

Kerala State Electricity Regulatory Commission
Thiruvananthapuram

Present : **Shri Preman Dinaraj, Chairman**
Shri K.Vikraman Nair, Member
Shri S.Venugopal, Member

OP No. 12/2018

In the matter of: Petition under section 86 (1) (f) of the Electricity Act, 2003 read with Article 36.4 of the Power Supply Agreement (PSA) dated 31.12.2014 for supply of 115 MW of Power to KSEBL seeking adjudication on the issue of reduction of Fixed Charges by KSEBL due to Station Heat Rate indicated by JPL as per the terms and conditions of PSA.

Petitioner : M/s. Jhabua Power Limited
6th Floor, Vatika City Point, Gurgaon

Respondent : Kerala State Electricity Board Limited
Vydyuthi Bhavanam, Pattom

Petitioner represented by : Sri. Parinay D Shah, Advocate
Sri. Roopam Bansal

Respondent represented by : Sri. K G P Nampoothiri, EE, KSEB Ltd
Smt. Sangeetha S, EE, KSEB Ltd
Sri Ajith Kumar G, DA, KSEB Ltd
Smt. Hema K, AEE, KSEB Ltd
Smt. Latha S V, AEE, KSEB Ltd

Order dated 06.06.2019

1. M/s. Jhabua Power Ltd (herein after referred to as the petitioner or JPL) filed a petition before the Commission on 03.07.2018 for adjudication of the dispute under Section 86 (1) (f) of the Electricity Act 2003 read with Article 36.4.1 of the PPA with following prayers.

- i. Consideration of Net SHR of 2347.9kCal/kWh for payment of Fixed Charge Rate since the start of supply of power under the PSA dated 31.12.2014.*
- ii. Allow JPL to recover entire withheld fixed charges along with carrying cost from KSEBL.*
- iii. Issue clarification regarding the applicability of Clause 3.2 of Schedule F of the PSA for Net SHR to be considered for the purpose of payment of Fuel Charge under Article 22 of the PSA*
- iv. Pass such further and other Order, as the Hon'ble Commission may deem fit and proper, keeping in view the facts and circumstances of the case.*

2. The Commission admitted the petition as OP No.12/2018 and heard the petition in detail on 15.11.2018. Based on the deliberations during the hearing and other documents and materials placed on record, the Commission vide the daily order dated 06.12.2018, has issued following directions to the petitioner JPL and the respondent KSEB Ltd.

- (i) The Commission clarified during the hearing that, since the SHR being a technical parameter, two different SHR cannot be accepted for the same unit of the plant.*
- (ii) M/s Jhabua Power Limited shall confirm whether the petitioner is agreeable to adopt the SHR of 2347.90 kCal/kWh for the payment of fixed charge and fuel charge as per the PSA dated 31.12.2014.*
- (iii) Whether the approval of the Board of Directors of KSEB Ltd has been obtained for adopting the SHR of 2347.90 kCal/kWh for payment of fixed charge and fuel charge, as decided in the meeting held on 31.10.2017 between KSEB Ltd and M/s Jhabua Power Limited. If so, a copy of the Board Order may be produced.*
- (iv) Whether KSEB Ltd has done any financial assessment resulting from (iii) above for the entire term of the PSA, by adopting the SHR of 2347.90 kCal / kWh?. If so, a copy of the same may be submitted to the Commission.*
- (v) Whether KSEB Ltd has done any financial assessment for the entire term of the PSA by adopting the SHR of 2465.20 kCal/kWh ?. If so, a copy of the same may be submitted to the Commission.*

3. In compliance of the daily order issued by the Commission, JPL filed its reply vide affidavit dated 18.12.2018 and KSEB Ltd on 05.02.2019 and the Commission was in the process of finalizing the order on the petition filed by them. In the meanwhile the petitioner, JPL, vide affidavit dated 14.01.2019,

requested the Commission for withdrawing the petition, citing a judgment of the Hon'ble Supreme Court dated 11.04.2017 in CA 5399-5400 of 2016, where in the Hon'ble Court has clarified the jurisdiction of the State Commissions on adjudicating the dispute between generator and distribution licensee as per Section 86 of the Electricity Act, 2003.

4. KSEB Ltd vide its letter dated 05.04.2019 has suggested that, the matter involved in the judgment of the Hon'ble Supreme Court dated 11.04.2017 in Energy Watchdog Vs CERC cannot be compared with the matter involved in the instant petition. The State Commission has ample jurisdiction to adjudicate up on the petition filed under Section 86 (1) (f) of the EA-2003 and hence the instant petition filed to withdraw the petition OP No. 12/2018 with liberty to file fresh petition before CERC is not maintainable and liable to be dismissed.

Analysis and Decision

5. The Commission examined the application filed by M/s JPL for withdrawing the petition OP No. 12/2018 and the judgment of the Hon'ble Supreme Court dated 11.04.2017 in CA 5399-5400 of 2016. The summary of the judgment of the Hon'ble Supreme Court dated 11.04.2017 is as follows,
 - (i) The issues raised before the Hon'ble Supreme Court was on the adjudication of dispute on the Power Purchase Agreement (PPA) signed between the DISCOMS of Gujarat and Haryana with the Generator M/s Adani Power Limited for procuring power as per Section 63 the Electricity Act, 2003 through competitive bid route as per the standard bidding guidelines notified by the Central Government.
 - (ii) In the said judgment, Hon'ble Supreme Court has examined the facts in detail regarding the jurisdiction of the State Commission and Central Commission in adjudicating the dispute between the generating companies and distribution licensees arising out of the Power Purchase Agreement signed under Section 63 of the Electricity Act 2003, the generator being selected under competitive bidding process as per the guidelines of the Central Government. The relevant portion of the judgment of the Hon'ble Supreme Court is extracted below.

“Jurisdiction of the Central Commission

20. The appellants have argued before us that the expression “composite scheme” mentioned in Section 79(1) must necessarily be a scheme in which there is uniformity of tariff under a PPA where there is generation and sale of electricity in more than one State. It is not enough that generation and sale of electricity in more than one State be the subject matter of one or more PPAs, but that something more is necessary, namely, that there must be a composite scheme for the same.

21. In order to appreciate and deal with this submission, it is necessary to set out Section 2(5) of the Act which defines appropriate Government as follows: "2. Definitions. In this Act, unless the context otherwise requires, (5) "Appropriate Government" means, - (a) the Central Government, - (i) in respect of a generating company wholly or partly owned by it; (ii) in relation to any inter-State generation, transmission, trading or supply of electricity and with respect to any mines, oil-fields, railways, national highways, airports, telegraphs, broadcasting stations and any works of defence, dockyard, nuclear power installations;

(iii) in respect of the National Load Despatch Centre; and Regional Load Despatch Centre; (iv) in relation to any works or electric installation belonging to it or under its control ; (b) in any other case, the State Government, having jurisdiction under this Act," Sections 25 and 30 also have some bearing and are set out as under : "25. Inter-State, regional and inter-regional transmission. For the purposes of this Part, the Central Government may, make region-wise demarcation of the country, and, from time to time, make such modifications therein as it may consider necessary for the efficient, economical and integrated transmission and supply of electricity, and in particular to facilitate voluntary interconnections and co-ordination of facilities for the inter-State, regional and inter-regional generation and transmission of electricity. 30. Transmission within a State. The State Commission shall facilitate and promote transmission, wheeling and inter-connection arrangements within its territorial jurisdiction for the transmission and supply of electricity by economical and efficient utilisation of the electricity."

22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in sub-clauses (a), (b), and (d), and "intra-state" in sub-clause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State.

23. This also follows from the dictionary meaning [(Mc-Graw-Hill Dictionary of Scientific and Technical Terms (6th Edition), and P.Ramanatha Aiyar's Advanced Law Lexicon (3rd Edition)] of the expression "composite":

(a) 'Composite' – "A re-recording consisting of at least two elements. A material that results when two or more materials, each having its own, usually different characteristics, are combined, giving useful properties for specific applications. Also known as composite material."

(b) 'Composite character' – "A character that is produced by two or more characters one on top of the other."

(c) 'Composite unit' – "A unit made of diverse elements."

The aforesaid dictionary definitions lead to the conclusion that the expression "composite" only means "consisting of at least two elements". In the context of the present case, generation and sale being in more than one State, this could be referred to as "composite".

24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a "composite scheme". This makes it clear that the expression "composite scheme" does not have some special meaning – it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.

25. We must also hasten to add that the appellant's argument that there must be commonality and uniformity in tariff for a "composite scheme" does not follow from the Section.

26. Another important facet of dealing with this argument is that the tariff policy dated 6th June, 2006 is the statutory policy which is enunciated under Section 3 of the Electricity Act. The amendment of 28th January, 2016 throws considerable light on the expression "composite scheme", which has been defined for the first time as follows:

"5.11 (j) Composite Scheme: Sub-section (b) of Section 79(1) of the Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State. Explanation: The composite scheme as specified under section 79(1) of the Act shall mean a scheme by a generating company for generation and sale of electricity in more than one State, having signed long-term or medium-term PPA prior to the date of commercial operation of the project (the COD of the last unit of the project will be deemed to be the date of commercial operation of the project) for sale of at least 10% of the capacity of the project to a distribution licensee outside the State in which such project is located."

27. That this definition is an important aid to the construction of Section 79(1) (b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in

respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”

As extracted above, Hon'ble Supreme Court in the above judgment has held that the State Commission have jurisdiction only where Generation and Supply takes place within the State, otherwise the Central commission has the authority to adjudicate upon the dispute as per the Section 79 (1) (f) of the Electricity Act, 2003.

6. The Commission also noted the judgment of the Hon'ble Appellate Tribunal (APTEL) dated 31.10.2018 in Appeal No. 230 of 2017 which was issued subsequent to the judgment of the Hon'ble Supreme Court dated 11.04.2017. This judgment of the Hon'ble APTEL, is on the appeal petition filed by M/s KSK Mahanadi Power Company Limited (herein after referred as M/s KSK Ltd) against the order of the APERC dated 28.09.2016 in adjudicating the dispute arising out of PPA signed between the petitioner therein and DISCOMS of Andhra Pradesh.

The Petitioner M/s KSK Ltd, a generator situated in the State of Chhattisgarh, was selected by the DISCOMS of Andhra Pradesh under Section 63 of Electricity Act, 2003 for procuring power, in the competitive bidding route, as per the guidelines notified by the Central Government. The PPA between DISCOMS of Andhra Pradesh and M/s KSKMPCL was signed in 31.07.2012 and in earlier case, the dispute between M/s KSK Ltd and DISCOMS of Andhra Pradesh was adjudicated by the APERC only. M/s KSK Ltd on 31.05.2014, approached before the APERC for adjudicating another dispute between them and the AP DISCOMS, arising out of the PPA signed between them. However, subsequent to the Full bench judgment of the Hon'ble APTEL dated 07.04.2016 in Appeal No 100/2013, M/s KSK Ltd made an application for withdrawing the petition filed before the APERC and preferred a petition before CERC on the same issue. However, the APERC on 28.09.2016, decided on the matter, opining that it has jurisdiction over the matter. Aggrieved by the order of the APERC, the filed the Appeal Petition No. 230 of 2017 before the Hon'ble APTEL. However Hon'ble APTEL in the Judgment dated 31.10.2018 held that, in view of the judgment of Hon'ble Supreme Court dated 11.04.2017, the State Commission has jurisdiction only where Generation and Supply takes place within the State (Intra-State). Accordingly held that CERC only have jurisdiction to adjudicate upon the dispute arising out of PPA signed by the Generator M/s. KSK Ltd and DISCOMS of Andhra Pradesh.

7. In the present case, M/s Jhabua Power Limited has been supplying 115 MW power from the unit No 1 of (600 MW), of the 1260 MW Plant located in Seoni district, in Madhya Pradesh. As per the details submitted, the petitioner also has PPA with distribution utilities of Madhya Pradesh for supplying power from the same unit.
8. Though M/s. Jhabua Power Limited has an independent PPA with KSEBL arising out of a separate bidding process under Section 63 of Electricity Act, 2003, the generator has been supplying power to utilities in more than one State. In light of the judgment of Hon'ble Supreme Court, the Commission is of the view that though the PSA is approved by this Commission, and the power was purchased exclusively for the supply within the State of Kerala, the CERC have jurisdiction to adjudicate upon the dispute arising in the PPA signed by M/s. Jhabua Power Limited and KSEB Ltd. on 31.12.2014.
9. Considering the judgment of the Hon'ble Supreme Court dated 11.04.2017 in CA No. 5399-5400 of 2016, and other provisions of the Electricity Act, 2003, the Commission here by permits M/s Jhabua Power Limited to withdraw the petition OP No.12/2018, dated 03.07.2018, filed under Section 86 (1) (f) for adjudicating upon the disputes between KSEB Ltd. and the petitioner on the PPA entered into on 31.12.2014.

Petition disposed of accordingly.

Sd/-
K.Vikraman Nair
Member

Sd/-
S.Venugopal
Member

Sd/-
Preman Dinaraj.
Chairman

Approved for issue

G Jyothichudan
Secretary