

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

Present: Shri. Preman Dinaraj, Chairman
Adv. A.J Wilson, Member (Law)

Date of Hearing: 21.01.2021

OP No 33/2020

In the matter of : Petition in compliance with Order dated 02-06-2017 in OP 02/2017 seeking approval for modifying the terms and conditions of the Agreement entered into between KSEBL and M/s. INDSIL in line with the provisions in the Kerala State Electricity Regulatory Commission (Renewable Energy and Net Metering) Regulations, 2020

Petitioner : Kerala State Electricity Board Ltd (KSEB Ltd)

KSEB Ltd represented by : Sri. KGP Nampoothiri, Executive Engineer

Respondents : INDSIL Hydro Power and Manganese Limited

Respondents represented by : Sri. Adv Joseph Kodianthara, Senior Advocate

Daily Order dated 02.02.2021

1. M/s. KSEB Ltd (hereinafter referred to as the petitioner or KSEBL), on 02.11.2020, filed a petition before the Commission with the following prayers:

"In accordance with the direction contained in the Order dated 02-06-2017 and the provisions in the Kerala State Electricity Regulatory Commission (Renewable Energy and Net Metering) Regulations, 2020, it is humbly prayed that the proposal for modifying the agreement executed by KSEBL with M/s. INDSIL may be approved"
2. The summary of the petition filed by M/s. KSEB Ltd is given below:
 - (i) M/s. INDSIL Hydropower and Manganese is an EHT consumer having its factory at Palakkad District and with the contract demand of 14000 kVA.

- (ii) The State Government vide Government Order GO (Ms) No. 23/90/PD dated 07.12.1990 issued the policy guidelines on setting up of small/mini/micro hydel projects in the State as part of Private Participation.
- (iii) The State Government, in line with the policy guidelines on setting up of small/mini/micro hydel projects in the State, has allocated the Kuthumkal SHP (21 MW) to M/s INDSIL as Captive Power Plant for meeting their own consumption. M/s INDSIL and KSEB entered into an agreement on 30.12.1994, regarding the following.
- Construction, operation and maintenance including the construction of transmission system, evacuation system etc.
 - Transmission, wheeling, T&D loss, banking, treatment of excess energy.
 - Validity of the agreement is for 30 years from the date of COD. Since the plant was commissioned in the year 2001, the said agreement is valid till 2031.
 - The Government Policy guidelines dated 07.12.1990 and the subsequent GO dated 12.03.1992 shall form part of the Agreement.
- (iv) The project had declared COD on 01.06.2001, i.e. before the enactment of the EA-2003.
- (v) The Commission vide Order dated 02.06.2017 in Petition O.P. No.02/2017 'in the matter of: Dispute with KSEB relating to non-payment of invoice dated 29-07-2016 raised by the petitioner (Generator) for banked energy', between the present petitioner KSEB Ltd and the respondent INDSI, ordered as follows.

"32. After carefully examining the petition and the additional affidavit filed by the petitioner, the counter affidavit filed by the respondent KSEB Ltd, the arguments raised by the petitioner and respondent during the hearing held on 03.04.2017, the additional clarification provided by the petitioner and the respondent, the Commission issues the following orders.

(1) The net banked energy from the Kuthungal plant of the petitioner INDSIL as on 31.03.2016 of the accounting year 2015-16, shall be sold to KSEB Ltd @Rs 3.14/unit, the average pooled cost of power purchase of KSEB Ltd.

(2) During the period from 01.04.2016 to 30.06.2016 of the accounting year 2015-16, total power consumption of the factories of the petitioner and their associates shall be settled against the electricity generated from Kuthungal plant and the

power supplied from KSEB Ltd, as per the clause-13 of the agreement dated 30.12.1994.”

Further vide para 31 of the order, the Commission observed as follows.

*“The Commission has further noted that, the agreement dated 30.12.1994, between the petitioner INDSIL and the respondent KSEB was signed much before the enactment of the Electricity Act-2003. Prior to the enactment of the Electricity Act, 2003, the factories of company did not have the option to purchase power from traders/ generator by availing the facility of open access and the entire electricity requirement has to be met from KSEB and/or by consuming the electricity generated from their captive plant at Kuthungal. Similarly, the company has no option to sell the excess energy if any generated from Kuthungal project to third party other than KSEB. Accordingly, the agreement provides for the sale of excess energy banked with KSEB after meeting the requirement of the factories of the company at the EHT rate applicable to the factories of the company. However, after the enactment of the Electricity Act-2003, the electricity market in the country has changed considerably, especially with the introduction of electricity trading and open access. Further, as per the provisions of the Electricity Act-2003, the Electricity Regulatory Commission is the sole authority for regulating the electricity purchase and procurement process of the distribution licensees including the price at which electricity can be purchased. Hon’ble Apex Court and Hon’ble Appellate Tribunal of Electricity in its various judgments has ordered that the State Electricity Regulatory Commissions have the authority to revisit, even the already concluded PPAs, if the circumstances necessitated. **The Commission is of the considered view that, some of the clauses of the agreement dated 30.12.1994 is to be modified in line with the provisions of the Electricity Act-2003. Hence, considering the larger interest of the consumers of the State, it is directed that, KSEB Ltd shall approach the Commission with proposal for modifying the agreement dated 30.12.1994.***

- (vi) Commission, vide the notification dated 05-06-2020, notified in official gazette the Kerala State Electricity Regulatory Commission (Renewable Energy and Net Metering) Regulations, 2020. As per Regulation 1(2) of the said Regulation, the provisions in the said Regulations **shall apply to all the existing and new, Grid Interactive Renewable Energy Systems**, consumers, prosumers, captive consumers, captive generating plants, generating companies, distribution licensees and obligated entities, in the matter of Determination of Tariff of Renewable Energy, Renewable Purchase Obligation, Net Metering, Banking, Generation Based Incentives and related matters.
- (vii) On 13.07.2020, the respondent M/s INDSIL, raised an invoice for Rs 6,39,63,157/- for the surplus energy of 11.63 MU banked with KSEB

during the period from July 19 to June 2020 @Rs 5.50/unit. During the hearing, KSEB Ltd claimed that, the surplus is on account of open access drawal and also due to the surplus injection resulting from reduction in consumption in the plant of the respondent INDSIL. Due to the lack of information on the operation of the factory during lock down period, KSEB Ltd could not curtail the surplus injection as per the Clause-12 of the Agreement dated 30.12.1994.

KSEB Ltd also submitted that, the procurement of energy @Rs 5.50 per unit is not part of the power procurement plan approved by the Commission. Hence there is a necessity to modify the various provisions in the Agreement including the procurement of surplus energy in accordance with the prevailing legal framework.

(viii) KSEB Ltd further submitted that, Clause 16 of the Agreement dated 30.12.1994 provide as follows.

“The T&D losses, wheeling charges, banking commission and/or other levies prescribed by KSEB will be liable for review and revision, if any statutory contingency arises”.

(ix) KSEB Ltd claimed that, the instant petition is therefore filed seeking approval for initiating the process of modifying the agreement executed by KSEBL with M/s.INDSIL in line with the provisions in the Kerala State Electricity Regulatory Commission (Renewable Energy and Net Metering) Regulations, 2020.

3. The respondent M/s INDSIL Ltd, vide the letter dated 13.01.2021 submitted its comments and its submitted its comments vide letter dated 13.01.2021, and its summary is given below

(i) The petition filed in the case of the Respondent is mischievous and mala fide. A similar agreement was executed with M/s Carborandum Universal Ltd. It is impermissible on the part of KSEB Ltd to seek an amendment only in the case of the Respondent herein. Such a stand is patently discriminatory, arbitrary, unreasonable and unjust particularly at the hands of a public authority like the petitioner.

(ii) The present petition is nothing but an afterthought and backlash of KSEB Ltd to the issues leading to Petition OP No. 44/2020 filed by the respondent for compelling KSEB to pay an amount of Rs 6.39 crore (Rs 6,39,63,157/-) towards banked energy as on 30.06.2020.

(iii) A huge investment of Rs 54.00 crore was invested by the Respondent for putting up the hydel plant at Kuthumkal. The Agreement dated 30.12.1994 stipulate the terms and conditions under which the respondent to operate the hydel plant for 30 years from June 2001. After completion of 30 years from the date of commissioning, the project without any cost shall be transferred to KSEB Ltd. All the terms of the Agreement are built on the consideration that the respondent has

to given the project to KSEB after a period of thirty years at free of cost. Within the said period of thirty years no alteration can be effected to the terms of the Agreement, as these terms already fixed and agreed upon, duly considering the fact that the entire project to surrender to KSEB Ltd after thirty years.

- (iv) The Commission in its earlier Order dated 16.04.2008 in OP 36(a) of 2007 held as follows.
“In this connection it is relevant to note that the Secretary, Ministry of Power, GoI vide letter No. 45/2/2006-R&R dated 15.02.2008 informed this Commission that any PPA which stood legally concluded before the notification of the tariff policy on 6th January 2006 would not alter the legal enforceability unless and until it is mutually.
- (v) KSERC (Renewable Energy and Net Metering) Regulation 2020 cannot apply to the Agreement in question entered into between the KSEB and respondent. The said Regulation can be prospective and cannot apply to the Agreement entered into prior to thereto.
- (vi) The respondent further submitted that, the Agreement dated 30.12.1994 has to be read as a whole, which encompasses various aspects relating to the huge investments required for setting up the hydel project, the modalities and financial implications including in the operations thereof, corresponding benefits arising to KSEB as well as the Respondent herein, all of which are inter-related and composite. It will be absolutely unreasonable and unjustified to pick and chose certain cluses in the Agreement and seek to modify the same particularly when the period of such Agreement has not expired and also taking note of what is to transpire on the expiry thereof.
- (vii) Respondent prayed that, the petition filed by KSEB Ltd is not maintainable, otherwise sustainable in law, bereft of merits and liable to be dismissed.

4. The Commission admitted the petition as OP 33/2020 and hearing conducted through video conference on 21.01.2021. Sri. KGP Nampoothiri, represented the petitioner KSEB Ltd and Adv Joseph Kodianthara, the respondent M/s.INDSIL. The summary of the deliberations during the hearing is given below.

- (i) KSEB Ltd submitted that, the Commission vide order dated 02.06.2017 in OP 02/2017 directed KSEBL to relook into the agreement in view of the enactment of Electricity Act, 2003. The Commission notified the KSERC (Renewable and Net Metering) Regulation, 2020, in the month of June-2020, wherein the terms and conditions of the electricity generated from RE plants as CPP, including banking charges, transmission and wheeling charges etc has completely revised. This Regulation is applicable to all the existing and new RE power plants. The amendments proposed in the clauses 10,11,12,13,14, 16 and 24

of the Agreement dated 30.12.1994 is separately appended along with the petition.

Further, the respondent INDSIL banked 11.63 MU during the lockdown period and raised an invoice for Rs 6.40 crore for this banked energy @Rs 5.50/unit. During the lockdown period, KSEB Ltd also surrendered its share of power from CGS and also backed down its own hydel generation as KSEB Ltd did not require this energy. The rate of power in the market was also very less. The respondent was also not informed of the fact that though there is no demand for electricity, still electricity is being generated from the plant and injected into the grid for banking.

(ii) Sri. Joseph Kodianthara, Senior Advocate, on behalf of the respondent submitted the following.

- There are two IPPs operating in the State more or less on the similar terms, however KSEB Ltd has proposed amendment only against the power plant of the respondent. Such a stand of the KSEB Ltd is discriminatory, arbitrary and un reasonable.
- The respondent established the project as per the policy of the State Government on promoting CPP in the State. The respondent established the project at a total cost of Rs 55.00 crore. By the year 2031, the project has to be transferred to KSEBLtd at free of cost.
- It is established fact that, in the case of concluded PPAs, its terms shall not be altered or modified without the mutual consensus of both the parties. The Commission also observed this aspect in its Order dated 16.04.2008.
- Hon'ble Supreme Court in the Judgment dated 30.07.2019 in Civil Appeal No. 5943-5945 of 2019, dealing with the issues on delay in construction of transmission evacuation system of this project, observed that, entire terms of the Agreement dated 30.12.1994 shall be read in totality.
- In the present petition filed by KSEB Ltd, there are two major legal principles are involved
 - (a) Promissory estoppel: The petitioner established the project as per the policies of the State Government and also the terms of the agreement was arrived on mutual consensus duly considering the fact that the project has to be transferred to KSEB after 30 years from the date of commissioning.
 - (b) The provisions in the Renewable Regulations cannot be established retrospectively, for a project established as per the specific policy of the State Government, and agreement entered into between the Government Agency, KSEB Ltd for implementing the policies of the State Government.

- During the entire period of operation till dated from the year 2001, only, two to three times only the petitioner had raised invoices for banking of energy. Due to Covid-19, the factory of the petitioner was under close down and this resulted in banking the energy generated from the project.
- The electricity is being generated from the project strictly based on the schedule given by SLDC of KSEB Ltd.
- KSEB Ltd cannot be allowed to pick and choose modifications of the Agreement clauses to their advantage and unilaterally.
- There is absolutely no justification in the amendment thereof which offends and absolutely mitigates against the consideration and obligations consciously entered in Agreement dated 30.12.1994, leading to Cause 11 and the considerations thereunder. Proposed amendment is absolutely untenable.

Investment were made into this captive hydel scheme which has to be returned free of cost after 30years keeping in view certain inviolable conditions that governed the Agreement out of which one of the most important conditions is the sale of excess energy generated and banked (at the generator's injection point) at EHT tariffs from time to time to the KSEBL. Therefore, if there is a change in such terms, the entire consideration including the time frame of the Boot period as well as the transfer "at free of cost" condition will have to be reviewed and relooked at. The Cause-11 of the Agreement dated 30.12.1994 is extracted below.

"11. If the energy in excess of the requirement of the Company is generated from the project during one accounting year is not utilized by the Company and their associates during that accounting year, the Company may sell the excess banked energy to KSEB. The sale shall be deemed to be effected at the EHT terminals of the KSEB where the power generated by the Company is fed into the KSEB grid. The energy fed into the KSEB grid less banking commission, royalty and/or other levies shall be deemed to be the energy sold to the KSEB. The wheeling charge and loss towards transmission and distribution shall not be taken into account to determine the energy sold. The rate at which the KSEB shall pay to the company for such sale will be at the rate at which the KSEB sell the energy to the EHT consumers in the same voltage clause at which the KSEB receives the energy from the company. The KSEB shall not pay to the Company for the maximum demand component of the energy sold to KSEB. Under no circumstances shall the Company be entitled to sell or transfer any excess energy or any energy produced from the project to any party other than the KSEB and their associates. The accounting and billing of the energy fed into the grid by the Company and/or supplied by KSEB to the company for operating its factories, if any, in Kerala will be settled on monthly basis. The year of accounting will be reckoned from 1st of July to 30th June. In the case of supply or receipt made in LT lines of the Company the charges for losses will be extra as stipulated by the KSEB. If the energy banked is not utilized by the Company and their associates

during one accounting year, it shall not be carried over to the next accounting year and shall be treated as lapsed. The Company has however the option to sell the excess energy to KSEB on the terms specified in the agreement. Otherwise, the company has no claim over the energy banked.”

- One more inviolable condition the preceded the Respondent from investing into the hydro electric power plant was that there would be no arbitrary clamp down on generation ordered by KSEBL at least to the extent of Respondent's captive consumption which is approximately 60 lakh units in a month. Therefore, Clause 12 of the earlier Agreement enable the KSEBL to control the Respondent's generation in case of events like high storage of reservoirs and breakdown of transmission lines at various points. However such ability of the KSEBL is restricted wherein the KSEBL should atleast allow the respondent to generate the extent of captive consumption at any point in time in all contingencies. Clause 12 of the Agreement dated 30.12.1994 is extracted below.

“12. If the KSEB grid is not in a position to absorb the energy generated from the project for any reason such as high level of storage in reservoirs, breakdown of transmission lines and/or other reasons beyond the control of KSEB, the generation from the project will have to be restricted to the extent of generation for captive consumption as directed by KSEB. The schedule of power generation from the project shall be as directed by the KSEB.”

5. Based on the deliberations during the hearing, the Commission here by direct the petitioner KSEB Ltd and the respondent INDSIL to comply the following.

- (i) KSEB Ltd shall submit the comments on the counter filed by the respondent INDSIL latest by 12.02.2021, with a copy to the respondent.
- (ii) KSEB Ltd shall also submit the following details latest by 12.02.2021, with a copy to the respondent.
 - (1) Month wise details of the energy generated from Kuthumkal plant of the respondent, total energy consumption of the factory of the respondent and the open access availed during the period from July 2019 to June 2020.
 - (2) The details of instructions issued by SLDC to the respondent to restrict or stop power generation from the Kuthumkal plant during the period of close down of the factory of the respondent, as required under Clause 12 of the Agreement dated 30.12.1994.
- (iii) The respondent INDSIL shall submit their comments and written note on the subject matter latest by 18.02.2021.

Next hearing on the petition is schedule on 18.02.2021 at 11 AM through video conference.

Sd/-

Adv. A.J. Wilson
Member (Law)

Sd/-

Preman Dinaraj
Chairman

Approved for issue

C R Satheeshchandran
Secretary (i/c)