

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

Order dated 25 .06.2021

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 Ltd is an EHT consumer having its factory at Palakkad District and with the contract demand of 14000 kVA.
- (ii) The State Government vide Government Orders viz. GO (Ms) No. 23/90/PD dated 07.12.1990 and G.O (Ms) No. 5/92/PD dated

12.03.1992 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 Kuthungal 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 Electricity Act, 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 INDSIL, 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) The 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 Ltd 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 drawl 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 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 frame work.

- (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’.

The modifications proposed by KSEB Ltd in the petition dated 02.11.2020 is given below.

Sl.No.	Existing provisions in the Agreement	Modifications suggested by KSEBL
1	Clause 10: The energy from Kuthungal Phase-I & II project fed into the KSEB grid will be metered at a location as detailed above, using meter duly calibrated by KSEB and this quantum of energy less 12% (twelve percent) towards wheeling charges and T&D losses will be delivered free of cost to the company and their associates M/s.Sun Metals & alloys Pvt.Ltd. Kanjikode, Palaghat at the EHT Terminals at the point of supply in their installations if any, or it will be banked by the KSEB, if the company so desires. The KSEB will collect 1% (one percent) of the energy so banked as its commission. This will be in addition to wheeling and loss towards transmission and distribution charges.	Clause 10: The energy from Kuthungal Phase-I & II project fed into the KSEB grid will be metered at a location as detailed above, using meter duly calibrated by KSEB and the generation from the project can be used for consumption of their associates M/s.Sun Metals & alloys Pvt.Ltd. Kanjikode, Palaghat as per the procedure stipulated under Regulation 27 of the KSERC(Renewable Energy and Net Metering) Regulations, 2020 as amended from time to time. The developer shall be granted open access as per the provisions under KSERC (Connectivity and Intra State Open Access) Regulations, 2013 for transmitting the energy from the project to their captive consumption points. The developer shall pay the applicable charges and bear losses as per the KSERC(Renewable Energy and Net Metering) Regulations, 2020 as amended from time to time.
2	Clause 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 the 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 in the KSEB grid less banking commission, royalty and/or other levies shall be deemed to be the energy sold to the KSEB. The wheeling charges 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 the rate at which the	The accounting year shall be as per KSERC(Renewable Energy and Net Metering) Regulations, 2020 as amended from time to time. Excess energy at the end of the accounting year shall be settled as per the provisions under KSERC(Renewable Energy and Net Metering) Regulations, 2020 as amended from time to time. If KSEBL is not in a position to absorb the energy generated from the project, KSEBL shall grant open access for sale or transfer of excess energy generated from the project to any party in Kerala other than KSEB Ltd.

	<p>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 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 the 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.</p>	
3	<p>Clause 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, break down 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.</p>	<p>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 or other reasons beyond the control of KSEB, KSEBL shall grant open access for sale or transfer of excess energy generated from the project to any party in Kerala other than KSEB Ltd.</p> <p>In such cases, the generation from the project will have to be restricted to the extent of generation for captive consumption as directed by KSEB or the quantum transacted under open access. The schedule of power generation from the project shall be as directed by the KSEB.</p> <p>If the KSEB grid is not in a position to absorb the energy generated from the project due to break down of transmission lines, power generated from the project shall be limited as directed by KSEB Ltd.</p>
4	<p>Clause 13: The total power consumption in the factories of the company and their associates is inclusive of the power supplied from the KSEB grid as well as the power generated by the company and fed into</p>	<p>The total power consumption in the factories of the company and their associates is inclusive of the power supplied from the KSEB grid as well as the power generated by the company and fed into the KSEB grid and open access</p>

	<p>the KSEB grid. During the period of power cut and/or other restrictions imposed by the KSEB, the KSEB shall work out the base consumption by the company and their associates based on total consumption for its factories on the same principle as applicable to the consumers fed by the KSEB. The consumption from the KSEB system shall be worked out on the following basis.....”</p>	<p>power availed if any. During the period of power cut and/or other restrictions imposed by the KSEB, the KSEB shall work out the base consumption by the company and their associates based on total consumption for its factories on the same principle as applicable to the consumers fed by the KSEB. The consumption from the KSEB system shall be worked out for each zone by deducting open access energy from the energy recorded for that zone in the energy meters at consumer end. The billed energy shall be worked out by deducting the energy generated and banked including banked energy carried forwarded from previous billing period after deducting the charges and losses as per KSERC(Renewable Energy and Net Metering) Regulations, 2020 as amended from time to time. Zone wise adjustment of excess energy shall be as per KSERC(Renewable Energy and Net Metering) Regulations, 2020 as amended from time to time. Transmission charges and wheeling charges as applicable shall be paid as per the tariff orders of KSERC as applicable from time to time.</p> <p>The base consumption and quota of energy during the period of power cut and/or other restrictions shall be worked out on the basis of total consumption as recorded in the energy meter subject to the general principles laid down by the KSEB which shall be binding on the company. The company and their associates shall be supplied energy by KSEB not exceeding the quota worked out. In addition to this, the company and their associates shall however be permitted to use the energy generated by it and fed into the grid during the months of power cut as well as the banked energy to its credit as per the provisions under KSERC(Renewable Energy and Net Metering) Regulations, 2020. However, the total consumption including the restricted quota from KSEB, power generated by the company and their associates during the months of power cut and the banked power shall not exceed the base consumption.</p>
5	Clause 14(a) (Maximum Demand)	Deleted
6	Clause 14(b) (Relating to Power Cut)	Deleted
7	Clause 16. The T&D loss, wheeling charges, banking commission and/or other levies prescribed by the KSEB will be liable for review and revision, if any statutory contingency arises.	Transmission charges, Wheeling charges, Banking charges, other levies and T&D losses as approved by KSERC from time to time shall be applicable .

8	Clause 24: In case any dispute and/or difference between company and the KSEB arises, the matter would be referred to Government of Kerala and their decision shall be final and binding on both the parties.	Clause 24: In case any dispute and/or difference between company and the KSEB arises, the matter would be referred to Kerala State Electricity Regulatory Commission and their decision shall be final and binding on both the parties.
---	---	---

- (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 and prayed before the Commission to approve the proposal for modifying the agreement executed by KSEB Ltd with INDSIL.

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

- (i) The petition filed in the case of the Respondent is clearly 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 Ltd 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 Kuthungal. 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 Ltd 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 is 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, Gol 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 altered on agreeable terms and conditions by the parties therein.”

- (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 clauses 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 KSEB Ltd 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 M/s 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 KSEB Ltd 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 Clause 11 and the considerations thereunder. Proposed amendment is absolutely untenable.

Investment was made into this captive hydel scheme which has to be returned free of cost after 30 years 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 KSEB Ltd. 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 Clause-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 that encouraged the Respondent to invest in the hydroelectric power plant was that, there would be no arbitrary clamp down on generation ordered by KSEB Ltd at least to the extent of Respondent's captive consumption which is approximately 60 lakh units in a month. Therefore, Clause 12 of the Agreement enable the KSEB Ltd 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 KSEB Ltd is restricted wherein the KSEB Ltd should at least 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 vide the Daily Order dated 02.02.2021, issued following directions to KSEB Ltd for immediate compliance.
 - (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.
6. KSEB Ltd vide the letter dated 18.02.2021 submitted its rejoinder before the Commission, and its summary is given below.
 - (1) KSEB Ltd in the original petition submitted that, they are in the process of filing separate petition for the case of Carborandum Universal. There is no arbitrariness and inconsistency as claimed by the respondent.
 - (2) The petition was filed by KSEB Ltd pursuant to the Order of the Commission dated 02.06.2017 in petition filed by M/s INDSIL. Further, Hon'ble APTEL vide the judgment dated 29-07-2019 in Appeal No.293 of 2017 filed by INDSIL had issued following Orders:

“27. Since the 1994 Agreement between the parties came into existence much prior to the Electricity Act 2003, the Commission opined those terms of the Agreement have to be modified in line with the provisions of the Electricity Act, 2003. Commission had genuine reasons why such opinion was expressed by the Respondent – Commission. The factual situation reveals that the Appellant started obtaining power through open access without consuming the energy from the captive power plant even though there was energy banked. It started purchasing power through open access facility without using the power generated from captive power plant thereby it did not consume the required power generated from captive power plant for its factories. On the other hand, it accumulated the said power as banked energy by resorting to method of open access facility provided in the Electricity Act, 2003.

28. Since the Respondent – KSEB Ltd had to purchase unutilised excess banked energy at EHT rate at which KSEB Ltd sells to similar consumers, this would affect the interest of larger sections of consumers of the State by way of tariff, the Respondent – Commission opined that KSEB Ltd shall approach the Commission with a proposal for modifying the Agreement dated 30.12.1994.”

- (3) Clause 16 of the Agreement provides that T&D losses, wheeling charges and other levies will be liable for revision and review. However, the claim of the Respondent for reviewing clause 7 of the Agreement has no legal standing and is not in line with the provisions of the Electricity Act, 2003 and Regulations of the Commission. Moreover, it is against the allotment policy of Govt of Kerala.
- (4) It is well a settled principle under the Indian Contract Act, 1872 (Contract Act), that a concluded contract between parties can be amended only by mutual agreement. Parties can mutually agree to vary the terms of the contract and absolve a party from the original obligations. Section 62 of the Contract Act allows novation, modification/alteration of contracts. The Contract Act also gives rights to the parties to put a contract to an end or terminate it. The principle being that a contract is the outcome of a mutual agreement and it is equally open to the parties to mutually agree to bring the said contract to an end, enter into a new contract or modify the earlier contract.

Under page 2 of the Agreement signed between M/s.INDSIL and KSEBL, it has been mentioned that “the company had agreed to abide by the rules and regulations to be framed by the State Government and or/KSEB from time to time in the matter of electricity generation by private agencies.”

The Order referred to by M/s.INDSIL (Order dated 16.04.2008 in O.P No.36 (a), Annexure R-1) in the counter affidavit has no relevance as far as the matter involved in the present petition is considered. Hon’ble Commission and Hon’ble APTEL through its Orders as submitted in the preceding paragraphs have issued orders for amending the agreement.

- (5) Month wise details of the energy generated from Kuthungal 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.

Month	Generation	Consumption	Open Access
	(Units)	(Units)	(Units)
Jul-19	555000	5478497	566113
Aug-19	7468000	5432250	109860
Sep-19	6810000	3546780	
Oct-19	6403000	4860750	
Nov-19	6606000	4868940	
Dec-19	4393000	5029620	
Jan-20	1209000	5148030	
Feb-20	487000	3246240	
Mar-20	2031000	2102550	
Apr-20	6564000	17430	
May-20	4881000	16320	
Jun-20	385000	16290	

- (6) In response of the direction of the Commission to produce the details of the instructions issued by SLDC to the respondent M/s INDSIL to restrict or stop power generation from the Kuthugal plant during the close down of the factory of the respondent as required under Clause 12 of the Agreement dated 30.12.1994, KSEB Ltd submitted the following:

“INDSIL factory consumption is almost round the clock whereas generation from Kuthungal SHEP depends on water availability in the weir constructed for Kuthungal SHEP. There is no link with the INDSIL factory consumption and Kuthungal generation as far as SLDC is concerned as no such information is passed on from INDSIL factory/ Kuthugal SHEP.

During monsoon period water is available in the weir and generation is permitted when requested by Kuthungal, so as to avoid or reduce overflow from the weir subject to technical constraints in power evacuation. Anayirankal dam will be closed during the monsoon period. Once the monsoon subsides water available in the weir will be just sufficient to run the plant partially for a few hours. The generation is permitted as suggested from Kuthungal SHEP to SLDC control room over phone when water in the weir is sufficient, subject to availability of machines.

During summer once the Ponmudi reservoir level reduces Anayirankal reservoir is opened for controlled releases of water to Ponmudi. During this period depending on the level in the reservoir, as and when informed by Kuthungal SHEP, generation is permitted subject to technical constraints of evacuation and load generation balance.

There is no correlation between generation at Kuthungal SHEP and consumption at INDSIL factory premises in daily operation as far as SLDC is concerned. Information on the consumption at INDSIL factory premises is never informed to SLDC. SLDC is allowing generation from Kuthungal when the plant is ready and availability of water in the weir is confirmed by Kuthungal SHEP operator, subject to real time technical constraints in absorbing the power by the grid”.

7. M/s INDSIL vide the letter dated 02.03.2021 submitted their comments on the rejoinder filed by KSEB Ltd, and its summary is given below.

- (i) It is now evident that the application for modification of the Agreement has been filed only on account of the invoice raised by M/s INDSIL for the banked energy. This by itself warrants dismissal of the application.
- (ii) The modification on a concluded agreement will have to be on mutually agreed terms. As per the various orders of the Hon'ble Supreme Court, it is evident from the sanctity of the Agreement and the fact that neither party can wriggle out of the terms of the Agreement within a 30-year period.
- (iii) There is evidently no need for modification of the Agreement and in any case, the same is impermissible.
- (iv) With respect to the energy generation and consumption details, the data submitted by KSEB Ltd are correct.
- (v) With respect to the report of the SLDC, the respondent submitted that this in fact supports the case of the Respondent.

8. The second hearing on the petition was held on 05.03.2021 at 11 AM through video conference. Sri K G P Nampoothiri represented KSEB Ltd and Adv. Joseph Kodianthara, the respondent, M/s INDSIL. Summary of the deliberations during the hearing is given below.

- (1) To the query raised by the Commission Chairman regarding the writ petition filed by M/s INDSIL in the Kerala High Court, the Respondent INDSIL submitted that, this Writ Petition is not related to the issues raised before the Commission. The Writ Petition is against the action initiated by KSEB Ltd for the disconnection of the electricity supply and encashment of bank guarantee.
- (2) KSEB Ltd submitted that, the Kuthungal plant of the M/s INDSIL was allotted as a Captive plant, for meeting their self-consumption. It is not intended for sale of electricity. As and when water is available and the machine is ready as informed by the M/s INDSIL through phone, permission is granted to them for generation of electricity. There is no information given to SLDC regarding the consumption of their factories. Further, SLDC also does not formally issue any schedule or approval for generation and injection of power from the Kuthungal plant.

KSEB Ltd further submitted that, since the plant is a captive plant developed for their own consumption, they should have to stop or reduce the generation when the factory consumption is low as is the case during the Covid-19 pandemic. Instead, they generated power from the plant

and banked the same with KSEB Ltd. Due to Covid-19, KSEB Ltd also did not require the power from the plant for meeting the electricity demand during the said period. Even hydro generation from KSEB Ltd's own plants and schedule of generation from CGS and IPPs were reduced during the said period. Power was also available in the power exchanges at cheap rates. Under these circumstances, KSEBL did not require the banked power from the respondent M/s INDSIL. KSEB Ltd further submitted that the Hon'ble APTEL vide the judgment dated 29.07.2019 filed by the respondent against the Order of the Commission dated 02.06.2017 in petition No.02/2017, endorsed the directions issued by the Commission to modify the terms of the Agreement dated 30.12.1994.

- (3) The respondent M/s INDSIL reiterated their earlier submission that, Hon'ble Supreme Court in the Judgment dated 30.07.2019 in Civil Appeal No. 5943-5945 of 2019, observed that, the entire provisions of the Agreement dated 30.12.1994 shall be considered in totality. KSEB Ltd cannot propose to modify some of the clauses of the Agreement according to their benefit and that too unilaterally.

The respondent further contradicted KSEB Ltd's contention that being a captive plant they should stop or limit generation as per their factory requirement. Clause-11 of the Agreement dated 30.12.1994 specifically permit them to bank the surplus energy with KSEB Ltd and the surplus banked energy shall be settled at EHT tariff applicable to the respondent at the end of the settlement period on 30th June every year.

The respondent has been generating power based on water availability and M/s INDSIL pointed out that there were no instructions from SLDC to stop generation. More importantly, KSEB Ltd has used the entire energy injected to their grid for meeting the electricity demands of the nearby areas of the power plant wherein it was situated. In order to support this claim, the respondent INDSIL further submitted that, KSEB Ltd has established a substation at Rajakkad in the premise of the power plant, in the land owned by M/s INDSIL, to feed the electricity generated from the plant to the grid to meet the electricity demand of the Rajakkad area. This is in addition to feeding the electricity generated from the plant to the Neriamangalam grid.

Moreover, the power plant was established as per the Captive Power Policy of the State Government notified in the year 1990. KSEB Ltd cannot seek to modify the Agreement dated 30.12.1994, which was based on the said policy.

Based on the deliberations during the hearing, the Commission directed the petitioner KSEB Ltd and the respondent INDSIL the following.

- (1) KSEB Ltd shall clarify the reasons for establishing the substation at the land owned by M/s INDSIL at the project area of Kuthungal.

- (2) Whether KSEBL is willing to modify the entire terms of the Agreement dated 30.12.1994, especially whether KSEB Ltd is willing to alter the term of the Agreement beyond 30 years.
- (3) M/s INDSIL is also permitted to submit additional documents to support their claims.
- (4) Both the parties shall submit the details on or before 12th March 2021.

9. The respondent M/s INDSIL vide the letter dated 09.03.2021 submitted the following additional details.

- (1) KSEBL uses the generated power from the Kuthungal power house for the needs of not only the Neriamangalam Power house, but also for the needs of the local area. KSEBL established a new substation at the land owned by the respondent. The power generated from the Kuthugal power house is fed into this substation as well as for distribution of power in Rajakumari/ Senapathu/ Rajakkad/ Udumpanchola and surrounding areas.
- (2) Vide the letter of the Chief Engineer (Transmission- South) dated 09.03.2021, KSEB Ltd submitted a letter to the Company with a proposal to setup a 110/33kV, 16 MVA substation. Vide the letter dated 27.05.2010 the Company agrees to the proposal. On 13.07.2012, the Company and KSEB Ltd enters into a supplementary agreement for commissioning and operation of the new substation in the Kuthungal power house.
- (3) On 27.12.2015, the substation was inaugurated and was accompanied by a function wherein the Director of KSEB Ltd presented a report on the benefits of the substation for the local area. In general, 3 to 5MW of power generated by Kuthungal is being taken through the new substation to the Senapathy area and the balance alone is fed into the Neriamangalam power house.
- (4) The respondent M/s INDSIL further submitted the following.
 - (i) The power generation from the Kuthungal power house is also a direct benefit to KSEB Ltd for supply and distribution of power to local area.
 - (ii) The generation from the Kuthungal power house does not depend on the consumption of the Palakkad unit.

10. KSEB Ltd vide the letter dated 12.04,2021 submitted the additional clarifications and its summary is given below.

- (i) Reasons for establishing the substation at the land owned by M/s INDSIL at the project area of Kuthungal.

The substation constructed by KSEB Ltd at Kuthungal is not meant to evacuate power from Kuthungal power house, but to meet the increasing

local demand as part of regular network expansion plan to adequately meet growing demand. On assessing the feasibility based on proximity to existing 110kV line, availability of land, proximity of load center etc, the location near Kuthungal power house was found optimum. M/s INDSIL gave consent to give the land adjacent to existing 110kV switchyard, and a supplementary agreement was entered into between M/s INDSIL on 13.07.2012. If M/s INDSIL had not given the land, KSEB Ltd would have to find an alternate location.

The equipment installed at Kuthungal substation for feeding Rajakkad and Senapathy areas function essentially as an extension of the grid of KSEBL and the supply fed on these areas cannot be treated as that fed from Kuthungal power house. Power to these areas is fed from KSEB Ltd grid irrespective of Kuthungal generation. Moreover, electricity flows as per the laws of physics, and the consumption at the factories of M/s INDSIL are not fed by M/s INDSIL generation directly, but drawn from KSEB Ltd grid only.

- (ii) Whether KSEB Ltd is willing to modify the entire terms of the Agreement dated 30.12.1994, especially whether KSEB Ltd is willing to alter the term of the Agreement beyond 30 years.

KSEB Ltd submitted that, they willing to modify the entire terms of the Agreement dated 30.12.1994 to make it consistent with the provisions of the Electricity Act, 2003 and the Regulations of the Commission. In the matter of extending the BOOT period beyond 30 years, KSEB Ltd submitted the following.

- The agreement period of 30 years or extension of it further is not a matter coming under the purview of Electricity Act, 2003 or the Regulations issued by the Commission.
- The project is allotted as per the orders of the Govt of Kerala dated 7.12.1990, 12.3.1992 and 22.08.1992 as part of the Government decision to allow private agencies to undertake small/mini/micro hydel schemes for the generation of power. As per the said orders, the land with all constructions and installations shall without any cost be transferred to the ownership of the Board at the end of the stipulated period of 30 years from the date of commissioning.

Since the natural resources of the State has been allotted for usage by private developers for a definite period, only State can take a decision to alter the same. It would be impermissible for any other authority or agency including the petitioner to modify the said period.

Analysis and Decision of the Commission

11. The Commission has carefully examined the present petition filed by KSEB Ltd for modifying the clauses 10, 11,12 and 13 and also for deleting the clauses

14(a) & 14(b) of the Agreement dated 30.12.1994 and submission made by the Petitioner KSEB Ltd and the Respondent and the Counter affidavits filed by M/s INDSIL and rejoinder to the Counter filed by KSEB Ltd and other materials presented during the deliberations of the subject matter, as per the provisions of the Electricity Act, 2003, Rules and Regulations in force in detail. In order to appraise the issues in detail, the Commission examined the background of the issues and noted the following.

12. The State Government vide the Government Order GO (Ms) No. 23/90/PD dated 07.12.1990 issued the Terms and Conditions for setting up of small/mini/micro hydel projects in the State through Private Participation.

The paragraph 9 and 10 of the said GO deals with wheeling charges, T&D loss, banking, treatment of surplus energy after meeting the captive consumption, grid constraints etc.

The relevant paragraphs of the said GO dated 07.12.1990 is extracted below.

“9. The captive plant energy fed into the KSEB grid will be metered at a location as above(using meter calibrated by KSEB). This quantum of energy less 12% towards wheeling charges, T&D losses etc. will be delivered free of cost to the agency at their HT terminals at the point of supply of their HT installation. The above wheeling charges deduction covers the service charges for making use of Board’s transmission system. In the case of supply or receipt made in LT lines the allowance for losses and wheeling charges will be more and will be as stipulated by the Government/Board.

In case energy in excess of the requirement of the agency is generated from the scheme, during one accounting year, such excess energy shall be fed into the state itself at rates to be mutually agreed upon. Under no circumstances shall the agency be entitled for the sale/transfer of any excess energy or any energy produced from the plant to any party other than the Government/Board. The accounting of the energy fed into the grid and supplied to the company by the Board will be settled on an annual basis, the year being reckoned from 1st of July to 30th June.

10. In case the state grid is not in a position to absorb the energy generated from the scheme for any reason the generation from the scheme will have to be temporarily stopped as directed by the Board. The pattern of power generation from the scheme shall be as directed by the regional Load Despatch Centre of the KSEB.”

Paragraph 17 of the above GO dated 07.12.1990 stipulates the right of the State Government/ Board to take over the plant in the case of contingencies. The relevant paragraph is extracted below.

“17. Government/ Board shall have the right to take over the plants set up by the agency if any exigency arises, without any commitment whatsoever regarding the taking over of the staff of the agency involved in the work. When the lease period or the agreement period for generation by the agency is over, and the premises with all structures & installations etc are transferred to the lessor/ Board by the agency, the former will not under obligation to take over the staff employed by the licensee under any circumstance”.

Paragraph 20 of the above GO deals with dispute resolution between the captive generator and KSEB, which is extracted below.

“20. In case of any dispute or difference of opinion between the agency and the KSEB, the matter would be referred to the Government and their decision shall be final’.

As extracted above, the terms and conditions specified by the State Government vide the GO dated 07.12.1990 for setting up of small/mini/micro hydel scheme by private agencies stipulated the following regarding the metering, banking and for adjusting the excess energy fed in to the grid etc from the captive power plants.

- (i) KSEB shall deliver the energy generated from the captive plant less 12% towards wheeling charges and T&D losses, at the HT terminals of the consumer end of the captive power developer.
 - (ii) In case energy in excess of the requirement of the agency is generated from the scheme during one accounting year, such excess energy shall necessarily be fed into the state grid itself at rates to be mutually agreed upon by the KSEB and the captive producer.
 - (iii) The accounting of the energy fed into the grid and supplied to the company by the Board will be settled on an annual basis, the year being reckoned from 1st of July to 30th of June every year.
 - (iv) In case the state grid is not in a position to absorb the energy generated from the scheme for any reason, the generation from the scheme will have to be temporarily stopped as directed by the Board.
 - (v) In case of any dispute between the Captive developer and KSEB would be referred to the State Government and their decision shall be the final.
13. Based on the GO dated 07.12.1990, KSEB vide its order dated 22.08.1992 allotted the Kuthungal Small Hydro Project (21 MW) to the respondent M/s INDSIL. Subsequently, 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.

The Commission also noted that, the ‘Terms and Conditions prescribed by the State Government for the allotment of Small/Mini/Micro Hydel projects by Private Agencies dated 07.12.1990 and the subsequent GO dated 12.03.1992 shall form part of the Agreement.

KSEB Ltd, vide the petition dated 02.11.2020, proposed amendments in the clauses 10, 11, 12 and 13 of the Agreement dated 30.12.1994. The relevant paragraphs of the Agreement are extracted below for ready reference.

- “10. *The energy from Kuthungal Phase I & Phase II project fed into the KSEB grid will be metered at a location as detailed above(using meter calibrated by KSEB and this quantum of energy less 12% (twelve percent) towards wheeling charges and T&D losses will be delivered free of cost to the company and their associates M/s.Sun Metals & Alloys Pvt.Ltd. Kanjikode, Palaghat at the EHT terminals at the point of supply in their installations if any, or it will be banked by the KSEB, if the company so desires. The KSEB will collect 1% (one percent) of the energy so banked as its commission. This will be in addition to wheeling and loss towards transmission and distribution charges.*
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.*
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.*
13. *The total power consumption in the factories of the Company and their associates is inclusive of the power supplied from the KSEB grid as well as the power generated by the Company and fed into the KSEB grid. During the period of power cut and/or other restrictions imposed by the KSEB, the KSEB shall work out the base consumption by*

the company and their associates based on total consumption for its factories on the same principle as applicable to the consumers fed by the KSEB.”

It may be noted that the Company and their associates shall be permitted to use the energy generated by it during the months of power cut less wheeling charges and T&D losses and other levies and also to utilise the maximum demand considering their contribution in power generation as per Clause 13 (b) and 14 (b) of the Agreement. Clause 16 of the Agreement dated 30.12.1994, permits the petitioner and the respondent to review and revise the ‘T&D losses, wheeling charges, banking commission and/or other levies’, if any statutory contingency arises. The relevant paragraph is extracted below.

“16. The T&D losses, wheeling charges, banking commission and/or other levies prescribed by the KSEB will be liable for review and revision if any statutory contingency arises’.

The clause-25 of the Agreement deals with dispute resolution, which is extracted below.

“25. In case any dispute and/or difference between company and the KSEB arises, the matter would be referred to Government of Kerala and their decision shall be final and binding on both the parties’.

14. The Commission has carefully examined the clauses 10,11,12 and 13 of the agreement, and it is observed that,
- (i) The company have the option either to consume the energy generated from the Kuthungal plant at their factory located at Palakkad or can bank the energy with KSEB if the company so desires. 1% of the energy banked with KSEB will be the commission for banking.
 - (ii) If the energy in excess of the requirement of the Company is generated during an accounting year and is not utilized by the Company and their associates during that accounting year, the Company have the option to sell the excess banked energy to KSEB Ltd.
 - (iii) The rate at which the KSEB Ltd shall pay to the company for such sale will be at the rate at which KSEB Ltd sell the energy to the EHT consumers in the same voltage clause at which the KSEB Ltd receives energy from the company.
 - (iv) The company cannot sell or transfer any excess energy or energy produced from the project to any third party other than the KSEB Ltd and their associates.
 - (v) The accounting and billing of the energy fed into the grid by the company and/or supplied by KSEB will be settled on monthly basis. The year of accounting will be reckoned from 1st of July to 30th of June.
 - (vi) There is no provision to carry forward the energy banked with KSEB during an accounting year to the next accounting year. If the company

has not utilized the entire energy banked with KSEB during an accounting year, the unutilized energy shall be treated as lapsed. The Company has the option to sell the surplus energy to KSEBL. If the Company does not opt to sell the surplus energy to KSEBL, the company has no claim over the energy banked.

- (vii) The schedule of power generation from the project shall be as directed by KSEB.
 - (viii) It is also specified under clause 13 of the agreement that, the total power consumption in the factories of the company and their associates is inclusive of the power supplied from KSEB grid as well as the power generated by the company and fed into the grid.
 - (ix) Special concessions were also granted to the Company as per Clause 13 (b) and 14 (b) of the agreement considering their contribution of power generation and supply to KSEB grid.
 - (x) The T&D losses, wheeling charges, banking commission and/or other levies prescribed by the KSEB will be liable for review and revision, if any statutory contingency arises.
 - (xi) The dispute if any between the company and KSEB arises, it shall be referred to GoK and their decision shall be final.
15. The Central Government, enacted the Electricity Act, 2003 (Central Act 36 of 2003), 10.03.2003, by repealing 'Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 2003.

The Electricity Act, 2003, introduced trading of electricity as a licensed activity, open up electricity market for sale and purchase of electricity including setting up of power exchanges, provides mandate for non-discriminatory open access to the generators, licensees and consumers for sale/purchase of power from any source within the Country, open up multiple sources for power purchase for the distribution licensees, mandates Regulatory approval for all power purchases including rates of power purchase, schedule and purchase of electricity of the distribution licensees strictly based merit order despatch, delicensed the generation of electricity etc.

The Section 185(2) of the Electricity Act,2003, permits to re-open the Agreements entered by the Distribution Licensees before the enactment of the Electricity Act, 2003, provided that the provisions in the said Agreement is inconsistent with the provisions of the Electricity Act, 2003. The Section185(2) of the Electricity Act, 2003 is extracted below for ready reference.

"185(2) Notwithstanding such repeal, - (a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not

inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.”

16. By virtue of the statutory powers conferred on the Commission by the Electricity Act, 2003, the Commission vide paragraph 31 of the Order dated 02.06.2017 in Petition OP No. 02/2017 directed KSEB Ltd 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.***

17. But the said direction was issued without examining the previous decision of this Commission’s Order dated April 16th 2008 in O.P No.36 (a) filed by M/s INDSIL Electrosmelts Limited which is final and binding. The relevant portion said Order is extracted hereunder:

KSEB has further submitted that the agreement executed between M/s INDSIL and KSEB on 3/12/1994, does not contain a provision for installation of TOD meter at generation point nor any agreement has been entered in to between KSEB and Company regarding this. It is understood that the firm had installed TOD meter on their own choice at Kuthungal on 23.06.2003 to differentiate zone wise energy even though there was no mutual agreement between INDSIL and KSEB in this respect. Even if there is no provision for such a claim as per the agreement, the Petitioner has breached the agreement conditions through deferring payment on the above grounds.....According to KSEB para 25 of the agreement which stipulates that “in case any dispute and/or difference between Company and KSEB arises, the matter would be referred to Government of Kerala and their decision shall be final and binding on both the parties.”...

In this connection it is relevant to not that the Secretary, Ministry of Power, Govt of India vide his letter No. 45/2/2006-R&R dated 15/02/2008 informed this Commission that 2008 any Power purchase Agreement which stood legally concluded

before the notification of the Tariff Policy on 6th January, 2006 would not alter the legal enforceability unless until it is mutually altered on agreeable terms and conditions by the parties therein.

In the light of this guidelines of Govt of India this Commission did not find to interfere in this matter since the PPA was executed by the parties as early as in 1994.

4. Commission's Order

Commission after a detailed examination in the matter found that the petition filed under Section 86 (1)(f) of the Electricity Act, 2003 by Indsil Electrosmelts Ltd, Coimbatore does not have any substantial ground for intervention by the Commission.

18. Government of India, Ministry of Power as per communication No. 45/2/2006-R&R New Delhi, dated 15th February, 2008 informed to the Secretary, Central Electricity Regulatory Commission, New Delhi and Secretaries of all State Electricity Regulatory Commissions regarding the clarification on the Subject: Tariff Policy under Electricity Act, 2003 thus:

Sir, Please refer to the clarification issued by the Ministry of Power under the provisions of the para 5.1 of the Tariff Policy vide letter No. 45/2/2006-R&R dated 28.3.2006.

*2. An issue had arisen recently as to what would be the status of those PPAs which stood legally concluded before the notification of the Tariff Policy on 6th January, 2006. The issue has been examined in consultation with the Department of Legal Affairs. **It has been advised that the provisions of the Tariff Policy would not alter the legal enforceability of the already concluded contracts unless and until it is mutually altered on agreeable terms and conditions.** Yours faithfully, Sd/- (Alok Kumar) Director Tel: 2371 4000 Copy to: Secretaries of all the SERCs*

19. The respondent M/s INDSIL Hydro Power and Manganese Limited filed appeal before the Hon'ble APTEL against the Order of the Commission dated 02.06.2017. The issue raised before the Hon'ble APTEL is that, 'Whether the Regulatory Commission erred in unilaterally granting KSEB Ltd alone the option to approach the Commission with proposal for modifying the Agreement dated 30.12.1994?

Hon'ble APTEL vide the judgment dated 29.07.2019 in Appeal No. 293 of 2017, decided on the matter as follows.

"26. It is not in dispute that in terms of the Agreement, sale of excess energy banked with KSEB Ltd could be opted out only after meeting the requirement of factories of the Appellant. This would mean, after utilising the power required for the factories of the Appellant and its associates, the excess banked energy has to be arrived at. Since the Act 2003 has introduced the scenario of facility of open access and created Electricity Regulatory Commission for regulating the electricity purchase and procurement process of the distribution licensees including the price at which power can be purchased, one cannot dispute the fact that State Regulatory Commission has the authority to revisit the terms and conditions of even the concluded contracts, i.e. PPA, if circumstances warrant.

27. Since the 1994 Agreement between the parties came into existence much prior to the Electricity Act 2003, the Commission opined those terms of the Agreement have to be modified in line with the provisions of the Electricity Act 2003. Commission had genuine reasons why such opinion was expressed by the Respondent – Commission. The factual situation reveals that the Appellant started obtaining power through open access without consuming the energy from the captive power plant even though there was energy banked. It started purchasing power through open access facility without using the power generated from captive power plant thereby it did not consume the required power generated from captive power plant for its factories. On the other hand, it accumulated the said power as banked energy by resorting to method of open access facility provided in the Electricity Act 2003.

28. Since the Respondent – KSEB Ltd had to purchase unutilised excess banked energy at EHT rate at which KSEB Ltd sells to similar consumers, this would affect the interest of larger sections of consumers of the State by way of tariff, the Respondent – Commission opined that KSEB Ltd shall approach the Commission with a proposal for modifying the Agreement dated 30.12.1994.

29. Therefore, on considering the entire facts, reasoning and opinion of the Respondent – Commission in its impugned order dated 02.06.2017, and in the light of our analysis and reasoning, we find that the impugned order does not warrant any interference.”

20. In this context, the decision of the Hon'ble Supreme Court in *INDSIL Hydro Power & Manganese Ltd Vs. State of Kerala and Ors (MANU/SC/1103/KSERC)* decided on 30.07.2019 is also relevant which is extracted hereunder:

.....However as significant as these reasons are, it should not lead to a situation where a private investor who has acted upon the policy of the State Government being left in the lurch as a result of supervening circumstances which have resulted in the power not being evacuated into the grid due to the non-commissioning of the transmission lines at the material time by KSEB. **It is imperative that contractual obligations entered into by the State have legal sanctity.** A legal regime where the sanctity of contracts is respected and commercial contracts are enforced is essential to the maintenance of the Rule of law. Trade and commerce can be freely conducted in a stable legal order which provides remedies for enforcement.....**In what manner the State should remedy the grievance of the private investor is something which should be duly considered by the State Government within the available framework of law and its own policy.**

21. During the deliberations of the petition, the respondent and the petitioner have raised rival contentions. The arguments raised by the Respondent M/s INDSIL Hydro Power and Manganese Limited can be summarised as follows:

- (1) The present petition is nothing but an afterthought and backlash of KSEB Ltd to the issues leading to petition O.P. No. 44/2020 filed by the Respondent herein for compelling KSEB to pay an amount of Rs. 6,39,63,157/-towards banked energy as on 30.06.2020.
- (2) The issue is squarely covered by Orders of this Commission, affirmed by the Appellate Tribunal as well as the Hon'ble Supreme Court.

- (3) Every stipulation in the Agreement including the substantial stipulations with respect to availability of energy fed by the Kuthungal project in to KSEB grid, provision of banking and payment thereof as stipulated in Clause 11 of the Agreement, banking commission, MD relief etc. all built in on a consideration that is to flow to the respondent for the thirty-year period on the expiry of which the entire project is to be given to KSEB free of cost. It is obvious therefore that within the period of thirty years no alteration can be effected.
- (4) KSEB is estopped in all respects from filing the present petition seeking modifications of the Agreement within thirty-year period. The Respondent's legitimate expectation is also severely hampered and prejudiced by such Petition being entertained by the Commission.
- (5) This Commission on 16.04.2008 in O.P. 36(a) of 2007 had taken a decision based on the clarification issued by the Ministry of Power under the provisions of the para 5.1 of the Tariff Policy vide letter No. 45/2/2006-R&R dated 28.3.2006.
- (6) The Kerala State Electricity Regulatory Commission (Renewable Energy and Net metering) Regulations, 2020 can only be prospective and cannot apply to the Agreement entered in to prior thereto. The agreement dated 30.12.1994 has to be read as a whole. It will be absolutely unreasonable and unjustified to pick and choose certain clauses in the Agreement and seek to modify the same, before its expiry.
- (7) 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 into".

22. The arguments raised by the Petitioner KSEB Ltd can be summarised as follows:

- (1) KSEB Ltd filed this petition in compliance with the Orders of this Commission dated 02.06.2017 and Order dated 29.07.2019 of Hon'ble APTEL.
- (2) The averment of the respondent relating to M/s Carborandum Universal is not correct. KSEB Ltd is in the process of filing separate petition for the case of M/s Carborandum Universal.
- (3) Kerala State Electricity Regulatory Commission (Renewable Energy and Net Metering) Regulations, 2020 is applicable for all existing plants.
- (4) A concluded contract can be altered as per Section 62 of the Indian contract Act, 1872
- (5) The Order dated 16.04.2008 of the Commission has no relevance as far as the matter involved in the present petition is considered.
- (6) The KSEB Ltd is not willing to amend the agreement extending the period of contract beyond 30 years.

23. Based on the deliberations on the subject petition, the following issues emerged before the Commission for detailed examination.

- (1) **Whether the agreement dated 30.12.1994, made between KSEB and the respondent M/s INDSIL ELECTROSMELTS Ltd is a mutually**

concluded contract attracted by the provisions of Indian Contract Act,1872 which is legally enforceable?

- (2) Whether the direction issued by the Commission in O.P No.2/2017 dated 02.06.2017 is contrary to the direction issued by the Ministry of Power and observation made by the Commission in its Order dated 16.04.2008 is legally in order?**

Question No.1

24. The Commission carefully examined the present petition filed by KSEBL for modifying the clauses 10,11,12 and 13 and also for deleting the clauses 14(a) & 14(b) of the Agreement dated 30.12.1994.

- (1) The Commission noted that the Agreement dated 30.12.1994 is not a Power Purchase Agreement (PPA) signed between a generator and a distribution licensee for the purchase of power. The Agreement dated 30.12.1994 was signed in pursuance of the policy decision of the government for promoting private sector in power generation. The terms and conditions contained in the Agreement was framed in line with the 'terms and conditions specified by the State Government Orders viz. GO (Ms) No. 23/90/PD dated 07.12.1990 and GO (Ms) No. 5/92/PD dated 12.3.1992 issued with an intention to allow private agencies to undertake Small/ Mini/ Micro Hydel schemes for the generation of power in the State of Kerala.
- (2) The Commission also noted that, as per Clause 13 (b), the Company and their associates were permitted to use the energy generated by it and fed into the grid during the months of power cut less wheeling charge and T&D losses and other levies, by virtue of its contribution in power generation. Further, as per Clause 14 (b), the Company and their associates shall be permitted to utilise the maximum demand in excess of the quota limiting to the maximum demand by virtue of its contribution in power generation.
- (3) As per Clause 7 of the agreement, the land with all structures including electrical installations, machinery building and other appurtenant works and operating facilities constructed in connection with KUTHUNGAL PHASE I & Phase II electric project shall without any cost, be transferred to the ownership of the KSEB at the end of the stipulated period of thirty years from the date of the commissioning or such other periods as decided by the KSEB and company shall surrender the premises with all structures, machinery etc in favour of the KSEB after redeeming all the charges, if any created by the company.
- (4) Paragraph 20 of the 'State Government Order GO (Ms) No. 23/90/PD dated 07.12.1990 deals with the dispute resolution between the captive private generator and KSEB Ltd, which is extracted below.

“20. In case of any dispute or difference of opinion between the agency and the KSEB, the matter would be referred to the Government and their decision shall be final”.

25. As per the records produced before the Commission, the project was allotted by KSEB Ltd to the respondent M/s INDSIL in pursuance of the Order of the State Government dated 07.12.1990, for a period of thirty years from the date of CoD of the project. After the period of 30 years from the date of CoD, the project including land has to be transferred to KSEB at free of cost. The project was declared CoD on 01.06.2001. Accordingly, by the year 2031, the project will be fully transferred to KSEB Ltd.

As per the provisions of the GO dated 07.12.1990 and the GO dated 12.03.1992, the respondent INDSIL on 30.12.1994, signed an agreement with then KSEB. The Agreement mainly deals with the 'construction, operation and maintenance of the plant' during the entire life of the plant. Among other things, the agreement also provides for terms and conditions for transmission and wheeling of electricity from the point of injection of power from the Kuthumkal plant to the State Grid and up to the point of drawl of the respondent Company at their factory premises. It also permits banking of electricity during the accounting period specified therein from 1st July to 30th June every year, and also provide provisions for selling the surplus energy available at the end of the accounting period, as on 30th June every year.

26. The respondent M/s INDSIL came forward for establishing that the Agreement entered in to with KSEB is a legally enforceable contract made in terms of the policy decision of the Government of Kerala and its binding nature. Kuthumkal plant was established as per the terms and conditions specified by the State Government vide the GO dated 07.12.1990 and GO (Ms) No. 5/92/PD dated 12.3.1992. As discussed in the preceding paragraphs, as per the GO dated 07.12.1990 and the Agreement dated 30.12.1994, the State Government was the authority to adjudicate the dispute or difference in opinion arose between the M/s INDSIL and KSEB Ltd during the course of the Agreement. However, the said power has been delegated to the Commission by virtue of Section 185 of the Electricity Act, 2003. The KSEB also agreed with the fact that the Agreement dated 30.12.1994 was made in pursuance of the policy guidelines issued by the Government as per GO (Ms) No. 23/90/PD dated 07.12.1990 and GO (Ms) No. 5/92/PD dated 12.3.1992. Neither the petitioner KSEB Ltd nor the respondent M/s INDSIL has raised any contention against the validity of the agreement.
27. The Government has granted special consideration to M/s INDSIL as per Clause 13 (b) and 14 (b) of the Agreement wherein the Company and their associates were permitted to use the energy generated by it and fed into the grid during the months of power cut less wheeling charge and T&D losses and other levies, by virtue of its contribution in power generation. Further, as per Clause 14 (b), the Company and their associates shall be permitted to utilise the maximum demand in excess of the quota limiting to the maximum demand by virtue of its contribution in power generation. Hence the Govt had granted

permission to M/s INDSIL considering their huge investment and contribution in power generation.

28. The Commission also noted that, Section 86(1)(f) of the EA-2003 empower the Commission to adjudicate the dispute between the licensees and generating companies and to refer any dispute for arbitration. But as already stated, the present agreement is not a PPA signed between INDSIL and KSEB for the purchase of power. This is an agreement signed by the respondent INDSIL as a captive generator who established the plant for self-consumption with the KSEB, as per the GO dated 07.12.1990 for a period of 30 years from the date of CoD. After 30 years from the date of CoD, the plant including the land has to be transferred to the KSEB. As above, most of the conditions specified in the Agreement is related to the, then policy of the State Government for developing power plants in private sector for captive use. So, any dispute or difference in opinion if it arises between the parties during the course of the Agreement shall be referred to the State Government as provided in the GO dated 07.12.1990 and GO (Ms) No. 5/92/PD dated 12.3.1992 and the Agreement dated 30.12.1994.
29. The Petitioner KSEB Ltd as well as the respondent M/s INDISIL have already admitted the fact that the agreement dated 30.12.1994 is a **mutually concluded agreement**. On a careful scrutiny of the agreement, it is evident that the agreement was made by free consent of parties, competent to contract on the consideration of captive consumption having all characteristics of the relevant provisions of the Indian Contract Act, 1872 as discussed below.
30. As per Section 10 of the Indian Contract Act, 1872, all agreements are contracts if they are made by the **free consent of parties** competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. The term "**Free consent**" is defined in Section 14 of the Act thus: *Consent is said to be free when it is not caused by—*
- (1) coercion, as defined in section 15, or
 - (2) undue influence, as defined in section 16, or
 - (3) fraud, as defined in section 17, or
 - (4) misrepresentation, as defined in section 18, or
 - (5) mistake, subject to the provisions of sections 20, 21 and 22.

5. Section 16 of the Act which defines 'undue influence' is reproduced hereunder:

(1) *A Contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.*

Xxxxxxxxxx xxxxxxxxxxxx xxxxxxxxxxxx

The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Specific performance will not be ordered if the contract itself suffers

from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. (1990) 3 SCC 1).

Consent is said to be free when it is not caused by—

- (1) coercion, as defined in section 15, or*
- (2) undue influence, as defined in section 16, or*
- (3) fraud, as defined in section 17, or*
- (4) misrepresentation, as defined in section 18, or*
- (5) mistake, subject to the provisions of sections 20, 21 and 22.*

5. Section 16 of the Act which defines 'undue influence' is reproduced hereunder:

(1) A Contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

Xxxxxxxxxx xxxxxxxxxxxx xxxxxxxxxxxx

The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. (1990) 3 SCC 1).

- 31. Hence free consent is necessary for making a valid and legally enforceable contract. It is a well settled legal position that a mutually concluded contract cannot be altered unilaterally. *"An agreement made by free consent of parties is legally binding and is enforceable by law. Mutual consent is an integral part of a contract. Parties can, by mutual agreement, make their own contracts; they can also by mutual agreement remake them..... (Union of India (UOI) vs. Association of Unified Telecom Service Providers of India and Ors. (24.10.2019 - SC): MANU/SC/1468/2019)*
- 32. In addition to the above, the respondent has pleaded "promissory estoppel" and "legitimate expectation". *Doctrine of Promissory estoppel means that if Government or some other public body or its officials make a representation or a promise and an individual acts upon such promise and alters his position,*

*Government or public body must make good that promise and shall not be allowed to fall back upon the formal defect in the contract. The doctrine of promissory estoppel does not belong to the law of contract or evidence but appertains to equity. (MANU/AP/0497/2002) In this context, it is relevant to examine the observation made by the Hon'ble Supreme Court in the decision in *INDSIL Hydro Power & Manganese Ltd Vs. State of Kerala and Ors (MANU/SC/1103/KSERC)* decided on 30.07.2019 which is extracted hereunder:*

36.....Thus, the reasonable construction of the contract would be that the commencement of commercial operations within 30 months postulated that both the Appellant and KSEB must perform their respective obligations under the contract within that period so as to adhere to the date of commencing commercial operations.....However as significant as these reasons are, it should not lead to a situation where a private investor who has acted upon the policy of the State Government being left in the lurch as a result of supervening circumstances which have resulted in the power not being evacuated into the grid due to the non-commissioning of the transmission lines at the material time by KSEB. It is imperative that contractual obligations entered into by the State have legal sanctity. A legal regime where the sanctity of contracts is respected and commercial contracts are enforced is essential to the maintenance of the Rule of law. Trade and commerce can be freely conducted in a stable legal order which provides remedies for enforcement.....In what manner the State should remedy the grievance of the private investor is something which should be duly considered by the State Government within the available framework of law and its own policy. (24.10.2019 - SC): MANU/SC/1468/2019)

*The Government is subject to the rule of promissory estoppel and if the essential ingredients of this doctrine are satisfied, the Government can be compelled to carry out the promise made by it.(*Monnet Ispat and Energy Ltd. and Ors. vs. Union of India (UOI) and Ors. (26.07.2012 - SC)* : MANU/SC/0601/2012)*

33. Before coming to the conclusion in this matter, observation made by the Hon'ble Supreme Court in (*Kusumam Hotels (P) Ltd. vs. Kerala State Electricity Board and Ors. (16.05.2008 - SC)* : MANU/SC/2428/2008) is relevant which is extracted hereunder:

*....But the general principle that emerges is that once a representation has been made by one party and the other party acts on that representation and makes investment and thereafter the other party resiles, such act cannot be stated to be fair and reasonable. **When the State Government makes a representation and invites the entrepreneurs by showing various benefits for encouraging to make investment by way of industrial development of the backward areas or the hill areas, and thereafter the entrepreneurs on the representations so made bona fidely make investment and thereafter if the State Government resile from such benefits, then it***

certainly is an act of unfairness and arbitrariness. Consideration of public interest and the fact that there cannot any estoppel against a Statute are exceptions.

34. It is also well settled that as per Section 62 of the Indian contract Act, 1872, if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. But the respondent has not agreed to proceed with the proposed amendment in the Agreement. Hence, Section 62 cannot be applied. It is also a settled legal position that “***terms and conditions of the contract can indisputably be altered or modified. They cannot, however, be done unilaterally unless there exists any provision either in contract itself or in law.***” (*Bharat Sanchar Nigam Ltd. and Ors. vs. BPL Mobile Cellular Ltd. and Ors. (14.05.2008 - SC): MANU/SC/7717/2008*)
35. In view of the reasons mentioned above, the Commission has come to the conclusion that the agreement dated 13.12.1994 entered in to between the KSEB and respondent M/s INDISIL is a mutually concluded contract enforceable by law. Hence, the Commission is of the considered view that in the absence of ample legal provisions enabling the Commission to amend the provisions contained in the agreement unilaterally, this Commission cannot issue any directions to the respondent to agree to the proposed amendment of the Agreement dated 13.12.1994 which is mutually concluded and legally enforceable in terms of the provisions of the Indian Contract Act,1872.

Question No.2

(2) Whether the direction issued by the Commission in O.P No.2/2017 dated 02.06.2017 is contrary to the direction issued by the Ministry of Power and observation made by the Commission in its Order dated 16.04.2008 is legally in order?

36. The Commission vide Order dated 02.06.2017 in Petition O.P. No.02/2017 had issued a direction as follows:
- 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.***
37. It is also an undisputed fact that the Hon'ble APTEL vide the judgment dated 29.07.2019 in Appeal No. 293 of 2017, decided on the matter as follows.

27. Since the 1994 Agreement between the parties came into existence much prior to the Electricity Act 2003, the Commission opined those terms of the Agreement have to be modified in line with the provisions of the Electricity Act 2003.

28. Since the Respondent – KSEB Ltd had to purchase unutilised excess banked energy at EHT rate at which KSEB Ltd sells to similar consumers, this would affect the interest of larger sections of consumers of the State by way of tariff, the Respondent – Commission opined that KSEB Ltd shall approach the Commission with a proposal for modifying the Agreement dated 30.12.1994.

29. Therefore, on considering the entire facts, reasoning and opinion of the Respondent – Commission in its impugned order dated 02.06.2017, and in the light of our analysis and reasoning, we find that the impugned order does not warrant any interference.”

38. But in this context, it is relevant to examine the earlier decision of the Hon'ble APTEL dated 21.07.2009 as extracted hereunder:

11. Further the Ministry of Power issued a clarificatory letter dated 15.02.2008 conveying therein that the provisions of tariff policy would not alter legal enforceability of already concluded contract unless and until altered on mutually agreed terms and conditions. Accordingly, the challenge to the fixation of secondary energy rate on the ground that it is hit by Regulation 39 of CERC Tariff Regulations has to be rejected. (Himachal Pradesh State Electricity Board vs. Himachal Pradesh State Electricity Regulatory Commission and Ors. (21.07.2009 - APTEL): MANU/ET/0058/2009)

39. In order to arrive at a conclusion on the 2nd question mentioned above the following facts and legal provisions contained in the Electricity Act, 2003 relating to National Electricity Policy and Plan are also to be examined in detail:

Section 3 of the Electricity Act, 2003 dealt with National Electricity Policy and Plan as reproduced below:

(1) *The Central Government shall, from time-to-time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, unclear substances or materials, hydro and renewable sources of energy.*

(2) The Central Government shall publish the National Electricity Policy and tariff policy from time-to-time.

(3) *The Central Government may, from time-to-time, in consultation with the State Governments and the Authority, review or revise the National Electricity Policy and tariff policy referred to in sub-section (1).*

The Central Government had notified the Tariff Policy under section 3 of the Electricity Act, 2003 on 6th January, 2006. The relevant provisions of the Clause 5.1 of **Tariff Policy** is reproduced as under:

“..... All future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a State controlled/owned company as an identified developer and

where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity. Even for the Public Sector projects, tariff of all new generation and transmission projects should be decided on the basis of competitive bidding after a period of five years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition.....”

The Government of India Ministry of Power as per communication No. 45/2/2006-R&R New Delhi, dated 15th February, 2008 informed to the Secretary, Central Electricity Regulatory Commission, New Delhi and Secretaries of all State Electricity Regulatory Commissions regarding the clarification on the Subject: Tariff Policy under Electricity Act, 2003 thus:

Sir, Please refer to the clarification issued by the Ministry of Power under the provisions of the para 5.1 of the Tariff Policy vide letter No. 45/2/2006-R&R dated 28.3.2006.

*2. An issue had arisen recently as to what would be the status of those PPAs which stood legally concluded before the notification of the Tariff Policy on 6th January, 2006. The issue has been examined in consultation with the Department of Legal Affairs. **It has been advised that the provisions of the Tariff Policy would not alter the legal enforceability of the already concluded contracts unless until it is mutually altered on agreeable terms and conditions.** Yours faithfully, Sd/- (Alok Kumar) Director Tel: 2371 4000 Copy to: Secretaries of all the SERCs.*

40. It was based on the above clarification issued by the Ministry of Power , Govt of India that this Commission in its Order dated April 16th 2008 filed by M/s INDSIL Electrosmelts Limited had disposed the petition. Relevant portion of the said Order is extracted hereunder:

KSEB has further submitted that the agreement executed between M/s INDSIL and KSEB on 3/12/1994, does not contain a provision for installation of TOD meter at generation point nor any agreement has been entered in to between KSEB and Company regarding this. It is understood that the firm had installed TOD meter on their own choice at Kuthungal on 23.06.2003 to differentiate zone wise energy even though there was no mutual agreement between INDSIL and KSEB in this respect. Even if there is no provision for such a claim as per the agreement, the Petitioner has breached the agreement conditions through deferring payment on the above grounds.....According to KSEB para 25 of the agreement which stipulates that “in case any dispute and/or difference between Company and KSEB arises, the matter would be referred to Government of kerala and their decision shall be final and binding on both the parties.”...

In this connection it is relevant to not that the Secretary, Secretary, Ministry of Power, Govt of India vide his letter No. 45/2/2006-R&R dated 15/02/2008 informed this Commission that 2008 any Power purchase Agreement which

stood legally concluded before the notification of the Tariff Policy on 6th January, 2006 would not alter the legal enforceability unless until it is mutually altered on agreeable terms and conditions by the parties therein.

In the light of this guidelines of Govt of India this Commission did not find to interfere in this matter since the PPA was executed by the parties as early as in 1994.

4. Commission's Order

Commission after a detailed examination in the matter found that the petition filed under Section 86 (1)(f) of the Electricity Act, 2003 by Indsil Electrosmelts Ltd, Coimbatore does not have any substantial ground for intervention by the Commission.

41. A careful reading of the Agreement dated 30.12.1994 would show that the said Agreement is having all characteristics of a contract in terms of various provisions of the Indian Contract Act, 1872 which is legally enforceable one and a mutually concluded contract. It is also a fact that neither the petitioner, M/s Indsil Electrosmelts Ltd nor the KSEB Ltd had not challenged the Order dated 16.04.2008 of the Commission. Hence the Order issued by the Commission dated 16.04.2008 and its findings are final and binding which is squarely applicable to this petition also. The above decision of this Commission was not brought to the notice of this Commission by any of the parties while adjudicating the Petition O.P. No.02/2017. It is also relevant to examine the observation made by the Hon'ble Supreme Court in the reported decision in *INDSIL Hydro Power & Manganese Ltd Vs. State of Kerala and Ors (MANU/SC/1103/KSERC)* decided on 30.07.2019 which is extracted hereunder:

.....However as significant as these reasons are, it should not lead to a situation where a private investor who has acted upon the policy of the State Government being left in the lurch as a result of supervening circumstances which have resulted in the power not being evacuated into the grid due to the non-commissioning of the transmission lines at the material time by KSEB. **It is imperative that contractual obligations entered into by the State have legal sanctity.** A legal regime where the sanctity of contracts is respected and commercial contracts are enforced is essential to the maintenance of the Rule of law. Trade and commerce can be freely conducted in a stable legal order which provides remedies for enforcement.....In what manner the State should remedy the grievance of the private investor is something which should be duly considered by the State Government within the available framework of law and its own policy.

42. It is a settled legal position that the provisions of the Central enactments will prevail over the provisions of the State enactment and the provisions of the said Act will prevail over any rule, regulation or bye law. (*West U.P. Sugar Mills Association and Ors. vs. The State of Uttar Pradesh and Ors. (22.04.2020 - SC) : MANU/SC/0381/2020*), (*Central Board of Secondary Education and Ors. vs. Aditya Bandopadhyay and Ors. (09.08.2011 - SC)*). It is also well settled that once judicial satisfaction is reached that the direction was not open to be made and it is accepted as a mistake of the court, it is not only appropriate but also

the duty of the Court to rectify the mistake by exercising inherent powers. Judicial opinion heavily leans in favour of this view that a mistake of the Court can be corrected by the Court itself without any fetters. (A.R. Antulay vs. R.S. Nayak and Ors. (29.04.1988 - SC) : MANU/SC/0002/1988).

43. As mentioned in the above paragraphs, the Agreement dated 30.12. 1994 being a mutually concluded contract came into force prior to the commencement of the Electricity Act, 2003. The clarification issued by the Ministry of Power, Govt of India as per letter dated 15.02.2008 conveying therein that “**the provisions of tariff policy would not alter legal enforceability of already concluded contract unless and until altered on mutually agreed terms and conditions**” is squarely applicable to the said agreement. Hence, this Commission is of the considered view that the view expressed by this Commission in O.P No.02/2017 dated 02.06.2017 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 is contrary to the clarification issued by the Ministry of Power, Govt of India.
44. In view of the clarification issued by the Ministry of Power and communicated to this Commission, and in view of the above factual and legal position, the Commission is of the considered view that the direction contained in the Commission’s Order dated 02.06.2017 in OP No.2/2017 cannot be implemented **unless and until it is mutually altered on agreeable terms and conditions** and the agreement dated 30.12.1994, made between KSEB and the respondent M/s INDSIL ELECTROSMELTS Ltd **is a mutually concluded contract attracted by the provisions of Indian Contract Act,1872 which is legally enforceable**. The Commission is also of the view that the direction issued by the Commission in O.P No.2/2017 dated 02.06.2017 is cannot be made applicable unilaterally. The question referred as 2nd above is answered accordingly
45. It is to be noted that, during the deliberations of hearing on the Petition, the Respondent has not expressed their willingness to proceed with the proposed amendment of the Agreement. The petitioner KSEB Ltd also is not willing to alter the term of the Agreement beyond 30 years. Though the Commission has power to intervene and even override the existing contracts between the regulated entities based on the Regulations, the Commission cannot issue Orders to amend unilaterally, “the mutually concluded contracts” made prior to the commencement of the Tariff policy as discussed above. The observation made by the Hon’ble Supreme Court in *INDSIL Hydro Power & Manganese Ltd Vs. State of Kerala and Ors (MANU/SC/1103/KSERC)* decided on 30.07.2019 is also binding on the Commission. Various clauses contained in the Agreement dated 30.12.1994 would show that principles of promissory estoppel is highly attracted in this issue. The huge amount invested by M/s INDSIL the respondent in the project which shall be handed over to the petitioner KSEB Ltd free of cost on expiry of 30 years has to be considered. Further the Order issued by the Commission dated 16.04.2008 is legally binding and final.

46. In view of the reasons mentioned above this Commission is of the considered view that the Petition filed by the KSEB Ltd unilaterally 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 is liable to be rejected.

Orders of the Commission

The Commission after carefully examined petition filed by the KSEB Ltd, the arguments of the respondent M/s INDSIL and other materials presented during the deliberations of the subject matter, as per the provisions of the Electricity Act, 2003, and Rules and Regulations in force, order as follows: **'Reject the petition filed by KSEB Ltd for seeking approval for modifying the terms and conditions of the Agreement dated 30.12.1994, entered into between KSEB Ltd and M/s. INDSIL'** due to the reasons explained in this order.

The petition disposed off. Ordered accordingly

**Sd/-
Adv. A J Wilson
Member (Law)**

**Sd/-
Preman Dinaraj
Chairman**

Approved for issue

**C.R. Satheesh Chandran,
Secretary -in-charge**

