

**KERALA STATE ELECTRICITY REGULATORY COMMISSION  
THIRUVANANTHAPURAM**

Petition No. : OP 6/2014

**In the matter of : Complaint under Section 86(1)(f) of Electricity Act read with Regulation 22 of KSERC (conduct of business) Regulations 2003 for the refund of penalty & interest charges for exceeding contract demand and arrears due on revision of Bulk Supply Tariff claimed by KSEB**

M/s KINESCO Power and Utilities Limited, Kakkanad, Kochi : Petitioner.

V/s

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

**PRESENT** : Shri. T.M.Manoharan, Chairman  
Shri. Mathew George, Member

**ORDER DATED 22-01-2015**

**Background**

1. This petition is preferred by M/s. Kinesco Power and Utilities Private Limited (KPUPL for short), a distribution licensee having area of supply in the KINFRA Export Promotion Park Limited, KINFRA Hi-Techpark, Kalamassery, and KINFRA Textile Park Palakkad against Kerala State Electricity Board Limited (hereinafter referred to as KSEBL), the supplier of bulk power to M/s KPUPL for its retail supply. The petition is filed for cancellation of a demand notice dated 23-09-2013 for Rs.258.67 lakhs issued by KSEBL and to refund Rs.82.38 lakh with interest paid by KPUPL in protest to KSEBL.
2. M/s.KPUPL had taken over the distribution operations in the park as a distribution licensee from 01-02-2010, after the transfer of distribution licence from M/s KINFRA Export Promotion Industrial Parks (KEPIP), through an order of the Commission for transfer of licence. The erstwhile licensee, M/s KEPIP, had executed a PPA with respondent Board for 9000 kVA on 24-02-2006 for 20 years. After the transfer of licence, the petitioner KPUPL applied to the

respondent Board for a PPA with a contract demand of 11,000 kVA. But the respondent was not willing to execute the PPA with petitioner. The matter was taken up with the Commission and the Commission in its order dated 27-07-2010 had directed the respondent to execute the PPA at the prevailing tariff. In between, the matter was taken up with the Government and in the meeting convened by Chief Secretary, on 10-01-2011, the respondent agreed to extend the PPA which was entered into with M/s KEPIP to the petitioner, KPUPL. The respondent also agreed to supply power to the petitioner at Kakkanad. Since there was difference of opinion between the parties, again a meeting was convened by the Chief Secretary on 17-03-2011 and in the said meeting, it was decided that KSEB should sign PPA with the petitioner for supply of 11000kVA power. Thus, according to the petitioner, the allocation of 11000kVA power became a concluded matter between the petitioner and the respondent. Only the procedural formality for execution of formal agreement remained. According to the petitioner, from April 2011, the petitioner 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 mean time, the peak load of the petitioner 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 the demand charges as penalty for the consumption exceeding 9000kVA. The petitioner on the other hand continued to remit electricity charges at the normal rate for the entire usage without default and from March 2012, the petitioner started paying penalty at the rate of 150% for all quantities in excess of 11000kVA and paid upto September 2014. According to the petitioner charging penal demand charge at 150% of the normal demand charge for the consumption above 9000kVA is in gross violation of the said decision taken at the meeting convened by Chief Secretary.
4. Another contention of the petitioner was that, in the conciliatory meeting held on 09-08-2012, convened by the Secretary (Power) pursuant to the order of the Hon. High Court of Kerala, the total accumulated arrears due to the Board was fixed at Rs.338 lakhs. This amount was remitted by the petitioner on 10-01-2013. 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 petitioner 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 revision (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). The respondent also issued a disconnection notice dated 06-11-2013 if the respondent failed to pay the amount by 08-11-2013. In order to avoid the disconnection, the petitioner paid the Rs.82.37 lakhs under protest. Regarding the arrears on account of power restrictions (Rs.176.30 lakhs) the petitioner, KPUPL, stated that they had collected Rs.3,25,57,852 from the consumers during the power restriction period and remitted the same amount to the Board and there is no charge due from the petitioner. The petitioner being aggrieved, preferred this petition for cancelling the demand notice for Rs.258.67 lakhs and to return the amount of Rs.82.37 lakhs remitted under protest with interest at 24%, else to adjust the same in the future bills.

### **Hearing on the petition**

5. The hearing on the matter was held on 30-04-2014. The petitioner was represented by Advocate S. Balachandran. The respondent, KSEBL presented the oral and written replies on the petition. Shri. B Pradeep, representing KSEBL, stated that the statement of the petitioner that KSEBL had agreed to extend the existing power purchase agreement with KEPIP to KINESCO and KSEB had also agreed to supply power to the petitioner at Kalamassery as a bulk purchaser in the meeting conducted by Chief Secretary on 10-01-2011 is factually incorrect. According to KSEB, upon receiving the minutes on the meeting held on 10-01-2011, the KSEB vide letter dated 16-02-2011 addressed the Government in Industries Department to modify the minutes of the meeting dated 10-01-2011 so as to reflect the views of KSEB more correctly. Thereafter, Chief Secretary, Government of Kerala convened another meeting on 17-03-2011, took following decisions:
  - (i) KSEB should sign PPA with KINESCO for the supply of 11MW power in KEPIP
  - (ii) In case of the Hi-Tech park, KINESCO should act as a franchisee. Meanwhile KINESCO should take steps for finding alternate sources of power for distribution.
6. KSEB submitted that, it had addressed the petitioner several times after the meeting, to settle the issues before signing of PPA. But the petitioner did not respond to these letters and did not bother to comply with the decisions arrived

at the meeting convened by the Chief Secretary, Government of Kerala. KSEBL also objected to the statement that the matter between petitioner and the respondent regarding the allocation of 11000 KVA was settled at the High Level committee and it became final. According to KSEB, it was contingent upon the decision (ii) of the decisions taken in the said meeting i.e., *“In case the Hi-Tech park, KINESCO should act as a franchise”*. KSEBL further pointed out that consequent to the decisions taken in the meeting convened by Additional Chief Secretary on 09-08-2012, as per the directions of Hon. High Court, the draft PPA was forwarded to the petitioner on 09-10-2012 with contract demand of 11MVA at Kakkanad, 1MVA at Kalamassery and 1MVA at Palakkad. After incorporating the modifications suggested by the petitioner, final draft PPA was forwarded to petitioner on 28-11-2012 and no delay was caused by KSEB in this regard. Though the respondent forwarded the draft PPA to the petitioner as early as in 2012, the petitioner has not taken any measures to sign PPA. KSEBL stated that in the absence of a valid signed PPA for the agreed contract demand (11MVA+1MVA+1MVA), the agreement which prevails with the petitioner as of now shall be the only authenticated document in determining the terms and conditions of supply to the petitioner as well as its predecessor.

7. KSEBL pointed out that the contract demand as per the existing PPA is 9000kVA. The maximum demand of the petitioner exceeded 9000kVA from February 2011. Though the excess demand charge for the consumption above 9000kVA was being levied from February 2011, the petitioner has been remitting the excess demand charges only when their maximum demand exceeded 11000kVA. Thus arrear was accruing on account of partial remittance of excess demand charges month by month. KSEBL also stated that, they have adjusted the excess over demand charges during the power restrictions period as per the request of the petitioner.
8. According to KSEB, the amount of Rs.338.04 lakhs is on account of arrears during the period from 1/2011 to 6/2012 due to non-remittance of charges as per revised BST. Though the APTEL dismissed the petition on 30-05-2012, the petitioner paid the principal portion of the arrears only on 10-01-2013 leaving behind the interest portion unpaid. As per the standard practice, interest portion of Rs.73.54 lakhs as on 10-01-2013 was adjusted from the remittance of Rs.338.04 lakhs. Hence, Rs.73.54 lakhs has been outstanding as balance principal and this amount attracts interest at applicable rate (18%). All other licensees who have approached the APTEL also had paid the amount with interest at 18%. Hence, the same principle is applicable to the petitioner also.

The petitioner remitted Rs.82.37 lakhs towards balance arrears on BST revision alone, leaving behind the Additional Cash Deposit (ACD) and arrears on excess demand charges unpaid. Hence, according to KSEB, the disconnection notice and the demand notice are perfectly legal. KSEBL requested that the Commission may direct the petitioner to remit the legitimate arrears as per the existing PPA dated 24-02-2006 and execute fresh PPA after resolving the disputes between the Joint venture partner and the petitioner.

9. After the hearing, on the request of the counsel for the petitioner, the Commission allowed time till 16-05-2014 for furnishing reply to the counter affidavit of M/s KSEBL. The Commission also directed to furnish written statements on the reasons for the failure to execute PPA, the draft of which was approved by the Commission on 28-02-2014.
10. KSEBL vide letter dated 08-05-2014 had given a detailed reply narrating the events from 28-02-2013, the date on which the draft PPA was approved by the Commission. In the said submission, KSEBL has stated that delay in execution of PPA is on account of failure to complete the formalities by the petitioner. M/s KPUPL filed their version on the delay in executing the PPA on 15-05-2014, in which they have stated that the failure is mainly due to financial constraints faced by the petitioner and issues with respect to the promoters/partners namely NESCL and KINFRA.
11. Since the petitioner has pressed for the point that in the meeting convened by the Chief Secretary, it was decided by the parties to enhance the contract demand to 11000kVA, the Commission vide letter dated 23-9-2014 sought clarification from the Government and KSEBL to provide the minutes of the meeting convened by the Chief Secretary on 11-01-2011 and 17-03-2011 to ascertain whether a decision was taken to enhance the contract demand from 9 MVA to 11MVA.
12. Further to this, the Commission vide letter dated 28-10-2014 informed the parties and scheduled another hearing on 14-11-2014 on this issue as well as issues connected with transfer of assets. In the said hearing, representative of M/s.KINFRA, one of the joint venture partner stated that PPA has already signed on 01.10.2014 with effect from 01-09-2014 and asset transfer process has been completed. Regarding present dispute, in the said hearing, the counsel for M/s KPUPL, Adv. Shri Balachandran stated that one more chance is to be given for explaining the legal position. He stated that though the PPA was signed now, it

has only prospective effect. There is no mention in the PPA for the period between the date of the meeting convened by the Chief Secretary/Addl Chief Secretary till the date of effect of new PPA. Since the matter is before the Commission, no decision was taken for the period and incorporated in the PPA.. According to him there is an agreement in the meetings convened by the Chief Secretary / Additional Chief Secretary to enhance the contract demand from 9 MVA to 11MVA. He further submitted that the judgments of the apex court have the settled position of law in this regard. The representative of KSEBL Shri. B. Pradeep stated that the delay in signing the PPA is entirely attributable to M/s KPUPL as they defaulted in fulfilling the conditions for signing PPA. The Commission gave time till 24-11-2014 to submit the written note of arguments and other supporting documents by the parties.

13. M/s KPUPL on 24-11-2014 submitted the written note on arguments and on 08-12-2014 submitted additional argument notes. In the written notes of arguments, M/s KPUPL reiterated that the parties had agreed to enhance the contract demand from 9000kVA to 11000kVA in the meeting convened by the Chief Secretary and hence the allocation of 11000kVA was a concluded matter between petitioner and respondent. The offer of the petitioner was accepted by respondent in the high level meeting and the subsequent execution of PPA is only a formality. Thereafter the signing of PPA was delayed. As per the direction from Hon. High Court, a meeting convened by Addl Chief Secretary on 09-08-2012, the respondent agreed to execute the PPA. The respondent's willingness conveyed on 24-05-2013 and the petitioner after arranging funds entered into PPA on 01-10-2014. Thus at any rate the respondent is bound to accept supply of 11000 kVA with effect from 09-08-2012. Hence the argument of the respondent that the contract demand is enhanced to 11000 kVA only with effect from 01-10-2014, is unfounded and prayed that the demand notice for Rs.258.67 lakhs be cancelled and the amount paid under protest of Rs.82.37 lakhs be returned with interest at 24% with effect from 08-11-2013.
14. The petitioner, M/s KPUPL in their additional argument notes attempted to substantiate the position that the decisions on 17-03-2011 and on 09-08-2012 between petitioner and the respondent will amount to a valid contract. Based on the decision, the arrears on account of BST revision were quantified as Rs.338 lakh and when the petitioner paid the amount, the respondent accepted the same without any protest. After availing the benefit, the petitioner cannot reprobate and deduct the interest from the said amount. The petitioner cited the judgment of the apex court in *Bharati Cellular limited Vs Union of India*, wherein

the apex court ruled that a person cannot approbate and reprobate or accept and reject the same instrument. In Trimax International Fze limited, Dubai Vs Vendanta Aluminium Limited India, Hon. Supreme Court held that a commercial offer containing an arbitration clause conveyed through e-mail for the supply of bauxite to the respondent is a valid offer. Based on the acceptance by the respondent, a valid contract will emerge and no written contract is necessary. In Bhagavathi Prasad Pawankumar Vs Union of India, Hon'ble Supreme Court held that :

*“it is well settled that an offer may be accepted by conduct. But conduct only amount to acceptance if it is clear that the offeree did not act with intention actual or apparent of accepting the offer. The Court must examine the evidence to find out whether in the facts and circumstances of the case, the conduct of the offeree was such as amount to an unequivocal acceptance of the offer made. If the facts of the case disclosed that there is no reservation in signing acceptance by conduct, it must follow that the offer has been accepted by conduct.”*

#### **Analysis and Decision of the Commission.**

15. The Commission has examined the arguments of the petitioner and respondents and the documents submitted by them before the Commission. The petitioner, KPUGL in their prayer, requested for quashing the demand notice for Rs.258.67 lakhs dated 23-09-2013 and to return the amount of Rs.82.37 lakhs paid as interest towards short remittance of BST from 12/2010 to 6/2012. As has been revealed from the above, there are many interconnected issues in the petition. For the sake of clarity, it is better to narrate the same. The Commission has revised the BST (energy charge) with effect from 12/2010 from Rs.2.75 per unit to Rs.3.16 per unit for all licensees. This was effective till 6/2012, and the Commission further revised the BST from 7/2012. When the BST was revised in 12/2010, the petitioner continued to pay the electricity charges at pre-revised BST rates and approached the APTEL for relief. The principal amount of arrears on account of short remittance of electricity charges at the pre-revised BST rates, amounted to Rs.338.00 lakhs. According to the petitioner, the respondent KSBEL, had fixed and informed the total amount of arrears as Rs.338 lakhs, at the meeting of the Additional Chief Secretary held on 09-08-2012, and the petitioner paid the full amount of Rs.338 lakhs on 10-01-2013 for the full settlement of dues and hence it is illegal to adjust the interest for the period to the tune of Rs.73 lakhs. When petitioner paid the amount, the instrument was

accepted, after accepting it the respondent cannot again raise additional demand for interest.

16. In addition to this, the petitioner remitted the demand charges at normal rates till the demand reached 11000 kVA, and did not pay the charges for the excess demand over 9000kVA for which the predecessor of the petitioner had the PPA. The petitioner refused to pay the excess demand charges above 9000kVA on the ground that already there was an agreement for enhancing the contract demand to 11000kVA, and hence the petitioner is liable to pay excess demand charges only if demand exceeded 11000kVA. According to the petitioner since the agreement has already been reached for increasing contract demand, it is illegal and unfair to raise excess demand charges for demand exceeding 9000kVA.
17. Based on the details provided by the petitioner, there are arrears on account of two payments: a) Arrears on BST - in the case of revision of BST the petitioner has not paid the increase in BST from 12/2010 to 6/2012. From 7/2012, the petitioner started paying at the rate of BST approved by the Commission. b) Arrears on account of excess demand charges - the respondent KSEBL started charging excess demand from February 2011 when the contract demand started exceeding 9000kVA. However from 3/2012, the respondent started paying the excess demand charges for demand above 11000kVA.
18. In the mean time, a PPA was signed between the parties. As per the terms agreed to by the parties, the PPA entered on 01-10-2014, has come into force from 01-09-2014 and will remain valid for a period of one year. It was also agreed to provide total quantity of power of 11000 kVA at KEPIP Kakkanad, 1000kVA at KINFRA Hi-tech park, Kalamassery and 1000kVA at KINFRA integrated Textile park Kanjikode, Palakkd. Thus as per this, the terms are prospective, effective from 01-09-2014, and the contract demand for period from February 2011 to August 2014 is to be decided.
19. The reliefs prayed for by the petitioner are;
  - (i) To cancel the demand notice for Rs.2,58,67,485/- and interest based on Exhibit P5 notice issued by the respondent and to declare that the respondent is not entitled to realise that amount.



- (ii) To direct the respondent to pay back the amount of Rs.82,37,397/- remitted by the petitioner under protest on 08-11-2013 with 24% interest for the said amount or else, the said amount and interest may be adjusted in future bills.
- (iii) To grant such other reliefs as the petitioner seeks for and the Commission deems fit in the nature of the case, and
- (iv) To allow the petitioner to realize all cost and liabilities incurred hereby to the petitioner from the respondent as its assets.

20. Ext P5 notice contains the following demands.

- I. Balance arrear pending against BST revision
  - Principal .....Rs. 73,54,821/-
  - Interest upto 8/2013 .....Rs. 8,82,576/-
  - Total .....Rs. 82,37,397/-
- II. Arrear due to partial remittance of penal demand charge for the consumption above 9000kVA from 03/2011 to 08/2013
  - Principal .....Rs. 1,57,09,387/-
  - Interest upto 8/2013 .....Rs. 19,20,701/-
  - Total .....Rs. 1,76,30,088/-

Total outstanding arrear as on 31.8.13 (including interest) Rs. 2,58,67,485/-

- III. ACD
  - ACD for the financial year 2012-13 for Rs. 1,45,07,520 in cash and Rs. 1,90,14,635/- in the form of bank guarantee is also outstanding.

21. Based on the contentions of the parties and the documents produced during the proceedings, the Commission arrives at following issues in the dispute for decision:

- 1. Whether there was any agreement between the parties for increasing the contact demand from 9000kVA to 11000kVA, if so from when it is to be given effect.
- 2. Whether it is reasonable to charge interest at 18% for short remittance on account of increase in BST effective from 12/2010.

22. The prayers of the petitioner as well as the documents, facts and arguments submitted by the petitioner and the respondent have been carefully examined. In order to put the issues, the discussions and the decisions in proper perspective it would be desirable to state the following common principles, though they are expected to be known to the petitioner and the respondent.
- (i) The provisions of the statute namely the Electricity Act, 2003, will prevail over the rules and regulations issued by the Government and the Commission respectively and if any of the provisions of such rules or regulations are repugnant to the provisions of law, such provisions of rules or regulations would be illegal.
  - (ii) Similarly the provisions of rules and regulations issued by the Government and the Commission respectively in accordance with the provisions of Electricity Act, 2003, will prevail over any order issued by the Commission or by any licensee or by any generator, if such order is repugnant to or in contravention of the provisions of such rules and regulations.
  - (iii) It is a well settled principle in law that one who approbates cannot reprobate.
  - (iv) It is also well settled in law that agreement will come in to force once a legally valid offer is accepted with free will and without any duress even in the absence of a written document of agreement.
  - (v) In an agreement, the parties to the agreement have to be treated equally and equitably, irrespective of their size or turn over and their consequent influential position in the society.
  - (vi) Unilateral, arbitrary or illegal decisions or orders issued or imposed by any of the parties to the agreement cannot be supported or sustained.
  - (vii) The Commission takes decision in good faith, after evaluating the facts, circumstances and legal provisions applicable to the issues under consideration. If any contesting party has any grievance against such order, he can file a petition before the Commission itself to review the impugned order or can file an appeal before the Appellate Tribunal or can file a Writ Petition before the Hon'ble High Court. Unless modified by the Commission or stayed or modified or quashed by the Hon'ble APTEL or by the Hon'ble High Court, the order issued by the Commission has to be implemented by the concerned parties. Non-compliance of the orders issued by the Commission will attract the provisions of section 142 of the Electricity Act, 2003.

23. The first prayer arises out of the dispute relating to the claim raised by the respondent KSEB Limited for penal demand charges for the power availed by the petitioner M/s KPUPL in excess of 9000 kVA, which was the contract demand as per the PPA executed between KSEB Limited and M/s KINFRA Export Promotion Industrial Park Limited (KEPIP), which was the predecessor in interest of M/s KPUPL. In order to appreciate the issue, the facts leading to the genesis of this petition have to be clearly understood and appreciated.
24. Government of Kerala had, vide G.O (P) No. 18/2003/PD dated 08-05-2003, notified as Gazette Extra Ordinary number 908 dated 29-05-2003, granted licence to M/s KINFRA Export Promotion Industrial Park Limited (KEPIP) under the provisions of Indian Electricity Act, 1910 for the distribution of power within the area specified in the said licence subject to the terms and conditions specified therein. Consequently KEPIP had entered in to agreement no.72/03-04 on 24-02-2006 for the purchase of 9000 kVA power at 110 KV from KSEB for own use and for distribution to other consumers within the area specified in the licence namely 180.126 acres at Kakkanad. While the said agreement was in operation, Government of Kerala 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 dated 27-06-2008. Accordingly a private limited company namely M/s KINESCO Power and Utilities Private Limited (KPUPL) was incorporated under the Companies Act, 1956. KSERC vide its order dated 23.10.2008 included 100 acres of KEPIP expansion area at Kakkanad, 240 acres at KINFRA High Tech Park, Kalamassery and 350 acres at KINFRA Integrated Textile, Palakkad in the distribution licence of KEPIP as per the provisions of Electricity Act, 2003. Thereafter, vide order No.01/2009 dated 30-11-2009, KSERC had, as per provisions in the Electricity Act, 2003, transferred the distribution licence of KEPIP to M/s KPUPL, based on an application made by M/s KPUPL. The said order was issued after hearing the stakeholders including M/s KEPIP and M/s KSEB Limited. As per the said order of KSERC, M/s KPUPL became the licensee in the above mentioned areas, namely 280 acres at KINFRA Industrial Park, Kakkanad, 240 acres at KINFRA High Tech Park, Kalamassery and 350 acres at KINFRA Integrated Textile Park, Palakkad, with effect from 01-02-2010. As stated in the order dated 27-07-2010 in DP-82/2010, this Commission had instructed M/s KPUPL and M/s KSEB Limited, vide letter

dated 09-12-2009, to execute a fresh PPA for the purchase of power by M/s KPUPL from M/s KSEB Limited. Thus, soon after the order dated 30-11-2009, transferring the licence of KEPIP to KPUPL and well before 01-02-2010, the appointed date for effectiveness of the licence of KPUPL, the Commission had directed KSEB and KPUPL to enter into PPA.

25. M/s KPUPL had approached M/s KSEB Limited to transfer the PPA between KEPIP and KSEB or to enter into a new PPA. KSEB, vide its letter dated 03.03.2010, had forwarded a draft PPA to M/s KPUPL in which a lot of deviations from the PPA signed with KEPIP had been incorporated. Thereupon M/s KPUPL filed DP-82/2010 before the Commission for the removal of difficulties and for the approval of draft PPA almost in line with PPA already executed by M/s KEPIP. The main deviation as stated in the petition DP-82/2010 were the following;

- (a) *As per the PPA signed by KEPIP input voltage at Kakkanad is 110 kV. KSEB has in the draft PPA changed the input voltage at Kakkanad as 33 kV. It is also noted that the area is mentioned as the expansion of the existing area at Kakkanad. Also it is noted that the other areas at Kalamassery and Palakkad have also been included in the draft PPA submitted by KSEB. KPUPL would like to have only Kakkanad mentioned in the PPA.*
- (b) *The validity of the PPA executed by KSEB with KEPIP was 20 years and the same has been changed by KSEB as 5 years. KPUPL would like to have an agreement for 25 years.*
- (c) *In the PPA signed by KSEB with KEPIP, the rate for supply has been mentioned in the Schedule and is given as Demand charge of Rs.225 per kVA per month plus energy charge of Rs.2.6 per unit. In the draft proposed by KSEB demand charge is given as Rs.300 per kVA of Billing Demand plus energy charge at weighted average rate of energy drawn by KSEB during the month multiplied by energy from liquid fuel stations plus proportionate share of any other charges as claimed by CGS and CTUs. KPUPL would like to have demand charge of Rs.245 per kVA per month and energy charge of Rs.2.75 per unit.*
- (d) *Penalty for exceeding contract demand is given as 200% by KSEB whereas the corresponding figure in the executed PPA is 150%.*
- (e) *Security is given as one month's average billing is cash plus one month's average billing as BG. This is the same as that given in the*

*executed PPA but KPUGL would like to change it to two month's average billing as LC.*

- (f) Penal interest for delay in payment is given as 12% for delay up to 30 days and 18% for delay beyond 30 days. KPUGL would like to have it changed as twice the bank rate.*
  - (g) For power factor below 0.9 KSEB insists on 1% energy charges for every reduction of 0.01 power factor and for power factor below 0.75 penalty at 3% of energy charges for every reduction of 0.01 p.f. No incentive for p.f. KPUGL would like to have both incentive and penalty. Incentive at 0.15% of energy charges for p.f. above 0.9 and penalty at 1% of energy charges for every reduction of 0.01 p.f below 0.9.*
  - (h) KSEB has taken a stand that availability of supply shall be continuous when there is spare energy at the disposal of KSEB. KPUGL would like to have continuous supply except under force major conditions which is the agreed term in the executed PPA.*
  - (i) Regarding applicability of Laws/Obligations KSEB insists on including orders issued by Board also in addition to provisions of Act 2003 and orders issued by the Commission. KPUGL would like to remove the conditions of including Board orders.*
  - (j) On liabilities, KSEB insists on including heirs, successors or predecessors and legal assignees whereas KPUGL would like to remove predecessors. Predecessors are not included in the executed PPA.*
26. The said petition was heard on 23-06-2010 wherein M/s KPUGL had submitted that the term of agreement of 20 years as well as other conditions of the PPA cannot be allowed to be changed since the licence of KEPIP was transferred to M/s KPUGL. In the order dated 27-07-2010 in DP 82/2010, the Commission has recorded that,

*“though, there were many points of dispute such as supply voltage, incentive for high power factor, period of contract, penalty for exceeding contract demand, penal interest rate and security for payment. It was noted that the dispute had converged to the issue of tariff only by the time the matter was heard as was noted from the counter affidavit filed by KSEB and the stand taken by M/s KPUGL during the process of hearing.”*

Regarding tariff, KSEB Limited had argued that they proposed to charge M/s KPUGL at marginal cost along with transmission loss and trading margin so

as to cause no loss to KSEB consumers, subject to approval by the Commission. KSEB had also stressed that M/s KPUPL should adopt the bidding route to meet their requirements. KSEB had not given convincing reasons for the deviations proposed by it, from the agreement conditions.

27. The Commission had observed that the licence given to M/s KPUPL was a transfer from KEPIP, who had executed an agreement with KSEB in order to carry on the business of supplying power to the consumers earlier serviced by KEPIP, M/s KPUPL wanted the conditions of PPA to be retained as such. It was further observed by the Commission that changes in regulations notified by the Commission could be incorporated and the structure of the PPA cannot be otherwise changed as there was no situation warranting a change. KSEB Limited had not pointed out any clause in the executed agreement allowing for such a revision when ownership of licence is changed. No regulations issued by the Commission allowing such revision had been pointed out by KSEB Limited except on the provision on purchase of power in the licensing regulations. The Commission observed that KSEB need not bother about the method adopted by the licensees in procuring power as it was a concern of the Commission. All other small licensees in the State were sourcing their requirement of power from KSEB and M/s KPUPL cannot be treated in a different manner. The Commission further directed that KSEB cannot insist on a tariff not approved by the Commission. The Commission found that the stand taken by KSEB Limited to impose a tariff which had no approval from the Commission, was not correct and hence legally invalid. The Commission ordered that the Bulk Supply Rate to be included in the PPA to be executed between KSEB Limited and KPUPL should be the rates then in force which should continue till a revision of rate was ordered by the Commission. It was also directed that KPUPL should forward a copy of the PPA executed. **(Refer Order dated 27-07-2010 of the Commission in DP-82/2010)** In spite of the above facts, the KSEB Limited has taken a strange and unfounded stand in para 2 of their counter affidavit dated 28-04-2014 that the Commission had not directed the respondent to execute PPA with the petitioner for supply of power. Evidently this statement of KSEB Limited is not true.

28. KSEB Limited thereupon filed Writ Petition No.37700 of 2010 challenging the order of the Commission dated 27.07.2010 in DP No.82/2010. During the pendency of said Writ Petition the Chief Secretary to Government of Kerala convened a meeting to settle the issues in signing the PPA

between KSEB and M/s KPUPL. During the discussion Additional Chief Secretary, Industries and Commerce had requested that M/s KPUPL should be facilitated to start their distribution operations. As M/s KPUPL was in the infant stage, any restrictions imposed will badly affect its future as a distribution licensee. When compared to KSEB, the operations of M/s KPUPL are very small and KSEB need not be apprehensive about their entry in to the power sector of Kerala. It was also pointed out that KSEB had issued orders in their favour. KSEB also had explained that it was bound to protect its commercial interest. Chief Secretary explained that the Government would have to protect the interest of all stakeholders. It is seen recorded in the minutes of the meeting that KSEB had agreed to enhance the contract demand of M/s KPUPL from 9000 kVA to 11000 kVA and that KSEB and M/s KPUPL had agreed to sign the PPA. As per the minutes of the meeting KSEB is seen to have given the following two options to M/s KPUPL in respect of power supply at Kalamassery,

- (i) M/s KPUPL should issue NOC to KSEB for the direct supply of power by KSEB to M/s BEL or
- (ii) KSEB should supply power to KPUPL at Kalamassery on Bulk Purchase basis.

29. The minutes of the meeting dated 11-01-2011 convened by Chief Secretary was forwarded to KSEB and M/s KPUPL as per letter no. 9015/G1/10/ID dated 20-01-2011 of Additional Chief Secretary to Government, Industries Department **(Annexure A1 to letter no.KSEB/TRAC/KPUPL/OP6 of 2014/R1/1120 dated 08-10-2014)**. In letter no. KSEB/TRAC/KPUPL/ PPA/2011/R1/140 dated 21-11-2011 KSEB informed that the said minutes of the meeting convened by the Chief Secretary did not accurately reflect the positions of KSEB on various issues. Therefore they requested Government to review the minutes. In letter No. KSEB /TRAC/KPUPL/PPA/2011/141 dated 21-02-2011 KSEB informed M/s KPUPL that KSEB would consider the matter after proper settlement of the issues before various legal forums.

30. Thereupon the Chief Secretary convened another meeting on 17-03-2011 the minutes of which was forwarded to the petitioner and the respondent as per letter No.9015/G1/10/ID dated 31-03-2011 of the Additional Chief Secretary to Government, Industries Department. **(Exhibit P2 in this petition)**. The relevant portions of the minutes are quoted hereunder.

*“Chairman KSEB informed that KSEB will honour all the existing power purchase agreement with the licensee until the expiry of the validity period. For all licensee requiring power above the contracts, power would be procured from the other source through competitive bidding. He also suggested that KINESCO can act as franchisee of KSEB. Additional Chief Secretary (Industries) informed that decision to create special purpose vehicle was taken by the Council of Ministers to streamline the power supply in Industries parks. More over SPV will be able to attract investment for additional facilities to streamline the power supply. He also informed that all assets of KINFRA was already transferred to KINESCO.*

*Chief Secretary has asked the KINESCO to seek clarification from NTPC whether KINESCO can act a franchisee. He also informed that any agreement for power supply should be a win-win situation for both KSEB and KINESCO. After a detailed discussion following decisions were taken:-*

*I) KSEB should sign PPA with KINESCO for the supply of 11 MW power in KEPIP.*

*II) In the case of High Tech Park, KINESCO should act as a franchisee. Meanwhile KINESCO should take step for finding alternate source of power for distribution.”*

31. The said minutes and the decisions therein are not seen disputed by the petitioner KPUGL or by the respondent KSEB. In spite of the decision taken by the Chief Secretary in the meeting participated by Additional Chief Secretary, Industries and Commerce and Secretary to Power, the PPA was not executed. In this regard it has to be specially noted that execution of PPA was inevitably required for specifying the terms and conditions of supply of power by KSEB to M/s KPUGL. This was to be done to safeguard interest of both the supplier and the purchaser. From the facts stated above it can easily be seen that the Commission as well as Government had directed KSEB and KPUGL to execute the PPA with contract demand of 11 MW. KSEB had also agreed to supply 11 MW power to M/s KPUGL.
32. In respect of the second decision in the minutes of the meeting dated 17-03-2011, as insisted by KSEB and included in the minutes, the Commission has to make the following observations. M/s KPUGL is a licensee in accordance with the order issued by the Commission in exercise of its powers under the provisions of Electricity Act, 2003. As



already indicated they are the licensee for Kakkanad, High Tech Park, Kalamassery and Integrated Textile Park, Palakkad. When M/s KPUPL is holding a valid licence for distribution of power in the said areas, the KSEB Limited cannot validly and legally insist on them to be its franchisee. If this legal position was properly explained to the Chief Secretary, Additional Chief Secretary (Industries and Commerce) and the Secretary Power, such a decision would not have been taken in the meeting dated 17.03.2011. At any rate such proposal or insistence by KSEB Limited is contrary to the legal provisions, conditions of licence and the order of the Commission. Such a stand was not taken by KSEB Limited when DP-82/2010 was heard and decided by the Commission. The decisions taken on the basis of unilateral, arbitrary and illegal proposal of KSEB Limited cannot be supported or sustained by the Commission.

33. In letter No.KSEB/TRAC/Licensee's PPA/2010/294 dated 28-04-2011 **(Annexure 2 of the counter affidavit filed by the KSEB Limited)** KSEB is seen to have intimated M/s KPUPL that KSEB Limited decided in principle to provide power allocation for 11 MVA to M/s KPUPL at Kakkanad, subject to realization of applicable fees and charges and after examining technical feasibility. The PPA to be entered in to between KSEB Limited and M/s KPUPL, based on the power allocation needed to be in a revised format as desired by the Hon'ble KSERC and KSEB Limited is approaching the Commission for the formal approval of the format. As regards issue related to High Tech Park, Kalamassery, as decided in the meeting convened by the Chief Secretary, KPUPL should furnish an undertaking indicating its willingness to act as a franchisee of KSEB Limited in that area for distribution of electricity on mutually agreed terms and conditions. For the reasons cited in earlier paragraphs the stand of KSEB Limited in this regard can only be regarded as contrary to the legal provisions and order of the Commission.
34. In letter No.KSEB/TRAC/Licensee's PPA/2010 dated 06-06-2011 **(Annexure 3 to the counter affidavit)** KSEB Limited to seen to have informed that M/s KPUPL, being the licensee at Kalamassery, High Tech Park it was the responsibility of KPUPL to procure power required for distribution to their consumers in the licensed area. It was only since KPUPL failed in delivering the prime responsibility as licensee, KSEB Limited consented to provide temporary extension for a limited period of two weeks, considering the best interest of the States. Further, to enable

- uninterrupted functioning of industrial units at High Tech Park, including BEL unit, KSEB Limited agreed to provide power so long as KINESCO is willing to function as a franchisee of KSEB.
35. Though M/s KPUPL had forwarded to M/s KSEB Limited a draft PPA for availing 11 MVA power, the Chief Engineer, Transmission (South), KSEB Limited in his letter No. COM-I/EHT/KPUPL/610 dated 17-08-2011 (**Annexure 4 to the counter affidavit**) had sought for certain clarifications. The Chief Engineer had informed that the area at Kakkanad was only 180 acres and additional area of 100 acres as mentioned in the draft PPA cannot be considered. It was informed by him that entering in to PPA would be considered only after M/s KPUPL withdrew the appeal filed by it before the Hon'ble APTEL against the revision of tariff with effect from 01-12-2010. He also insisted that PPA would be signed only after receiving an undertaking from KINESCO indicating willingness to function as a franchisee of KSEB for distribution of power at High Tech Park, Kalamassery. It was further informed that KSEB was formulating standard PPA to be submitted for approval of KSERC. Even if a PPA was to be signed between KSEB Limited and M/s KPUPL before the approval of the standard PPA, a clause prescribing execution of revised PPA after getting approval for the standard PPA should be included in the present format. He also informed that decision of the Board had to be obtained regarding the authority for signing the PPA on behalf of KSEB Limited.
36. In letter No.COM-I/EHT/KPUPL/1007 dated 09-11-2011 (**Annexure 6 to the counter affidavit**) the Chief Engineer, Transmission (South) intimated that it had been decided by the Board that the availability of power in the State did not permit giving additional power allocation and when the power position improved, the request of KPUPL could be considered. KSEB Limited is seen to have reiterated the above stand in letter No.KSEB/TRAC/KPUPL/ PPA/2011/253 dated 18-04-2012 (**Annexure 7 to the counter affidavit**).
37. In this regard the Commission finds that the stand taken by the Chief Engineer, Transmission (South) is not seen supported by any decision of the Commission or the Government or of the Board. When the Commission had given licence for 280 acres at KINFRA Industrial Park, Kakkanad, the Chief Engineer had no authority to reduce the area supply arbitrarily at his own will further the other conditions imposed by him also lacked support of any order from the Board, from the Government or from

the Commission. The execution of PPA did not materialize under the above circumstances. It is strange to note that different authorities of the KSEB Limited were imposing their own conditions to incapacitate M/s KPUPL to execute PPA. It is a riddle to be answered by the KSEB Limited how and why its Chief Engineer has gone against the decisions of the Commission, the Government and the Board.

38. In the interim order dated 12-06-2012 in WP (C)No.37700/2010 filed by KSEB Limited against the orders of the Commission in DP-82/2010, the Hon'ble High Court directed to convene a meeting with KSEB and M/s KPUPL to take a decision and to file an affidavit regarding the decision taken in the meeting. Accordingly a meeting was convened by Additional Chief Secretary, Power and Transport on 09-08-2012. In the meeting M/s KPUPL presented their requirement of power as 13 MVA, that is 11 MVA at KINFRA Park, Kakkanad, 1 MVA at KINFRA High Tech Park, Kalamassery and 1 MVA at KINFRA Integrated Textile Park, Palakkad. M/s KPUPL informed that they desired to source the power from KSEB to meet requirements of their consumers within the parks. It was also informed that the issue relating to tariff had been subsequently addressed by the Regulatory Commission in its tariff order dated 25-05-2012 in OP No.23/2012 by introducing differential bulk supply tariff. To meet the requirements of power from new consumers at Kalamassery and Palakkad parks KSEB Limited may provide the requested quantum of power. The Chief Engineer, Commercial and Tariff had pointed out that M/s KPUPL had an arrear of electricity charges to the tune of Rs.3.38 crores. To this M/s KPUPL had intimated that arrears can be settled separately when KSERC disposed the true up petition for the year 2010-11 as directed by the Hon'ble APTEL. The Additional Chief Secretary, Power and Transport had opined to settle the issues once and for all both KPUPL and KSEB Limited should abide by the order of the Commission. After discussion M/s KPUPL agreed to clear the arrears immediately. Based on the discussions the following decisions were taken.

- (a) *KSEB agreed to provide the power sought by KINESCO on a provisional basis.*
- (b) *KINESCO will make payments based on revised BST as ordered by KSERC.*
- (c) *KINESCO will clear the arrears immediately.*

- (d) *The matter of recovery of higher infrastructural cost within the parks shall be addressed when KSERC finalizes the regulations of small licensees.*
- (e) *Draft provisional PPA for a period of one year shall be forwarded by KSEB to KINESCO. A provision may be incorporated in the PPA to the effect that the agreement could be extended or amended based on mutually agreed terms and conditions, after notification of applicable regulations by KSERC.*
- (f) *Classification of consumers within the parks shall be same as that of KSEB.*
39. The above decisions can be seen in Annexure 8 to the counter affidavit filed by KSEB Limited. It is interesting to note that at this stage KSEB Limited is seen to have withdrawn its illegal demand for an undertaking from M/s KPUPL agreeing to function as franchisee of KSEB Limited in the area of licence of M/s KPUPL.
40. Accordingly M/s KPUPL remitted an amount of Rs.338 lakh on 10-01-2013. They also filed OP 6/2013 for the approval of the PPA. In its order dated 28-02-2013 the Commission had approved the PPA with certain modifications and suggestions. A meeting is seen to have convened by the Chief Engineer, Commercial and Tariff) on 05-04-2013 to discuss the modifications and suggestions given by the Commission with regard to the PPA. The suggestions and modifications made by the Commission are seen broadly accepted by the petitioner and the respondent, as could be seen from the minutes of the meeting (**Annexure 9 to the counter affidavit**). But it is seen that there was difference of opinion on the arrears of electricity charges due to KSEB Limited. The Chief Engineer, Commercial and Tariff is seen to have taken the following stand in the said meeting.
- “Since PPA is being entered with a new licensee, KSEB required that the past dues be cleared before entering into the PPA. Also, KSEB has difficulties in providing additional power when payments for existing quantity is blocked.”*
41. M/s KPUPL stated that the matter of signing PPA and arrear issues might be delinked. The amounts mentioned in the said meeting were not discussed earlier in the chamber of Additional Chief Secretary, Power. They informed that the issue can be discussed and settled once PPA in

position. In view of the acute financial problem they wanted 3 to 4 months to settle the issues relating to arrears. Ultimately the Chief Engineer, Commercial and Tariff, KSEB Limited suggested that M/s KPUGL should submit before the Board, a proposal for clearing the arrears and after that the matter of execution of PPA can be placed before the Board for consideration.

42. Thus, it can be seen that the authorities of KSEB Limited had, citing yet another reason, further postponed even placement of the issue of signing PPA before the Board.

43. In letter no. KSEB/TRAC/KPUGL-PPA/2012/R1/458 dated 24-05-2013 the Chief Engineer, Commercial and Tariff had further informed M/s KPUGL to furnish security deposit of Rs.5 crore. **He has also informed that notice for termination of the agreement no. 2 of AGT-72** of 2003-04 dated 24-02-2006 with effect from 31-05-2013 for supply of power to KEPIP at Kakkanad has been forward to KEPIP for their consent. It was also informed that PPA could entered into, on receipt of consent of KEPIP in the matter of termination of the existing agreement.

44. In BO(FM) No.1158/2013 (KSEB/TRAC/KPUGL-PPA/2013) dated 25-05-2013 the Board had issued the following orders.

*(1) The Chief Engineer, Transmission (South) should issue notice for termination of agreement dated 24.02.2006 to KEPIP under intimation that security deposit in the name of KEPIP shall be refunded after adjustment of dues, if any.*

*(2) Authorize the Chief Engineer, Commercial and Tariff to enter into PPA with M/s KPUGL for supply of power for a contract demand of 11 MVA at KINFRA park, Kakkanad, 1 MW at KINFRA High Tech Park, Kalamassery and 1 MVA at KINFRA Integrated Textile Park, Palakkad as per **Annexure 2**, after collecting security deposit of Rs.5 crore (Rs.2.5 crore as cash deposit and Rs.2.5 crore as bank guarantee)*

45. It can be seen that the Board had not insisted on any consent from KEPIP as a precondition for execution of PPA, though the Chief Engineer, Commercial and Tariff had imposed such condition. It can also be seen that the Board had authorized Chief Engineer, Commercial and Tariff to enter into PPA with M/s KPUGL only on 25-05-2013. It is not known how and why the Chief Engineer, Transmission (South) was imposing various conditions for execution of PPA.

46. In letter No. KSEB/TRAC/KPUPL-PPA/2013/923 dated 02-12-2013 the Chief Engineer, Commercial and Tariff informed M/s KPUPL that they should provide bank guarantee for Rs.6,00,06,050/- and modify the conditions in draft PPA accordingly. The PPA was only for one year though the Commission had expressed its view that one year is too short a period for the PPA between two licensees. He had directed M/s KPUPL to settle the arrears amounting to Rs.1,95,31,500/- which was due to the Board by way of short remittance of regular monthly current charges at the pre-revised tariff from 01-05-2013 up to 31-10-2013. He also informed that the Board is examining the issues raised by M/s KPUPL and that the final amount after reconciling the claims raised by M/s KPUPL shall also be settled in full before signing the agreement. In letter No.KIN/PLG-123 (a)/2013-14 dated 23-12-2013 (**Annexure 18 to the counter affidavit**) the Managing Director, KINFRA, who is not a party to the issue under consideration, had requested the Chairman, KSEBL to keep in abeyance the signing of PPA with M/s KPUPL and to allow them to continue the present power purchase agreement KEPIP with KSEB Limited. This request is seen made in view of certain proposed changes with regard to the agreement between NESCL and KINFRA. The Chairman is seen to have issued orders to keep the execution of PPA in abeyance.
47. In letter No.HTB-8/4008 dated 23-09-2013 (**Exhibit P5 in the OP**) the Special Officer, Revenue is seen to have raised claims for remittance of arrears. The details of arrears are given in the said letter, which shows that balance arrear pending against BST revision was Rs.82,37,397/- and the arrear due to partial remittance of excess over demand charge from 3/2011 to 8/2013 was Rs.1,76,30,088/-. He also intimated that additional cash deposit for the year 2012-13 was Rs.1,45,07,520 in cash and Rs.1,90,14,635/- in the form of bank guarantee. In the letter No. 8/4008 dated 28-03-2014 (**Annexure 10 the counter affidavit**) the Special Officer, Revenue has informed that the Board had decided to withdraw the excess amount charged amounting to Rs.90,34,113/- during the power restriction period from 15-02-2012 to 31-05-2013. Consequent to the withdrawal of the excess penalty charged on demand charges during the power restriction period, the arrears from 3/11 to 3/14 would come to Rs.87,75,275/- (Principal) plus Rs.20,08,814/- as interest at the rate of 18% upto 31-03-2014. Thus the total as on 31-03-2014 would come to Rs.1,07,84,089/-. It was also informed that if the arrear was not being paid

within 14 days service connection shall be disconnected without any further notice.

48. Admittedly by the petitioner, one of the reasons for delay in execution of the PPA was their acute financial problems which prevented the compliance of conditions imposed by the officers of KSEB Limited. In this regard it should also be noted that the officers of KSEB Limited had preferred many claims for remittance of penal charges and security for payment, which were subsequently modified or withdrawn. Thus the officers of KSEB Limited had also contributed to the financial problems of the petitioner.
49. From the facts cited above, it can easily be seen that the execution of PPA was delayed mainly due to the unilateral and arbitrary conditions imposed by the officers of KSEB Limited namely Chief Engineer, Commercial and Tariff, Chief Engineer, Transmission (South) and Special Officer, Revenue. In fact most of such conditions did not have the support of any Board Order or Government Order or Commissions Order. Right from 17-03-2011, the date of convening the second meeting by the Chief Secretary, the Board is seen to have maintained the stand that it would provide 11 MVA power at KINFRA Park, Kakkanad, 1 MVA power at High Tech Park, Kalamassery and 1 MVA power KINFRA Integrated Textile Par at Palakkad. The Special Officer, Revenue is seen to have raised many claims which are withdrawn subsequently. The Chief Engineer, Commercial and Tariff and the Chief Engineer, Transmission (South) are seen to have insisted on clearance of such arrears before execution of the PPA. The series of such reasons cited by various officers of KSEB Limited cannot be brushed aside as incidental or non-deliberate. In spite of the above facts KSEB Limited has been consistently blaming KPUPL for the delay in execution of the PPA.
50. Now the facts of the case have to be examined with regard to the relevant legal provisions. In view of the order of the Commission dated 30-11-2009 in petition No.1/2009, the distribution licence of M/s KEPIP stood transferred to M/s KPUPL with effect from 01-02-2010. Therefore with effect from 01-02-2010 M/s KEPIP is not a distribution licensee. The agreement No.72/03-04 dated 24-02-2006 entered into by KEPIP with KSEB was in the capacity of a distribution licensee. When M/s KEPIP ceased to be a licensee with effect from 01-02-2010, the said agreement has become legally inoperative. After 01-02-2010 KEPIP is no more a distribution licensee and it cannot supply electricity to the consumers. In fact and as per law, KPUPL succeeded KEPIP as a distribution licensee and commenced distribution of

electricity to the consumers, who were earlier serviced by KEPIP. Hence electricity was being supplied by KSEB to M/s KPUPL only and not to M/s KEPIP. KSEB should have determined the contract dated 24-02-2006 with M/s KEPIP as on 01-02-2010 and settled the account between them. KSEB Limited and KPUPL should have entered into a fresh agreement for the supply of electricity to KPUPL. It was in view of this legal position this Commission had, as early as on 09-12-2009, directed KSEB Limited and KPUPL to enter into fresh PPA for the supply of electricity to KPUPL. But the said instruction is seen implemented only with effect from 01-10-2014, the date on which KSEB Limited and KPUPL entered into fresh agreement.

51. Therefore, strictly speaking, the supply of electricity by KSEB Limited to M/s KPUPL during the period from 01-02-2010 to 01-09-2014 was not on the basis of a valid agreement between them. It is informed that KSEB used to issue bills to M/s KEPIP for the energy supplied to KPUPL and such bills were paid by KPUPL. This system of billing has no support of a valid agreement. It appears that the supply of electricity to M/s KPUPL was on an understanding that the terms and conditions of the agreement dated 24-02-2006 would apply to the supply of electricity to KPUPL also, though there was no undertaking or memorandum of understanding to this effect. KSEB has, in their communications, indicated that the terms and conditions of the agreement dated 24-02-2006 would apply to supply of electricity KPUPL also since it is the successor in interest to M/s KEPIP. If that is the case, KSEB has to explain why they had proposed many changes to the agreement conditions as per their letter dated 03-03-2010. Those changes only delayed execution of PPA between KPUPL and KSEB Limited and led to filing of DP-82/2010 by M/s KPUPL.
52. It is seen from the order of the Commission dated 27-07-2010 in DP-82/2010 that when the issue was finally heard, KSEB Limited had not insisted on any change except tariff. In respect of tariff, KSEB had insisted to charge marginal cost of purchase of power from M/s KPUPL. KSEB Limited cannot fix such as bulk supply tariff after formation of the State Electricity Regulatory Commissions. It is a matter of preliminary knowledge to any licensee or consumer that the authority to fix tariff is the Commission, after the formation of Commission under the Electricity Regulatory Commissions Act, 1998 or under the Electricity Act, 2003. In the order dated 27-07-2010 the Commission had stated that the bulk supply rate to be included in the PPA between KSEB Limited and KPUPL should be the rates approved by the



Commission. This is the legal position as well. But the Board chose to challenge the said order in the Writ Petition before the Hon'ble High Court. In fact, KSEB as well as all other licensees are implementing the bulk supply tariff order issued by the Commission. If KSEB Limited had or has any grievance against bulk supply tariff approved by the Commission, it should have filed appeal against the order of the Commission fixing bulk supply tariff. This has not been done by KSEB Limited. Therefore the stand of KSEB Limited in this regard cannot be viewed as inadvertent.

53. KSEB Limited has submitted several documents along with the counter affidavit in this petition to substantiate that they were repeatedly requesting KPUGL to sign PPA and that the delay was caused by KPUGL. But a careful perusal of all such documents clearly shows that various officers of KSEB Limited were imposing unilateral, arbitrary or illegal conditions as pre-requisites for signing PPA as can be seen from the facts narrated in earlier paragraphs. Many such conditions are seen withdrawn subsequently by KSEB Limited as can be seen from the following facts.
- (i) The deviations proposed to the conditions of PPA as per the letter dated 03-03-2010 of KSEB Limited are not seen insisted subsequently.
  - (ii) The condition that KPUGL, the licensee for High Tech Park area at Kalamassery, should act as franchisee of KSEB Limited in High Tech Park area, Kalamassery is not seen insisted subsequently.
  - (iii) The condition that KPUGL should source power from other generators is not seen insisted subsequently.
  - (iv) The objection raised by the Chief Engineer, Transmission (South) regarding the extent of licence area at KINFRA park, Kakkanad is not seen insisted subsequently.
  - (v) Though KSEB had, in the high level meetings convened by Chief Secretary, Additional Chief Secretary etc., agreed to supply 13 MW power in the three licence areas, Chief Engineer, Transmission (South), in his letter dated 09-11-2011 had intimated that additional power cannot be given until power position improved.
  - (vi) The demand for penalty at the rate of 300% for the excess energy drawn during the power restriction period has been withdrawn subsequently.

- (vii) The demand for clearance of all arrears as per the calculation of KSEB Limited, as a pre-condition for execution of PPA is not seen insisted subsequently.
- (viii) The earlier conditions insisted by KSEB Limited, relating to payment security mechanism have been subsequently modified.

If KSEB Limited had taken a reasonable and equitable stand treating KPUPL as another infant licensee, the PPA could have been executed earlier.

54. The decisions taken in the meeting chaired by the Chief Secretary have got special significance in view of the following facts. Previously, certain departments and institutions under the Government had filed writ petitions before the Hon'ble High Court, against other departments and institutions under the Government. The Hon'ble High Court observed that this was not a desirable practice. The Hon'ble High Court had, thereupon, directed that such issues between or among different departments or institutions under the same Government shall be settled by a high power committee under the chairmanship of the Chief Secretary. The Government had accordingly constituted high power committee consisting of the Chief Secretary and concerned secretaries to Government. The decisions of such committee were issued as Government orders. Therefore the decision taken in the meeting chaired by the Chief Secretary cannot be ignored by the parties to the meeting.
55. The officers of KSEB Ltd such as Chief Engineer, Transmission (South), Chief Engineer, Commercial and Tariff and Special Officer, Revenue are seen to have imposed certain pre-conditions for execution of agreement with M/s. KPUPL. It has been pointed out that the contract demand of a consumer cannot be increased, when arrears of electricity charges are due from the consumer. It has also been pointed out that M/s. KPUPL did not furnish security amount equal to electricity charges for two months. All such contentions raised by KSEB Ltd show that the officers of KSEB Ltd had treated KPUPL as a consumer. The conditions relating to clearance of arrears before increasing contract demand, and the conditions relating to security deposit are in accordance with the provisions of the Supply Code and they are applicable only to the consumers. KPUPL is not a consumer. It is a distribution licensee authorised by the Commission to distribute electricity to its consumers. The relation between KSEB Ltd and KPUPL is that between a utility which supplies electricity and a distribution licensee which purchases electricity. It is true that the utility which supplies electricity has to obtain from

the purchaser necessary payment security mechanism such as letter of credit or escrow account or bank guarantee or cash deposit. But such payment security mechanism has to be discussed and decided by the parties to the agreement. The officers of KSEB Ltd cannot dilute the decisions taken in the high level committee at Government level or delay implementation of such decisions, quoting conditions relating to supply of electricity to consumers.

56. All the above facts lead only to the conclusion that KSEB Limited has been consistently delaying execution of PPA citing one reason or the other and imposing unilateral and arbitrary or illegal conditions as pre-requisites of signing PPA. It was in view of this fact, this Commission had, while approving the bulk supply tariff applicable to licensees with effect from 01-05-2013 as per its order dated 27-05-2013 in OP No.2/2013, issued the following directions,-

*“It is directed that M/s KPUGL shall continue to remit the power purchase bill to the Board at the pre-revised rates (that is rates effective from 01.07.2012), till the PPA is signed. The difference in amount between the electricity charges of pre-revised tariff and revised tariff shall be deposited in a separate account maintained by M/s KPUGL for this purpose. Once the PPA is signed and effective as directed by the Commission, the difference amount shall be paid to the Board with prior consent of the Commission. The carrying cost if any for the delay in execution of PPA shall not be applicable for the amount”.*

The above directions is seen quoted in letter No. KSEB/TRAC/KINSESCO/2009/R1 dated 28-03-2013 copy of which has been submitted as Annexure 14 to the counter affidavit of KSEB Limited.

57. As already explained KSEB Limited had agreed to supply 11 MW power at KINFRA Industrial Park, Kakkanad, 1 MW power at High Tech Park, Kalamassery and 1 MW power at KINFRA Integrated Textile Park, Palakkad right from the meetings convened by the Chief Secretary on 17-03-2011. This stand has not been withdrawn or modified by KSEB Limited in any of the subsequent meetings at Government level. Ultimately PPA has been signed on 01-10-2004 for the same quantum of power with effect from 01-09-2014. It is a well settled position of law that agreement need not necessarily be in writing. During the period from 01-02-2010 till 01-09-2014, electricity was being supplied by KSEB Limited and it was being availed by KPUGL on the belief and understanding that the terms and conditions of agreement dated 24-02-2006 with KEPIP would continue to apply to them as the transferee of

KEPIP. KPUPL had requested for and KSEB Limited had agreed to supply 13 MW of power at least with effect from 17-03-2011, the date of meeting convened by the Chief Secretary. Therefore, KSEB Limited cannot charge any penalty for consumption up to 11 MW in KINFRA Industrial Park, Kakkanad, 1 MW in High Tech Park, Kalamassery and 1 MW at KINFRA Integrated Textile Park, Palakkad. KSEB Limited cannot be allowed to take advantage of its own tactics to delay execution of PPA and implementation of directions of the Government and the Commission.

58. The financial impact of the decision on this issue has also been examined. According to KSEB Ltd, the contract demand of M/s. KPUPL before 01-09-2014 ( the date of effect of the PPA signed by KSEB Ltd and KPUPL) should be treated as 9000kW and demand charges at 150% of the normal rate shall be charged for the consumption above 9000kW. KPUPL is the licensee for KINFRA Industrial park, Kakkanad. The total consumption of KPUPL has exceeded 9000kW because of the cumulative consumption of all the consumers in the said industrial park. The consumers in the industrial park avail electricity on the strength of a power supply agreement with the licensee namely KPUPL. Demand charges at 150% of the normal rate can be levied from the consumer only if he exceeds his contract demand. In this case the excess consumption over 9000kW by KPUPL has not been caused by the excess consumption by individual consumers, on the other hand it has been caused by the increase in number of consumers. Therefore total consumption in excess of 9000kW cannot be attributed to any lapse on the part of KPUPL. Therefore, the total amount paid by KPUPL to KSEB towards electricity charges, including the penal demand charges should be treated as the expenditure for power purchase and should be admitted in its ARR. The Commission has adopted the principle of differential BST and uniform RST for working out the BST applicable to various small licensees who purchase electricity from KSEB. In this process the expected revenue from charges for the sale of energy as projected by the licensee is worked out based on the uniform revised RST. The increase in BST to be granted is worked out based on the expected revenue based on revised RST and the amount of ARR approved by the Commission. Cost of power purchase is a major ingredient in the ARR. When the cost of power purchase increases, the increment in BST at which electricity charges to be paid to KSEB Ltd will come down accordingly. Therefore the financial impact of deciding this issue one way or other is practically negligible.

59. In view of the above facts and circumstances it can be found that,-

- (i) The PPA between KSEB Ltd and KEPIP executed on 24-02-2006 for the supply of 9000kVA power for 20 years became inoperative with effect from 01-02-2010, the date from which the distribution license of M/s. KEPIP was transferred to M/s. KPUPL by the Commission.
- (ii) M/s KPUPL, being the licensee authorised by the Commission cannot be treated as a franchisee by KSEB Ltd.
- (iii) In spite of the directions from the Commission and the approval given by the Commission to the draft PPA initialed by both KSEB Ltd and KPUPL, the power purchase agreement was not executed by KSEB Ltd and M/s. KPUPL till 01-09-2014.
- (iv) The delay in execution of the PPA was due to the untenable demands of the officers of KSEB Ltd and the financial problems of KPUPL and therefore the delay cannot be attributed to the lapses on the part of any particular party.
- (v) Thus there was no written PPA between KSEB Ltd and KPUPL during the period from 01-02-2010 to 01-09-2014.
- (vi) The decision taken in the meeting chaired by the Chief Secretary on 17-03-2011, to enhance the contract demand from 9000kVA to 11000kVA has not been repudiated either by KSEB Ltd or by KPUPL.
- (vii) KSEB Ltd continued supply of electricity to KPUPL during the period from 01-02-2010 to 01-09-2014 and this fact indicates that there was an implied contract by conduct during the above period.

60. The other issue to be decided is whether KPUPL is liable to pay penal interest on the amount of short remittance based on the bulk supply tariff (BST) order issued by the Commission. The Commission had revised with effect from 12/2000, the BST applicable to the licensees who purchase electricity from KSEB Ltd. The Commission had adopted the policy of uniform retail supply tariff (RST) for all the consumers in the State and differential BST for different licensees depending upon their ARR. Thus the bulk supply tariffs applicable to different licensees were determined by the Commission after duly considering the ARR & ERC of such licensees. The Hon'ble Appellate Tribunal for Electricity also, in its order dated 30-05-2012 in Appeals Nos. 25,107,127 and 151 of 2011 had held that the revision of BST has ordered by the Commission with effect from 12/2000 was legally sustainable. All the licensees who purchased electricity from KSEB Ltd were paying electricity

charges at the revised BST. Therefore there is no valid ground for KPUPL to pay electricity charges at a lower pre-revised rate as chosen by them. The action of KPUPL in having paid the electricity charges to KSEB Ltd at a lower pre-revised rate even after revision of the BST by the Commission is not legally valid. According to the petitioner, the total arrear amount due to such unilateral short remittance by KPUPL was 338 lakhs as presented by KSEB Ltd and endorsed by KPUPL in the meeting held on 09-08-2012. As per the minutes of the meeting KPUPL had agreed to clear the arrears immediately. Though decision was taken to clear the arrears immediately soon after the meeting held on 09-08-2012, KPUPL did not clear the arrears without delay. It is clear from the records that the said amount of 338 lakhs was towards the principal. It is also clear that the accumulation of arrears was due to the unilateral decision taken by the petitioner to pay the electricity charges at a lower pre-revised rate. Therefore the respondent KSEB Ltd has the right to charge penal interest on the arrear amount since there is a financial cost for the delay in payment. It has to be considered that KSEB Ltd is also running its business by availing huge amounts as loans and interest has to be paid on such loans. Whenever arrear amount is remitted by the defaulting entity, it is a regular practice that the amount remitted is adjusted first towards the interest and then towards the principal. Therefore the adjustment of the arrear amount paid by M/s. KPUPL first towards the interest due on the arrear amount and the balance towards the principal arrear amount is in order.

### **Orders of the Commission**

61. In view of the facts and circumstances explained above the following orders are issued
- (i) The demand notice for Rs. 2,58,67,485/- and interest thereon, as per Ext P5 notice issued by KSEB Ltd is quashed.
  - (ii) The contract demand of KPUPL shall be reckoned as 11 MW in KINFRA Industrial Park, Kakkanad, 1 MW in High Tech Park, Kalamassery and 1 MW at KINFRA Integrated Textile Park, Palakkad with effect from 17-03-2011, the date of decision in the meeting convened by the Chief Secretary.
  - (iii) KSEB Ltd shall, based on the above decision, re-assess the penal charges if any, due from M/s KPUPL on account of its exceeding the recorded maximum demand over 9000kVA.

- (iv) KSEB Ltd is entitled to realise from M/s KPUPL, the electricity charges at the revised BST rates with effect from 12/2010 as per the order of the Commission in this regard.
- (v) KSEB Ltd is also entitled to realise from M/s. KPUPL, the penal interest at the simple interest rate of 18% per annum on the arrears of electricity charges caused due to the delay in making payment at revised BST.
- (vi) The power purchase agreement dated 24-02-2006 between KSEB and KEPIP shall be determined as on 01-02-2010, the date on which the said agreement became inoperative due to the transfer of distribution license to M/s KPUPL by the Commission.
- (vii) The request of M/s. KPUPL to pay back the amount of Rs. 82,37,397/- remitted by it under protest on 08-11-2013 with 24% interest or else, to adjust in future bills, the said amount with interest, is rejected.
- (viii) The payments due from M/s KPUPL to M/s KSEB Ltd during the period from 01-02-2010 to 01-09-2014 shall be re-assessed and settled in view of the above decisions.
- (ix) The terms and conditions of supply of electricity by M/s KSEB Ltd to M/s KPUPL with effect from 01-09-2014 shall be governed by the PPA entered into between them.

Sd/-  
T.M. Manoharan  
Chairman

**Per Shri. Mathew George Member**

I respectfully disagree with the findings of the Chairman on the issue of levy of penal demand charges for the period from February 2011 to August 2014, in the above order. My findings and orders are given below.

**Dissenting order by Member**

1. The dissent in the case is only on the issue of levy of penal demand charges from February 2011 to 30<sup>th</sup> August 2014 payable by Kinesco Power and Utilities Pvt.Ltd (KPUPL). After February 2011 the petitioner remitted the demand charges only at normal rates even when the demand crossed the contract demand of 9000 kVA, and did not pay the penal charges for drawal of power in excess of 9000kVA as per the existing power purchase agreement (PPA). KSEB was raising the penal charges whenever the recorded demand crossed the contract demand as per the relevant provisions of the PPA. The petitioner refused to pay the excess demand charges above 9000kVA on the

ground that already there was an agreement for enhancing the contract demand to 11000kVA in the meeting held by the Chief Secretary.

2. The existing power purchase agreement provides for levy of penal demand charges whenever the recorded maximum demand exceeded the contract demand. The existing PPA was only for 9000kVA of power. After protracted negotiations a new PPA was finally signed between the parties in October 2014. As per the terms agreed to by the parties, the PPA entered on 01-10-2014, has come into force from 01-09-2014 and remains valid for a period of one year. It was also agreed to provide total quantity of power of 11000 kVA at KEPIP Kakkanad, 1000kVA at KINFRA Hi-tech park, Kalamassery and 1000kVA at KINFRA integrated Textile park Kanjikode, Palakkad. Thus as per this PPA, the terms are prospective, effective from 01-09-2014, and the dispute is on the quantum of contract demand for period from February 2011 to August 2014.
3. Among other things the petitioner has prayed for the cancellation of the demand notice which included the penal demand charges for excess drawal of power. The essential question is whether there was any agreement between the parties for increasing the contact demand from 9000kVA to 11000kVA before signing of the power purchase agreement (PPA) in September 2014 and if so from when it is to be given effect to.
4. According to the petitioner, there is an agreement for enhancing the contract demand in the meeting convened by Chief Secretary on 10-01-2011 and on 17-03-2011 and the matter of allocation of 11000 KVA was settled at the High Level committee meeting and it has become final. On the other hand, KSEB Ltd. stated that the said decision was contingent upon the other decision viz., the decision (ii) taken in the second meeting as given below. The decisions taken in the meeting convened by the Chief Secretary on 10-01-2011 are as follows:

*“After detailed discussions KSEB has agreed to extend the existing BPSA for Kakkanad which was executed between KEPIP and KSEB in 2006 to KINESCO. KSEB also agreed to enhance the contract demand from existing 9000kVA to 11000kVA to meet the additional requirement of power for the units proposed to be set up in the park. KSEB and KINESCO have agreed to sign power purchase agreement for the supply of power for the*



*Kakkanad park. For the KINESCO's license areas at Kalamassery, KSEB has offered two options for supply of power(1)KINESCO to issue a no-objection certificate to KSEB so that they can directly supply power to M/s BE*

*(2) KSEB shall supply power to KINESCO at Kalamassery as a bulk purchase basis. KINESCO shall distribute the power to the units in the Hi-Tech Park Kalamassery*

*KINESCO has agreed to accept the option (2). Inauguration of BEL is scheduled to be held during this month. So KSEB should ensure power supply by the end of this month. Chief Secretary has informed that this is a temporary arrangement and KINESCO shall arrange for their own input power from NTPC for all future requirements.”*

The decisions taken in the second meeting ie., 17-03-2011 are as follows:

*“After a detailed discussion following decision were taken:*

*i)KSEB should sign PPA with KINESCO for the supply of 11MVA power in KEPIP.*

*ii)In case of High Tech Park, KINESCO should act as a franchisee. Meanwhile KINESCO should take steps for finding alternate sources of power for distribution”*

5. Further to the above two meetings one more meeting had taken place which was convened by the Additional Chief Secretary (Power) on 09-08-2012. The decisions taken in this meeting are as given below:

*“a. KSEB agreed to provide the power sought by KINESCO on a provisional basis.*

*b. KINESCO will make payments based on revised BST as ordered by KSERC.*

*c. KINESCO will clear the arrears immediately.*

*d. The matter of recovery of higher infrastructural costs within the parks shall be addressed when KSERC finalises the regulations on small licensees.*

*e. Draft provisional PPA for a period of one year shall be forwarded by KSEB to KINESCO. A provision may be incorporated in the PPA to the effect that the agreement could be extended or amended based on mutually agreed terms and conditions after notification of applicable regulations by KSERC*

f. *Classification of consumers within the parks shall be same as that of KSEB.*”

6. It is pertinent to examine whether the agreements reached in the various meetings held by the Chief Secretary and the Additional Chief Secretary amount to legally enforceable contracts. The first two conciliatory meetings by the Chief Secretary on 10-01-2011 and 17-03-2011 were held while the issue was already under consideration of the High Court of Kerala. KSEB had filed a writ petition WP(c) 37700/2010 in the Hon'ble High Court of Kerala on the issue of power purchase agreement with KPUPL and there was an interim order by the Court on 12-06-2012 directing the Government to call for a meeting with KSEB and KPUPL and file an affidavit regarding the decision taken in the meeting. A meeting was held consequent to this High Court orders on 09-08-2012 by the Additional Chief Secretary (Power and Transport) where Smt. R.Gayatri Nair, Chief Engineer (Commercial and Tariff) KSEB and Joseph Kurien Chief Executive Officer, KPUPL participated.
7. KSEB had objected to the minutes of the first meeting of 10-01-2011 held by Chief Secretary on the grounds that the minutes did not reflect the decisions in the meeting which necessitated a second meeting. In the draft minutes of the second meeting taken by the Chief Secretary on 17-03-2011, it is admitted that “still there is some difference of opinion between KSEB and KPUPL. Thus another meeting was convened to discuss this issue again.” Thus it can be concluded that the minutes of the first meeting has no significance in the eyes of law as a concluded contract. The second meeting was held by the Chief Secretary on 17-03-2011 when the matter was already under consideration of the High Court. If KPUPL was of the view that the disputes were settled in the meeting of the Chief Secretary held on 17-03-2011, they should have presented this position to the High Court so that there was no need for the honourable High Court to refer the matter again to Government for reconciliation. The High Court vide its interim order issued on 12-06-2012 directed the government to call for a conciliatory meeting with KSEB and KPUPL. Since this interim order is binding on both the parties, the decision in the meeting held by Chief Secretary on 17-03-2011 loses its sanctity since the High Court order issued on 12-06-2012 recognises the existence of differences between the parties. Hence any earlier decisions, wherein consensus is said to have been reached, cannot be said to be final.
8. Now we have to examine whether the consensus reached by the parties in the meeting held on 09-08-2012 by the Additional Chief Secretary amounts to

a legally enforceable contract and if so the date from which such agreement comes into effect. A careful reading of the minutes of the said meeting makes it amply clear that the decisions made therein are only an agreement to enter into an agreement and not an agreement per se. The operative portion of the minutes reads as follows:

“Based on the discussions it was agreed that

- a. *“KSEB agreed to provide the power sought by KINESCO on a provisional basis.*
- b. *KINESCO will make payments based on revised BST as ordered by KSERC.*
- c. *KINESCO will clear the arrears immediately.*
- d. *The matter of recovery of higher infrastructural costs within the parks shall be addressed when KSERC finalises the regulations on small licensees.*
- e. *Draft provisional PPA for a period of one year shall be forwarded by KSEB to KINESCO. A provision may be incorporated in the PPA to the effect that the agreement could be extended or amended based on mutually agreed terms and conditions after notification of applicable regulations by KSERC.*
- f. *Classification of consumers within the parks shall be same as that of KSEB.”*

9. It is clear from the above minutes that power sought by KPUGL shall be provided by KSEB on a provisional basis, based on a provisional PPA for one year and KPUGL will clear the arrears immediately and make payments based on revised BST. No argument can be taken that only one of the decisions viz. providing additional power will be immediate and the other decisions can be implemented at the will of the parties. To make the decisions binding, both the parties have to fulfil all the duties cast on them by virtue of the conciliatory meeting. KPUGL has paid only the principal amount of arrears amounting to Rs. 338 lakhs and that too only on 10-01-2013 ie. five months after the meeting. Entering into a PPA also is one of the decisions in the meeting which cannot be deferred at the sweet will of the parties on grounds like liquidity problem or cash crunch. Any power purchase agreement has attendant conditions like security deposit, letter of credit, escrow account etc. for securitizing payments and the parties willingly chose the mode of security deposit on which there is no contention from either party. If there is delay on account of payment of pending arrears and furnishing security deposit for

entering into PPA, both of which were agreed to by KPUPL in the meeting such delay is solely attributable to KPUPL only. They have no right to claim that the agreement to supply power alone should be pre-dated with effect from the date of meeting to avoid penal demand charges.

10. An agreement will not be considered a legally binding contract unless the agreement is "complete". The decisions in the meeting held on 09-08-2012 or for that matter the meetings held by the Chief Secretary on 10-01-2011 and 17-03-2011 can at best be considered only as agreements in principle. Here the parties have entered into an agreement with a view to entering into further more detailed agreement which makes it only an agreement to agree. These kinds of agreements are classified as unenforceable because they lack fundamental details which remain to be determined by the parties.
11. Inter departmental disputes are settled through the mechanism of high power committee notified for the purpose which is chaired by the Chief Secretary where both Secretaries of the disputant departments are necessary participants. Here it can be seen that the Additional Chief Secretary (Power) has called for the meeting where Chief Engineer from KSEB and Chief Executive Officer of KPUPL participated. The elements of a contract are "offer" and "acceptance" by "competent persons" having legal capacity who exchange "consideration" to create "mutuality of obligation." Chief Engineer (Commercial and Tariff) of KSEB is not the competent person who has legal capacity to enter into agreement for supply of power. On this ground also the decisions in the meeting of 09-08-2012 cannot be said to have legal enforceability.
12. In this context it would be worthwhile to analyse the background of the dispute. The transfer of license from KINFRA Export Promotion Industrial Park (KEPIP) to Kinesco Power and Utilities Pvt.Ltd (KPUPL) has taken place with effect from 1<sup>st</sup> February 2010. Thus from that date KPUPL is the new licensee of the area of supply though the power purchase agreement (PPA) was between KSEB and KEPIP. However the records show that it was agreed by KSEB to extend the benefit of PPA to KPUPL on the same terms and conditions. The monthly bills were issued in the name of KEPIP and such bills

were settled by KPUPL. KEPIP has also not raised any issue on this arrangement. Thus there was an implied agreement to honour the terms and conditions of the existing agreement which was never questioned by any of the parties. This kind of interim arrangements till the fresh PPA is signed by the new licensee is usually resorted to so that power supply to ultimate consumers is not interrupted. The same kind of arrangement is followed by KSEB in the case of Kannan Devan Hill Plantations Company Private Ltd. Munnar where the original PPA is still in the name of M/s. Tata Tea Ltd. and bills are issued in the name of Tata Tea Ltd. though the demands are settled by Kannan Devan Hill Plantations Company Private Ltd. In such cases all the commercial and other conditions of the existing agreement will be applicable to the new licensee till the new agreement is signed. Thus in the case of KPUPL too the demand charges till then will be governed by the terms and conditions of the existing contract between KSEB and KEPIP. In the light of the above position the agreement for supply of the revised demand of 11 MVA by KSEBL to KPUPL takes effect only from 01-09-2014 the date mentioned in article 2.1 of the PPA signed between the parties on 1<sup>st</sup> October 2014.

13. Contracting adequate power for redistribution among its consumers is one of the primary duties of a distribution licensee. For safeguarding the interests of its consumers the licensee has to also ensure that such procurement of power is done at the best price through a transparent bidding process. Clause 22 (3) of the license dated 30-11-2009 issued by the Commission in favour of KPUPL reads as follows: *“The Licensee shall in all circumstances purchase electrical power and/or energy in an economical and efficient manner under a transparent procurement process.”* KPUPL, the distribution licensee in KINFRA Export Promotion Industrial Park Kakkanad, KINFRA Hi Tech Park Kalamassery and KINFRA Textile Park Palakkad failed in fulfilling this basic duty cast on the licensee. The financial consequence of such a failure should not be allowed to be passed on to KSEB. It will also be unfair to allow these penal charges as a ‘pass on’ expenditure while determining the bulk supply tariff (BST) of the licensee, which will again reflect on the retail tariff of the consumers of KSEB. Any kind of expenditure resulting from the negligent action of the licensee cannot pass the test of prudence check by the regulator.

14. In the light of the above position the agreement for supply of the revised demand of 11MVA by KSEBL to KPUGL takes effect only from 01-09-2014 the date mentioned in article 2.1 of the power purchase agreement signed between the parties on 1<sup>st</sup> October 2014. The demand charges till then will be governed by the terms and conditions of the existing contract between KSEB and KEPIP which was agreed to be extended to KPUGL on the same terms and conditions by KSEB. However as agreed by KSEBL the excess amount charged during the power restriction period from 15-12-2012 to 31-05-2013 shall be withdrawn.

### **Order of the Member**

The arrears on account of penal demand charges on account of drawal of power in excess of 9000kVA till 31<sup>st</sup> August 2014 along with interest is payable by M/s. KPUGL based on the existing contract between KSEB and KEPIP which was agreed to be extended to KPUGL on the same terms and conditions by KSEB. This amount shall not be treated as an allowable expenditure of the licensee KPUGL while considering the truing up of the accounts for the year in which it is actually paid to KSEB Ltd. As agreed by KSEB Ltd. the excess amount charged during the power restriction period from 15-12-2012 to 31-05-2013 shall be withdrawn.

Sd/-  
Mathew George  
Member

Approved for issue

Secretary