

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

Petition No. : OP 22/2014

In the matter of : Petition under Section 86(1)(f) of Electricity Act for the refund of penalty & interest charges for exceeding contract demand and arrears due on revision of Bulk Supply Tariff from KSEBL

Petitioner : M/s Kinfra Export Promotion Parks, Kakkanad, Kochi.

Respondent : Kerala State Electricity Board Limited, Vydhyuthi Bhavan, Thiruvananthapuram

PRESENT : Shri. T.M.Manoharan, Chairman
Shri. Mathew George, Member
Shri. K.Vikraman Nair, Member

ORDER DATED 06.01.2015

Background

1. M/s Kinfra Export Promotion Industrial Parks Limited (hereinafter referred to as KEPIP) filed a petition against Kerala State Electricity Board Limited (hereinafter referred to as KSEBL or Board), the supplier of bulk power to M/s KPUPL, the distribution licensee in the park area. The petition is filed for cancellation of a demand notice dated 23-9-2013 for Rs.258.67 lakhs issued by KSEBL and to refund with interest the amount of Rs.82.38 lakh paid by KPUPL in protest to KSEBL.
2. The petitioner, M/s. KEPIP is a fully owned subsidiary of M/s.KINFRA, a statutory body under the State Government. The petitioner KEPIP was functioning as a distribution licensee in the park from 16-1-2004. The contracted power for the parks was enhanced couple of times to reach 9MVA from February 2006. As per the orders of Government of Kerala, a joint venture company was formed between KINFRA and NTPC Electric Supply Company Limited to take over the retail distribution of power in the industrial areas/parks/economic zones run by KINFRA. Accordingly a company viz, KINESCO Power and Utilities Private Limited (KPUPL) was formed. M/s.KPUPL took over the distribution

operations in the park as a distribution licensee from 1-2-2010, after the transfer of distribution licence from M/s Kinfra Export Promotion Industrial Parks (KEPIP), as per the order dated 30.11.2009 of the Commission for transfer of licence. The erstwhile licensee, M/s KEPIP, had executed a PPA with respondent Board for 9000 kVA on 24-2-2006 for 20 years. After the transfer of licence, the new licensee, M/s.KPUPL applied to the respondent for a PPA with a contract demand of 11,000 kVA. Initially the respondent was not willing to execute the PPA with M/s.KPUPL on the existing terms and conditions. The matter was taken up with the Commission and the Commission in its order dated 27-7-2010 had directed the respondent, KSEBL to execute the PPA at the prevailing tariff. In between, the matter was taken up to the Government and in the meeting convened by the Chief Secretary, on 10-1-2011, the respondent agreed to extend the PPA which was entered into with M/s KEPIP to M/s.KPUPL. The respondent also agreed to supply power to the petitioner at Kakkanad. Since there were differences of opinion between the parties, again a meeting was convened by the Chief Secretary on 17-3-2011 and in the said meeting, it was decided that KSEB should sign PPA with KPUPL for supply of 11000kVA power. It was also decided in the said meeting that M/s KPUPL would function as a franchisee of KSEB in Kalamassery area. Thus, according to the petitioner, the allocation of 11000kVA power became a concluded matter between the KPUPL and the respondent. Only the procedural formality for execution of formal agreement alone remained. According to the petitioner, from April 2011, M/s KPUPL is entitled to use the authorised load of 11000kVA as decided in the joint meeting held in the chamber of the Chief Secretary.

3. In the meantime, the peak load of M/s KPUPL at Kakkanad exceeded 9000 kVA and in February, 2011 it further went up and exceeded 11000kVA in March 2012. According to the petitioner, the respondent Board, from February 2011 onwards began to charge 150% of penalty for the consumption exceeding 9000kVA. M/s KPUPL on the other hand continued to remit electricity charges at the normal rate for the entire usage without default and from March 2012, M/s KPUPL started paying penalty at the rate of 150% for all quantities in excess of 11000kVA and paid up to September 2014. The petitioner further represented that charging excess demand charge at 150% above 9000kVA is in gross violation of the said decision taken at the meeting convened by Chief Secretary. There is also a contention that the power bought from KSEBL is used in turn by the consumers in the Park and the increase in contract demand is due to such higher usage by the consumers, for which the licensee KPUPL has no control. Hence, it is the contention of the petitioner that the excess demand charges shall

not be charged on to KPUGL for exceeding the contract demand as it is not under its control.

4. Another contention of the petitioner was that, in the conciliatory meeting held on 9-8-2012, convened by the Secretary (Power) pursuant to the Order of the Hon. High Court of Kerala, the total accumulated arrears due to the respondent was fixed at Rs.338 lakhs. This amount was remitted by the petitioner on 10-1-2013. However, the respondent KSEB, deducted Rs.73.54 lakh out of this amount as penal interest. Thus, the principal amount was in arrear to the tune of Rs.73.54 lakhs. Again the respondent issued a demand notice in 9/2013 directing the KPUGL to pay Rs.82.37 lakh towards principal amount of balance arrears pending from 1/2011 to 6/2012 on account of revision of BST (Rs.73.54 lakhs) and interest thereon from 1/2011 to 8/2013 (Rs.8.82 lakhs) and another sum of Rs.176.30 lakh (arrear due to partial remittance of excess over demand charges from 3/2011 to 8/2013), totalling Rs.258.67 lakhs (Rs.176.30 lakhs+Rs.82.37 lakh).
5. As per letter No.8/2008, the Special Officer (Revenue), KSEB Limited raised claim for demand charges and interest thereon for exceeding the contract demand from March 2011 to March 2014 for an amount of Rs.1,07,84,089 alleging that the consumption beyond 9000kVA is penal and interest claimed for the said amount at the penal rate. According to the petitioner, it is illegal as already a decision was arrived at for increasing the contract demand.
6. The respondent also issued a disconnection notice dated 6-11-2013 if the KPUGL fails to pay the amount by 8-11-2013. In order to avoid the disconnection, KPUGL paid the Rs.82.37 lakhs under protest. The petitioner based on the above claims sought for many reliefs which include cancelling the demand notice for Rs.1,07,84,089 and to cancel the demand notice of Rs.2.58 crore. Further the interest paid in protest of Rs.82.37 lakhs is to be returned with interest at 24%.

Hearing on the petition

7. The hearing on the matter was held on 23-12-2014. The petitioner was represented by Shri. Krishnakumar, Director, KINFRA and Shri. Balu, MD, KEPIP. Shri. Krishnakumar argued that the transfer of possession of distribution assets of KEPIP to KPUGL was made as per the direction of the Commission. As there was an agreement entered into with KSEB in the meeting convened by the

Chief Secretary, the increase in demand shall be construed from the date of such meeting. He also argued for cancellation of demand notice and narrated the situations in which PPA was delayed. The petitioner also stated that they are aggrieved by the decision of the respondent in the case of return of security deposit, where, the respondent has deducted all the dues on account of KPUPL from the security deposit paid by the petitioner.

8. The respondent, KSEBL argued that the petitioner has no *locus standi* on this issue as the petitioner is not a licensee any more in the park. Further the events mentioned in the petition are taken place after the transfer of licence. The provisions in the Electricity Act 2003 under which the petitioner sought for the intervention of the Commission is not applicable in the case. According to KSEBL, Section 86(1)(f) of the Electricity Act deals with the disputes with licensees and generating companies. The petitioner is no more a licensee and not even an affected person. In such circumstances, the petitioner has no *locus standi* in the matter. Further the references of the meetings of the Chief Secretary/Addl Chief Secretary, made in this petition, in which the petitioner is not a party to these meeting. Already a petition is before the Commission filed by M/s KPUPL on the same issues. Hence, KSEBL sought to dispose of the petition as it not maintainable under the law.

9. The Commission has duly considered the arguments and has examined the written submissions of both the parties. It is to be noted that a similar petition has already been filed by M/s KPUPL on the same issue, which is also before the Commission. It has been pointed out by KSEBL, that the petition is not maintainable under Section 86(1)(f) of the Electricity Act, 2003. As per section 86(1)(f) of the Electricity Act, 2003, the Commission is empowered to adjudicate upon the disputes between licensees and generating companies. Therefore the *locus standi* of the petitioner has to be examined before going into the merits of the contentions and pleadings. It is seen that as per order no.1/2009 dated 30.11.2009 of the Commission in the matter relating to transfer of distribution licence in industrial parks of M/s KINFRA at Kakkanad, Kalamassery and Palakkad, the Commission had ordered as follows;

In exercise of powers conferred under section 14 read with section 17 (3) and section 181 of Electricity Act, 2003, (Central Act 36 of 2003) and all other powers enabling it in this behalf, Kerala State Electricity Regulatory Commission hereby makes the following order to grand transfer of licence for distribution of electricity from M/s KINFRA Export

Promotion Industrial Parks to M/s KINESCO Power and Utilities Private Limited (KPUPL), Kochi.

Order

Licence is hereby granted by Kerala State Electricity Regulatory Commission under section 14 read with section 17 (3) of Electricity Act, 2003 to M/s KINESCO Power and Utilities Private Limited having its registered office at KINFRA House, T.C. 31/2312, Sasthamangalam, Trivandrum 695010 for carrying out the business of distribution of electricity within the area of supply (as defined in the licence) and with powers and upon the terms and conditions specified hereinafter transferring the deemed distribution licence of KINFRA Export Promotion Industrial Parks Limited.

10. The above order was issued considering the following facts. Government of Kerala had, vide G.O (P) No.18/2003/PD dated 08.05.2003, granted a licence to M/s KINFRA Export Promotion Industrial Parks Limited (KEPIP) in exercise of the powers conferred under section 19 of the Indian Electricity Rule, 1956. Government of Kerala had issued sanction for the formation of a joint venture company between M/s KINFRA and M/s NTPC Electric Supply Company Limited (NESCL) vide G.O (MS) No.88/2008/ID dated 27th June 2008. It was stated in the said government order that the main objective of the joint venture company was distribution of power as a licensee in the Industrial Parks, Special Economic Zones and other Industrial Projects. In terms of the government order dated 27.06.2008 the joint venture company namely M/s KINESCO Power and Utilities Private Limited was incorporated with 50% equity held by M/s KINFRA and 50% equity held by M/s NESCL. Government of Kerala had, vide letter dated 25.09.2009, intimated that they have no remarks in the matter relating to transfer of distribution licence of M/s KEPIP to M/s KPUPL. The order dated 30.11.2009 was issued by the Commission under the above circumstances. Thus, the petitioner M/s KEPIP is not a licensee under the Electricity Act, 2003 at present. The distribution licence of M/s KEPIP stood transferred to M/s KPUPL with effect from 01.02.2010 as per clause 2 (3) of Part II of the licence issued by the Commission. Accordingly, the petitioner has no *locus standi* on the issues raised in the petition which relate to a period after 01.02.2010. On this ground itself the petition is liable to be rejected. In any case, the petitioner is not affected by the outcome the case mentioned in the petition.
11. The Commission had, vide letter dated 9th December, 2009, instructed M/s KPUPL that a fresh power purchase agreement may be executed for the purchase of power. Accordingly M/s KPUPL had approached M/s KSEB to transfer the power purchase agreement or to enter into a new power purchase

agreement. KSEB vide letter dated 03.03.2010 had forwarded a draft power purchase agreement to M/s KPUPL in which a lot of deviation from the power purchase agreement signed with M/s KEPIP had been incorporated. M/s KPUPL had approached this Commission for removal of difficulties and for approval of a draft power purchase agreement almost in line with power purchase agreement already executed with M/s KEPIP. In the draft power purchase agreement forwarded by KSEB there were many changes such as supply voltage, period of contract, incentive for high power factor, penalty for exceeding contract demand, rate of penal interest, payment of security etc. This lead to filing of DP-82/2010 by M/s KPUPL. By the time the issue was finally heard the major issue remained to be settled was on the bulk supply tariff. This Commission had, in its order dated 27.07.2010, in DP-82 of 2010 filed by KPUPL, observed as follows;

“The licence given to KPUPL is a transfer from KEPIP. KEPIP has executed an agreement with KSEB. In order to carry on the business of supplying power to the consumers earlier serviced by KEPIP, KPUPL wants the power purchase agreement to be retained as such. Of course, changes in the regulations notified by the Commission can be incorporated. But otherwise the structure of power purchase agreement cannot be changed as there is no situation warranting a change. KSEB has not pointed out any clause in the executed agreement allowing for such a revision when ownership of licence is changed. No regulation issued by the Commission allowing such revision has been pointed out by KSEB except on the provision on purchase of power given in the Licensing Regulations.

KSEB as a generating company supplying power to other licensees need not bother about the method adopted by the licensees in procuring power. This is a concern of the Commission. All other small licensees are sourcing their requirement of power from KSEB. KPUPL cannot be treated in a different manner.

As regards the tariff, Commission has approved a bulk supply tariff for licensees. KSEB cannot insist on a different tariff without the prior approval of the Commission. Judgment by APTEL in appeal no.125/2005 by Kashi Vishwanath Steel Limited seems applicable in this case also. Here, APTEL has considered the stand on cost of additional power and has finally concluded that the tariff shall be based on pooled average cost of power purchased from all sources to all categories of

consumers and also that there should not be any tariff shock caused to any category of consumers. In order dated 27.01.2009 issued by APTEL the principles of arriving at tariff have been discussed and the conclusion is the same as that given in order dated 02.06.2006. The argument of the petitioner is reasonable.

Also KSEB cannot insist on a tariff not approved by the Commission. Commission finds that the stand taken by the KSEB to impose a tariff that has no approval from the Commission, is not correct and hence legally invalid.”

12. It was directed by the Commission in its order dated 27.07.2010 in DP-82/2010 that the bulk supply rate to be included in the power purchase agreement to be executed by KPUPL and KSEB shall be the rates then in force. It was also ordered that the said rate would continue till a revision of rate was ordered by the Commission.
13. Further this Commission had, in its order dated 28.02.2013 in OP No.6/2013 filed by M/s KPUPL, issued the following directions;
 - (1) Power purchase agreement between KSEB and KPUPL for supply of 11 MVA power at KINFRA, Kakkanad, 1 MVA power at KINFRA, Kalamassery and 1 MVA power at KINFRA, Palakkad as initialled by the parties is approved subject to the modifications / amendments suggested and directions issued in para 3.3.
 - (2) KPUPL shall submit to the Commission a copy of the power purchase agreement entered into.
14. In para 3.3 of the said order the Commission had observed that the period of one year is too short for such a power purchase agreement between two licensees. Further in the order dated 30.04.2014 in OP No.6/2014 the Commission had directed both KSEB Limited and KPUPL to submit on or before 16.05.2014, a written statement on the reasons for the failure to execute the power purchase agreement, the draft of which was initialled by them and approved by the Commission in its order dated 28.02.2013 in OP No.6/2013. All such facts will be considered in detail while disposing of the petition filed by M/s KPUPL on similar issues as raised by M/s KEPIP in this petition.
15. In view of the above facts, it can be seen that the proper course of action should have been to determine the power purchase agreement between M/s KSEB and M/s KEPIP and settle the accounts between them as on 01.02.2010 and to enter into fresh power purchase agreement between M/s KSEB and M/s KPUPL incorporating special clauses to deal with the matters relating to the period from 01.02.2010, till the date of execution of power purchase agreement. As already

pointed out the Commission had issued several directions to execute power purchase agreement, which could have solved all such issues as presented in this petition. The Commission places on record its dissatisfaction over the present state of affairs.

Orders of the Commission

16. Based on the facts and evidences discussed above the Commission finds that the petitioner M/s KEPIP is not a distribution licensee with effect from 01.02.2010 and therefore the petitioner has no *locus standi* to agitate the claims relating to a period on or after 01.02.2010. The issues raised in this petition relate to a period after 01.02.2010 and therefore this petition filed by M/s KEPIP is not maintainable under clause (f) of subsection (1) of section 86 of Electricity Act, 2003. The petition is therefore dismissed.

Sd/-

K. Vikraman Nair
Member

Sd/-

Mathew George
Member

Sd/-

T.M. Manoharan
Chairman

Approved for issue

Secretary