSEB nor SECI should attempt to get into clarification of such aspects unilaterally particularly when these aspects has to considered at the time when the issue arises during the implementation of the PPA and PSA. It is however submitted that the context in which the term 'procurer' has been mentioned in different provisions clearly guides whether it refers to 'intermediary procurer' or 'end procurer' or both. At this stage, SECI is not commenting upon the interpretation made by KSEB of the different clauses of the Guidelines on the above aspect, particularly when the Competitive Bidding had already been undertaken and the Power Developers have been selected. The Power Developers will be selling electricity to SECI for resale to Buying Utilities in various states including KSEB.

Analysis and Decision of the Commission

18. The Commission has examined the petition filed by KSEB Ltd, the comments of the respondent SECI, as per the provisions of the Electricity Act, 2003, Rules and Regulations in force, and has arrived at the following conclusions and decisions:
19. KSEB Ltd, had filed the amendment petition dated 22.09.2021 for the approval of the purchase of 300 MW Solar Power under ISTS connected Solar Projects (Tranche-IX) through Solar Energy Corporation of India @Rs.2.44 per unit including their trading margin. KSEB Ltd has proposed the procurement to meet its Renewable Solar Power Obligations.
20. The Commission has examined the petition in detail. Over the years, KSEB Ltd has not been able to meet its Renewable Solar Power Purchase Obligation targets specified by this Commission. As per the latest order of the Ministry of Power, GoI dated 29.01.2021 in File No. 23/03/2016-R&R, the Solar RPO to be met by the KSEB Ltd during the current year 2021-22 is 10.5% of its total consumption excluding the consumption to be met from its large hydel plants. The Commission further noted that, as per the Tariff Order dated 08.07.2019, the energy sale approved for the year 2021-22 is 24,991MU and the generation from large hydel plants is 6,279MU. In order to meet the Solar RPO alone, KSEB Ltd has to generate/procure about 1965MU of Solar Energy, and @CUF of 19%, KSEBL should have to generate/procure an additional quantum of about 1180MW of Solar Power during the current financial year alone.

Further, the cost of Solar power is much less than the 'non-solar renewables' such as wind and small hydro etc. Hence, the Central Government has allowed the distribution licensees to meet upto 15% of their Non-Solar RPO from the Solar Power. Duly considering this additional requirement, the total Solar Power requirement for the current year is 1360 MW.

However, as per the information available with the Commission, the Solar RPO met by KSEB Ltd is hardly 20% of the above target prescribed by the Central Government. Even after considering all the Solar power tied up by KSEB Ltd so far, including the 200 MW tied up directly, Roof top solar plants targeted in the SOURYA Scheme, and also the solar power under net metering etc, the additional Solar Power required to meet the Solar RPO would be more than 800 MW in the current year. This target will increase further in the forthcoming years.

Considering the shortfall in Solar RPO met by KSEB Ltd, and the competitive rate in the offer of SECI, the Commission had decided to grant approval for 300MW ISTS connected Solar Power through SECI @ Rs 2.44/unit.

21. M/s SECI, during the deliberations of the subject petition submitted that they had, on 20.03.2020, floated the bids for the selection of the Solar Power Developers (SPDs) for procuring 2000MW ISTS connected Solar PV Projects (Tranche-IX) Scheme. There are Seven Solar Power Developers were selected in the Tranche-IX bid, and the tariff quoted by the SPDs ranges from Rs 2.36/unit to Rs 2.38/unit. The details are given below.

SECI 2GW ISTS Tranche IX Solar Tender- Auction Results

Sl No	Bidder/ Developer	Capacity	Quoted Bid/ Tariff
		MW	(Rs/ kWh)
1	Solarpack	300	2.36
2	Avikiran Surya (ENEL Green Power)	300	2.37
3	Amp Energy Green	100	2.37
4	Eden Renewables	300	2.37
5	ib vogt Singapur	300	2.37
6	Ayana Renewabale (CDC Group)	300	2.38
7	ReNew Power	400	2.38
	Total	2000	

SECI also clarified during the hearing that, it had offered 300MW from the ReNew Power, whose quoted rate is Rs 2.38/unit. However, the rate applicable to KSEBL is Rs 2.44/unit, which is inclusive of the trading margin of Rs 0.06/unit.

22. As per the Section 79 of the Electricity Act,2003 read along with the Section 63 of the EA-2003, in the present case, the tariff derived through the competitive bidding route as per the bidding guidelines notified by the Central Government has to be adopted by the Central Commission. It is learned that,

though SECI had filed the petition before the CERC for adoption of tariff, CERC is yet to adopt the tariff as per the Section 63 of the Electricity Act, 2003.

23. The Commission however notes that, Article 5.1.1 of the initialed PSA specifies as follows.

“5.1.1 From SCD and subject to the provision of the Article 6.7, the Buying Entity shall pay the fixed tariff of Rs2.37/kWh plus trading margin of Rs 0.07/kWh for the entire term of the Agreement.”

Hence, the Commission hereby clarify that if the CERC adopts the tariff of the ‘ReNew Power’ at Rs 2.38/unit as per the auction results, the tariff payable by the ‘Buying Entity’ KSEB Ltd to the ‘Buyer’ SECI shall be limited to Rs 2.44/unit including trading margin.

24. **In anticipation of the adoption of tariff by CERC for the 2000MW ISTS connected Solar Power under Tranche-IX Scheme, the Commission hereby provisionally approve the purchase of 300MW ISTS connected Solar Power under Tranche-IX scheme at a ceiling rate of 2.44/unit including trading margin. As soon as the CERC issues orders on adoption of Tariff, a copy of the same shall be submitted before the Commission for further action, if any.**

Disputes on Draft Initialed Power Supply Agreement raised before this Commission.

25. KSEB Ltd also submitted the initialed Power Supply Agreement (PSA) between the SECI and KSEB Ltd before the Commission for approval. Further, during the deliberations of the subject petition, KSEB Ltd submitted that SECI has accepted almost all the comments of KSEB Ltd based on the earlier orders of the Commission, except the following clauses in the PSA.

- (1) Clause 5.1.8 and Clause 6.4(C) of the PSA regarding Performance Security Fund.
- (2) Definition 1.1 “Appropriate Commission”.

Detailed deliberations on the above two clauses of the PSA and the considered decision of the Commission on these issues are discussed below.

26. **Clause 5.1.8 and Clause 6.4(C) of the PSA regarding Performance Security Fund.**

The summary of the deliberations on the subject is given below.

- (1) Clause 5.1.8 of the draft PSA provide as follows.

‘Subject to the Article 6.4(c), any damages/dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of

the SPD under Buyer-SPD PPA, shall be passed on by Buyer to the Payment Security Fund maintained by the Buying Utility.'

- (2) KSEB Ltd, on their side submitted that, maintaining Payment Security Fund is optional as per Clause 6.4 (C) of the PSA, and as there is 'Letter of Credit' and 'State Government Bank Guarantee' as Payment Security Mechanism for KSEB Ltd as the 'Buying Entity', there is no requirement for a third payment security mechanism. Hence KSEB Ltd has not opted for maintaining 'Payment Security Fund'. Therefore, KSEB Ltd suggested that Clause 5.1.8 may be modified as,

'Subject to the Article 6.4(c), any damages/dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of the SPD under Buyer-SPD PPA, shall be passed on by Buyer to the Buying Entity'. ~~to the Payment Security Fund maintained by the Buying Utility.'~~

- (3) SECI during the hearing submitted that, clauses 5.1.8 has been incorporated as per the bidding guidelines notified by the MNRE, Government of India. The clause 6 (4) (C) of the PSA provides an option for KSEB Ltd to open a Payment Security Fund or otherwise. Clause 6 (4) (C) of the draft initialled PSA provides as follows:

"6.4 C Payment Security Fund

In addition to provisions contained in Article 6.4 (A) and 6.4. (B) Above, the Buying Utility may also choose to provide Payment Security Fund, not later than the commencement of supply of Power to the Buying Utility under this Agreement, which shall be suitable to support Payment of at least 3 (three) months' billing of all the Projects tied up with such fund."

SECI further submitted, this clause is not compulsory but provides an option to KSEB Ltd to open the 'Performance Security Fund' till the commencement of supply. KSEB Ltd can choose and take any appropriate decision before the commencement of supply on Performance Security Fund.

Based on the deliberations, Commission directed KSEB Ltd to intimate its decision on whether 'Payment Security Fund' can be maintained or not after financial due diligence check.

- (4) Incompliance of the directions of the Commission, KSEB Ltd, vide letter dated 04.10.2021 submitted the following.
- (a) Based on the financial due diligence check, KSEB Ltd has decided that creating a payment security fund is not financially prudent.
- (b) KSEB Ltd further submitted that, there is lack of clarity in Clause 11.2 of the Solar Bidding Guidelines and its amendments, regarding passing on of damages/dues recovered by the intermediary procurer by encashing the PBG. Hence it has

decided to take up this issue with MoP for clarification of this clause on passing on the damages recovered to the buying entity.

- (c) Accordingly, KSEB Ltd suggested to modify clause 5.1.8 of the PSA as follows:

“5.1.8 ‘Subject to the Article 6.4(C), any damages/dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of the SPD under Buyer-SPD PPA, shall be passed on by the Buyer to the Buying Entity ~~to the Payment Security Fund maintained by the Buying Utility~~ subject to the clarifications issued by MoP/MNRE.”

- (d) KSEB Ltd decided to modify clause 6.4(c) regarding Payment Security Fund by clearly specifying that KSEB Ltd does not intend to choose Payment Security Fund as a Payment Security Mechanism as follows:

“6.4 (C) Payment Security Fund

*‘In addition to provisions contained in Article 6.4 (A) and 6.4. (B) Above, the Buying Utility may also choose to provide Payment Security Fund, not later than the commencement of supply of Power to the Buying Utility under this Agreement, which shall be suitable to support Payment of at least 3 (three) months’ billing of all the Projects tied up with such fund. **KSEBL does not intend to choose Payment Security Fund as a Payment Security Mechanism.**’*

- (e) KSEB Ltd further submitted that, SECI on 30.09.2021, has concurred for the modifications of the two clauses as suggested by KSEB Ltd as above.
- (5) The Senior Counsel appeared on behalf of SECI, during the hearing held on 08.10.2021 submitted that the issue of liquidated damages comes only after scheduled date of commercial operation. SECI and KSEB Ltd may pursue with MNRE for getting clarification on the liquidated damages. Hence SECI suggested to add a sentence at the end of the clause 5.1.8 to the effect that, *“till clarification is obtained from MNRE, the guidelines will prevail”*. SECI requested for an early decision of the subject matter.
- (6) KSEB Ltd vide letter dated 18.10.2021 submitted that, duly considering the suggestions of the SECI, KSEB Ltd has decided to modify clause 5.1.8 of the initialed PSA as follows:

*‘Subject to the Article 6.4 (C), any damages/dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of the SPD under Buyer-SPD PPA, shall be passed on by the Buyer to the Buying Entity **subjected to the clarifications issued by MoP/MNRE.***

Till any clarification is issued by MOP/MNRE, the amount of such liquidated damages shall be dealt as per the Guidelines.

- (7) The Commission examined in detail the modifications proposed in Clause 5.1.8 and Clause 6.4(C) of the PSA as discussed above. As per the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects notified by the Central Government vide the Resolution dated 3rd August 2017 and its amendments, creation of Performance Security Fund by the Buying Entity is not mandatory. The respondent SECI also clarified that, it is not compulsory and provide option to KSEB Ltd to open Performance Security Fund or not. KSEB Ltd, after detailed appraisal clarified that, creation of Performance Security Fund is not financially prudent. The petitioner KSEB Ltd and SECI mutually agreed to modify the Clause 5.1.8 and accordingly, the Commission hereby approve to modify the 'Clause 5.1.8 of the PSA' as follows.

(a) 'Clause 5.1.8 of the PSA'.

'Subject to the Article 6.4 (C), any damages/dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of the SPD under Buyer-SPD PPA, shall be dealt with as per MNRE Guidelines on this matter, pending clarification to be issued by MoP/MNRE which shall be incorporated appropriately in the PSA.'

(b) Modification agreed for 'Clause 6.4 (C) Payment Security Fund' of the PSA.

Both the parties agreed to modify the Clause 6.4(C) Payment Security Fund' of the PSA as follows.

'In addition to provisions contained in Article 6.4 (A) and 6.4. (B) Above, the Buying Utility may also choose to provide Payment Security Fund, not later than the commencement of supply of Power to the Buying Utility under this Agreement, which shall be suitable to support Payment of at least 3 (three) months' billing of all the Projects tied up with such fund. KSEBL does not intend to choose Payment Security Fund as a Payment Security Mechanism.'

Since the parties to the Power Sale agreement mutually agreed and consented to the modifications in Clause 6.4(C) of the PSA as above, the Commission hereby approve the modifications Clause 6.4(C) of the PSA as above.

27. Definition 1.1 "Appropriate Commission".

- (1) KSEB Ltd during the deliberations of the subject petition raised disagreement on the definition 1.1 of the PSA, read along with the Clause 12.3 of the PSA. The summary of the deliberations during the hearing is discussed in the following paragraphs.

- (2) As per the Definition 1.1 of the draft PSA, SECI proposed to define the “Appropriate Commission’ as follows.

“ Appropriate Commission : Unless otherwise stated, Appropriate Commission shall mean Central Electricity Regulatory Commission”

- (3) KSEB Ltd submitted that the definition of the Appropriate Commission should include the State Commission also and proposed to modify the definition of the ‘Appropriate Commission’ as follows.

“ Appropriate Commission : Unless otherwise stated, Appropriate Commission shall mean Central Electricity Regulatory Commission / Kerala State Electricity Regulatory Commission as the case may be”.

- (4) KSEB Ltd further submitted that, the Clause 12.3 of the PSA proposed by SECI provide as follows.

“12.3 Dispute Resolution

12.3.1 Dispute Resolution by the Appropriate Commission

*i. Where any Dispute (i) arises from a claim made by any Party for any change in or determination of Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could results in the Change in the Tariff, or (ii) **relates to any matter agreed to be referred to the Appropriate Commission., such Dispute shall be submitted to adjudication by the Appropriate Commission.** Appeal against the decision of the Appropriate Commission shall be made only as per the provisions of the Electricity Act,2003, as amended from time to time’.*

KSEB Ltd submitted that, as far as they are concerned, State Commission is the Appropriate Commission as per the Electricity Act, 2003 to adjudicate on matters in the PSA other than tariff related matters, as specified in the Clause 12.2.1(i)(ii) as highlighted above.

- (5) SECI during the hearing held on 23.09.2021 agreed that, the PSA is to be approved by the State Commission, but disputes are to be dealt by the Central Commission. The authority to regulate the purchase of Discoms lies with State Commission. The Appropriate Commission was defined in such a way only to have clarity/distinction in the jurisdiction of the two Commissions. It starts with “ *unless otherwise stated ...*” . It is settled position that, the adjudicatory power on all disputes on PSA between the generator/trader involving composite schemes with the DISCOMS shall be vested with the Central Commission.
- (6) As directed by this Commission, the SECI vide its letter dated 24.09.2021 submitted a detailed legal note in support of the above claims, mainly relying on the Judgment of the Hon’ble Supreme Court in Civil Appeal No. 5399-5400 of 2016 (Energy Watchdog vs CERS. Ors) and also Judgment of the Hon’ble APTEL dated 02.07.2021 in Appeal No. 52 of 2021 (SECI Vs DERC and another). The respondent further submitted as follows.

“The exercise of powers by the State Commission under Section 86 (1) (b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005 is to decide on whether the quantum of power should be purchased by the distribution licensees or not at the Tariff including Trading Margin determined/adopted by the Central Commission. The Jurisdiction under Section 86(1)(b) of the Act is to regulate the power purchase and procurement process including the price at which the electricity shall be procured through agreement for purchase. It therefore refers to the initial stage of approval to be granted to the Power Purchase Agreement providing for purchase of power at the price terms and conditions specified therein. This provision is not for ongoing regulation of the implementation of power purchase agreement and dealing with adjudication of disputes in regard to generating company covered by section 79(1)(a) or (b) of the Act selling power to KSEBL. In such cases of agreement with a generating company falling under section 79(1)(a) or (b), Section 86(1)(f) of the Act will have no application but Section 79(1) (f) of the Act will apply. The jurisdiction to regulate the tariff in such cases being with the Central Commission, the jurisdiction to oversee the implementation of the PPA and adjudication of the disputes has also to be with the same Commission namely the Central Commission.”

28. The Commission examined in detail the deliberations on the Appropriate Commission as per the provisions of the Electricity Act, 2003, Electricity Rules notified by the Central Government, the Clarifications issued by the Central Government, the various judgement of the Hon'ble Supreme Court and Hon'ble APTEL, and observed the following.

- (1) The Electricity Act, 2003 (Central Act 36 of 2003) (herein after referred as EA-2003), did away with the earlier statutes in electricity sector in the Country, namely the Indian Electricity Act, 1910, Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998. The EA-2003, received the assent of the President of India on 26.05.2003 and published in the Gazette of India on 02.06.2003
- (2) Among other things, the Section 76 of the EA-2003 mandates for the constitution of Central Commission to exercise the powers conferred on it, and discharge the functions, assigned to it under the EA-2003.
- (3) Similarly, Section 82 of the EA-2003 mandate the constitution of the State Commission by the State Government for the purposes of the EA-2003.
- (4) **Functions of Central Commission and State Commissions.**
The functions of the Central Commissions is prescribed under Section 79 of the EA-2003, and the functions of the State Commissions are prescribed under Section-86 of the EA-2003. A comparison of the functions of the Central Commission and State Commission are extracted below for ready reference.

Section 79: Functions of Central Commission	Section 86: Functions of State Commission
<p>(1) The Central Commission shall discharge the following functions, namely:--</p> <p>(a) to regulate the tariff of generating companies owned or controlled by the Central Government;</p> <p>(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;</p> <p>(c) to regulate the inter-State transmission of electricity;</p> <p>(d) to determine tariff for inter-State transmission of electricity;</p> <p>(e) to issue licences to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;</p> <p>(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;</p> <p>(g) to levy fees for the purposes of this Act;</p> <p>(h) to specify Grid Code having regard to Grid Standards;</p> <p>(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;</p> <p>(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;</p> <p>(k) to discharge such other functions as may be assigned under this Act.</p> <p>(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely :-(a) Advise the Central Government on all or any of the following matters, namely:- (i) formulation of National electricity Policy and tariff policy: (ii) promotion of competition, efficiency and economy in activities of the electricity industry; (iii) promotion of investment in electricity industry; (iv) any other matter referred to the Central Commission by that Government.</p> <p>(3) The Central Commission shall ensure transparency while exercising its powers and discharging its functions. (</p>	<p>(1) The State Commission shall discharge the following functions, namely:--</p> <p>(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:</p> <p>PROVIDED that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;</p> <p>(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;</p> <p>(c) facilitate intra-State transmission and wheeling of electricity;</p> <p>(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;</p> <p>(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;</p> <p>(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;</p> <p>(g) levy fee for the purposes of this Act;</p> <p>(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;</p> <p>(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;</p> <p>(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary;</p> <p>(k) discharge such other functions as may be assigned to it under this Act.</p> <p>(2) The State Commission shall advise the State Government on all or any of the following matters, namely :- (i) promotion of competition, efficiency and economy in</p>

4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3	activities of the electricity industry; (ii) promotion of investment in electricity industry; (iii) reorganization and restructuring of electricity industry in the State; (iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government. (3) The State Commission shall ensure transparency while exercising its powers and discharging its functions. (4) In discharge of its functions the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.
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- (5) A careful reading of the statutory functions of the Central Commission and State Commissions as extracted above reveals that, their functions are totally independent of each other, and the EA-2003 do not entrust any supervisory role to the Central Commission over the State Commissions. More importantly, the EA-2003 do not entrust any role and authority to the Central Commission in electricity distribution business and allied matters including the 'determination of retail tariff for end electricity consumers, and for power purchase by the Distribution companies for supply within the State'. These aspects are further discussed in the following paragraphs.
- (6) As per the Section 79 of the EA 2003, the functions of the Central Commission is to 'Regulate the tariff of Electricity Generation and Transmission business only, and no role is assigned to the electricity distribution business and allied matters, which is in the exclusive domain of the State Commission. More importantly, the functions of the Central Commission regarding the 'electricity generation and transmission business' is clearly prescribed under Section 79(1) (a) to Section 79(1)(d) in the EA-2003 as below.
- (a) Regulate the Generation Tariff of generating companies owned and controlled by Central Government,
 - (b) Regulate the generation Tariff of generating companies having composite scheme of generation and sale of electricity in more than one State.
 - (c) To regulate the inter-State transmission of electricity,
 - (d) To determine the tariff for inter-State transmission of electricity
 -
 - (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

Further, as per Section 79(1)(f) of the EA-2003, the adjudicatory power of the Central Commission is restricted to disputes involving generating companies and transmission licensee in regard to the matters connected with the above four functions (a) to (d) only.

- (7) Section 86(1)(a) of the EA-2003, prescribe the functions of the State Commission. This includes determination of the tariff for 'generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail within the State.
- (8) Further, as per the Section 86(1)(b) of the EA-2003, the State Commission is entrusted with,

'Regulate the electricity purchase and procurement process of distribution licensees for distribution and supply within the State, including,
- *price at which electricity shall be procured from generating or other sources through agreements'.*

As above, as per the Section 86(1)(b) of the EA-2003, the authority to 'regulate' the purchase and procurement process of the distribution licenses from generating companies or licenses through **agreements**, for the supply of power within the State is in the exclusive domain of the State Commission. **The word 'regulate' is already interpreted by the Hon'ble Apex Court in many cases that, the power to regulate implies the 'power to specify and enforce proper and reasonable rules and regulations as may be deemed necessary to conduct the business in a proper and orderly manner'.**

- (9) Section 62 of the EA-2003 empowers the Central Commission and State Commissions for determination of tariff for.
- (a) supply of electricity by a generating company to a distribution licensee,
 - (b) transmission of electricity,
 - (c) wheeling of electricity, and
 - (d) retail sale of electricity.

The relevant Section is extracted below.

"62. (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity.

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for

promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

- (10) Section 63 of the EA-2003 deals with the adoption of tariff 'determined through bidding process. The relevant Section is extracted below.

"63. 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."

- (11) **The Rule-8 of the Electricity Rules, 2005. Tariff of generating companies under Section 79.**

The Rule-8 of the Electricity Rules, 2005, notified by the Central Government prescribed that, the tariff determined by the Central Commission for generating companies under Clause (a) or (b) of section 79 of the Act shall not be subject to re-determination by the State Commissions in exercise of the functions under clause (a) or (b) of sub-section (1) of the Section 86 of the EA-2003. The Rule-8 also specify that, subject to the tariff determined by the Central Commission, the State Commission may determine whether the Distribution Licensee in the State should enter into PPA for procurement of power with such generating companies based on the tariff determined by the Central Commission. The Rule-8 of the Electricity Rules 2005 is extracted below.

"8. Tariffs of generating companies under section 79.- The tariff determined by the Central Commission for generating companies under clause (a) or (b) of sub section (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of sub-section (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission."

- (12) **Clarifications on Rule 8 of Electricity Rules 2005 regarding approval by PPA by Appropriate Commission for Inter-State Projects (dated 28.8.2006).**

Central Government vide the letter dated 28th August 2006 clarified as follows regarding the Rule 8 of Electricity Rules 2005 regarding approval by PPA by Appropriate Commission for Inter-State Projects.

2....Rule 8 of Electricity Rules 2005 which prescribes that the tariff determined by CERC for generating companies under clause (a) or (b) of subsection 1 section 79 of the Act shall not be subject to re-determination by SERC and with this condition, the State Commission may determine whether a distribution license in the State should enter into PPA or procurement process with such generating companies based on the tariff determined by CERC.

3. From the above, it is clear that, the concerned SERC has the jurisdiction to regulate electricity purchase and procurement process of a distribution license under section 86(1)(b) of the Act, except to determine the tariff and tariff related matters of the PPA of generating companies as specified under Section 79 of the Act.

4. It is further clarified that the PPA, in cases where tariff has been determined through competitive bidding process under section 63 of the Act and in accordance with the relevant guidelines issued by the Central Government, is finalised within the bidding process and the Appropriate Commission is required to adopt the tariff in accordance with the provisions of the law.

29. As discussed in paragraph 28 above, as per Section 79 of the EA 2003, read along with the Section 86(1) (b) EA-2003 and Rule 8 of the Electricity Rules, 2005, when the Distribution Licensee purchases power from a Generating Company having a composite scheme for generation and sale of electricity in more than one State, **the State Commission has the exclusive jurisdiction to regulate the electricity purchase and procurement process of the distribution licensee under Section 86(1)(b) of the EA-2003 except the tariff and tariff related matter of the PPA.**

More clearly, when the Distribution Licensee purchase power from a Generating Company having a composite scheme for generation and sale of electricity in more than one State, the jurisdiction of the Central Commission is limited to 'regulate the Tariff and Tariff related matters only. The authority to Regulate the matters other than the 'tariff and Tariff related matter' is vested with the State Commissions.

30. Similarly, as per Section 79 of the EA 2003, read along with the Section 86(1) (b) EA-2003 and Rule 8 of the Electricity Rules, 2005, when a dispute arises on a Power Purchase Agreement entered into between a Generating Company having a composite scheme for generation and sale of electricity in more than one State, and a Distribution licensee purchasing power from such company, this Commission is of the view that the appropriate Commission for adjudicating of the dispute, is as follows.

- (1) If the dispute is on 'tariff and tariff related matters', the authority to adjudicate on the clauses of the PPA related to 'tariff and tariff related matters' is vested solely with the Central Commission, by virtue of the Section 79(1) to (d) & Section 79(f) of the EA-2003, read along with the Rule-8 of the Electricity Rules, 2005.
- (2) However, if the dispute between the generating Company having a composite scheme for generation and sale of electricity in more than one State and a Distribution licensee, **is on matters 'other than the Tariff and Tariff related matters', the authority to adjudicate on the dispute on such matters is vested with the State Commission by virtue of the Section 86(1)(b) EA-2003 & Section 86(1)(f) of the EA-**

2003 read along with the Rule-8 of the Electricity Rules, 2005, and the clarifications of the Central Government dated 28.08.2006.

31. Hon'ble Supreme Court vide its Judgement dated 11.04.2017 in Civil Appeal No.5399-5400 of 2016, in Energy Watchdog vs CERC & Ors, held that if the dispute between the generating company having a composite scheme for generation and sale of electricity in more than one State and a Distribution licensee arising out of a PPA is on 'Tariff or Tariff related matters' or wholly related to any change in tariff, such matters shall be dealt by the Central Commission. It is also observed that in the said case, the issues under dispute are on the Force Majeure event and change in law, resulting in enhancement of Electricity Tariff.
32. In the above light, the present issue before the Commission and its considered decision is given below.
 - (1) Solar Energy Corporation of India, a Government of India Enterprise, is an inter-state trading licensee of the Country, granted trading license by the Central Commission as per the Section 79(1)(e) of the EA-2003. SECI invited bids for procurement of 2000MW solar Power under Tranche-IX in June 2020, as per the bidding guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects notified by the Central Government on 3rd August 2017 and its subsequent amendments. Seven Solar Power Developers (SPDs) selected under the scheme and their quoted rates ranges from Rs 2.36/unit to Rs 2.38/unit. Since SECI is the inter-State Trading licensee and further the power procured from the SPDs by SECI is being supplied to more than one State, the adoption of the Tariff of the Tranche-IX bidding scheme is vested with Central Commission. The Central Commission is yet to adopt the tariff.
 - (2) KSEB Ltd is the State owned incumbent distribution licensee in the State of Kerala. SECI had offered 300MW of solar power from the Tranche-IX scheme to KSEB Ltd and the licensee had decided to proceed with the purchase to meet its Solar RPO. Accordingly, KSEB Ltd had filed the instant petition for the approval of the Solar Power procurement from SECI.
 - (3) As per the Section 86(1)(b) of the EA-2003, the proposed power procurement of 300MW by KSEB Ltd from SECI @ Rs 2.44/unit, and the Power Sale Agreement to be signed with SECI has to be approved by this Commission.
 - (4) Further, as per the Regulation 76 of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2018, prior approval of this Commission is required for all long term and medium-term power purchases of KSEB Ltd. The relevant portion of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2018 is extracted below.

“76. Approval of power purchase agreement. –(1) Every agreement for procurement of power by the distribution business/licensee from the generating business/company or licensee or from other sources of supply entered into after the date of commencement of these Regulations shall come into effect only with the approval of the Commission:

Provided that the approval of the Commission shall also be required in accordance with this Regulation for any change to an existing agreement for power procurement, whether or not such existing agreement was approved by the Commission.”

- (5) Since the adoption of Tariff of the Tranche-IX Solar Procurement of SECI is vested with the Central Commission as per Section 63 of the Act, and also as per Section 79(1)(b) of the EA-2003 read along with the Rule-8 of the Electricity Rules, 2005 notified by the Central Government, and further duly considering the various judgment of the Hon'ble Supreme Court, this Commission has decided the following.

- (i) To approve the procurement of 300MW Solar Power of KSEB Ltd from SECI, at the ceiling tariff of Rs 2.44/unit including trading margin, subject to the adoption of tariff of Tranche-IX Scheme by the Central Commission.
- (ii) The authority to regulate the tariff and tariff related issues of the PSA to be signed by KSEB Ltd with SECI Tranche-IX scheme is vested with the Central Commission, and the adjudication of the various clauses of the PSA related to Tariff and Tariff related issues may be dealt by Central Commission.
- (iii) However, as per the Section 86(1) of the EA-2003, read along with the Rule-8 of the Electricity Rules, 2005, clarifications issued by the Central Government on 28th August 2006 regarding the approval of PPA for Inter-State projects, read along with the Regulation 76 of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2018, this Commission is having the exclusive jurisdiction for approving the 'terms and conditions of the present PSA other than the Tariff related issues to be signed with SECI'.

Further, as per the Section 86(1) (f) of the EA-2003, this Commission is vested with the powers to adjudicate the disputes arises out of the various matters of the PSA other than the 'tariff and tariff related issues' to be signed with the SECI.

- (6) However, according to SECI, though this Commission is vested with the powers to approve the power procurement process including approval of the PSA, the implementation of the PSA between the parties and adjudication of disputes is covered by Section 79(1) (a) or (b) of the EA 2003. In such cases of agreement with a generating company falling under Section 79(1)(a) or (b), Section 86(1)(f) of the

EA-2003 will have no application. Hence, the jurisdiction to oversee the implementation of the PSA and adjudication of disputes has to be with the Central Commission in such cases.

- (7) This Commission has examined the argument of the respondent in detail. The respondent SECI has raised the issue on the back to back PPA signed by SECI with the SPD as the generating company. In the present case, this Commission has no jurisdiction to decide the terms of the PPA signed by the SECI with the SPD as the generating company. Hence, if any dispute arises in the course of implementation of the PPA signed by SECI with the generating company, it can be referred to Central Commission or the arbitrator appointed by it, as per the provisions of the EA-2003.

But, the issue under consideration of the Commission is not the PPA but the Power Supply Agreement signed between the SECI and KSEB Ltd. As already discussed elaborately, as per the Section 86(1) of the EA-2003, read along with the Rule-8 of the Electricity Rules, 2005, clarifications issued by the Central Government on 28th August 2006 regarding the approval of PPA for Inter-State projects, read along with the Regulation 76 of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2018, this Commission is of the view that the State Commission has the jurisdiction to approve the power purchase, its rate and also to regulate the PSA to be signed between the SECI and KSEB Ltd.

- (8) The Commission is of the view that, the scheme of the Electricity Act, 2003 clearly spelt out the jurisdiction of the Central Commission and State Commissions. The power, authority and functions of both the Commissions are totally independent. The EA-2003 does not envisage any supervisory role for the Central Commission over the State Commissions. As per the Scheme of the EA-2003, approval of the power purchase and the power to regulate the power purchase through agreements fall within the sole jurisdiction of the State Commissions. Once a PSA/PPA containing terms and conditions of the Agreement is approved by a quasi-judicial body like SERC, any legal interpretation / dispute resolution of its terms and conditions have to be carried out by a higher judicial forum and not by CERC. Hence it naturally flows that all disputes will have to be referred to the PSA/PPA approving SERC for its resolution.

However, when the distribution licensee purchases power from generating companies with composite scheme of generation which supplies power to more than one State, the power to regulate the Tariff and Tariff related matters shall be governed by Section 79(1)(b) of the EA-2003 by the Central Commission. **All other matters of the PSA/PPA to be signed by the distribution licenses with the generating companies/intermediary procurer with composite**

scheme of generation for supplying power to more than one State is vested with the State Commission.

- (9) With the above observation and views, the Commission has re-examined the Clause 12.3 of the of the PSA submitted by SECI, which is extracted below.

“12.3 Dispute Resolution

12.3.1 Dispute Resolution by the Appropriate Commission

- i. *Where any Dispute (i) arises from a claim made by any Party for any change in or determination of Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could results in the Change in the Tariff, or (ii) relates to any matter agreed to be referred to the Appropriate Commission., such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decision of the Appropriate Commission shall be made only as per the provisions of the Electricity Act,2003, as amended from time to time’.*

The clause 12.3.1(i) of the PSA provides to types of disputes between the SECI and KSEB Ltd.

- (i) Dispute type-1.

Dispute (i) arises from a claim made by any Party for any change in or determination of Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could results in the Change in the Tariff, or

- (ii) Dispute type-2

Dispute relates to any other matter included in the PSA and agreed to be referred to the Appropriate Commission.

This Commission is of the considered view that, the adjudication of disputes cited as type-1 above, which relates to tariff and all matters affecting the tariff may be referred to the Central Commission, and accordingly the Appropriate Commission for adjudicating such disputes may be the Central Commission and all its decisions shall be binding on both the contracting parties

However, when the disputes arises on matters other than the tariff related matters of the PSA cited as type-2 above, such issues shall be dealt by this Commission by virtue of the powers conferred on it as per the Section 86(1) of the EA-2003, read along with the Rule-8 of the Electricity Rules, 2005, clarifications issued by the Central Government on 28th August 2006 regarding the approval of PPA for Inter-State projects, read along with the Regulation 76 of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2018.

Accordingly, the Appropriate Commission for adjudicating the disputes other than disputes related to tariff and all tariff related matters shall be the State Commission.

- (10) Considering these aspects in detail, the Commission hereby order to modify the definition of “Appropriate Commission’ under Article 1.1 of the PSA as follows.

“ Appropriate Commission : Unless otherwise stated, Appropriate Commission shall mean Central Electricity Regulatory Commission / Kerala State Electricity Regulatory Commission as the case may be”.

Orders of the Commission

33. The Commission, after examining the petition filed by KSEB Ltd, the comments of the respondent SECI, as per the provisions of the Electricity Act, 2003, Rule-8 of the Electricity Rules, 2005, clarifications issued by the Central Government on 28th August 2006 regarding the approval of PPA for Inter-State projects, read along with the Regulation 76 of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2018, hereby orders the following.

- (1) Grant approval for the procurement of 300MW Solar Power under ISTS connected Solar Projects under Tranche-IX scheme, through SECI on long term basis at the ceiling tariff @Rs 2.44/unit including trading margin, subject to the adoption of the tariff of Tranche-IX scheme of SECI by the Central Commission.
- (2) Approve the initialed Power Sale Agreement dated 20th September 2021 between Solar Energy Corporation of India Ltd (SECI) and Kerala State Electricity Board Limited (KSEB Ltd), with the following modifications.

- (i) **Clause 5.1.8 of the PSA shall be modified as;**

‘Subject to the Article 6.4 (C), any damages/dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of the SPD under Buyer-SPD PPA, shall be dealt with as per MNRE Guidelines on this matter, pending clarification to be issued by MoP/MNRE which shall be incorporated appropriately in the PSA

- (ii) **Clause 6.4 (C) Payment Security Fund’ of the PSA shall be modified as,**

‘In addition to provisions contained in Article 6.4 (A) and 6.4. (B) Above, the Buying Utility may also choose to provide Payment Security Fund, not later than the commencement of supply of Power to the Buying Utility under this Agreement, which shall be suitable to support Payment of at least 3 (three) months’ billing of all the Projects tied up with such fund. KSEBL does not intend to choose Payment Security Fund as a Payment Security Mechanism.

- (iii) Definition under Article 1.1 of the PSA, the term “Appropriate Commission” shall be modified as;

“ Appropriate Commission : Unless otherwise stated, Appropriate Commission shall mean Central Electricity Regulatory Commission / Kerala State Electricity Regulatory Commission as the case may be”.

The petition is disposed off. Ordered accordingly.

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

Sd/-
Preman Dinaraj
Chairman

Approved for issue

C R Satheeshchandran
Secretary (i/c)