

**KERALA STATE ELECTRICITY REGULATORY COMMISSION  
THIRUVANANTHAPURAM**

PRESENT

**Shri T.M.Manoharan, Chairman  
Shri P.Parameswaran, Member  
Sri Mathew George, Member**

*PETITION IN THE MATTER OF*

**Extending the benefit of higher tariff of SHPs as per Order of the Commission No. 442/CT/2012/KSERC dated 01.01.2013 which shall be applicable for the projects commissioned / Synchronized on or after 01.01.2013 only and in force for the Financial Year 2013-2014 to Iruttukanam stage II (1x1.5)MW Project whose Contractual Date of Commissioning / Synchronizing and achievement of COD is 07.11.2014 only but which was commissioned earlier than 01.01.2013.**

Admissibility hearing was held on 9-05-13 as per Clause 26(1) of Kerala State Electricity Regulatory Commission (Conduct of Business) Regulations, 2003

Petition	Dy No. 345 dated 14.02.2013	Sri P.D.Nair, Managing Director, Viyat Power  1. Kerala State Electricity Board Vaidyuthi Bhavanam, Trivandrum  2. The Principal Secretary, Power Department, Government of Kerala  3. The Director, Energy Management Centre, Thiruvananthapuram	Petitioner  Respondent
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## **ORDER**

### **1. Background**

1.01 Sri P.D.Nair, Managing Director, Viyyat Power has filed a petition for redetermination of tariff of (1x1.5) MW Iruttukanam Stage II Small Hydel Power Project the tariff of which was determined by the Commission vide Order dated 30.09.2011. The redetermination was requested in the light of the Commission's order no. 442/CT/2012/KSERC dated 01.01.2013 revising the tariff of SHPs and Wind Power Generators. Petitioner has successfully executed and commissioned Iruttukkanam Stage I Project ,one of the 13 Small Hydro-electric Power (SHP) Projects allotted by the Government of Kerala in 2004. Subsequently Government allotted Iruttukanam Stage II project (1x1.5) MW to the Petitioner vide GO (Rt)No.117/2011/PD dated 25.05.2011.

1.02 As directed by the Government, Supplementary Implementation Agreement was signed on 22.09.2011 between the Government and the Petitioner. As per this agreement "The words and expressions used in this Supplementary Agreement shall have the same meaning as those assigned to them in Clause 1.1 of the Implementation Agreement (Main Agreement) dated 10.12.2004 between these parties. The provisions of the Implementation Agreement (Main Agreement) dated 10.12.2004 between these parties shall be deemed to be part of this

agreement to the extent they are relevant to this agreement, and shall mutatis mutandis, be applicable to this agreement”.

1.03 It is pointed out in the petition that as per the Implementation Agreement Clause 5.4 (a) (iii) “The Company shall adhere to the prudent utility practices and achieve COD within 36 months from the date of Financial Close”. The Financial Close for Stage II Project was achieved on 08.11.2011 with the State Bank of India. As per conditions described above the Contractual Commissioning Date for the Project (stage II) is 36 months from the date of Financial Close i.e. 36 months from 08.11.2011 namely 07.11.2014. The stage II project (1x1.5) MW was synchronized with the grid on 04.04.2012 and COD declared w.e.f 10.04.2012. In the meantime Tariff petition was filed on 21.06.2011 and Tariff Order was issued by the Commission vide Order dated 30.09.2011.

1.04 A review petition was filed by the Petitioner on 23.11.2011 which was dismissed by the Commission vide Order dated 27.02.2012. Draft Power Purchase Agreement was approved by the Commission vide Order dated 12.07.2012. However, the PPA is not yet signed.

## **2. Prayer**

**The prayer of the petitioner** is to extend the benefit of higher tariff of SHPs as per Order of the Commission No. 442/CT/2012/KSERC dated 01.01.2013 which shall be applicable only for the projects commissioned / Synchronized on or after 01.01.2013; to

Iruttukanam stage II (1x1.5)MW Project which was commissioned on 10.04.2012, ie about 8 months earlier than 01.01.2013, though the contractual date of Commissioning was only on 7.11.2014.

### **3.0 Admissibility hearing of petition**

- 3.1 In the admissibility hearing of the petition held at 11.00 am on 9-05-13 at the Commissions Office at Vellayambalam, and in the petitions dated 14-02-13 and 22-02-13 the petitioner has stated that KSERC issued Order No. 442/CT/2012/KSERC dated 01.01.2013 fixing the levelised tariff applicable to Small Hydel Projects less than 5 MW as Rs 4.88 per unit. This Tariff shall be applicable for the projects commissioned / synchronized on or after 01.01.2013 only and also that this Tariff shall be in force for the Financial Year 2013-2014 also. The Order further states that the generic tariff shall be applicable for the entire project developed during the control period and the developers need not obtain approval from the Commission for the tariff applicable for their individual projects.
- 3.2 Petitioner further stated that as per the Implementation Agreement signed by and between the Petitioner and the Government; the Petitioner was given time for commissioning of the project up to 07.11.2014., which is after the effective date of 01.01.2013 of the Order. The Project got commissioned earlier than contractual commissioning date. In other words, the Petitioner has commissioned the project ahead of schedule. The petitioner points out that the normal practice in such cases is to give the developer motivation and encouragement by giving

awards, rewards and recognition. The petitioner further points out that if the Petitioner is deprived of the benefits of higher tariff, just because the Petitioner has put up and commissioned the project earlier than scheduled, it will be a miscarriage of justice . If the Petitioner had delayed the execution of the project to the contractual commissioning date he would have been benefited by getting a higher tariff in this case.

3.3 Petitioner stated that the energy generated by KSEB is less than 50% of its requirement. The shortage is partially met from central quota and the balance mostly by thermal energy purchased at an average price of Rs 10/Unit to Rs 12/Unit. Iruttukkanam Stage II (1X1.5 MW) of which the contractual commissioning date is 07-11-2014, was commissioned and synchronized with the grid on 04-04-2012 because of the performance par excellence of the developer. Stage II as on 01-02-2013 has generated and supplied 64,12,500 Units to the Grid, and thus avoiding the necessity of KSEB to purchase energy of same magnitude at a unit price of Rs 10 to Rs 12 totaling to Rs 7 Crores approximately. Allowing payment of Rs1,73, 13, 750 to the petitioner leads to a direct saving of Rs 5.27 Crore to KSEB in the intervening period of ten months. At this rate KSEB would have saved an amount of Rs 10 Crores or more before contractual commissioning date of 07-11-2014. The interest for this amount at 12% per annum is Rs 180 Lakhs which is more than sufficient to meet all the additional expenses every year arising out of new tariff of Rs 4.88/Unit. Hence it is crystal clear that the biggest beneficiary of early

commissioning of Stage II Project of the petitioner by his performance par excellence is KSEB.

3.4 Energy Management Centre has pointed out in the hearing that the petitioner deserves appreciation for completing augmentation scheme of 1.5 MW Iruttukkanam SHP in record time and could synchronize the machine to KSEB grid on 4-04-2012 and COD declared with effect from 10-04-2012. Considering the fact that the petitioner completed the project ahead of the contractual commissioning date of 7-11-2014 as agreed to in the implementation agreement executed with the Government they should be incentivized by awarding the revised higher tariff. CERC has allowed M/s Adani Power to charge compensatory tariff for electricity from its 1980 MW Mundra Plant at Gujarat which they had won through competitive bidding. The petitioner completed the second stage of the scheme ahead of contractual commissioning date of 07-11-2014 as agreed to in the implementation agreement, executed with the Government while many such schemes allotted earlier have been under various stages of implementation for which new tariff will be applicable when completed.

3.5 KSEB pointed out that as per KSERC(Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2013 issued No. 442/CT/2012/KSERC dated 01.01.2013 the levelised tariff applicable to Small Hydel Projects less than 5 MW is Rs 4.88 per unit. This Tariff shall be applicable for the

projects commissioned / synchronized on or after 01.01.2013 only and also that this Tariff shall be in force for the Financial Year 2013-2014 also. Hence the new tariff shall be made applicable for projects commissioned after 01-01-2013 only as bound by the Regulation and hence cannot be made applicable to 1.5 MW Iruttukkanam SHP synchronized to KSEB grid on 4-04-2012 and COD declared with effect from 10-04-2012.

#### **4. Analysis**

4.1 Commissions have been empowered to review its own orders as provided under Sec 94(1)(f) of Electricity Act, 2003. The said section reads as follows

“ The appropriate commission shall for the purpose of any enquiry or procedure under this Act , have the same powers as are vested in the Civil Court under the CPC 1908 in respect of following matters.

Namely -

(f) reviewing of its decisions, directions and orders.”

A reading of this section would indicate that this section incorporates by reference to provision of the CPC in regard to exercising the power over review of its own decisions, directions and orders. Since the said powers vested in civil court under the CPC are conferred to the Commission, the relevant provisions of CPC relating to this power shall be referred. The relevant provisions of CPC are 114 and Order 47, Rule 7.

“114 Review – Subject as afore said any person considering himself as aggrieved

- a) By a decree or order from which an appeal is allowed by this code , but from which no appeal has been preferred.
- b) By a decree or order from which no appeal is allowed by this court.
- c) By a decision on a reference from a Court of small causes, may apply for a review of judgment to the court which passes the decree or made the order, and the court may make such order thereon as it thinks fit.”

20. For the purpose of reviewing its own decisions Commission has the same powers as are vested in a civil court under Code of Civil Procedure, 1908.

21. In view of this provision, Commission can review its decision only to the extent it can be done by a civil court under the Code of Civil Procedure. Accordingly Commission has to be guided by the principles governing review as available in the Civil Procedure Code. Review under Civil Procedure Code is permissible under XXXXVII Rule 1 on the following grounds.

- (a) Discovery of new and important matter or evidence which after exercise of due diligence was not in the knowledge of the applicant and could not be produced by him at the time when decree or order was passed.
- (b) Some mistake or error apparent on the face of the record and
- (c ) For any other sufficient reason



The words 'any other sufficient reason' occurring in Rule 1 has to be analogous to the first two grounds. Pleas akin to those which can be taken in appeal cannot be grounds for review. So also error in judgment cannot be cured in a review petition.

4.2 Petitioner stated that as per the Implementation Agreement signed by and between the petitioner and the Government; the Petitioner was given the project commissioning time up to 07.11.2014., which is after effective date of 01.01.2013 of the Order revising the tariff. The project got commissioned earlier than contractual commissioning date. In other words, the petitioner has commissioned the project ahead of schedule. The petitioner points out that the normal practice on such cases is to give the developer motivation and encouragement by giving awards, rewards and recognition. The petitioner further points out that if the petitioner is deprived of the benefits of higher tariff, just because the petitioner has put up and commissioned the project earlier than scheduled, it will be a miscarriage of justice. If the petitioner had delayed the execution of the project to the contractual commissioning date he would have been benefited by getting a higher tariff in this case.

This cannot be taken under XXXXVII Rule 1

“(a) Discovery of new and important matter or evidence which after exercise of due diligence was not in the knowledge of the applicant and could not be produced by him at the time when decree or order was passed.”

Since KSERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2013 was issued on 01.01.2013 on a subsequent date and was not available at the time when the impugned order was passed, it cannot be treated as a reason for review. Review of an order of the Commission based upon a subsequent regulation issued by the Commission will not be in order.

The existing tariff was decided based on a petition by the petitioner and the review petition on the order was also disposed off by the Commission. The practice of petitioning again and again before the Commission on a settled matter cannot be allowed.

### **Decision of the Commission**

Considering the above facts Commission decides not to admit the petition.

Sd/-  
**Member (F)**

Sd/-  
**Member (E)**

Sd/-  
**Chairman**

Approved for issue

**Sd/-  
Secretary**