

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

**Present : Shri T K Jose, Chairman
Adv. A.J Wilson, Member
Shri B Pradeep, Member**

OP No 53/2022

In the matter of : Petition under section 86 of the Electricity Act 2003, seeking approval of the draft power purchase agreement initialled by the petitioner and Kerala State Electricity Board Limited.

Petitioner : Minar Renewable Energy Projects Limited

Respondent : Kerala State Electricity Board Ltd (KSEB Ltd)

M/s Minar represented by : Adv. Anand.K.Ganesan, Counsel for the Petitioner
Adv. Krithika Khanna
Shri. Zulfikera, GM, MREPL
Shri. Mohammad Shafi, MD, M/s MREPL
Shri. Shaji.P, Accounts Manager, M/s MREPL

KSEB Ltd represented by : Shri. M.P.Rajan, Deputy Chief Engineer
Shri Shine Raj, AE, TRAC, KSEB

First hearing on : 11.01.2023
Second hearing on : 25.01.2023, 02:30 PM

Venue : e-hearing through video conferencing

Order dated 08.02.2024

1. M/s Minar Renewable Energy Projects Private Limited, (hereinafter referred to as M/s Minar or the petitioner) has filed a petition dated 17.01.2022, before the Commission with the prayers to;

*“(a) Approve the PPA to be executed between the Petitioner and the Respondent - KSEB with the clauses as detailed above in the present petition;
(b) Pass such other Order(s) and this Hon’ble Commission may deem just and proper.”*

The Commission admitted the petition as OP No. 53/2022.

2. The summary of the petition filed by the petitioner is given below.
 - (1) The State Government vide the Order dated 12.12.2012, had invited proposals for setting up 62 Small Hydro Power Projects at Build, Own, Operate and Transfer (BOOT) basis for 30 years from the date of allotment of the project. Out of the above, the petitioner was successful

in the bid for implementing the 4 MW "Pathamkayam Small Hydro Electric Project".

- (2) The State Government vide the GO dated 21.07.2014 had allotted the Pathamkayam SHP to the petitioner under Captive Power Plant (CPP) category.
- (3) The petitioner had signed the implementation agreement with the State Government on 10.04.2015. The implementation agreement dealt with various aspects of the project including the terms of the agreement, CoD, obligations of the Company and the State Government, force majeure, transfer of project facilities at the end of the project etc.
- (4) Based on a detailed study conducted by the petitioner, the State Government vide the GO dated 07.07.2015 has granted approval for enhancing the capacity of the project from 4 MW to 8 MW.
- (5) The project was successfully synchronized with the KSEB grid on 17.03.2017. Since then, electricity is being generated from the project continuously.

Subsequently, as requested by the petitioner, the State Government vide the GO dated 01.08.2017, ordered to change the project category from CPP to IPP.

- (6) After completing all the procedure formalities, the project declared CoD on 14.08.2017.
- (7) The Commission vide Order dated 06.09.2019, read along with the Corrigendum Order dated 14.11.2019 in OA No.08/2018 had determined the levelized tariff for the electricity generated from the 8 MW SHEP developed by M/s Minar at Pathamkayam at Rs 3.94/unit with the benefit of accelerated depreciation.
- (8) Aggrieved by the Order of the Commission regarding the determination of project specific tariff, the petitioner on 06.11.2019 has filed an appeal petition before the Hon'ble APTEL being Appeal No. 431 of 2019, which is pending before the Hon'ble APTEL.
- (9) Subsequently, the petitioner on 16.01.2020 had requested to the KSEBL to execute the PPA in line with the model PPA in the tender documents.
- (10) The petitioner further submitted that, prior to the determination of the tariff by the Commission, KSEB Ltd has been making payments @Rs 3.49/unit (which is 75% of the generic tariff @Rs 4.65/unit). The petitioner further requested KSEB Ltd to release the balance payments of Rs 1.16/unit (which is the difference of Rs 4.65/unit minus Rs 3.49/unit, though the Commission determined project specific tariff was Rs 3.94/unit only).

- (11) Subsequently, there was a higher level meeting between the petitioner with CMD of KSEBL and other officials on 21.08.2020. KSEBL informed the petitioner that, the project specific tariff @Rs 3.94/unit shall be paid once the petitioner initialed the PPA. KSEB Ltd also informed that, the draft PPA forming part of the bidding documents was only a reference document. However, KSEBL agreed to look into the project specific issues.
- (12) With repeated request and compulsion from KSEBL, the petitioner decided to initial the PPA as a precondition for making even the interim payment, with disagreement on the following clauses of the initialed PPA.
- (i) Must run status of the project
 - (ii) Payment security
 - (iii) Change in law.
 - (iv) Clause 5.4 of the PPA regarding tariff.
 - (v) Retention money

3. KSEBL vide its letter dated 01.09.2022 has submitted its detailed comments on the petition. The petitioner has submitted the rejoinder on 20.01.2023.
4. The Commission has conducted hearings on the petition on 11.01.2023 and 25.01.2023. Shri. Anand. K. Ganesan, Counsel presented the matter on behalf of the petitioner. Shri.M. P. Rajan, Deputy Chief Engineer, appeared on behalf of the respondent.

Subsequently, as instructed by the Commission, the petitioner has submitted the written note on the petition on 27.01.2023. KSEBL has submitted the written note on 20.02.2023.

Summary of the project

5. As discussed above, M/s MINAR Renewable Energy Projects Private Limited has established the Pathamkayam SHP 8MW in Chaliar Basin. The State Government had signed an Implementation Agreement with the petitioner on 10.04.2015. Originally the project was allotted as Captive Power Plant (CPP). Subsequently as requested by the petitioner, the State Government vide the GO dated 01.08.2017 has allowed to change the project category from CPP to Independent Power Producer (IPP) category.

The project achieved COD on 14.08.2017. Since then electricity is being generated from the project and supplying to KSEBL.

6. The Commission vide the Order dated 06.09.2019, read along with the Corrigendum Order dated 14.11.2019 in Petition OA No. 08/2019 had approved the tariff of the Pathamkayam project @ Rs 3.94/unit.

Aggrieved by the tariff determined by the Commission, the petitioner had filed an appeal petition before the Hon'ble APTEL being Appeal No. 431 of 2019, which is pending before the Hon'ble APTEL.

The present petition is filed by the petitioner on 17.01.2022, for the approval of the power purchase agreement (PPA) to be signed between the petitioner M/s Minar Renewable Energy Projects Pvt Ltd and the respondent KSEBL.

7. As discussed in paragraph 2(12) above, there are certain disputes in the various provisions of the PPA. The deliberations on the various disputes raised by both the petitioner and respondent KSEBL of the initialled PPA and the considered decision of the Commission on each issues is given in the subsequent paragraphs below.

Issue No.1. Must run status of the project.

8. Suggestions of the petitioner

The petitioner submitted that the project of the petitioner being a hydroelectric power plant falls under the category of a renewable energy source and as such ought to be promoted in terms of the provisions of the Electricity Act, 2003. As part of promoting RE, the project of the petitioner may be exempted from merit order despatch and allow must run status to the project.

The petitioner further submitted that, it had sought for inclusion of the 'must run status' of its project in line with the provisions of the Electricity Act, 2003, KSERC (Renewable Energy & Net Metering) Regulations,2020, KSERC (Renewable Energy and Net Metering) (First Amendment) Regulations, 2022. KSEBL has agreed in principle to it, and hence the same may be included by express language in the PPA. Such inclusion cannot in any manner prejudice to the interest of KSEBL.

9. Comments of KSEB Ltd

The Regulation 38(1) of the KSERC (Renewable Energy and Net Metering) (first amendment) Regulations, 2022 stipulates that all renewable energy power plants having valid Power Purchase Agreement (PPA) approved by the Commission, unless and otherwise exempted by the Commission for reasons to be recorded in writing, shall be treated as 'MUST RUN power plants and shall not be subjected to 'Merit Order Dispatch' principles.

Hence KSEB Ltd submitted that, there is no need to specify 'must run status' in explicit terms in the PPA. Further, as per the Electricity (Promotion of Generation of Electricity from must-run power plant) Rules 2021 dated 22.10.2021, stipulates that 'must run plants' are not subjected to 'Merit Order Dispatch' principles.

Analysis and Decision of the Commission

10. The Commission has examined the deliberations of the subject matter in detail, and noted the following;

- (1) The Pathamkayam SHP (8MW) established by the petitioner is a renewable source of energy in terms of the provisions of the KSERC (Renewable Energy & Net metering) Regulations, 2020 and other Rules and Regulations in force.
- (2) The Regulation 38 of the KSERC (Renewable Energy & Net Metering) (First Amendment) Regulations, 2022, deals with the “Principles for the dispatch for Electricity Generated from Renewable Energy Sources”. The relevant Regulations is extracted below for ready reference.

“38(1) All the renewable energy power plants having valid Power Purchase Agreement (PPA) approved by the Commission, unless and otherwise exempted by the Commission for reasons to be recorded in writing, shall be treated as ‘MUST RUN’ power plants and shall not be subjected to ‘Merit Order Dispatch’ principles.

38(2) Scheduling of Renewable Energy plants shall be governed by the Regulations issued by the Commission from time to time.”

- (3) As above, as per the Regulation 38(1) of the KSERC (Renewable Energy & Net Metering) (First Amendment) Regulations, 2022, the Pathamkayam SHP (8MW) of the petitioner shall be treated as ‘Must Run’ power plant and it is exempted from ‘Merit Order Dispatch’ principles.
11. There is no dispute between the petitioner and respondent regarding that the Pathamkayam SHP has to be treated as ‘must run’ power plant and the scheduling of the plant is exempted from merit order principles. The only issue raised by the petitioner is that, a clause may be incorporated in the PPA to specify in explicit term that, the Pathamkayam SHP of the petitioner shall be treated as ‘must run’ power plant and it is exempted from merit order principles.

However, KSEBL argued that, since as per the Regulation 38 of the KSERC (Renewable Energy & Net Metering) (First Amendment) Regulations, 2022, all the RE power plants having valid PPA is treated as ‘must run’ power plants and such plants are exempted from ‘merit order dispatch’ principles’. Hence there is no need to specify the same in the PPA to be signed between the parties for the purchase of power from the Pathamkayam SHP.

12. The Commission has examined the arguments of both the parties. Since the Power Purchase Agreement (PPA) is a legally enforceable contract as per the Indian Contract Act, 1872, there is no harm in specifying in the PPA in explicit term that, the Pathamkayam Project (8MW) of the petitioner shall be treated as ‘must run project’ and exempted from ‘merit order dispatch’ principles’ as per the KSERC (Renewable Energy & Net Metering) Regulations and its amendments from time to time.

However, the Commission hereby clarify that, the scheduling of power from the power plant is subject to the Regulations, if any, to be notified by the

Commission as provided under Regulation 38(2) of the KSERC (Renewable Energy & Net Metering) (First Amendment) Regulations, 2022.

13. Considering the entire aspects in detail as discussed in paragraphs 10,11,12 and 13 above, the Commission hereby approve to include the following clause as 'Clause 5.9 of the draft initialled PPA' submitted before the Commission for approval.

"5.9 The Pathamkayam SHP (8MW) shall be treated as 'must run' power plant and exempted from 'merit order despatch principles' as provided under the Regulation 38 of the KSERC (Renewable Energy & Net Metering) Regulations 2020 as amended from time to time. The scheduling of power from the power plant shall be governed by the Regulations, if any, notified by this Commission on this behalf from time to time"

Issue No.2.

Payment Security for the electricity generated and supplied to KSEBL from the Pathamkayam SHP (8MW)

14. **Suggestions of the petitioner**

The Petitioner submitted that, the initialled PPA does not specify any provision pertaining to payment security mechanism. The project of the petitioner is operated by borrowing loans which ought to be periodically repaid. The servicing of loans is done by generators through payment received from the bills raised. Absence of any payment security mechanism severely affects the bankability of a project. Hence specifying the same helps in securing lender confidence.

The petitioner further submitted that, there are number of risks involved in the whole process of power generation. In order to reduce the risks for the generators, the legislature in its wisdom has created the provision of multi-level payment security mechanism, which include Letter of Credit, Default Escrow Agreement, Payment security fund etc.

The Regulation 28 of the KSERC (Renewable Energy) Regulations,2015 provides the Security mechanism for purchase of Renewable Energy.

The argument of the KSEBL that, till date it had never defaulted on regular payment to the generator is not correct. In the case of the petitioner, KSEBL is not making payments at the approved tariff of Rs 3.94/unit, instead KSEBL has been paying tariff at the interim rate of Rs 3.49/unit. The petitioner vide the letter dated 07.01.2023 had requested KSEBL to release the balance amount withheld wrongfully by it. However, KSEBL has till date not released the amount.

The argument of the KSEBL that, it is not encouraging LC to any developer within the State is not correct. KSEBL has included the provision of letter of credit in case of the Iruttukkanam project developed by M/s Viyyat Power Pvt Ltd, which was also developed as per the Small Hydro Policy of the State Government. Relevant extract of the PPA dated 07.06.2007 with M/s Viyyat Power Pvt Ltd is extracted below.

“9.6 Payment

Board shall make payment of the amounts due in Indian Rupees on or before Due Date of Payment. On the first default of payment by the Board, the Board shall open an irrevocable, confirmed revolving Letter of Credit (LC) in favour of the Company. The initial value of the LC shall be the value payable for the preceding 3 months”

15. Comments of KSEBL

KSEB Ltd submitted that the prevailing Regulations of KSERC does not stipulate creation of payment security mechanism. KSEBL further submitted that, till date there has been no case of defaulting regular payment from KSEBL side to the generator. But in the case of CGS/IPPs outside the State, as per MoP policy, KSEBL is bound to establish an irrevocable unconditional revolving Letter of Credit. However, KSEB is not encouraging payment security mechanism such as ‘letter of credit’ to any developer within the State.

Regarding the payment security clause included in the PPA of M/s Viyyat Power Pvt Ltd, KSEBL submitted the following;

“Irrutukanam Stage I SHEP was allotted in 2004 to M/s. Viyyat Power Private Limited as per GO dated 21.06.2004 and KSEBL has executed PPA with M/s. Viyyat Power Private Limited on 07.06.2007. The project was allotted to M/s Viyyat on BOOT basis through tariff based competitive bidding route by GoK. Whereas, Pathamkayam SHEP was allotted to the petitioner as per Small Hydro Policy 2012 based on competitive upfront premium based bidding process. The allotment of above two projects is at different time period and under different type of bidding process, hence both the cases are different.

As per the Clause 9.6 of the PPA executed between KSEBL and M/s. Viyyat Power Project Pvt Ltd, states that 'On the first default of payment by the Board, Board shall open an irrevocable, confirmed revolving Letter of credit (LC) in favour of the Company. It is submitted that, since the project allocation are different, PPA clauses of both the projects cannot be compare each other. Further, it is noted that, till date KSEBL has not executed any payment security mechanism with M/s. Viyyat Power Project Pvt Ltd as there has been no default in payment from KSEB Ltd.”

Analysis and Decision of the Commission on Issue No.2

16. The Commission has noted the arguments of both the parties on the issue. The Commission is of the view that, insisting for payment security by the petitioner for its obligations to supply electricity from the Pathamkayam SHP cannot be termed as against the interest of KSEBL. However, the petitioner shall also keep in mind that, none of the generators/traders supplying power to KSEBL had complained about default in regular payments of power purchase, till date.
17. The Commission after examining the entire issue in detail, is of the considered view that, a clause for payment security may be included in the draft initialled PPA between the petitioner and KSEBL, similar to the payment security provided in the Clause-9 of the PPA dated 07.06.2007, signed between the generator M/s Viyyat Power Pvt Ltd and KSEBL. As such, if the KSEBL promptly make payment for the electricity purchase within the due date, the necessity of opening of Letter of Credit does not arise.

18. Considering the entire aspects in detail as discussed in the preceding paragraphs 15 to 18 above, the Commission hereby approve to insert the following clauses as Clause 6.6 below in the initialled draft Power Purchase Agreement.

“6.6 Payment

KSEBL shall make payment of the amounts due in Indian Rupees on or before Due Date of Payment. On the first event of default of payment, if any, by the KSEBL, the KSEBL shall open an irrevocable, revolving Letter of Credit (LC) in favour of the Company. The initial value of the LC shall be the average value payable for the preceding 3 months”

Issue No.3.

Modifications of the Clause 10.4 of the draft initialled PPA regarding Change In Law conditions in the PPA.

19. **Suggestions of the petitioner**

The petitioner submitted that, the Clause 10.4 of the draft PPA provide as below;

"In case of change in law or restriction imposed by Regulator (Central or State) and Appellate Tribunal on any aspect for purchase of power, the same shall be binding on both the parties”

Petitioner further submitted that the events covered by the change in law in the draft PPA is extremely narrow in scope only.

The clause in the draft PPA is silent on the changes in law by way of coming into force of any enactment by the State or Central Legislature or the repeal of any existing law.

The Petitioner further submitted that the Hon'ble Supreme Court has recognized the importance and scope of the change in law provision in Uttar Haryana Bijli Vitran Nigam Ltd & Ann v Adani Power Ltd & Ors, [(2019) 5 SCC 325] wherein it held that the change in law provision acts as an in-built restitutionary principle and ensures that the parties affected by such change in law are compensated so as to be restored to the same economic position as if the such change in law never occurred. Further, the Hon'ble Supreme Court also recognized the scope of change in law and held that a change in law, inter alia, includes adoption, promulgation, amendment, re-enactment or repeal of the law.

Considering the above, the petitioner proposes to modify the 'change in Law' clause as given below.

The proposed amendment of the petitioner

"In case of change in law by the occurrence or coming into force of the enactment of any new Indian law or legislation passed by the State Legislature or Central Legislature or the repeal, modification or reenactment of any existing Indian law or restriction imposed by Regulator (Central or State) and Appellate Tribunal on any aspect for

purchase of power after getting an opportunity of hearing the grievances of the affected party on change in law shall be binding on both the parties”

20. Comments of KSEB Ltd

KSEBL submitted that, the clause 1.1 (h) of the implementation agreement of Pathamkayam SHEP, clearly specifies the provision of change in law, which is extracted below.

"1.1 (h)Change in Law" means the occurrence or coming into force of any of the following:

the enactment of any new Indian law or legislation passed by the State Legislature or the repeal, modification or re-enactment of any existing Indian law

Provided that Change in Law shall not Include:

Coming into effect after the date of signing this Agreement of any provision of a statute which is already in place as of the date of signing this Agreement or any new law or any change in existing law under the active consideration of or in the contemplation of any government as of the date of signing this Agreement, which is a matter of public knowledge. Any change in the rates of any of the taxes”

As per the clause 10.4 of draft PPA, in case of change in law or restriction imposed by Regulator (Central or State) and Appellate Tribunal on any aspect for purchase of power, the same shall be binding on both the parties. KSEBL further submitted that, the implementation agreement along with the Clause 10.4 of the draft PPA takes care of the request of the developer. Hence KSEBL Ltd submitted that there is no need to include such provisions in the PPA.

Analysis and Decision of the Commission on the Issue No.3

21. The Commission has examined the argument of both the parties in detail and noted the following;

- (1) Subsequent to the allotment of the Pathamkayam SHP to the petitioner by the Government vide the Order G.O (Ms) No. 23/2014/PD dated 21.07.2014, the State Government had signed an Implementation Agreement with the petitioner M/s Minar Renewable Energy Projects Pvt. Ltd on 10th April-2015. The said agreement deals with the various aspects of the Pathamkayam SHP, including (but not limited to) the following;
 - (i) Term of the Agreement (Article-2)
 - (ii) Development of the project (Article-4).
 - (iii) Obligations of the developer (here the petitioner) (Article-5) and Obligations of the State Government (Article-6),
 - (iv) Force majeure conditions (prior to CoD and after CoD) (Article-7)
 - (v) Events of default and termination (Article-8)
 - (vi) Transfer of project facilities (Article-10).

The clause 1.1 (h) of the Implementation agreement, defines the change in law as extracted under paragraph 23 above. The clause 1.1(h) of the implementation agreement read along with the Article 10.4 of the PPA

may address the concern raised by the petitioner regarding the issue on 'change in law' in the draft initialled PPA.

- (2) Since the implementation agreement dated 10.04.2015 cover various aspects of the Pathamkayam Project (8MW) from the commencement till the date of transfer of the project including termination as discussed above, the implementation agreement shall also form an integral part of the PPA to be signed between M/s Minar Renewable Energy Projects PVt Ltd and KSEBL.
- (3) However, it is noticed that, there is no specific clause in the draft initialled PPA stating that, the implementation agreement signed between the petitioner and the State Government dated 10.04.2015 shall form an integral part of the PPA to be signed between the petitioner and respondent KSEBL.

22. Considering the above aspects in detail as discussed in paragraphs 21 to 24 above, the Commission hereby approve to include an additional clause as 'Clause 10.9 of the draft initialled PPA' as follows to make effect that the 'Implementation Agreement signed by the petitioner with the State Government shall form an integral part of the PPA.

"10.9 The Implementation Agreement (IA) dated 10.04.2015 as defined in Clause (1)(aj) shall form an integral part of this Agreement and shall be in full force and effect as though they were expressly set out in the body of this Agreement".

Issue No.4 Article 5.4 of the PPA regarding tariff

23. Comments of the petitioner

The Article 5.4 of the initialled PPA provide as follows;

"5.4 Tariff for power generated from the project shall be project specific tariff as determined by the Commission or generic tariff notified by the Commission, which ever is lower".

The petitioner further submitted that, they had not raised the 'lis' regarding the Article 5.4 of the PPA in the present proceedings. It is the case of the petitioner that, the generic tariff is applicable in the case of the petitioner's project, which was even incorporated in the Model PPA. However, when the PPA was being initialled between the parties, KSEBL chose to modify the Article 5.4 of the PPA to include that the tariff as applicable would be the project specific tariff or the generic tariff, whichever is lower.

The petitioner has also submitted that, they had filed an Appeal No. 431 of 2019 before the Hon'ble APTEL, which is pending as on date. The tariff approved by the Commission is subject to the outcome of the judgment of the Hon'ble APTEL.

However, presently the petitioner has been constrained to agree on interim billing at 75% of the generic tariff fixed for the FY 2015-16 (Rs 4.65/unit) i.e.,

Rs 3.49/unit, which was because otherwise KSEBL was not agreeing to initial the PPA at its end.

In view thereof, it is reiterated that the fate of Article 5.4 of the PPA cannot be decided in this petition at this stage since the issue is sub judice before the Hon'ble APTEL.

24. Comments of the respondent KSEBL

KSEB Ltd submitted that the Commission vide Order dated 06.09.2019 read along with the corrigendum dated 14.11.2019 in OA No.08 of 2018 had determined the project specific tariff at Rs. 3.94 per unit. The rate is acceptable to KSEB Ltd.

As far as the Commission is concerned, the tariff determination process is a settled matter and hence at the time of PPA approval, the clause 5.4 cannot be kept open such as " tariff for power generated from the project shall be project specific tariff as determined by the commission or generic tariff notified by the commission whichever is lower".

Hence KSEBL requested to modify the PPA clause as "Tariff for power generated from the project shall be Rs. 3.94 per unit as determined by the KSERC vide order dated 06.09.2019 in OA 8/2018 and corrigendum dated 14.11.2019".

KSEB Ltd further submitted that, the petitioner in the written argument note indicated that, 'the outcome of Appeal No. 431 of 2019, the tariff would not go lower than Rs. 3.94 per unit and would only be upwardly revised".

KSEB Ltd submitted that, the licensee had expressed its willingness to procure power from the project based on the condition that the tariff for the power generated from the project shall be lower of project specific tariff or generic tariff.

Since the petitioner is claiming that the outcome of the appeal No. 431 of 2019 is higher than project specific tariff, the tariff applicable to KSEBL will be project specific tariff as per the PPA condition. Hence KSEBL requested to modify the clause 5.4 of PPA. KSEB Ltd submitted that, the licensee is ready to procure and willing to continue with this PPA only at the tariff of lowest among project specific tariff or generic tariff.

KSEB Ltd further submitted that, interim tariff was allotted to the petitioner with proper intimation from KSEBL vide letter dated 08.01.2018 for the power purchase from Pathankayam SHEP from the date of CoD till KSERC approves the tariff and PPA. Later the Commission approved project specific tariff, vide order dated 06.09.2019. As the PPA approval process by the Hon'ble Commission was in progress, KSEBL continued the interim tariff of Rs. 3.49 per unit and the matter was intimated to the petitioner vide letter dated 24.07.2020. Accordingly, the petitioner had revised the invoice incorporating interim tariff vide letter dated 17.08.2020. The matter related to interim tariff was again communicated to the petitioner vide letter dated 17.09.2020.

KSEBL is a prompt payer of electricity charges. The petitioner is yet to sign the PPA and claiming the tariff @Rs 3.49/unit. Also, the claim of the petitioner to pay interest on unpaid tariff for the power supplied to KSEBL is baseless and hence not acceptable to KSEBL.

KSEB Ltd further submitted that, the claim of the tariff as stipulated in Article 5.4 of the PPA ought to be made subject to outcome of the Appeal No. 431 of 2019 is not acceptable to KSEB.

Analysis and Decision of the Commission on Issue No.4

25. The Commission has carefully examined the deliberations of the subject issue, and clarify the following.

(1) The State Government vide the Order GO(P) No. 25/2012/PD dated 03.10.2012 had notified the 'Kerala Small Hydro Policy 2012', with the intention of the development of the Small Hydro Projects through private participation in Captive Power Plant (CPP) for own consumption/ Independent Power Plant (IPP) within the State of Kerala.

The paragraph 12.1 of the Government policy stipulate that, the first right of purchase of power from the projects under IPPs is vested with KSEBL at the tariff and the terms and conditions for the purchase of power set forth by KSERC.

(2) The State Government vide the GO dated 21.07.2014 had allotted the Pathamkayam SHP to the petitioner as CPP for meeting their own consumption. The State Government signed an implementation agreement with the petitioner on 10th April 2015 treating the project under CPP category. Originally the capacity of the project was limited to 4 MW only, however, subsequently after reviewing the hydrological data, the Government vide the GO dated 07.07.2015 had enhanced the capacity of the plant to 8MW.

(3) In the meanwhile, the State Government on 01.07.2017 decided that, the tariff for the RE projects developed by private IPPs in the State shall be the project specific tariff fixed by KSERC. Thereafter, this Commission has been determining project specific tariff for all RE projects in the States.

(4) As requested by the petitioner, the State Government vide the GO dated 01.08.2017 has ordered to change the project category from CPP to IPP.

(5) The petitioner on 08.05.2018, filed the petition OA No. 08/2018 for the determination of the generic tariff for SHPs having capacity above 5MW for the year 2016-17 and subsequent years. The Commission, at the admissibility stage itself, clarified to the petitioner that, the Commission shall determine the project specific tariff for the electricity generated from the project and directed the petitioner and respondents to submit

necessary and sufficient details for determination of the project specific tariff.

Accordingly, in compliance of the direction of the Commission, the petitioner has submitted the necessary details for the determination of the project specific tariff.

- (6) The Commission after detailed deliberations including hearing, vide the Order dated 06.09.2019 and its corrigendum dated 14.11.2019 in petition OA No.08/2019 had determined the tariff of the electricity generated from the project at Rs 3.94/unit.
- (7) There is no merit in the argument raised by the petitioner during the deliberations of this subject petition at this Stage that, ***'it is the case of the petitioner that since it had based its entire computation based on the then assurance that it is the generic tariff which will be applicable in the case of the petitioner's project.'***

It is clarified that, before changing the category of the Pathamkayam project of the petitioner from the CPP to IPP on 01.08.2017, the State Government on 01.07.2017 had decided that tariff of the all ongoing RE projects shall be project specific tariff as determined by this Commission.

- (8) KSEBL, as the respondent is also aware of these facts. Once the Commission determine the project specific tariff, it is binding on the generator and KSEBL.

As a State Government owned power utility and incumbent licensee, KSEBL is bound to implement the policy directives of the State Government. Once the Commission decided to determine the project specific tariff, KSEBL cannot insist for 'lower of the project specific tariff or generic tariff'. However, KSEBL may, at its discretion, through negotiation with the generator, can reduce the tariff from the project specific tariff determined by the Commission, keeping the project specific tariff as the upper ceiling tariff.

- (9) After the enactment of the Electricity Act, 2003, the petitioner M/s Minar Renewable Energy Projects Pvt Ltd and KSEBL are governed by the provisions of the Electricity Act, 2003. As per the Section 111 of the EA-2003, the orders issued by the Commission is appealable before the Hon'ble Appellate Tribunal for Electricity. In the present case, the petitioner had filed an appeal petition namely Appeal No. 431 of 2019, against the Order of the Commission dated 06.09.2019 before the Hon'ble APTEL.

As per the provisions of the EA-2003, the final decision of the Hon'ble APTEL shall be binding on the petitioner and the respondent. The Order of the Commission dated 06.09.2019 and corrigendum Order dated 14.11.2019 shall be modified to the extent, if any, as ordered by the Hon'ble APTEL.

- (10) But at this stage, there is no stay on operation of the Order dated 06.09.2019 and corrigendum Order dated 14.11.2019 in Appeal Petition OA No. 08/2018, and hence both the parties are bound to comply with this Order of the Commission.
26. Considering these aspects in detail as discussed above, the Commission hereby orders to modify the Clause 5.4 of the draft initialled PPA as follows.
“Tariff for power generated from the project shall be Rs. 3.94 per unit as determined by the KSERC vide order dated 06.09.2019 in OA 8/2018 and corrigendum dated 14.11.2019, and its amendments, if any”.

Issue No.5.

Include new provision in the PPA for ‘retention money’ as per Article 10.2 of the Implementation Agreement to ensure smooth transfer requirement of the project at end of the BOOT period.

27. There is no provision in the initialled draft PPA regarding retention money at the time of transfer of the project facilities to the State Government/ KSEBL though it is specified in the implementation agreement. KSEBL has raised the issue during the deliberations of the subject matter and its summary is given below.

28. Suggestions of KSEBL

As per the request of petitioner, the State Government vide the GO dated 01.08.2017 had changed the category of the project from CPP to IPP. The project has achieved CoD on 14.08.2017.

As above, the category change was materialised just 13 days before achieving CoD and the petitioner has not executed the updated implementation agreement with GoK in connection with category change.

The commission in the order dated 06.09.2019 in OA 08/2018, has observed in, para 6 (xvi), as follows;

‘6(xvi) Status of Implementation Agreement: The Implementation Agreement dated 10-4-2015 was executed by M/s.Minar Renewables Energy Projects Limited with GoK for implementation of 4MW Pathamkayam SHP as CPP. GoK vide G.O. dated 1-8-2017 has allowed conversion of CPP to IPP and enhancement of installed capacity as 8MW. The petitioner has not produced the updated Implementation Agreement on the basis of these changes’

KSEBL further submitted that, even though the Commission has observed the above aspect in the order dated 06.09.2019, the petitioner has not yet taken any earnest effort to update the implementation agreement. Also, as per clause 1.1.2 of the RFP, Power Purchase Agreement(s) (PPA) shall be applicable in case of Independent Power Producer and Power Wheeling Agreement(s) in case of Captive Developer shall be executed with Kerala State Electricity Board (KSEB).

Since the developer has not executed the revised implementation agreement for IPP project consequent to change in category, the clause 10.2 (b) under clause 10.2 is presently read as 'Retention Energy'. The details given below.

*“For this purpose the company shall ensure that suitable clauses are inserted in the **wheeling agreement** to enable the board to withhold in each year energy, equivalent to 20% of average annual energy generated (total energy generated till date/number of years) from the project, during two years immediately preceding the expiry of the **wheeling agreement** (collectively the 'Retention energy’)”.*

KSEBL further submitted that, Anakampoil SHEP, which was tendered as IPP along with Pathamkayam SHEP as per the Small Hydro Policy 2012, (both projects allotted vide G.O (MS) 23/2014/PD dated 21.07.2014). The implementation agreement between the Anakampoil Project and State Government is having 'Retention Money' clause as it is an IPP. The clause 9.2 (b) under clause 9.2 'Retention Money' of Implementation Agreement executed between Anakampoil Power Pvt Ltd is reproduced below,

“For this purpose the company shall ensure that suitable clauses are inserted in the power purchase agreement to enable the board to withhold 25% of bill amount from each payment made to the company during two years prior to the expiry of the power purchase agreement (collectively the 'Retention Amount’)”.

Since, the Government has accorded sanction to change the mode of allotment from CPP to IPP for Pathamkayam Small Hydro Project as per the request of the developer, 'Retention Money' clause for "Transfer of Project as envisaged in the Implementation Agreement for IPP is applicable in the case of the Pathamkayam SHP of the petitioner also. Hence to comply the transfer requirements envisaged in the transfer of project facilities in the implementation agreement, the clause for Retention Money is to be included in the draft PPA, as clause 6.6

The proposed Clause 6.6 Retention Money:

“(i) The KSEB Ltd shall withhold a sum equal to 25% of bill amount from each Payment made to the Company during two years prior to the expiry of this Agreement (hereinafter referred to as the "Retention Amount”).

(ii) The Retention Amount shall be held in trust by the KSEB Ltd for the Government and shall be returned by the KSEB Ltd upon certification by the Government that the developer has complied with the transfer Requirements envisaged in the Implementation Agreement or appropriated to the extent required towards the costs reimbursable by the developer in terms of the Implementation Agreement.”

29. Comments of the petitioner M/s Minar Renewable Energy Projects Private Ltd.

The Pathamkayam SHP of the project was originally allotted under CPP category with an installed capacity of 4 MW. However, after assessing the hydro potential, the capacity of the plant was increased to 8MW from 4MW and also changed the project category from CPP to IPP vide the Order of the Government dated 01.08.2017.

The implementation agreement signed between the petitioner with the State Government stipulates 'retention energy' which now has to be allegedly substituted with the 'Retention Money' due to the change in category of the project from CPP to IPP.

It is the case of KSEBL that it would withhold '*Retention Money*' equivalent to 25% of the bill amount. The petitioner further submitted that, since KSEBL was to withhold '*Retention Energy*' equivalent to the 20% of average annual energy generated from the Project, during the two years immediately preceding the expiry of the wheeling agreement, the '*Retention Money*' to be now withheld by KSEBL shall also be 20% instead of 25% of the bill amount of the immediate past two years prior to the expiry of the PPA.

Analysis and Decision of the Commission on the issue No.5

30. The Commission has examined the issue in detail. The Article 10 of the Implementation Agreement (IA) dated 10.04.2015 signed between the petitioner and the State Government, deals with the 'Transfer of the project facilities of the Pathamkayam Project' is extracted below for ready reference.

" Article-10

TRANSFER OF PROJECT FACILITIES

10.1 Transfer

- (a) *Upon the expiry of the BOOT Period by efflux of time and in the normal course, all rights of the developer with respect to the Project gets extinguished and the land found necessary by the Government for the operation and maintenance of the project which was purchased / leased or obtained otherwise by the Company shall also vest with the Government as per the provisions of this agreement. The Company shall transfer Project Site / Project Facilities to the Government or Board on being authorized by the Government free of cost, in compliance with the Transfer Requirements as per Schedule J. Title of the land which was purchased by the Company shall also be transferred to Government at a nominal consideration. No compensation shall be payable by the Government on any account under this clause.*
- (b) *The process of handing back shall be initiated atleast 12 months before the actual date of expiry of the BOOT Period by a joint inspection by Government/Board and the Company. The Government shall, within 15 days of such inspection prepare and furnish to the Company a list of works / jobs, if any, to be carried out to conform to the Transfer Requirements. The Company shall promptly undertake and complete such works / jobs at least two months prior to the date of expiry of the BOOT Period and also ensure that the Project Facilities continue to meet the Transfer Requirements until the same are handed back to the Government.*

10.2 Retention Energy

- (a) *In case the Company fails to carry out the works / jobs envisaged in Cl. 10.1(b), within the stipulated period the Government shall be at liberty to have the same executed by any other Person at the risk and cost of the Company and in such as event the Company shall be liable to reimburse the Government one and half times the cost incurred (as certified by an Independent Auditor) in carrying out such works / jobs.*
- (b) ***For this purpose the Company shall ensure that suitable clauses are inserted in the Wheeling Agreement to enable the Board to withhold in each year energy, equivalent to 20% of the average annual energy generated (total energy generated till date / no. of years) from the project, during two years immediately***

preceding the expiry of the Wheeling Agreement (collectively the “Retention Energy”).

(c) The Retention Energy shall be released to the Company by the Board upon completion of the Transfer Requirements or appropriated to the extent required towards the costs reimbursable by the Company in terms of clause (a).”

31. As extracted above, the clause 10.2(b) of the Implementation Agreement mandates that, suitable clauses has to be inserted in the agreement to be signed between the petitioner and the respondent KSEBL to ensure to retain 20% of the average annual energy generated from the project, during two years immediately preceding the PPA.

However, there is no such provisions in the draft initialled PPA submitted before the Commission for approval.

32. The Commission noted that, the petitioner is not against including a clause on ‘retention money’ in the PPA, as per Article 10.2 of the Implementation Agreement to ensure smooth transfer requirement of the project at end of the BOOT period. However, the petitioner submitted that, the retention of money also shall be limited to 20% of the bill amount of the payment made to the company during two years prior to the expiry of the PPA, instead of 25% of the bill amount as claimed by respondent KSEBL.

33. The Commission has examined in detail the entire deliberations of the subject matter, and noted the following for the compliance of the petitioner and respondent.

(1) The Implementation Agreement (IA) dated 10.04.2015, signed between the State Government and the petitioner is on the basis of allotment of the project as CPP. However, subsequent to change of the project category from CPP to IPP vide the GO dated 01.08.2017, the implementation agreement was not modified in line with the change in project category.

(2) KSEBL as the Government instrumentality to take over the project facilities after its BOOT period, it has to be taken up with the State Government and the nodal agency Energy Management Center to make necessary amendments in the Implementation Agreement necessitated due to the change in project category from CPP to IPP.

(3) The petitioner M/s Minar Renewable Energy Projects Pvt Ltd also has to take initiatives with the State Government to make amendments subsequent to the change in project category from CPP to IPP.

34. The Commission vide the paragraph 22 of this Order has already decided to insert an additional Clause 10.9 in the draft initialled PPA to make the Implementation Agreement signed between the State Government and the petitioner as an integral part of the PPA to be signed between the petitioner and KSEB.

Since the Implementation Agreement forms an integral part of the PPA, the provision related to retention energy or retention money to be incorporated in the PPA has to be fully consistent with the implementation agreement. As such, there is no requirement to incorporate a separate clause in the PPA at this stage. Any modification in the Implementation Agreement subsequent to the change in project category shall also form part of the PPA and binding on the petitioner at the time of transfer of the project. The parties may consider executing a supplementary PPA once the State Government modifies the provisions related to retention energy, to reflect the changes, as may be required.

35. With the above observation and directions on each of the five disputes as discussed in the preceding paragraphs, the Commission hereby direct the petitioner M/s Minar Renewable Energy Projects Pvt Ltd and the respondent KSEBL to sign the PPA within one month from the date of this Order.

Order of the Commission

36. The Commission, after detailed examination of the petition filed by M/s Minar Renewable Energy Projects Limited, the comments of the respondent KSEB Ltd, the provisions of the Electricity Act,2003, KSERC (Renewable Energy & Net Metering) Regulations, 2020 & its amendments, and other Rules, Regulations and prudent practices, hereby orders the following;
- (1) Approve the draft Power Purchase Agreement (PPA) duly initialled by the petitioner M/s Minar Renewable Energy Projects Limited and the Respondent KSEB Ltd with the inclusions/ modifications as approved in the preceding paragraphs of this Order.
 - (2) The petitioner M/s Minar Renewable Energy Projects Limited and respondent KSEBL shall sign the PPA within one month from the date of this Order.
 - (3) A copy of the signed PPA shall be submitted before the Commission for information and record.

The petition is disposed of. Ordered accordingly.

Sd/-
T K Jose
Chairman

Sd/-
Adv. A J Wilson
Member

Sd/-
B Pradeep
Member

Approved for issue

Sd/-
C R Satheesh Chandran
Secretary