

performance tests, being highly onerous, unconscionable and opposed to public policy and law. The petitioner also filed a memo for urgent posting of the petition for an early disposal. The Commission admitted the petition as DP 69 of 2008 and issued notices to KSEB and the Government and posted the matter for hearing on 16-7-2008.

Background

2. Government of Kerala had notified vide G.O.(MS) 23/2004/PD dated 6-11-2004 and further vide G.O No. (MS) 7/2007/PD dated 11-5-2007, guidelines for allowing private sector participation in wind generation. The petitioner in pursuance to the policy of the Government of Kerala to encourage the development of wind projects in private lands, installed wind mills in Ramakkalmedu.
3. The petitioner had obtained technical clearance from the Nodal Agency, ANERT and interconnection facility from the Board. As per KSERC (Power procurement from renewable sources by distribution licensee) Regulations 2006, the petitioner filed a petition for determination of tariff and vide Order dated 27-2-2008 the Commission approved a tariff of Rs.3.14/kWh for Wind Energy Projects. As per the directions contained in the Order, a draft PPA initialed by the petitioner and respondent was submitted to the Commission. Since the investment decision was already taken and order was placed with the developer, under the threat of non-viability and financial hardship, the petitioner initialed the PPA with the respondent even with many onerous and unconscious clauses in the PPA. Now the project is generating electricity and pumping it to the grid, the respondent board has not yet allowed to submit the monthly bills and hence is not making payments for the delivered energy. The respondent Board is now insisting on the compliance of commissioning and entry into commercial service provision in Article 5 of the PPA. As per Article 5, performance test shall be considered successful if the project operates for a period of 14 days with a minimum of 24 hour's continuous operation at or above 90% of the nominal capacity of operation. Further Article 5.3 provides that if due to non-availability of required wind velocity, if the performance test cannot be carried out by the company, provisional certificate of commercial operation of the project maybe issued after carrying out the tests possible to

be conducted with the available capacity. The provisional certificate will be valid for one year and the buyer shall pay as per the tariff determined by the Commission for such period. If the company is not able to ensure the parameters during the performance tests, the energy supplied by the company shall be deemed as infirm power and the rate applicable shall only be Rs.0.25/kWh and the additional payment made by the buyer shall be adjusted against the bank guarantee to be submitted by the Company.

4. Petitioner claimed that the clauses in the power purchase agreement related to the performance tests are highly onerous, unconscionable and opposed to public policy and hence void in a contract. According to the petitioner, generation from wind energy is dependent on numerous parameters, none of which are in the control of the petitioner. Due to any factor including but not limited to wind availability, grid availability, machine availability or any other reason whatsoever to the subjective satisfaction of the respondent, the respondent can always make the petitioner fail in the performance tests to his subjective whims and fancies and at its absolute discretion. The petitioner also contented that, the denial of the legitimate dues to the petitioner by the respondent is an effort to procure the energy free of cost by coercing the petitioner to the onerous clause, taking advantage of the bundled, dominant and monopolistic nature of the respondent, which is opposed to the provisions of the Electricity Act, 2003. According to the petitioner, there is no precedent, procedure or guidelines set in for performance test in any part of India or the world and the respondent has not issued any guidelines explaining such process. Hence, in the absence of practical guidance, methodology, scheme or directions, standard operating procedure, it is impossible to practically implement the provisions of the PPA. Since wind generation is not characterized by any fuel, it is not dispatchable, schedulable and not subjected to ramping up or down at the choice of the generator. No State in India including Tamil Nadu and Gujarat (who have the highest installed capacity of wind generation in the Country) have stipulated such conditions as insisted by the petitioner. The petitioner further contented that the Hon. Supreme Court have ruled in many cases that courts will not enforce and will when called upon to do so, strike down an unfair and unreasonable contract for an unfair or unreasonable clause in the contract entered into by two parties who are not equal in bargaining power and unconscionable contracts

are contrary to Section 23 of Indian contract Act and public policy under Article 14 of the Constitution and directive principles of State Policy. The petitioner prayed to issue directions to pay tariff of Rs.3.14/kWh and strike down the provisions and clauses in PPA which relate to performance tests.

Hearing on the matter:

5. During the public hearing the petitioner and the stakeholders argued that the Commission has the powers to amend the PPA executed between a generating company and KSEB. The term 'regulate' includes discharging the function to intervene in the interest of protecting the interest of the power sector. The petitioner quoted decisions of Hon. High Court of Bombay in the writ petition No. 1205 of 2001 between Dhabol Power Company Vs MSEB, MERC and others, Hon. Supreme Court's decision on V.S. Rice and Oil Mills and others Vs State of AP reported in AIR 1964 SC1781, and in K.Ramanathan Vs. State of TN and another reported in AIR 1985 SC 660 to substantiate that the power to regulate has in fact wider ambit. According to the petitioner, 14 days of demonstration for the wind project is impossible as fuel supply in this case ie., wind cannot be ensured for 14 days. In this case wind generator is treated like a conventional project. In the conventional plants, capacity declaration has to be ensured as fixed charges are payable based on capacity. In the present case, single part tariff is payable as determined by the Commission and hence clauses relating to performance test particularly Article 5 are to be done away with. Petitioner also pointed out the alarming power situation in South India and especially in Kerala and if such clauses are included in the contracts, the situation will get worse and would create substantial hardship to consumers.

Objections of KSEB

6. KSEB objected to the conditions of the petitioner. According to KSEB, as a buyer, it has the right to ensure the capacity of the generating company to deliver energy. Hence the condition specifying the performance test has to be implemented by the petitioner. Further, if the petitioner is not in a position to implement the clause no. 5, grace period of one year is available. KSEB has to plan the system to cater to the demands of its consumers. Hence the

knowledge of system availability is essentially required to plan the generation in a reasonably good manner.

Position of Government of Kerala

7. Government of Kerala forwarded their response vide letter dated 15-07-2008. Addl. Secretary, Power Department appeared for the Government. According to the Government, the petitioner has given notice to KSEB on 23-6-2008 to carry out the performance test after 47 days of interconnection with the grid. The Government opined that even after the petitioner fails in the performance test, there is no penalty envisaged. Some of the developers in Agali area in Palakkad district have already obtained provisional certificate of commercial operation. Government also opined that as a buyer, KSEB has the right to check the actual available capacity of the generators to plan the generation from different sources.

Response from ANERT

8. Director, ANERT, stated that as per the guidelines of Government of Kerala vide G.O.(MS) No.7/2007/PD dated 11-5-2007, role of ANERT is to accord technical approval for the projects and so far ANERT has issued approval for wind projects of 30.6 MW capacity. In order to ensure quality of the wind machines, C-WET/MNRE approved machines are allowed for installation in Kerala as per the guidelines. The rated power of such certified wind turbine is measured at its rated speed and at an air density of 1.225 kg/m^3 . The average air density at Ramakkalmedu is 1.056 kg/m^3 and hence the wind machine installed at this site would develop only 86% of its rated power at rated speed. He mentioned that though Agali and Ramakkalmedu in Kerala are better sites compared to elsewhere in Kerala, it is highly improbable to have wind velocities so high to give 90% output continuously for 24 hours. As the representative of Expert Body providing technical approval, he categorically stated that the condition in the PPA that continuous operation for 24 hours of the generating unit/project at a capacity of not less than 90% of the nominal capacity for successful commissioning of the generating unit/project is too stringent to be met by the developers. He also mentioned that paying tariff for infirm power (Rs.0.25/kWh) for the power generated by

the machine for the reason that machine could not be tested successfully due to lack of sufficient wind velocity or air density is not justifiable.

Analysis by the Commission

9. The Commission heard the matter in detail. As per Section 86 (1) (b) the Commission has to regulate electricity purchase and procurement process of distribution licensees through agreements and under 86(1) (f) adjudicate upon the disputes between the licensees and generating companies. As per section 60, the Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry. As argued by the Petitioner, the term 'regulate' has been interpreted by Hon. Appellate Courts in wider context. Considering the arguments of the petitioner, respondents and stakeholders, the Commission is of the view that two issues are involved in the present case:

1. Whether the Commission should interfere in amending the PPA entered into by the petitioner and the Board in so far as it is onerous and unconscionable?
2. If interference is required, to what extent?

Section 86(1)(b) and 86(1)(f) of the Electricity Act, 2003, amply equip the Commission to interfere in the matters relating to PPA and disputes between licensees and generating companies. The petitioner as a generating company expressed its inability to follow certain provisions in the contract, as insisted by KSEB. As per Section 60, the Commission has to issue directions in a situation where a licensee or generating company has the advantage of a dominant position. In the present case, KSEB is the dominant party controlling generation, transmission and distribution of electricity in the State of Kerala. The petitioner has contented that the respondent Board is insisting on Article 5 on performance test. For clarity we shall reproduce the relevant section of the impugned PPA.

“ARTICLE 5

COMMISSIONING AND ENTRY INTO COMMERCIAL SERVICE

5.1 Performance Test to establish Entry into Commercial Service

The Company shall conduct performance tests in accordance with the procedure prescribed in Schedule 2, for entry of the generating unit (s) /project, as the case may be, into commercial service. The company shall, at least 7 days prior to the Date of Completion, give the Buyer notice of the performance test and shall invite Buyer’s representatives and the agency authorized by Government to attend the same.

5.2 Certificate of Commercial Operation

The Buyer or authorized agency of Government shall issue Certificate of Commercial Operation of the Project, to the Company on successful completion of the Performance Tests.

For the purposes of this clause each of the generating unit and/or the Project shall be deemed to enter into commercial service after if the Company has demonstrated fourteen day’s operation with a minimum of one day’s continuous operation of such generating unit and/or the Project and during such period the Tested capacity of generating unit(s)/Project, as the case may be, is not less than ninety percent (90%) of the Nominal Capacity for a minimum period of twenty four (24) consecutive hours within the electrical system characteristics and functional specifications, provided in Schedule 4 and Technical Limits provided in Schedule 3.

5.3 Provisional Certificate of Commercial Operation:

a. If due to non-availability of required wind velocity, the Performance Tests cannot be carried out by the Company, the Buyer or agency authorized by Government may issue a Provisional Certificate of Commercial Operation of the Project to the Company after carrying out the tests that are possible to be conducted with the available wind velocity.

b. The Provisional Certificate shall be valid for a period of 12 months from the date of issue or upto the date on which the Performance

tests are conducted, whichever is earlier. The Board/STU shall purchase the energy generated from the generating unit/Project as per the tariff determined by KSEERC for a period of twelve months from the date of issuance of Provisional Certificate subject to the condition that the company shall establish a Bank Guarantee towards the provisional payments made by Board/STU till the declaration of Commercial Operation.

c. In the event of the Performance Tests demonstrating that the Company has not satisfied the parameters set out in article 5.2, then the Provisional Certificate shall stand cancelled. In such an event the power generated by the Company shall be deemed to be Infirm Power and the tariff thereof shall be the tariff applicable for Infirm Power, which is Rs 0.25/ unit. The additional payment made by the Buyer shall be adjusted against Bank guarantee submitted by the company as per sub clause (b)".

10. According to the Commission, capacity declaration is essential and part and parcel of PPA for the conventional projects where fuel supply is assured. In such cases, the supplier has the obligation to provide firm energy for which fixed charges/capacity charges are payable. In a situation of uncertainty in the availability of wind for carrying out the performance tests as per the present contract, it is not fair to insist on such conditions. The petitioner has clearly stated his inability to carryout the performance test. The Commission has perused PPA on wind projects executed in neighboring states. Similar clauses are not present in such PPAs.

11. The wind projects on a large scale are being implemented in Kerala for the first time. It was not known reasonably before in the field conditions whether wind speed conditions allow such performance test as per the clauses mentioned in the PPA. Hence it was approved on the belief that the PPA conditions could be implemented by both the parties on a fair manner. Now after field testing, it is reasonably proved that the petitioner could not satisfy the impugned conditions in the present field conditions. Hence such conditions need to be removed.

12. It is evident now that Kerala is facing acute shortage of power. The Government is very keen to develop the alternate sources of electricity in the State and is encouraging thus promoting private participation in the development of wind energy. It is planned that about 100 MW of such projects are to be developed in Kerala. If such unfeasible conditions as cited are insisted, it would seriously dampen the investment flow into the sector and adversely affect the targets fixed by the Government. Hence, Commission is of the unanimous view that in the larger interest of the development of the power sector in the State, congenial investment climate has to be created which warrants amendment to some of the clauses in the PPA.
13. The Commission has sought the views of the nodal agency ANERT, entrusted by the Government for the development of wind energy in Kerala. ANERT has categorically stated that the condition in the PPA that continuous operation for 24 hours of the generating unit/project at a capacity of not less than 90% of the nominal capacity for successful commissioning of the generating unit/project is too stringent to be met by the developers and paying tariff for infirm power at the rate of Rs.0.25/kWh for the power generated by the machine for the reason that machine could not be tested successfully due to lack of sufficient wind velocity or air density is not justifiable.
14. Commission considers the view of ANERT, as an expert opinion in this regard. ANERT has categorically mentioned that the condition of continuous operation of 24 hours of the generating unit/project at a capacity of not less than 90% of the nominal capacity for successful commissioning is too stringent. Hence, the Commission views that it is highly unfair to insist on conditions which are not practicable to be implemented.
15. KSEB argued that as a buyer it has the right to insist on such conditions. As argued by KSEB, it is necessary that the wind machines of the petitioner have to be tested to ensure design parameters and grid connectivity conditions. However it is to be remembered that creating sufficient conditions for fulfilling the impugned clauses is beyond the control of the petitioner as well as KSEB.

The stand of KSEB is clearly against the 'Prudent utility practices' as mentioned in the PPA. 'Prudent Utility Practices' as defined in the PPA is

"Prudent Utility Practices means the practices, methods, techniques and standards as changed from time to time that are generally accepted internationally for use in electric utility and power generation industries (taking into account conditions in India) and used in prudent electric utility engineering and operations to design, engineer, construct, test, operate and maintain equipments lawfully, safely, efficiently and economically, as applicable to the power station of the size, service and type of the project and that generally conform to the manufacturer's operation and maintenance guidelines"

16. Insisting on condition 5 of PPA is against the principle of 'prudent utility practices'. Thus the Commission is of the view that the right of KSEB is so far to the extent that the wind machines of the petitioner is performing to meet the technical parameters as agreed by both parties. Since the petitioner has produced certificate as approved by the nodal agency ANERT, and ANERT has issued technical approval for the project, further stringent conditions need not be insisted.

Order of the Commission

17. Based on the above observations, the Commission is of the opinion that amendment is required for some of the clauses of the impugned PPA. Hence the Commission Orders as follows:

- a. Clause 1.1 (n) shall be changed as follows:

"Commercial Operation Date" with respect to the Project shall mean the date on which the Project is available for commercial operation and such date as specified in a written notice given in advance by the Company to the buyer and in any case, shall not be beyond the Scheduled Date of Completion

- b. Following clauses shall be deleted
Clause 1.1 (w) , Clause 1.1 (ag), Clause 1.1 (ay), Clause 1.1 (aab),
Clause 1.1 (aak), Clause 1.1 (aay)
- c. Article 4(1) (e)(4) and 4(1)(e)(5) shall be deleted
- d. Article 4(g) shall be modified as follows
“4(g) The company shall give the buyer 7 days notice before COD of each generating unit/project.”
- e. Article 4(j) shall be modified as follows:
“4(j) The Company shall intimate the buyer its maintenance schedule within 60 days before each Tariff Year.”
- f. Article 5 shall be amended as follows:
“Article 5

Commissioning and entry into Commercial Service

5.1. The Company shall conduct the testing of project facilities in accordance with manufacturer’s recommendations and in accordance with C-WET/MNRE approved guidelines.

5.2 The Company shall notify the buyer not less than 7 days prior to the Commercial Operation Date and the authorized representatives of the buyer shall verify that the company has achieved all of the conditions precedent to commercial operation except article 2.2(a)(i) and 2.2(a)(iv) and shall provide the company a written endorsement in this behalf acknowledging the documents, certificates, approvals, clearances etc. provided by the company in this behalf.”

- g. Article 6.1 shall be modified as follows

“6.1 The Company agrees to sell and the buyer agrees to purchase the entire energy made available by the Company at the interconnection point

as per the tariff specified in Article 9 during the term of this agreement or till the termination date in the event of termination”

h. Article 8.2 (c) and 8.2(g) shall be deleted

i. Article 9.1 shall be deleted

j. Article 9.2 shall be modified as follows

“The tariff applicable shall be as mentioned in Schedule 10”

k. Article 10.3 shall be deleted

l. Schedule 2 and 5 shall be deleted

19. With the above cited observations, the petition is disposed of with directions contained in this order to the parties. KSEB shall pay for the net electricity billed from the Wind Energy Generating plants based on the tariff approved by the Commission from the date of Commercial operation. This Order shall be applicable to all Wind Energy Generators who have executed PPAs with Kerala State Electricity Board as on the date of this Order. The modifications as directed above shall be incorporated in such PPAs.

Sd/-

M.P. Aiyappan
Member

Sd/-

C. Balakrishnan
Chairman

Authenticated copy for issue

Secretary (in charge)