

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

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

OP No :19 /2021

In the matter of : Petition seeking approval of draft Tripartite Power Purchase Agreement duly initialed by the petitioner and co-petitioner along with the respondent in terms of the Commission's common Order dated 24.04.2020 in OP 58 of 2019 & OP 58A of 2019.

Petitioner : M/s INOX Renewables Ltd
Petitioner represented by : Sri. Mayank Bugani, Advocate INOX
 : Sri. Venkatesh Sonti, INOX
 : Sri. Suku Nair, Consultant INOX

Co-petitioner : M/s Damodar Jagannath Malpani
Co-petitioner represented by : Sri.Prabhulla Khinvasara Malpani, Malpani Group
 : Sri. Kailas. B, Malpani Group

Respondents : Kerala State Electricity Board Ltd (KSEB Ltd)
KSEB Ltd represented by : Sri Sasankan Nair C S, CE (C&T)
 : Sri. P. Murali, DY CE, Commercial
 : Smt. Latha. S.V, AEE

First hearing on : 29.04.2021
Second hearing on : 22-06-2021
Third hearing on : 13.07.2021
Fourth hearing on : 25.08.2021
Fifth hearing on : 07.10.2021
Sixth hearing on : 16.02.2022

Order dated 31.03.2022

1. M/s. INOX Renewable Limited (hereinafter referred to as M/s INOX or the petitioner) and M/s D J Malapni (Co-petitioner) on 12.03.2021, filed a petition before the Commission with the following prayers.
 - a) *Grant approval of the duly initialed TPPA draft enclosed and allow to the petitioners to execute the formal PPA with the respondent, KSEB Ltd.*
 - b) *Pass such other Order or orders as this Hon'ble Commission may wish*

to pass for doing substantial justice in the matter and to uphold the provisions of the Act of 2003.

2. Summary of the petition filed by M/s INOX Ltd is given below:

- (1) The Commission vide Order dated 03.10.2018, determined the tariff of the 16 MW wind project of INOX at KINFRA park Kanjikode @Rs 4.09/unit, duly considering the benefit of accelerated depreciation. The relevant portion of the Order is extracted below.

“(1) The levelised tariff for the electricity generated from the 16 MW WEG installed by M/s INOX at the KINFRA land at Kanjikode, Palakkad is approved @Rs 4.09/unit, duly considering the benefit of accelerated depreciation.

(2) The levelised tariff approved by the Commission is applicable for the entire electricity injected into the grid from the date of synchronization.

(3) KSEB Ltd shall reimburse, any tax paid on the RoE, limited to the amount of equity specified in this Order. For claiming the tax, developer shall furnish the proof of payment of such tax to KSEB Ltd.”

- (2) Subsequently, the Commission vide Order dated 02.12.2019 in RP 01/2019 has modified the Order dated 03.10.2018 as follows.

“(1) In the Order dated 03.10.2018 in OP No. 08/2018, at the end of the paragraph

53(1), the following words shall be added ‘and the levelized tariff without the benefit of accelerated depreciation is approved @Rs 4.54/unit’. All other terms in the Order dated 03.10.2018 remains unchanged.”

- (3) Meanwhile, M/s D J Malpani, the strategic investor, on 05.04.2019 filed a petition before the Commission for approval of the draft initialed PPA with KSEB Ltd. Since M/s INOX Renewables Ltd (IRL) was the developer and had filed the original petition for the determination of tariff, the Commission directed M/s INOX to file the formal petition for the approval of the PPA. Accordingly, M/s INOX filed a petition on 10.07.2019 for the approval of the PPA. After appraising the petition in detail including conduct of hearings, the Commission vide Order dated 24.4.2020 in OP No 58/2019 & 58A /2019 ordered as follows:

(1) The Power of Attorney dated 7th March 2019, given by M/s INOX Renewables Ltd to M/s Damodar Jagannath Malpani, shall be registered as per the Registration Act. 1908.

(2) M/s INOX Renewables Ltd, M/s Damodar Jagannath Malpani and KSEB Ltd, shall enter into a Tripartite Power Purchase Agreement, specifying the role and responsibilities of each entity, as discussed (but not limited to) under paragraph-17 of this Order, for the purchase of the electricity generated from the 16 MW WEG at Kanjikode, Palakkad.

(3) The Tripartite Power Purchase Agreement shall be signed for a period of 25 years from the date of Commercial Operation Date (COD) of the project. The initialed Tripartite Power Purchase Agreement shall be submitted before the Commission for approval, as per the provisions of the KSERC (Conduct of Business) Regulations, 2003 and KSERC

(Terms and Conditions of Determination of Tariff) Regulations, 2018.

(4) *The petition filed by M/s D.J Malpani dated 05.04.2019 in OP No. 58A/2019, and the petition filed by M/s INOX dated 10.07.2019 in OP No.58/2019 stand disposed off as above.*

(4) Thereafter, as requested by M/s INOX, the Commission vide letter dated 17.07.2020 clarified that, in view of the decision to execute a tripartite agreement among KSEB Ltd, M/s INOX Renewables Ltd and M/s DJ Malani, the power of attorney is not mandatory between M/s INOX Renewables Ltd and M/s DJ Malpani as per the Order of the Commission dated 24.04.2020.

(5) M/s INOX Wind Energy Ltd on 09.04.2021 filed an IA for seeking approval to substitute M/s INOX Renewables Ltd (IRL) with M/s Inox Wind Energy Ltd. The petitioner submitted that, the Board of Directors of erstwhile INOX Renewables Ltd (IRL) as part of Business Restructuring, had approved a Composite Scheme of Arrangement whereby the said IRL was amalgamated into Gujarat Fluorochemicals Limited (GFL) w.e.f 01.04.2020. Further, as approved by Shareholders, SEBI, Stock exchanges and Hon'ble National Company Law Tribunal (NCLT), Ahmedabad Bench, approved the demerger of the Renewable Energy Business of GFL Limited into its wholly-owned subsidiary Inox Wind Energy Limited (IWEL) effective from 09.02.2021.

Consequently, post implementation of the said Scheme w.e.f 09.02.2021, the petitioner M/s INOX Renewables Ltd (IRL) has ceased to exist as it stood merged with GFL. Further, the applicant M/s Inox Wind Energy Ltd has acquired all the renewable energy business of GFL Ltd, the applicant is the proper and necessary party which now stands in the shoes of the erstwhile IRL. Hence, M/s INOX Wind Energy Ltd requested to substitute the name of the applicant i.e., INOX Wind Energy Ltd in place of the erstwhile Inox Renewables Ltd in the Petition OP No. 19/2021.

(6) The petitioners submitted that the petition is filed in compliance of the Order of the Commission dated 24.04.2020 in Petition No. OP 58 of 2019 & OP No. 58A of 2019 with respect to the 16MW (2x 8MW) wind power projects commissioned by the petitioners in the land allocated by KINFRA at Textile park, Kanjikode, Palakkad District, Kerala.

3. The Commission admitted the petition as OP 19/2021. First hearing of the petition conducted through video conference on 29.04.2021. Sri. Mayank Bugani, Advocate, presented the matter on behalf of the petitioner and Smt. Latha S.V, represented KSEB Ltd. Summary of the deliberations during the hearing is given below.

(1) M/s INOX submitted that, as directed by the Commission vide Order dated 24th April 2020, **KSEB Ltd, M/s INOX and M/s DJ Malpani, has initialled the draft Tripartite Power Purchase Agreement (TPPA), through mutual discussions.** It is further submitted that the petition was filed by M/s INOX Renewables Ltd (IRL) and due to demerger M/s

IRL ceased to exist and all rights and obligations which would accrue to the IRL now stand vested solely and exclusively with M/s INOX Wind Energy Ltd (IWEL). The Order of the National Company Law Tribunal (NCLT) dated 25.1.2021 approving the demerger and formation of IWEL is submitted along with the IA filed on this behalf.

- (2) The Agreement contains the roles and responsibilities of the three parties, KSEB Ltd, M/s INOX and M/s DJ Malpani. The KSEB Ltd will purchase the entire energy generated, M/s INOX is the developer and the EPC contractor who is carrying out the O&M for the entire life of project. M/s D J Malpani will be the strategic investor of the project.
- (3) As per the Article 6.9 of the draft initialled TPPA, the tariff for power generated from the plant shall be the levelized project specific tariff of Rs 4.09/unit with accelerated depreciation benefit, as per the KSERC order dated 03.10.2018, which shall form integral part of the agreement. During the last three years from the CoD, the investor has been raising invoices and KSEB Ltd has been remitting the electricity charges at this rate. The investor M/s DJ Malpani submitted during the hearing that, they would like to raise the invoice @Rs 4.54/unit, the levelized tariff approved by the Commission without the benefit of accelerated depreciation. In reply, KSEB Ltd clarified that, all the parties to the agreement had mutually consented to raise the bill at the tariff of Rs 4.09/unit with the benefit of accelerated depreciation and the investor agreed to avail the accelerated depreciation.

Based on the deliberations, the Commission clarified that since for the last three years the investor has been raising the invoice and KSEB Ltd remitting the electricity charges @ Rs 4.09/unit, and this is the rate mentioned in the initialled TPPA, it is not appropriate to change the tariff at this stage. Hence, the Commission also suggested to the investor DJ Malpani to avail the benefit of accelerated depreciation.

4. The Commission after detailed examination of the draft initialled TPPA, suggested the following modifications/changes in the draft initialled TPPA to give more clarity and to avoid litigations in future.
 - (1) The petitioner has not submitted any of the Schedules referred to in the draft initialled PPA along with the petition filed before the Commission. Hence the petitioner shall within 10 days from the date of this Order, submit the same before the Commission. **Consideration of approval of Clause 1(n) can be done only after the appraisal of Schedule 4 referred therein.**
 - (2) Clause 1(r) and 1 (s): The Commission directed the parties concerned to provide the details of the minimum Cut-in wind speed referred under Clause 1(r) and maximum Cut-out wind speed referred under Clause 1(s) of the initialled TPPA. The petitioner and respondent clarified during the hearing that, the details regarding the Cut in wind speed and Cut out

wind speed are available in the Schedule 2 to the initialled PPA. **The Commission has noticed that these Clauses can only be examined after submission of the Schedules to the initialled draft TPPA before the Commission.**

- (3) Clause 2.0: effective date and term of the agreement: The second sentence may be modified as *“The term of the agreement may be extended for a further period by mutual agreement with modifications as considered necessary, only with the prior approval of KSERC”*.

The Commission further noted that “Time is the essence of any contract” and a contract cannot be indefinitely extended. The contract cannot operate without mutual consent prior to termination of agreement. Hence the last sentence in Clause 2.0 starting with “In case KSEBL” need to be modified as follows.

“In case KSEB Ltd desires and the generator is willing to supply power beyond the Agreement date of 25 years, the licensee shall file a formal petition before KSERC at least 12 months before the Agreement expires seeking formal approval with complete documents including detailed justification, tariff and its justification, PPA etc ”.

This is essential considering the fact that the Commission has already determined the project specific tariff of this project considering 25 years as the life of the plant. Hence, at this time, this plant will be a fully depreciated one and hence the need for fresh determination of tariff.

- (4) Clause 6.4:
The Commission noted that the periodicity of the calibration and maintenance of meters is not specified under Clause 6.6 of the draft initialled TPPA. This has to be specified explicitly.
- (5) Clause 6.6
It is stipulated under Clause 6.6 of the draft TPPA that, in case both the check meter and the main meter fail, at least one of the meters shall be replaced **immediately** by a correct meter. The word immediate does not provide any specific time period. **Hence the Commission hereby direct that, a definite number of days for replacing one of the meters shall be specified under this clause.**
- (6) Clause 6.8:
The clause 6.8 gives freedom to KSEB Ltd not to purchase electricity from this plant even without any reasonable grounds. Similarly, if the price of electricity goes up, the generator can also refuse to supply power to KSEB Ltd and other wise, if price goes down, KSEB Ltd may refuse to avail power from the plant. Such possibilities are required to be avoided in contracts of such nature and duration. Hence suitable modification is required in the Clause 6.8 to safeguard the interest of both petitioners and respondent.

Hence it is directed that, the parties to the TPPA may suitably modify the Clause 6.8 of the TPPA.

- (7) Clause 6.11:
Clause 6.11 of the initialled TPPA provides the rates for reactive energy drawal by the plant from the grid. KSEB Ltd, clarified during the hearing that the rate of reactive energy provided in the draft TPPA is at the same rate, approved by the Commission for the reactive energy drawal by CIAL from the State Grid, in the year 2017. **Since nearly 4 years have elapsed, the Commission hereby direct that, KSEB Ltd and the petitioners may mutually decide and include the rate, considering the increase in electricity tariff since the year 2017.**
- (8) Clause 6.12:
It is clarified that the tariff for electricity availed from KSEB Ltd, during shutdown of the generator or for any construction/ maintenance work during the term of TPPA, shall be at the prevailing tariff, as per the orders issued by the Commission from time to time. The Clause may be modified accordingly.
- (9) Clause 6.14:
Commission noted that, there is ambiguity in the wording of the Clause 6.14. The generator is required to provide SCADA visibility of the plant to the SLDC.

However, the Clause 6.14 has to make it clear that the generator has to provide the generation data to SLDC, even during the time when the SCADA visibility is not recorded. **Clarifications are required as to what are the instances when the data is to be transmitted by means other than automatic transmission. It is suggested that the first sentence is to be modified as “if there is no SCADA visibility....”**

- (10) Clause 6.15:
As per the prevailing Grid Codes notified by CERC and KSERC, and also as per prudent practices followed, 15 minute block wise scheduling is followed. Hence, the first sentence of the Clause- 6.15 shall be suitably modified. In case this scheduling is changed, then such amended schedule shall be binding on this Agreement. This is especially relevant since there is a proposal to reduce the scheduling time block from 15 minutes to 5 minute time block.

- (11) Clause 6.16:
More clarify is to be provided on the rate for excess energy, during the billing period when the energy drawn from the grid happens to be more than the energy injected by the generator to the grid. **Hence it is directed that, the rate for raising the bills for excess energy if it is drawn from the grid during the billing period shall be explicitly specified under Clause 6.6 so as to give more clarity and to avoid disputes.**

- (12) Clause 8.0.
Based on the modifications agreed for Clause 6.11, the Clause 8.0 also shall be suitably modified.
- (13) Clause 10.0 Force majeure:
The Force Majeure clause shall be modified duly considering the Force Majeure clause as per the paragraph 7.5 of the Bidding guidelines dated 08.12.2017, the Guidelines for Tariff Based Competitive Bidding Process for procurement of Power from Grid connected Wind Power Projects.
- (14) Clause 11.0.
The numbering system used in the Clause may be corrected.
Further, proviso (i) to this clause may be modified by adding “after” between “coming into effect” and “the date of signing”
- (15) Clause 12.0 Dispute resolution: As per the Section 86 (1)(f) of the Electricity Act, 2003, KSERC is the Appropriate Commission empowered for dispute resolution between the Generating Companies and distribution licensees located within the State of Kerala. **Hence, the words “the same shall be dealt as per Electricity Act, 2003” shall be replaced with “the parties shall approach Kerala State Electricity Regulatory Commission for resolving the same”.**
- (16) Clause 14.0 Termination:
There is ambiguity in the terms of this clause. For instance, if one of the parties purposefully defaults the terms and conditions of the Agreement for more than 60 days, then the termination clause can be evoked.

Hence the termination clauses 14.0 shall be suitably modified duly considering the provisions under Paragraph 7.7 of the **Bidding guidelines dated 08.12.2017, the Guidelines for Tariff Based Competitive Bidding Process for procurement of Power from Grid connected Wind Power Projects.**

This will safeguard against such an eventuality and consequent avoidable litigations during the duration of the PPA.

- (17) Clause 15.7:
The Clause 15.7 of the draft initialled TPPA gives freedom to the parties to the Agreement to modify the clauses of this Agreement through mutual discussions. As per Section 86(1)(b) of the Electricity Act, 2003, the State Commission shall “regulate the electricity purchase and procurement process of the distribution licensees including the price at which electricity shall be procured from the generating companies...” Hence any modifications in the Agreement shall also be done only with the formal approval of this Commission and shall be came into effect from the date of approval for such modifications by this Commission.

Hence it is directed that, the words *“with prior approval of the Commission and shall come into effect from the date of approval of any such modification by this Commission”* shall be added at the end of the sentence.

5. Based on the deliberations during the hearing, the Commission vide Interim Order dated 26.05.2021 directed the petitioners M/s Inox Wind Energy Limited and M/s D J Malpani and the respondent M/s KSEB Ltd to comply the following, latest by 20.06.2021 and submit the same to this Commission for consideration.
 - (1) Modify the Clauses of the draft initialed Tripartite Agreement signed between the parties as per the directions contained under paragraph 9 of this Order.
 - (2) Submit all the schedules referred in the draft TPPA along with the modified draft TPPA before the Commission.
 - (3) A copy of the Annexure G referred in the NCLT Order dated 25.01.2021 shall also be submitted before the Commission.
6. In compliance of the direction of the Commission, M/s INOX, vide letter dated 01.06.2021 submitted the following details before the Commission.
 - (i) Schedules and Annexures to the petition
 - (ii) Copy of Annexure G referred in NCLT Order

However, the parties to the Tripartite Agreement not submitted the modified agreement after incorporating the suggestions of the Commission.

7. The second hearing on the petition was conducted on 22.06.2021 in which KSEB Ltd requested for two weeks' time to get approval of its Board of Directors. The Commission allowed the same.
8. The third hearing on 13.07.2021 through video conference., wherein further time was requested by the parties to finalize the TPPA and the Commission allowed the same.
9. The fourth hearing of the petition was conducted through a video conference on 25.08.2021. During the hearing, KSEB Ltd raised the following new issues for incorporating in the TPPA to be signed between the parties.
 - (1) Land lease agreement. KSEB Ltd submitted that the land lease agreement was signed between the KINFRA and INOX Renewables Ltd (IRL) for allotting the land at KINFRA park at Palakkad for developing the wind farm. However, M/s INOX Renewables Ltd (IRL) is ceased to exist and all functions handled by the IRL is assigned to the new company INOX Wind Energy Ltd by the parent company Gujarat Fluorochemicals Ltd. However, the land lease agreement is yet to be assigned to the new assignee INOX Wind Energy Ltd.

M/s INOX Wind Energy Ltd (IWL), during the hearing submitted that, for assigning the land lease agreement to the new entity may take at least

three months. Hence IWL suggested to incorporate a condition precedent in the TPPA to be fulfilled by the IWL that, within three months from the date of signing the TPPA, IWL shall get to assigned the land lease agreement to the new assignee M/s IWL.

(2) Capacity Utilisation Factor (CUF).

KSEB Ltd raised the issue that, the Commission determined the tariff of the 16MW wind project by adopting the CUF of 22%. However, the actual annual CUF since the date of commissioning in the year 2017 is more than 27%. As per the first proviso to Regulation 52(2) of the KSEERC (Renewable Energy & Net Metering) Regulations, 2020, if the actual CUF varies by (+) or (-) 5%, then the annual mean wind power density shall be measured at 100m hub height and the tariff shall be re-determined for the CUF corresponding to the measured wind power density.

The Commission during the hearing clarified that, the tariff of the 16MW wind plant of the petitioners was determined vide the Order of the Commission dated 03.10.2018. The petitioners have been supplying power to KSEB Ltd at the approved tariff since the FY 2017-18 onwards. However, due to various reasons the signing of the PPA got delayed. The Commission further pointed out that the tariff determined based on the repealed regulations cannot be re-opened by the Commission as and when the Commission issues amendments/ modify or issue new Regulations on Renewable Energy and related issues. However, since the tariff determined by the Commission is the ceiling tariff, the petitioner and KSEB Ltd can agree for a tariff lower than the tariff approved by the Commission.

(3) Reduced tariff for the generation in excess of the normative CUF adopted for tariff determination.

KSEB Ltd pointed out that, as per the present tariff order, the excess generation over the normative CUF of 22% also charged at the levelized tariff determined by the Commission with the normative CUF of 22%. However, as per the guidelines notified by the Gol dated 8th December 2017 for procurement of wind power through competitive bidding route, the excess generation may be charged at 75% of the PPA tariff. In this regard, KSEB Ltd requested to incorporate a provision in the TPPA.

7. Based on the deliberations, the Commission vide daily Order dated 03.09.2021 directed the parties to discuss and arrive a consensus on the new issues raised by the KSEB Ltd during the hearing and incorporate the same in the draft TPPA to be submitted before the Commission for approval. The parties shall finalise and submit the draft initialed TPPA, latest by 01.10.2021.

However, the parties have not complied with the direction of the Commission.

8. Fifth hearing of the petition is conducted through video conference on

07.10.2021. The deliberations during the hearing is summarized below.

- (1) M/s INOX submitted that, the draft TPPA, which submitted before the Commission was finalized through mutual discussion with KSEB Ltd and the same was also initialed by the KSEB Ltd. The issues raised by KSEB Ltd during the hearing on 25.08.2021, regarding the revision of CUF and reduced tariff for generation in excess of normative CUF was not discussed or deliberated earlier, even while determining the tariff vide Order dated 03.10.2018 in Petition OP No. 08/2017.

Moreover, the Commission vide the Order dated 03.10.2018 in Petition OP No. 08/2017 determined the tariff based on the provisions of the CERC (Terms and Conditions for determination of Tariff) Regulations, 2017. There is no provisions in the CERC Regulations to re-determine the tariff of the project based on the revised CUF.

The representative of the co-petitioner M/s DJ Malpani submitted that, when they take the decision to invest in the project, the generic tariff for electricity generated from wind power plants was about Rs 6.00 per unit, and however the tariff determined by this Hon'ble Commission was Rs 4.09/unit. It is not appropriate at this stage to incorporate new clauses in the TPPA which was not discussed or deliberated earlier, which results financial consequences to the investor.

- (2) KSEB Ltd during the hearing submitted that, the actual CUF of the project during the last three years since its CoD in the year 2017 was 27% as against the normative CUF of 22% adopted by the Commission for tariff determination. Hence a part of the benefit shall be passed on to the consumers of the State through reduction in the tariff.

KSEB Ltd further submitted that, the Commission has determined the tariff of the 16MW Wind plant of M/s INOX as per the provisions of the KSERC (Renewable Energy) Regulations, 2015. The Commission adopted the CERC norms, strictly as per the enabling provisions in Regulation 17(4) of the said Regulations. KSEB Ltd also submitted that, the Regulation 22(3) of the KSERC (Renewable Energy) Regulations, 15 provide as follows.

“(3) The Commission may, on application from the generator or the purchaser of electricity from a renewable energy project, for which a project specific tariff has been determined under sub-regulation (1) above, revise such project specific tariff applicable to the said project and issue appropriate orders, in case the actual average capacity utilization factor for three consecutive years immediately following the date of commissioning of the said project varies due to site specific reasons, by more than ten percent of the capacity utilization factor adopted earlier for the determination of the project specific tariff applicable to that project.”

KSEB Ltd requested before the Commission to approve to include a provision in the TPPA that permit either of the parties of the TPPA to

approach this Commission for re-determination of the tariff if the CUF of the project varies as provided KSERC (Renewable Energy) Regulations, 2015.

However, the petitioner INOX Wind Energy Limited and the co-petitioner M/s DJ Malpani, strongly objected the proposal of KSEB Ltd.

9. Based on the deliberations the Commission vide the order dated 25.10.2021, ordered the following:

- (1) *The petitioners and the respondent shall submit a detailed argument note on the issue of factoring the variations in the CUF over the normative CUF adopted for tariff determination in the draft TPPA, before the Commission, latest by 15.11.2021.*
- (2) *Any other supporting documents in support of the argument.*

10. In compliance of the direction of the petitioner, M/s INOX on 09.11.2021, submitted its detailed note and its summary is given below:

- (a) KSEB Ltd has not raised the issue on revising the tariff based on the CUF previously and first time raised the issue only on 25.08.2021. This issue was raised now deliberately, for prolonging the signing of TPPA.
- (b) **Change of the entity from Inox Renewables Ltd. to INOX Wind Energy Limited in the land lease agreement**

M/s INOX, submitted that, it had taken necessary steps for changing the entity from INOX renewables Ltd to INOX Wind Energy Ltd. M/s INOX already shared various correspondences issued to Kerala Industrial Infrastructure Development Corporation with the Respondent.

The petitioner further submitted that the change in the entity from Inox Renewables Ltd to Inox Wind Energy Ltd., in the Lease Agreement, is not a concession which is being sought by the Petitioner, rather it is a legal consequence of the order dated 25.01.2021 passed by the Hon'ble National Company Law Tribunal, Ahmedabad. The said order has a force of law and is therefore required to be implemented as per the law of the land.

- (c) **Non applicability of Kerala State Electricity Regulatory Commission (Renewable Energy and Net Metering) Regulations, 2020:**

The Petitioner submitted that the project achieved CoD 16.08.2017, which is prior to the control period of the KSERC (Renewable Energy and Net Metering) Regulations, 2020 (RE Regulations, 2020). The control period of RE Regulation, 2020 is five years from FY 2019-20

- (d) **Non applicability of guidelines for tariff based competitive bidding for procurement of power from grid connected wind power projects**

- issued by minister of power on 08.12.2017.

The Petitioner submitted that the project is not in response to any Tariff based Competitive bidding. Moreover, this project achieved CoD on 16.08.2017, which is much prior to 08.12.2017.

(e) Non applicability of Kerala State Electricity Regulatory Commission (Renewable Energy) Regulations, 2015:

The Petitioner submitted that, the project achieved CoD on 16.08.2017 and the Control Period of the (Renewable Energy) Regulations, 2015 commences from 01.04.2012 and continues till 31.03.2017(Regulation 18). Since the project achieved CoD after the Control Period of the (Renewable Energy) Regulations, 2015, the same is not applicable in this project.

(f) Observations made by this Hon'ble Commission in its Order dated 03.10.2018 passed in O.P. No.08 of 2017 while determination of project specific tariff in the present case:

The Petitioner submitted that the Respondent has, while seeking incorporation of new and additional clauses in the TPPA, completely ignored the observations of the Commission while determining the tariff of the project vide Order dated 03.10.2018 in O.P. No.08 of 2017.

(g) Applicability of CERC (Terms and conditions for tariff determination from renewable energy sources) Regulations, 2017.

The Petitioner submitted that project achieved CoD on 16.08.2017 and hence as stated by the Commission CERC (Terms and conditions for tariff determination from renewable energy sources) Regulations, 2017 is applicable.

The Petitioner further submitted that there is no provision in the CERC (Terms and conditions for tariff determination from renewable energy sources) Regulations, 2017 for the adjustment of Tariff based on actual CUF. Further, the Commission, in the Order dated 03.10.2018 has also not specified such condition for re-determination of tariff based on tariff.

11. The Respondent, KSEB Ltd on 12.11.2021, submitted their submission and its summary is given below:

- (1) KSEB Ltd submitted that, as per Regulation 18(3) of the KSERC (Renewable Energy) Regulations, 2015, continued in force till notification of KSERC (RE) Regulations, 2020. Hence the RE Regulation, 2015 is applicable for M/s INOX, since their CoD is 16.08.2017.
- (2) As per the report of the National Institute of Wind Energy (NIWE) Chennai, the wind power density at 80m hub height is 278 W/m². The CUF corresponding to this wind density is 28%.
- (3) KSEB Ltd further submitted that based on the generation details of the plant for the last three years, the annual CUF of the plant is found to be

in the range of 25% to 27%. The details are given below:

Period	Total units purchased	CUF
2018-19	38149760	27.22
2019-20	37209760	26.55
2020-21	35764160	25.52

The Regulation 22(3) of the RE Regulations, 2020 permits for re-determination of tariff based on actual CUF provided the actual CUF varies more than 10% from the normative CUF.

- (4) In the guidelines issued by the Ministry of Power on 08.12.2017, clause 7.2.3 provides that, the excess generation need be paid only at 75% of the PPA tariff. This is also stipulated in Regulation 11 of CERC (Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020

KSEB Ltd therefore submitted that, tariff redetermination provisions as per the KSERC regulations and the treatment of over generation as per MoP guidelines are to be included in the TPPA. KSEB Ltd also added that, it is interested in entering into Triparty Agreement only after completing the legal formalities and after obtaining sanction from Govt of Kerala for the amendment of the land lease agreement assigned to the new assignee M/s Inox Wind Energy Ltd.

12. The sixth hearing on the petition is conducted on 16.02.2021. Adv. Mayank Bugani, presented the issues on behalf of the petitioners and Smt. Latha.S.V, presented the comments of KSEB Ltd. Both the parties repeated the same arguments as in the written submissions dated 09.11.2021 and 12.11.2021. The parties additionally submitted the following.

- (i) M/s Inox Wind Energy Ltd submitted that, KSEB Ltd is insisting the change in CUF for this project only, whereas in case of other projects in the State, the licensee is not insisting for the same. M/s Inox Wind Energy Ltd had accepted and incorporated all the changes according to the Daily Order dated 26.05.2021 of the Commission and requested before the Commission for the approval of TPPA.
- (2) KSEB Ltd submitted that, the project was commissioned in 16.08.2017 that is in the year 2017-18. The Commission had determined the tariff by adopting a CUF of 22%. The applicable regulation at that point of time is RE Regulation 2015. From the generation details from 2018-19 to 2020-21 the actual CUF ranges from 25.2% to 27.2%. In light of this finding, KSEB Ltd put forward the request for the redetermination of tariff by considering the actual CUF.

Analysis and Decision of the Commission

13. The Commission has carefully examined the petition dated 12.03.2021 filed by M/s INOX along with M/s D J Malpani, written submissions of both petitioners and respondent, the deliberations during the hearings, the provisions of the Electricity Act, 2003, KSERC (Renewable Energy) Regulations, 2015 and other Rules and Regulations notified by the Commission, and decides the following:
14. The present petition dated 12.03.2021 was filed by M/s INOX Wind Energy Ltd for the approval of the Power Purchase Agreement to be signed between the licensee KSEB Ltd with the developer M/s INOX Wind Energy Ltd and the strategic investor M/s DJ Malpani. In this matter, the Commission noted the following.

- (1) The Commission vide Order dated 03.10.2018 and modified in Order dated 02.12.2019 in petition OP No. 08/2017 and RP 01/2019 had determined the tariff of the electricity generated from the 16MW Wind Power Plant at Kanjikode, Palakkad. The tariff was determined as per the Section 62 of the Electricity Act, 2003 and also duly considering the comments and objections of the KSEB Ltd.
- (2) During the deliberations of the petition OP No. 08/2017, KSEB Ltd vide its letter dated 29.11.2017 submitted that, the licensee had decided to purchase power from the project at the tariff and terms and conditions approved by the Commission. The relevant portion of the order dated 03.10.2018 is extracted below.

“ In compliance of the direction of the Commission, KSEB Ltd vide its letter dated 29-11-2017 submitted as follows;

‘KSEBL has decided to procure power from INOX at project specific tariff or generic tariff whichever is lower as approved by KSERC and as per terms and conditions of the PPA’.

- (3) The CoD of the project was on 16.08.2017. Since then, the power from the project is injected to the State grid. Though the formal PPA is yet to be signed by the licensee KSEB Ltd with INOX Wind Energy Ltd, but KSEB Ltd has been purchasing and making payments to the strategic investor at the tariff approved by the Commission, i.e. @ 4.09/kWh.

Considering these aspects in detail, the approval of the PPA by the Commission and signing the same in the stamp paper between the parties is a formal exercise only for regularizing the process of power purchase through a legally binding contract.

15. The PPA (here TPPA) between the generator/developer and the licensee is an

important legal document valid for a period of 25 years. In order to have a clarity on the various Clauses of the TPPA and to avoid ambiguities and legal disputes, the Commission had conducted a detailed examination of the various Clauses of the draft initialed TPPA and its details are given under **paragraph-4 of this Order**. The Commission vide the Daily Order dated 26.05.2021, had issued directions to the parties to modify the clauses of the draft initialed TPPA and submit the same before the Commission for formal approval.

16. However, during the subsequent hearings held on 22.06.2021, 13.07.2021 and 25.08.2021, the parties did not submit the modified draft initialed TPPA before the Commission. The petitioner and co-petitioner during the hearings submitted that, they had incorporated the observations of the Commission in the draft initialed TPPA and forwarded the same to KSEB Ltd to initial the same. But, KSEB Ltd is deliberately delaying the process.
17. Since KSEB Ltd did not initial the petitioner/co-petitioner initialled draft TPPA after incorporating the observations of the Commission, the fourth hearing on the petition was conducted on 25.08.2021. During the hearing, KSEB Ltd raised the following issues before the Commission for incorporation in the TPPA.

(1) **Issue No.1: Land lease agreement.**

KSEB Ltd submitted that the land lease agreement was signed between KINFRA and INOX Renewables Ltd (IRL) for allotting the land at KINFRA Park at Palakkad for developing the wind farm. However, M/s INOX Renewables Ltd (IRL) ceased to exist and all functions performed by IRL is assigned to the new company INOX Wind Energy Ltd by the parent company, Gujarat Fluorochemicals Ltd. However, the land lease agreement is yet to be assigned to the new assignee INOX Wind Energy Ltd.

(2) **Issue No.2: Capacity Utilisation Factor (CUF)**

KSEB Ltd raised the issue that, the Commission had determined the tariff of the 16MW wind project by adopting the CUF of 22%. However, the actual annual CUF, since the date of commissioning in the year 2017 is more than 27%. As per the KSERC (Renewable Energy) Regulations, 2015 and KSERC (Renewable Energy & Net Metering) Regulations, 2020, the tariff may be re-determined with the actual CUF.

KSEB Ltd further submitted that, Regulation 18(3) of the KSERC (Renewable Energy) Regulations, 2015, continued to be in force till the notification of KSERC (RE) Regulations, 2020. Hence, the RE Regulation, 2015 is applicable for M/s INOX, since their CoD is on 16.08.2017.

(3) **Issue No.3: Reduced tariff for the generation in excess of the normative CUF adopted for tariff determination.**

KSEB Ltd pointed out that, as per the present tariff order, the excess generation over the normative CUF of 22% is also charged at the

levelized tariff determined by the Commission with the normative CUF of 22%.

In the guide lines issued by the Ministry of Power on 08.12.2017, clause 7.2.3 provides that, the excess generation need be paid only at 75% of the PPA tariff. This is also stipulated in Regulation 11 of CERC (Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020. KSEB Ltd requested to incorporate a provision in this regard in the TPPA.

18. On the new issues raised by the KSEB Ltd, the petitioner M/s INOX Wind Energy Ltd and the co-petitioner M/s DJ Malpani submitted the following.

(1) Issue No.1. Land lease agreement

M/s INOX, submitted that, it had taken the necessary steps for changing the entity from INOX Renewables Ltd to INOX Wind Energy Ltd. M/s INOX had already shared the various correspondences issued to Kerala Industrial Infrastructure Development Corporation with the Respondent.

The petitioner further submitted that the change in the entity from Inox Renewables Ltd to INOX Wind Energy Ltd., in the Lease Agreement, is not a concession which is being sought by the Petitioner, rather it is a legal consequence of the Order dated 25.01.2021 passed by the Hon'ble National Company Law Tribunal, Ahmedabad. The said Order has a force of law and is therefore required to be implemented as per the law of the land.

(2) Issue No.2: Capacity Utilisation Factor (CUF)

The Petitioner submitted that the project achieved CoD 16.08.2017, which is prior to the control period of the KSERC (Renewable Energy and Net Metering) Regulations, 2020 (RE Regulations, 2020). The control period of the RE Regulation 2020 is five years from the FY 2019-20.

The petitioner further submitted that, the provisions of the early KSERC (Renewable Energy) Regulations, 2015 also not applicable since the control period of this Regulations is applicable from 01.04.2012 to 31.03.2017 only. The CoD of the project was on 16.08.2017, which is after the expiry of the control period of the RE Regulations, 2015.

The petitioner also submitted that, in the absence of a valid Regulation issued by KSERC, as per Regulation of 17 of RE Regulation, 2015 the provisions of CERC (Terms and conditions for Tariff determination from Renewable energy sources) Regulations, 2017 is applicable for this project. There is no provision in the CERC (Terms and conditions for Tariff determination from Renewable Energy sources) Regulations, 2017 for the adjustment of Tariff based on actual CUF.

(3) Issue No.3: Reduced tariff for the generation in excess of the

normative CUF adopted for tariff determination.

The Petitioner submitted that the project is not in response to any Tariff based Competitive bidding. Moreover, this project achieved CoD on 16.08.2017, which is much prior to 08.12.2017. Hence the question of applying the MoP guidelines for a project which achieved CoD at an earlier date is legally untenable and no Regulation can be retrospectively effected as seen from various pronouncement of various Courts of the Country.

19. The Deputy Chief Engineer appeared on behalf of KSEB Ltd during the hearing held on 16.02.2022 submitted that, it is interested in entering into the Triparty Agreement only after completing the legal formalities and after obtaining sanction from Govt of Kerala for the amendment of the land lease agreement assigned to the new assignee M/s INOX Wind Energy Ltd.
20. The Commission has examined the new issues raised by KSEB Ltd for incorporation in the TPPA, the arguments of the petitioner as per the provisions of the Regulations in force, and noted the following.
 - (1) Prima facie, the deliberations of the present petition is for the approval of an initialled TPPA between the KSEB Ltd with M/s INOX Wind Energy Ltd and M/s DJ Malpani. The initialled TPPA means, the parties to the agreement have mutually agreed to the various clauses of the TPPA and reached a consensus of the same. Once such an Agreement is reached, it is not open to the parties to propose modifications to the TPPA without the agreement of the other parties, once it is initialled by the parties. The Commission strongly disapproves such an approach of KSEB Ltd which amounts to changing the goal posts when the match is about to end.
 - (2) The Commission would also like to clarify that, KSEB Ltd had already submitted its written assurance that, KSEB Ltd shall purchase the power from the project at the tariff approved by the Commission. Further, as per the records, KSEB Ltd has been purchasing power from the project from the CoD since 16.08.2017, and making payments at the tariff approved by the Commission. A State Government owned utility KSEB Ltd cannot change its stand now and cannot prolong the signing of the TPPA citing one reason or other. Hence the stand taken by KSEB Ltd at this stage is neither correct nor justifiable and hence rejected.
 - (3) **Hence the Commission hereby direct that, the parties shall sign the TPPA after incorporating the observations of the Commission on the various clauses of the TPPA as detailed under paragraph-4 above.**
21. The Commission also examined the new issues raised by KSEB Ltd and the arguments of the petitioner M/s INOX on these issues and clarified the following.
 - (1) **Renewable Energy Regulations applicable for the project.**
The Commission had notified the KSERC (Renewable Energy)

Regulations, 2015 on 11.11.2015 (herein after referred as RE Regulations, 2015).

- (i) The Regulation 17(4) of the RE Regulation 2015, provide as follows.

“(4) Until separate principles, norms and parameters are specified by the Commission as above, the principles, norms and parameters specified by the Central Commission for the purpose of determination of tariff for the electricity generated from various categories of renewable sources of energy, as specified in the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2012, as amended from time to time, may be adopted by the Commission for the purpose of determination of tariff under these regulations.”.

As extracted above, the Regulation 17(4) of the RE Regulation, 2015, provides that this Commission can adopt the norms specified by the CERC for tariff determination provided separate norms are not available for the year under consideration.

- (ii) Regulation 18(3) of the RE Regulation, 2015 provide as follows.
“(3) On completion of every control period, the Commission may by notification, revise the norms for determination of tariff:

Provided that the norms for determination of tariff for electricity from renewable sources of energy, shall continue in force till they are revised.”

As above the Regulation 18(3) provides for continuance of the norms till the RE Regulations 2015 is revised by the Commission.

The Commission vide the notification dated 7th February 2020 notified the KSERC (Renewable Energy & Net Metering) Regulations, 2020 (RE Regulations 2020) and which was published in the official Gazette on 5th June 2020.

Considering all these aspects in detail, the Commission hereby clarify that, the provisions in the KSERC (Renewable Energy) Regulations, 2015 is applicable for the 16MW Wind Power Project of the petitioner.

- (iii) Provisions in the RE Regulation 2015 for revising the tariff once determined based on the actual CUF.**

“Regulation 22(3) The Commission may, on application from the generator or the purchaser of electricity from a renewable energy project, for which a project specific tariff has been determined under sub-regulation (1) above, revise such project specific tariff applicable to the said project and issue appropriate orders, in case the actual average capacity utilization factor for three consecutive years immediately following the date of commissioning of the said project varies due to site specific reasons, by more than ten percent of the capacity utilization factor adopted earlier for the determination of the project specific tariff applicable to that project.”

As above, the Regulation 22(3) of the RE Regulations, 2015 permits revision of the project specific tariff of an RE generator, subject to the following.

- (i) A petition has to be filed either by the generator or purchaser of electricity generator before the Commission for revising the project specific tariff already determined.
- (ii) The actual average capacity utilization factor for three consecutive years immediately following the date of commissioning of the said project varies due to site specific reasons, by more than ten percent of the capacity utilization factor adopted earlier for the determination of the project specific tariff.

But, in the present case, KSEB Ltd is yet to sign the formal TPPA with the developer M/s INOX and the co-developer M/s DJ Malpani. Hence, KSEB Ltd is required to first sign the TPPA with the petitioners, get it approved by the Commission and approach the Commission thereafter in this regard, if it so desires.

Moreover, for the re-determination of tariff, either of the parties, i.e., the generator or purchaser shall file a separate petition before the Commission with full supporting details. Once the petition is filed before the Commission by either of the parties, the Commission shall conduct deliberations including hearing, give sufficient opportunities for the parties to place their arguments before the Commission and only after completing all these procedures can the Commission take any decisions regarding the tariff issue.

But in the present case, KSEB Ltd is yet to sign the TPPA for purchasing power from the project, and hence they have no legal right to place the matter at this stage before the Commission. Further, KSEB Ltd has also not filed any petition before the Commission as per the Regulation 22(3) of the RE Regulations, 2015 for revising the tariff determined by the Commission vide the Order dated 03.10.2018.

Considering all these aspects in detail, the Commission is of the considered opinion that, KSEB Ltd shall, sign the TPPA agreement with the developer M/s INOX Wind Energy Limited and the co-petitioner M/s DJ Malpani, duly incorporating the observations of the Commission on various clauses of the TPPA as detailed in paragraph-4 above. Thereafter, KSEB Ltd, if they so desire, can file a separate petition for re-determination of tariff of the 16MW Wind Power Plant at Kanjikode as per Regulation 22(3) of the RE Regulations, 2020, with all supporting details.

Order of the Commission

22. The Commission, after examining the petition filed by M/s INOX Wind Energy Limited, comments of KSEB Ltd, written submissions of both petitioner and respondent, as per the provisions of the Electricity Act, 2003, KSERC (Renewable Energy) Regulations, 2015 and other Rules and Regulations in force, hereby orders the following.

- (1) Approve the draft Tripartite Power Purchase Agreement (TPPA) duly initiated by the petitioner M/s INOX Wind Energy Limited, co-petitioner M/s DJ Malpani and the Respondent KSEB Ltd with the modifications of the Commission cited under paragraph-4 above and with the following changes and conditions.
 - (i) The name of M/s INOX Renewables Ltd is permitted to change to M/s INOX Wind Energy Ltd.
 - (ii) M/s INOX Wind Energy Ltd shall execute an undertaking to the effect that KSEB Ltd shall be indemnified from any losses consequent to change in name in the lease agreement with KINFRA. The copy of the lease agreement shall be made available to the Commission and KSEB Ltd within 60 days of the date of its execution
- (2) KSEB Ltd shall sign the TPPA with the M/s INOX Wind Energy Limited, co-petitioner M/s DJ Malpani, within two months from the date of this Order.
- (3) A copy of the signed TPPA shall be submitted before the Commission for information and record.
- (4) After executing the TPPA, KSEB Ltd, if they so desire, can file a separate petition for re-determination of tariff of the 16MW Wind Power Plant at Kanjikode as per Regulation 22(3) of the RE Regulations, 2020, with all supporting details.

The petition is disposed of. Ordered accordingly.

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

Sd/-
Preman Dinaraj
Chairman

Approved for issue

Sd/-
C R Satheeshchandran
Secretary