

replaced. In the case of termination of the contract before its expiry, an amount equal to the fixed charge that would have been due and payable for Normative Availability for a period of six months as if the power station had operated for such six months from the date of termination."

6. NLCIL vide the letter dated 23.08.2022 had submitted the detailed comments on the modifications proposed by KSEB Ltd in the initialed PPA dated 03.01.2011 and the 2nd deed of amendment dated 20.07.2022 and its summary is given below.

- (i) NLCIL submitted that, the draft 2nd deed of amendment dated 20.07.2022, which is submitted along with main petition is a mutually agreed and approved document by both KSEB Ltd and NLCIL. The modifications suggested by KSEB Ltd in the said deed of amendment are not acceptable to the NLCIL.
- (ii) NLCIL is a Central Government Company, which falls within the purview of a generating company under Section 2(28) of the Electricity Act, 2003. The dispute that may arise between NLCIL and KSEB Ltd. are disputes between a generating company owned and controlled by Central Government and a Licensee. Therefore, such disputes have to be adjudicated by the Central Commission in terms of Section 79 (1) (a), (b) and (f) of the Electricity Act, 2003. NLCIL also submitted that the Section 79 (1) (f) uses the expression "to adjudicate upon the dispute involving a generating company". The term involving the provision is very wide, Hon'ble Supreme Court interpreted the same in the case of Renusagar Power Co. Ltd. v. General Electric Co., (1984) 4 SCC 679 as under:

25. Four propositions emerge very clearly from the authorities discussed above:

.....

(2) Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.

- (iii) NLCIL also submitted that they are setting up the project in the State of Odisha and will be supplying power to various procurers in different States including KSEB Ltd. in the State of Kerala. The entire transaction of generation and sale of electricity under the PPA executed between NLCIL and KSEB Ltd. falls within the scope of Section 79 (1) (b) of the Electricity Act, 2003 as the scheme involve generation and sale in more than one State and hence it is a composite scheme. The jurisdiction to deal with composite scheme is with the Central Commission in respect of all the matters arising out of the PPA. NLCIL also submitted reference to the judgment of the Hon'ble Supreme Court in Energy Watchdog v.

Central Electricity Regulatory Commission & Ors. (2017) 14 SCC (Para 24 and 26).

- (iv) The exercise of powers by this Hon'ble Commission under Section 86 (1) (b) of the Electricity Act read with Rule 8 of the Electricity Rules, 2005 is to decide on whether the quantum of power should be purchased by distribution licensee or not at the tariff determined by the Central Commission. The jurisdiction under Section 86 (1) (b) is to regulate the power purchase and procurement process including the price at which the electricity shall be procured through agreement for power purchase.
- (v) Hon'ble Appellate Tribunal also settle the above position in a) judgment dated 04.09.2012 in Appeal No.94 and 95 of 2012 in BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission & Other and b). Judgement dated 02.07.2021 in Appeal No. 52 of 2021 and connected appeal in Solar Energy Corporation of India Limited v. Delhi Electricity Regulatory Commission.
- (vi) NLCIL submitted before the Commission to direct KSEB Ltd. to withdraw the additional submission dated 04.08.2022 and to adhere to the original petition dated 29.07.2022. NLCIL also submitted that it is not agreeable to the modifications submitted in the additional submission dated 04.08.2022. If KSEB Ltd. does not withdraw the additional submissions, NLCIL will be unable to proceed with the PPA/2nd draft amendment to the PPA with KSEB Ltd. for the 400 MW power from the Talabara project in the State of Odisha.

7. The Commission admitted the petition as OP No: 45/2022. The hearing of the petition was held on 25.08.2022 through video conference. Sri M.P.Rajan, Deputy Chief Engineer presented the matter on behalf of KSEB Ltd. Shri Shaji John, Director (Power) presented the matter on behalf of NLCIL. The summary of the deliberations during the hearing is given below;

- (1) M/s KSEB Ltd submitted that, the original PPA with M/s NLCIL for the purchase of 400 MW power from the Sirkali Thermal Power plant was signed on 3rd January 2011. But due to the delay in land acquisition and also the cost involved in the transportation of coal, M/s NLCIL decided to develop a pit head station at Talabira to substitute Sirkali.

M/s KSEB Ltd further submitted that as per the Clause 2(1) of CERC Tariff Regulations 2019, a fresh consent was required from the beneficiaries for availing the already consented quantum of 400 MW power from Talabira project. Accordingly, M/s NLCIL approached M/s KSEB Ltd for a fresh consent. Ministry of Power, Government of India (GoI) has also directed to amend the original PPA, to reflect the change in location of the plant and other concomitant change because of the change in location.

KSEB Ltd. decided to purchase 400 MW power from the proposed power plant of Talabira in the State of Odisha since being a pit head station the tariff of the project is likely to be very competitive and less than other similar projects. It is also submitted that the project is likely to be commissioned in the year 2027-28 and it is expected that KSEB Ltd. may face difficulty in meeting the anticipated electricity demand of the State. On a query of the Commission, KSEB Ltd. reiterated that it is interested in entering into agreement with NLCIL for the procurement of 400 MW project.

(2) During the hearing M/s NLCIL submitted the following;

The original PPA was signed between KSEB Ltd. and NLCIL on 3rd January 2011, and the present deliberations are only limited to amendment to the original PPA. Due to the difficulty in land acquisition and also the excessive cost involved in transportation of coal, NLCIL shifted the location of the project from Sirkali, Nagapattanam in Tamil Nadu to Talabira in Odisha State by converting the plant to a pit head station. The variable cost of the project was reduced to ₹1.19 per unit as against the variable cost of ₹2.90 to ₹3.00 per unit when the project is located at Sirkali in Nagapattanam.

NLCIL further submitted that being a Central Government utility the power from the project is allotted by Ministry of Power, Government of India. Since the location of the project was changed, MoP again reallocated the capacity from the plant to different States with the direction that the already concluded PPA between NLCIL and the beneficiaries has to be amended to reflect the change in location of the plant and any other concomitant change that may happen because of the location. NLCIL further submitted that among the various changes in the original PPA proposed by the KSEB Ltd., NLCIL cannot agree with the proposed amendments in clauses 11 and 15 of the original PPA dated 03.01.2011, as it is in variance with the draft 2nd amendment dated 20.07.2022. NLCIL also submitted that they had already signed PPA with Tamil Nadu for supply of 1500 MW and also signed PPA with Puducherry for 100 MW.

NLCIL further submitted that since the Talabira power project is a composite scheme supplying power to more than one State any dispute arising out of power allocation from Talabira power plant is vested with Central Commission only.

It is further submitted that the exit clause included in the amendment leads to confusion. NLCIL submitted that except the clauses 11 and 15, other modifications suggested by KSEB Ltd. were acceptable to NLCIL.

- (3) During the hearing held on 25.08.2022, KSEB Ltd clarified that they are not sticking on to the modifications proposed in clauses 11 and 15 of the PPA and agreed to retain these clauses as in the original agreement dated 03.01.2011.

Analysis and Decision

8. The Commission has examined in detail the petition filed by M/s KSEB Ltd, the comments of the respondent M/s NLCIL, the deliberations during the hearing held on 25.08.2022, and other documents and details placed before the Commission as per the provisions of the Electricity Act, 2003, KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2021, various judgments of the Hon'ble Supreme Court and Hon'ble Appellate Tribunal for Electricity (APTEL), hereby by decided as follows.
9. KSEB Ltd filed the present petition for the approval of the 400MW power from the NLCIL's Talibara Power Project located at Odisha State. KSEB Ltd also requested to approve the PPA and amendments thereto. The Commission examined the prayer of the petition with respect to the provisions of the Electricity Act, 2003 and Tariff Regulations, 2021 notified by the Commission.
10. As per the Section 86(1) (b) of Electricity Act, 2003, 'regulate the electricity purchase and procurement process' by the distribution licensees is one of the statutory functions of the State Electricity Regulatory Commissions. The relevant Section of the Electricity Act, 2003 is extracted below.

"(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;"

11. The Regulation 77 of the Tariff Regulations 2021 deals with the 'Approval of the Power Purchase Agreements' by this Commission, which is extracted below.

"77. Approval of Power Purchase Agreement. –

(1) The distribution licensee shall not enter into any long term or medium-term power purchase without the formal approval of the Commission, based on a petition filed by the distribution licensee.

(2) 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 prior 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.

(3) Every proposal for procurement of power on medium term or long term basis shall be filed as petition complete in all respects before the Commission, at least

120/180 days respectively before the date of commencement of the proposed supply.

(4) The Commission shall examine such petition for approval of the Power Purchase Agreement having regard to, the approved Power Procurement Plan of the distribution business/ licensee and after considering the following factors:-

- (i) requirement of power under the approved Power Procurement Plan;
- (ii) adherence to a transparent process of bidding in accordance with the guidelines issued by the Central Government under Section 63 of the Act, if applicable;
- (iii) adherence to the terms and conditions for determination of tariff specified under Regulation 39 of Chapter V of these Regulations, where the process specified in clause (ii) above has not been adopted;
- (iv) Deviations to (ii) and (iii) above and whether such deviations have the prior approval of the competent authority;
- (v) availability (or expected availability) of capacity in the Intra-State transmission system for evacuation and supply of power procured under the agreement; and
- (vi) Need to promote co-generation and generation of electricity from renewable sources of energy.

.....”

12. The Regulation 74(5)(v) of the Tariff Regulations, 2021, further provides as follows.

"Mere allocation of power from the Ministry of Power cannot be the basis for drawing power or entering into a PPA. All such allocations have to be formally filed before the Commission as a petition and shall include the quantum of power, its rate, other terms and conditions etc. Only after formal approval of the Commission is obtained, shall the distribution licensee draw new power from any new source"

13. KSEB Ltd is the incumbent distribution licensee in the State of Kerala. As discussed in the paragraphs 10,11 and 12 above, as per the provisions of the Electricity Act, 2003 and Tariff Regulations, 2021, KSEB Ltd has to get the approval of this Commission for the purchase of electricity for distribution and supply within the State of Kerala.

14. M/s NLC India Ltd is a Generating Company as defined under Section 2(28) of the Electricity Act, 2003. M/s NLCIL is a company owned by the Central Government. Ministry of Power (MoP), Government of India (GoI) has allotted 400MW power from NLCIL's Talabira project located at Odisha State to the State of Kerala. MoP had also allotted 1500MW power from this project to Tamilnadu and 100 MW to Puduserry.

15. The Talibara project is expected to achieve commercial operation by the year 2027-28. Being a pit head station, the anticipated levelised tariff of the electricity generated from the plant is about Rs 3.06/kWh and the first year tariff is about Rs 3.29/unit.

However, as per the Section 79(a) of the EA-2003, the determination of tariff of the generating stations of NLCIL is vested with the Central Commission. Hence the actual tariff is known only after the tariff of the electricity generated from the

Talabira project is determined by the CERC as per the Section 62 of the EA-2003 and Tariff Regulations issued by CERC from time to time. Hence the tariff mentioned in the petition is indicative only and the actual payment for the electricity supplied shall be at the tariff determined by CERC.

But the Central Commission will determine the project specific tariff based on the actual capital cost, interest on loan and other technical & financial parameters as specified in the Tariff Regulations notified by CERC from time to time. Since the anticipated year of CoD is only in the FY 2027-28, the respondent NLCIL may file petition for determination of tariff only after commissioning of the project in the FY 2027-28. Being the beneficiary of the Talibara power station of the NLCIL, KSEB Ltd also get the opportunity to participate in the deliberations of the tariff determination of the Talibara project before the CERC. KSEB Ltd shall file its objections and comments on the tariff proposed by the respondent NLCIL before the CERC.

16. KSEB Ltd during the deliberations of the subject matter submitted that, being a pit head station, the tariff of the electricity generated from the Talibara project is likely to be very competitive. Further, for meeting the increase in electricity demand of the State by the year 2027-28, KSEB Ltd proposed to procure 400MW power from the Talibara Power Plant of the NLCIL.
17. The Commission after considering the entire aspects in detail, decides to grant approval for procuring 400MW power from the Talibara Power Plant of NLCIL subject to the following conditions;
 - (i) The tariff of the electricity generated from the Talibara Project of the NLCIL shall be at the tariff determined by the CERC as per Section 62 of the EA-2003 from time to time.
 - (ii) KSEB Ltd shall actively participate and file its objections and comments before the Central Commission during the deliberations of the determination of tariff of the electricity generated from the Talibara project.
18. The Commission has also examined the 2nd of Deed of Amendment dated 20.07.2022 to the original Power Purchase Agreement dated 03.01.2011 & subsequent 'Deed of Amendment' dated 07.10.2014. The original PPA dated 03.01.2011 was signed for the purchase of power from the NLCIL's coal based 3x660MW Thermal Power Station at Sirkali, Tamilnadu. However, subsequent to the allotment of coal blocks at Talibara II & III Mines to NLCIL by the Gol, NLCIL has decided to establish a coal based 3x800MW pithead Thermal Power Plant in Odisha State in lieu of Sirkali Thermal Power plant (3 x 660MW) in Tamilnadu.

The first proviso to Regulation 2(1) of the CERC Tariff Regulations 2019 provides as follows.

“

Provided that any generating station for which agreement(s) have been executed for supply of electricity to the beneficiaries on or before 5.1.2011 and the financial closure for the said generating station has not been achieved by 31.3.2019, such projects shall not be eligible for determination of tariff under these regulations unless fresh consent of the beneficiaries is obtained and furnished.”

As per the above provisions of the CERC Tariff Regulations, 2019, KSEB Ltd vide its letter dated 22.01.2021 has given fresh consent for availing 400MW power from the Talabira Project of NLCIL.

Ministry of Power, GoI vide its letter No. 06/01/2010-St. Th (Vol.I) dated 19.11.2020 has re-allocated the power from Talabira Power Project to the State of Tamilnadu (1500MW), Kerala (400MW) and Union Territory of Puducherry (100MW), wherein the MoP, GoI stated that, the above allocation is subject to the amendments in PPA by the above States/UTs with NLCIL for the already concluded PPAs signed on 03.01.2011, to reflect the change in location of the plant and any other concomitant change that may happen because of the change in location of the plant.

The 2nd Deed of Amendment submitted before the Commission for approval was initiated by both the parties, the seller M/s NLCIL and the procurer M/s KSEB Ltd. The parties to the agreement further submitted that, similar 2nd Deed of Amendment was already signed with Tamilnadu and the UT of Puducherry.

19. Subsequently vide the additional submission dated 04.08.2022, KSEB Ltd proposed certain minor modifications in the original PPA dated 03.01.2011 signed between M/s NLCIL and KSEB Ltd. The details of the modifications proposed by KSEB Ltd is extracted under paragraph 3 of this order. The changes proposed are mainly limited to the following clauses.

- (1) Clause-11 of the original agreement dated 03.01.2011 ‘Disputes and Redressal Mechanism’.
- (2) Clause-15 of the original agreement dated 03.01.2011 ‘Effective date and duration of the Agreement’.
- (3) Definition in 2nd deed of amendment dated 20.07.2022
- (4) Clause 7.4 in 2nd deed of amendment dated 20.07.2022
- (5) Clause 15 in 2nd deed of amendment dated 20.07.2022

However, M/s NLCIL strongly objected to the modifications proposed in Clause-11 and Clause-15 of the concluded PPA dated 03.01.2011. NLCIL during the hearing held on 25.08.2022 submitted that except the modifications proposed in clause-11 and clause 15 of the original PPA dated 03.01.2011, other modifications are acceptable to NLCIL.

20. During the hearing held on 25.08.2022, KSEB Ltd clarified that, they are not sticking on to the modifications proposed in the clauses 11 and 15 of the original PPA dated 03.01.2011 and requested before the Commission to approve the

draft 2nd Deed of Amendment dated 20.07.2022 with the modifications mutually consented by both the parties.

21. The Commission examined the modifications proposed by KSEB Ltd and the objections of the NLCIL and the deliberations of the subject matter in detail. NLCIL is a Central Government owned generating company and owning number of generating stations in the country. At present NLCIL has been supplying about 370MW power to M/s KSEB Ltd from its five generating stations located at various places in the country. The generating stations of NLCIL is established for supplying power to more than one State. Further, common PPAs/ Agreements with minor modifications to suite the State specific requirements are used for entering into PPAs with the distribution licenses.

In the present case also, in addition to 400MW power allotted from NLCIL's Talibara power plant at Odisha District, 1500 MW power is allotted to Tamilnadu and 100MW allotted to the Union Territory of Puducherry. It is also reported that, the PPA and the 2nd deed of amendments are already signed with Tamilnadu and Puducherry with mutual consensus.

Considering all these aspects in detail, this Commission is also not interfering in the mutually agreed PPA dated 03.01.2011 and 2nd Deed of Amendment dated 20.07.2022 with the modifications mutually consented by both NLCIL and KSEB Ltd. Hence the Commission decided to approve the PPA dated 03.01.2011 and the 2nd Deed of Amendment dated 20.07.2022 with the modifications mutually consented by both NLCIL and KSEB Ltd.

Order of the Commission

22. The Commission, after examining the petition filed by M/s KSEB Ltd dated 29.07.2022, the additional submissions dated 04.08.2022 and 22.08.2022 as per the provisions of the Electricity Act, 2003 and Tariff Regulations, 2021, and other documents and clarifications provided during the deliberations of the subject matter, hereby orders the following.

- (1) Grant approval for procuring 400MW power from the Talibara Power Plant of NLCIL at Odisha State, subject to the following conditions;
 - (i) The tariff of the electricity generated from the Talibara Project of the NLCIL at Odisha shall be at the tariff determined by the CERC as per Section 62 of the EA-2003 from time to time.
 - (ii) KSEB Ltd shall actively participate and file its objections and comments before the Central Commission during the deliberations of the determination of tariff of the electricity generated from the Talibara project at Odisha.
- (2) Approves the PPA dated 03.01.2011 & subsequent 'Deed of Amendment' dated 07.10.2014 and the 2nd Deed of Amendment dated

20.07.2022 with modifications mutually consented by both the NLCIL and KSEB Ltd.

- (3) KSEB Ltd shall submit a copy of the signed PPA and its amendments before the Commission for information and record within one month from the date of signing the 2nd Deed of Amendment.

The petition disposed off. Ordered accordingly.

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

Approved for issue

Sd/-
C R Satheeshchandran
Secretary