

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

Present: Shri. Preman Dinaraj, Chairman

Review Petition No. RP 5/2020

- In the matter of : Petition filed by M/s Viyyat Power Pvt Ltd, for reviewing the order dated 28.4.2020 in OA No 30/2019 for determination of Compensatory Tariff for rehabilitation of Iruttukanam Small Hydro Power Project Stage I (2 X 1.5) MW and Stage II (1 X 1.5) MW destroyed in the MahaPralayam on the 9th August and 14th August 2018.
- Petitioner : M/s. Viyyat Power Pvt Limited.
- Petitioner represented by : 1. Sri. Adv. C. K. Vidyasagar
2. Smt. S. Syamala Nair, Chairperson, Viyyat Power Pvt Ltd
3. Sri. P.D. Nair, Managing Director, Viyyat Power Pvt Ltd
- Respondent : 1. Kerala State Electricity Board Limited
2. Government of Kerala
3. Energy Management Centre
- KSEB Ltd represented by : 1. Sri. K.G.P. Nampoothiri, EE, KSEB Ltd
2. Smt. Latha S V, AEE, KSEB Ltd

Order dated 15.10.2020

1. M/s Viyyat Power Private Ltd (hereinafter referred to as the petitioner or M/s VPPL), on 15.06.2020, filed a review petition before the Commission against the Order of the Commission dated 24.04.2020 in Petition OA No. 30/2019. The prayer in the petition is as follows:

“On these and other grounds to be allowed to be urged at the time of hearing it is humbly prayed that the Hon. KSERC may be pleased to Review the order dated 24.04.2020 and set aside the same and post the case for further enquiry and rehearing in the interest of justice”

2. The Order of the Commission dated 24.4.2020 was issued upon the petition filed by M/s. VPPL , on 17.09.2019, with the following prayers.

“ Considering the fact that the Petitioner has rehabilitated the power project Stage I & II against heavy odds in a record time of 322 days after the disaster with almost all new equipments including new generators by spending an additional investment of Rs. 9,69,34,511.80 over and above the insurance cover benefit of Rs. 8.00 Crore, the petitioner humbly prays for the following.

- (i) *The Hon’ble Commission may be pleased to pass on order granting an additional “Compensatory Tariff” for Stage I and Stage II, commensurate with the new investment made by the petitioner as done by the Hon’ble CERC in Order dated 21.02.2014 in the case of Petition No. 155/MP/2012 of Adani Power Limited Vs. Uttar Haryana Bijli Vidyut Nigam Limited and Others.*
- (ii) *Any other Order the Hon’ble Commission may be pleased to deem fit considering the fact that the tariff of Iruttukanam Stage I and Stage II of the Petitioner as existing before the disaster, are much below the APPC of KSEBL and if the Petitioner had abandoned the project after the disaster, KSEBL has to purchase the same measure of power from elsewhere at the rate above APPC’.*

The Commission, after detailed deliberations including public hearing, vide the Order dated 24.4.2020 ordered as follows.

- (1) *The request of the petitioner to grant additional compensatory tariff for Iruttukkanam Stage-I and Stage-II is rejected, due to the reasons detailed in the preceeding paragraphs.*
- (2) *The petitioner may, approach the State Government, who allotted the project to the Company, to extend the BOOT period if the petitioner so desires.*
3. Grounds raised by the petitioner in the petition dated 15.06.2020 to review the Order dated 24.04.2020 in Petition OA No. 30/2019 is summarized below.
- (1) The Commission lost sight of the crass reality that, the petitioner could have legally terminated the agreement by proceeding under Article 6.5 of the Implementation Agreement grabbing whatever insurance amount obtainable, in which event the State would have been burdened to invest huge amounts to the tune of 17.97 Crores to rehabilitate the project and that by the tremendous endeavour of the Review petitioner company, the State and the KSEB Ltd stands to gain considerably, for on the termination of the BOOT period the project in running condition with replaced new generators and other machinery is going to vest with them.

(2) The argument that the petitioner got immense gain due to the delay in implementing the Sengulam Augmentation scheme, is not correct due to the following reasons:

- (i) The project cost was gone up from Rs 12.00 crore in the Detailed Investigation Report (DIR) to Rs 19.34 crore at the time of truing up. (61.20% increase over approved cost)
- (ii) The petitioner has been making use of the additional flow, first by overloading the machines of Stage-1 by 20% and second by going for Stage-II expansion, compensating the increase in cost.
- (iii) The increase in project cost was not due to the fault of the petitioner, but due to the delay in approving the tariff by KSERC and later the delay that occurred in the Government sanction for the same.
- (iv) By making use of the additional generation, the petitioner could avoid insolvency.
- (v) The petitioner also produced audited accounts upto the FY 2017-18.
- (vi) State of Kerala through its Power Secretary, practically acceded to the genuine needs of the petitioner, for the State and never raised any objection in the matter at all.
- (vii) KSERC has violated the principles of natural justice and fair procedure by relying upon the calculations projected at Page 41 and 42 of its Order, rendering the Order dated 24.04.2020 illegal and unsustainable.

4. The Commission admitted the petition as RP 5/2020 and heard on 5.8.2020. Adv. Vidyasagar, counsel of the petitioner, presented the petition on behalf of the petitioner company. The arguments put forward by the counsel are summarized below:

- (i) The petitioner presumed that the petition for compensatory tariff is rejected mainly on the ground that the Commission is misled by the erroneous assumption that the petitioner obtained a windfall of Rs 12.36 Cr by virtue of the delay in the implementation of Sengulam Augmentation Scheme.
- (ii) Further, as per Electricity Act 2003, the Commission has got ample powers to determine the tariff of the generating company. It is not an arbitrator, but a regulator empowered not only fix tariff, but to reopen the tariff, if required in the interest of licensee, consumer or generator.

- (iii) A small company like Viyyat could have walked away with the insurance amounting to Rs 9 Crore, but the promoters choose to rehabilitate the same, benefitting the State. The petitioner company is the only one successful developer out of 13 projects allotted to various developers by Government of Kerala. With the additional investment due to flood, the Company cannot achieve break even without a compensatory tariff. Only with the commendable entrepreneurship of the petitioners, the project materialized. Same effort led to the fast rehabilitation process. The petitioners have received tremendous applause from different quarters.
 - (iv) Regarding the additional water availability due to delay in Sengulam Augmentation Project of KSEB Ltd, the petitioner submitted that by the time the Viyyat project was established, the interest rates increased from 9% to 13% and the capital cost from Rs 12 Cr to 19.5 Cr from the date of allotment. Without the additional water availability, the company would have become insolvent.
 - (v) The whole issue was a result of force majeure event and the company notified the event to the concerned authorities in time as per provisions contained in the Implementation Agreement and Power Purchase Agreement (PPA). Further, Energy Management Centre vide its letter dated 22.5.2019 has stated that it is a “genuine case” and requested to grant tariff at prevailing rates. KSEB Ltd submitted that extension of BOOT period is not under their authority and State Government is the appropriate authority to take decision.
 - (vi) It seems that the Commission is influenced by the perception that the petitioner company obtained high profit due to increased water availability due to delay of Sengulam project. The Company could give only 7.28 % dividend to its share holders, whereas the industry norm is 16% RoE. The financial statements from the date of commissioning is submitted for perusal of the commission. Had the project been abandoned by the company, KSEB Ltd could have incurred Rs 14.00 crore for taking over the project and reconstructing it.
 - (vii) The State Government and the Commission may consider the grievance of small companies like Viyyat without putting it into bureaucratic red tape.
5. Sri P D Nair, Managing Director of the Company made a detailed presentation on the subject matter.
- (i) As per the Detailed Investigation Report, the project cost expected was Rs 12 Cr, and as per Techno Economic Feasibility Report, the same was Rs 13.48 Cr and finally the cost of completion was Rs 19.5 Cr. The major cause for increase in cost is on account of increase in interest rate from 9% to 13% and also 33 months of delay which is not attributable to the Company. The delay occurred due to;

- (a) Delay in getting Tariff Approval From KSERC = 15 months
- (b) Time taken for Additional Govt Approval of draft PPA = 6 months
- (c) 14 Court Cases – One in Supreme Court 2 in High Court, 11 in Lower Courts,

Court Intervention delays = 12 Months

Total Delays = 33 Months

- (ii) With the original design energy of 11.92 MU, the company could not achieve break even and would have been at a total loss. With the increased cost, the breakeven generation point must be at least 19.42 MU, which is impossible to achieve. A tariff below cost of generation will doom the project. To overcome this to some extent, the company ordered generators with 20% overloading capacity in the plant.
- (iii) On 31.03.2010, a few months before commissioning of the project a Truing Up Petition was filed for truing up the project cost and tariff before the Commission, but was rejected vide Order dated 02.11.2010. As a solution to save the company from insolvency, the company decide to go for expansion of 1.5 MW, in addition to the 3 MW originally proposed.
- (iv) The Commission vide Order dated 30.09.2011 in OP 20/2011, while determining the tariff of the increased capacity of 4.5 MW, decided as follows;
 - 5.1. The rates applicable for the first 11.92 MU shall be the tariff arrived at through the bidding route ie. 240 paise per unit*
 - 5.2. The rates applicable for the next 3.87 MU shall be the tariff fixed by the Commission: 294 paise per unit.*
 - 5.3. The generation in excess of the above shall be divided in the ratio 11.92:3.87 and the above two tariffs applied for the respective quantities.*
- (v) Hence even the so called excess generation of 45.26 MU is below the BEP (Break Even Point) and hence there is no excess generation at all. Further, the Commission had not called for these data from KSEB Ltd during hearing or in daily order dated 28.2.2020. Since these data have been considered after the hearing, the petitioner did not get an opportunity to explain these facts before the Commission.
- (vi) Thus what is appearing on Page 41 and 42 of the Order dated 24.04.2020 are only half truths and hence the Order needs to be amended. The fact is that there is no excess generation and the so called excess generation was well below the BEP generation of 22.01 MU. It can be seen that the total cumulative generation is less than the total cumulative BEP Generation by 0.54 MU.
- (vii) The petitioner works out the compensatory tariff as Rs 1 per unit as the minimum for survival.

6. Sri K G P Nampoothiri representing KSEB Ltd submitted that, KSEB Ltd reiterates the stand taken in the original petition. It is pointed out that the project is selected and awarded by the State Government through tariff based bidding. The Company has entered into an Implementation Agreement with the State Government for the implementation of the project. The Commission cannot re-determine the tariff of the project as prayed by the petitioner. Detailed comments of KSEB Ltd on the petitioner shall be submitted immediately. There is no provision either in the Electricity Act or Regulations in support of redetermination of tariff for a project selected through competitive bidding.
7. Smt. Syamala Nair, Chairperson of the company submitted before the Commission that the project was established and maintained like a child of their own. The project was totally destroyed in the floods of 2018. With the wholehearted involvement of the employees and all others concerned, the project could re-commission within 322 days. The project is as good as a new project. The power house is totally new leading to an extended life. As such, the Government or KSEB Ltd will not have any loss in allowing a compensatory tariff. In fact they stand to gain. On the other hand, if a reasonable cost is not recovered, the Company may go to heavy loss and the shareholders/ promoters will be in trouble for no fault of theirs, but for having done a remarkable contribution by re-establishing the project. She therefore prayed for the intervention of the Commission to extend justice.
8. Based on the deliberations during the hearing, the Commission, vide daily order dated 20.08.2020 directed the petitioner M/s Viyyat Power Limited and the respondent KSEB Ltd the following.
 - (i) *KSEB Ltd shall submit its detailed comments on the petition on or before 19th August 2020, with a copy to the petitioner*
 - (ii) *The Petitioner shall submit the counter arguments, if any, on or before 27th August 2020, with copy to KSEB Ltd.*
9. KSEB Ltd vide its submission dated 20.8.2020 submitted its comments and its summary is given below.
 - (1) Maintainability of the petition

The petition is not maintainable in view of the following:

 - a) *The petition filed by the petitioner is in the nature of a 'review petition' for reviewing the order dated 24-4-2020 in OA 30/2019.*
 - b) *It is submitted that review under Civil Procedure Code is permissible only on the following grounds. (a) Discovery of new and important*

matter or evidence which after exercise of due diligence was not in the knowledge of the applicant and could not be produced by him at the time when decree or order was passed. (b) Some mistake or error apparent on the face of the record.

- c) *There has been no discovery of new and important matter since the issue of the order dated 24-4-2020. Further, the argument raised by the petitioner cannot be treated as an error apparent in the order of Hon'ble Commission.*
- d) In view of the above, it is submitted that the instant petition is not maintainable and it is humbly requested that the petition may be dismissed.

(2) KSEB Ltd, without prejudice to the above, submitted the following for the consideration of the Commission:

(i) Benefit to the petitioner due to delay in implementing the Sengulam Augmentation scheme.

Due to delay in commissioning of Sengulam Augmentation Scheme there was an excess generation of 35.56 MU from Stage-1 and 9.70 MU from Stage-2 for these years with an the additional revenue of 12.45 Cr. The petitioner on its own, opted for installing overload capacity machines considering the catchment area of Sengulam Augmentation Scheme. Moreover, the Supplementary IA signed on 22-9-2011 specifically state that the Company will not have any claim over the water from the catchment stream of the proposed diversion weir of the Sengulam Augmentation Scheme and will not make any claim on account of that in future.

(ii) Contentions on the higher capital cost for the project

Vide the order dated 21.06.2004, the State Government allotted the Iruttukanam SHP (3MW) to the petitioner as an IPP for implementation through BOOT basis. The petitioner was selected by the Government through competitive bidding route and the petitioner ought to have quoted the rates ensuring cost recovery plus a return, with the design energy of 11.92MU.

However, actually the generation from the project was much above the design energy (around 22.50MU) due to the water from the catchment area of Sengulam Augmentation Scheme. Since the entire cost recovery of the project along with RoE is ensured by the petitioner with the quoted tariff and design energy of 11.92MU, additional generation over and above the design energy from the project has benefitted the petitioner. As per the balance sheets attached, the petitioner had profit after tax of Rs.14.07 Cr for the period from 2011-12 to 2017-18 as submitted below.

Year	Profit after Tax (Rs. Cr)
2011-12	1.3331
2012-13	1.4949
2013-14	3.0751
2014-15	1.6368
2015-16	2.3924
2016-17	1.3280
2017-18	2.8072
Total	14.0675

There is no process of re-determination of tariff or truing up in case of tariff discovered through bid process and the petitioner is not eligible to claim any enhancement of tariff over and above the quoted rate.

(iii) 'Break even analysis' furnished by the petitioner

There is no concept of analyzing the breakeven of a project and re-fixing the tariff in a regulatory regime as well as under competitive bidding route.

(iv) Whether Regulator can re-determine the tariff discovered through a bid process

The Petitioner has claimed that Commission has the powers to re-determine the tariff discovered through a bid process. The contention of the Petitioner that Commission can re-determine the tariff discovered through a bid process is contrary to the provisions of the Act as well as the provisions in the Implementation Agreement and PPA.

(v) "Compensatory Tariff" for Stage-1 and Stage-2

Regarding the compensatory tariff, KSEB Ltd submitted that,

- a) The claim of the petitioner is against the provisions in the Implementation Agreement signed by the Petitioner with GoK and the PPA signed by the Petitioner with KSEBL. Clause 6.6 of the Implementation Agreement is extracted below:

"6.6 Liability for other losses, damages etc.

Save and except as expressly provided in this Article 13, no party hereto shall be liable in any manner whatsoever to the other party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure event."

- b) The same provision exist under clause 13.6 of the PPA which states the following:

"13.6 Liability for other losses, damages etc.

Save and except as expressly provided in this Article 13, no party hereto shall be liable in any manner whatsoever to the other party in respect of

any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure event.”

- c) Thus as per the above provisions of the IA and PPA, KSEBL shall not be liable in any manner whatsoever to the Petitioner in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure event.
- d) As per clause 5.6 of the IA signed by the petitioner with GoK, the Petitioner shall at their cost and expense, purchase and maintain by re-instatement or otherwise, during the operation period insurance against:
 - a. Loss, damage or destruction of the project facilities, at replacement value
 - b. The Company’s general liability arising out of the project.
 - c. Liability to third parties
 - d. Fire Protection Coverage insurance
 - e. Any other insurance that may be necessary as per prudent utility practices to protect the Company, its employees and its assets against loss, damage, destruction, business interruption or loss of profit including insurance against all Force Majeure events that are insurable.
- e) The above clause is incorporated under clause 10.1 of the PPA also. The relevant clause of the PPA is extracted below:

“10.1 Insurance:

The Company shall at its cost and expense, purchase and maintain by re-instatement or otherwise, during the Operations period insurance against:

 - (i) Loss, damage or destruction of the project facilities, at replacement value*
 - (ii) The Company’s general liability arising out of the project.*
 - (iii) Liability to third parties*
 - (iv) Fire Protection Coverage insurance*
 - (v) Any other insurance that may be necessary as per prudent utility practices to protect the Company, its employees and its assets against loss, damage, destruction, business interruption or loss of profit including insurance against all Force Majeure events that are insurable.”*
- f) Thus as per the above provisions of the IA and PPA, the petitioner is required its cost and expense to purchase and maintain by re-instatement or otherwise, during the Operations period, insurance against Loss, damage or destruction of the project facilities, at replacement value. Therefore, the petitioner was obliged to take insurance coverage at replacement value and replacing the plant and machinery and other facilities destroyed by flood has to be through insurance.

- g) It is further submitted that the investment made by the petitioner was unilateral without consulting the beneficiary respondent. It is also submitted that the petitioner did not approach the Hon'ble Commission for 'in principle' approval for the huge capital expenditure.
- h) It is further submitted that the Petitioner has not followed the due procedures as per the provisions of the IA and PPA in dealing with the force majeure event. The period of force majeure event had prolonged for nearly 322 days and as per clause 13.5 of the PPA, the petitioner was entitled to approach the Government of Kerala to terminate the agreement. Clause 12.5 of the PPA is extracted below:

"13.5 If a Force Majeure event which is a nonpolitical event continues or is in the reasonable judgment of the parties likely to continue beyond a period of 120 days or a political force majeure event subsist for a period exceeding 365 days, the following shall apply:

- (a) If the Board is the aggrieved party, it shall approach the Government*
(b) If the Company is aggrieved party, article 6.5 of Implementing Agreement shall apply."

However, without following the above procedure, the petitioner claims to have invested a huge amount in their project without obtaining the consent of Beneficiary, KSEBL, the State Government, or the approval of Hon'ble Commission.

10. The petitioner submitted its rejoinder on 27.08.2020 against the counter argument of KSEB Ltd, and its summary is given below.
- (i) Regarding maintainability, the petitioner is of the opinion that, the decision to reject the petition was on the myth of additional revenue of Rs 12.45 Cr to the petitioner. Since the myth is now explored and facts brought to the Commission, the petition is maintainable.
 - (ii) The cost of generation went to Rs 3.57/unit from the estimated cost of Rs 2.22/unit due to increased cost of the project. Only when the expansion project commissioned, the cost / unit come down to Rs 2.56/unit and the project became financially viable. The so called excess generation is below breakeven point.
 - (iii) The bids were invited by GoK before the enactment of Electricity Act 2003 and hence Section 63 is not applicable.
 - (iv) Regarding profit after tax of Rs 14.07 Cr, the amount along with depreciation fund has been used repayment of loan.
 - (v) The petitioner has not requested for redetermination of tariff, but only requested for a compensatory tariff for the additional investment made due to an unnatural event.
 - (vi) The Commission has authority to decide the compensatory tariff without the consent of KSEB Ltd as per the judgment of Hon. Supreme Court Judgement on Civil Appeal No 5875 of 2012 and 1973-1974 of 2014. The petitioner extracted the portion of judgment as follows;

“1. Is the tariff fixed under a PPA (Power Purchase Agreement) sacrosanct and inviolable and beyond review and correction by the State Electricity Regulatory Commission which is the statutory authority for fixation of tariff under the Electricity Act, 2003 (hereinafter for short ‘the Act’). This is the short question that arises for determination in the present appeals.”

.....
4. In the case of Junagadh Power Projects Pvt. Ltd. the learned Appellate Tribunal even went to the extent of holding that if in the changed scenario occasioned by a drastic alteration of the facts and circumstances surrounding the determination of tariff, a review is declined/refused the power producer will be left with no option but to shut down its plants. Therefore, a review of the tariff in exercise of the statutory power vested in the State Regulatory Commission would be fully justified. It is the correctness of the aforesaid view that has been assailed in the present appeals under Section 125 of the Act.”

.....
“7. On the other hand, on behalf of the power producers it is argued that determination and fixation of tariff are instances of the exercise of the statutory powers of the State Regulatory Commission under Section 62 read with Section 86(1)(a) of the Act. The mere incorporation of the tariff in a PPA between the generating company and the distribution licensee would not make the tariff a consensual decision by and between the contracting parties which, can only be altered by the Commission with the mutual consent of the parties.”

.....
10.....“In the present case, admittedly, the tariff incorporated in the PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers. In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. Rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved.”

- (vii) GoK, vide letter dated 05.04.2011 has recognized the fact that the allotment was not strictly in accordance with the guidelines issued by the Central Government, since the entire process except the allotment was started and completed before the enactment of the Electricity Act 2003. Hence Section 63 is not applicable.
- (viii) Had the company taken away the insurance payment received as per the Power Purchase Agreement (PPA) / Implementation Agreement (IA) and abandoned the project, the cost to KSEB Ltd in rehabilitating the project would have been Rs 18 Crores, which is enough to provide a compensatory tariff of Rs 1.42/kWh.

- (ix) The company has included the reinstatement value clause in the insurance taken for the project
11. Adv Vidyasagar, vide the affidavit dated 26.08.2020 submitted the arguments notes.
12. M/s Energy Management Centre, vide letter dated 16.09.2020 submitted that “
1. *The Energy Management Centre - Kerala (EMC) confirm that, during the floods and associated landslides in August 2018, the powerhouse having Stage - 1 (2x1.5MW) and Stage - 2 (1x1.5MW) equipment of Iruttukanam SHP plant were subjected to extensive damages/ destruction. It is also submitted that officials from EMC had visited the site during different stages and provided technical support for the restoration work of the project.*
 2. *The petitioner has completed the maintenance, replacements of damaged systems and re-commissioned the plant on 08.07.2019, and restored the power evacuation to KSEBL Grid.*
 3. *From 03.09.2022, the tariff of Stage-1 will get reduced from the current tariff Rs.2.70/kWh to Rs.2.07/kWh. Once Sengulam Augmentation Scheme is started, the project may become commercially unattractive due to additional expenses incurred for project rehabilitation.*
 4. *From the plea produced by the investor, it is understood that the company got an insurance claim of Rs. 7.09 Crores and an additional spend of Rs. 7 Crores as loan as mentioned verdict clause 17 (page 16) cited ref(2) above towards completion of the rehabilitation works of the project.*
 5. *Additionally, in the Implementation Agreement signed between M/s Viyyat Power Pvt Ltd and Government of Kerala, the clause 6.5 (d) (II) says - "After COD if termination is due to a Force Majeure Event which is a Non - Political Event, the Company shall be entitled to receive and appropriate the proceeds of any insurance obtained by it". The Hon'ble Commission may consider a situation that the investor could have abandoned the project after claiming the insurance amount and avoided taking an additional loan, instead of taking a righteous stance to revive the project back to operation by spending the amount with the expectation of paybacks in the coming years.*
 6. *In this light, as a promotional measure for renewable energy, the Commission may allow the investor for getting consistent gains out of the investment they have made additionally for the project through a compensatory tariff."*
13. Government of Kerala has not responded to the review petition.

Analysis and Decision

14. The Commission has examined in detail the Review Petition dated 15.06.2020, filed by M/s Viyyat Power Pvt Ltd , as per the provisions of the Electricity Act, 2003 and KSERC (Conduct of Business) Regulations, 2003, and orders following.
15. The review petition No. RP 5/2020 is filed by the petitioner M/s Viyyat Power Pvt Ltd against the order of the Commission dated 24.04.2020 in Petition No.

OA 30/2020. The background and the issues considered in the said order is summarized below.

- (1) The petitioner M/s Viyyat Power Pvt Ltd on 17.09.2019, filed a petition before the Commission, with the following prayers.

“ Considering the fact that the Petitioner has rehabilitated the power project Stage I & II against heavy odds in a record time of 322 days after the disaster with almost all new equipments including new generators by spending an additional investment of Rs. 9,69,34,511.80 over and above the insurance cover benefit of Rs. 8.00 Crore, the petitioner humbly prays for the following.

- (i) *The Hon’ble Commission may be pleased to pass on order granting an additional “Compensatory Tariff” for Stage I and Stage II, commensurate with the new investment made by the petitioner as done by the Hon’ble CERC in Order dated 21.02.2014 in the case of Petition No. 155/MP/2012 of Adani Power Limited Vs. Uttar Haryana Bijli Vidyut Nigam Limited and Others.*
- (ii) *Any other Order the Hon’ble Commission may be pleased to deem fit considering the fact that the tariff of Iruttukanam Stage I and Stage II of the Petitioner as existing before the disaster, are much below the APPC of KSEBL and if the Petitioner had abandoned the project after the disaster, KSEBL has to purchase the same measure of power from elsewhere at the rate above APPC’.*

- (2) The Commission vide the order dated 24.04.2020, disposed the petition and orders the following.

- (i) The request of the petitioner to grant additional compensatory tariff for Iruttukkanam Stage-I and Stage-II is rejected, due to the reasons detailed in the proceeding paragraphs.
- (ii) The petitioner may, approach the State Government, who allotted the project to the Company, to extend the BOOT period if the petitioner so desires.

16. The Commission issued the above Order dated 24.04.2020 in OA 30/2020 after detailed examination of the issues raised by the petitioner in detail, and considered the following while deciding on the matter.

- (1) Rejected the claim of the petitioner for Rs 4.94 crore as presumptive loss of revenue due to non-generation during the rehabilitation period citing that,
“presumptive generation loss in revenue during the rehabilitation period from August 2018 to the date of re-commissioning in June and July 2019 cannot be approved and passed on to the electricity consumers of the State. The Commission notes that the Mahapralayam was a natural disaster and fell

within the definition of Non Political Force Majeure as defined in Article 6.2 of the Implementation Agreement and Article 13.2 of the PPA. Hence, the Commission rejects this claim of Rs. 4.94 crores on account of loss of generation during the rehabilitation period.”

(Paragraph 18 of the impugned order dated 24.04.2020)

- (2) Rejected the prayer of the petitioner for compensatory tariff citing that,

“There is no provision in the PPA or in the Implementation Agreement to claim compensatory tariff for any additional amount incurred over and above the insurance proceeds from KSEB Ltd and its consumers”

(see paragraph 19 of the order dated 24.04.2020 in OA 30/2019)

- (3) Commission ordered that, as per the Article 13.6 of the PPA, and also as per Clause 6.6 of the Implementation Agreement, **neither parties are liable** to bear any loss, damage, cost, expense, claims, demand and proceedings arising out of occurrence or existence of any Force Majeure Events, unless explicitly provided in the IA and/or PPA.

(see paragraphs 20 and 21 of the order dated 24.04.2020 in OA 30/2019)

- (4) Commission ordered that, the claim of the petitioner for any compensatory tariff is unsustainable and rejected citing the following;

“ ...

Considering all these aspects in detail, the Commission ordered that, there is no provision in the Implementation Agreement dated 10.12.2004 and Power Purchase Agreement dated 07.06.2007, to determine the compensatory tariff to make good the losses sustained due to Non-Political Force Majeure Events. The Commission has also seen from the insurance assessment statement, Rs. 3.39 crores has been rejected on account of under insurance. It is also a fact that though the petitioner had a valid Reinstatement Insurance policy, the insurance amount of Rs. 7.095 crore was accepted by the petitioner against a damage claim of Rs. 12.23 crore without any protest or demur. Hence the request of the petitioner for any compensatory tariff is unsustainable and rejected.”

(see paragraph 23 of the order dated 24.04.2020 in OA 30/2019).

- (5) Commission rejected the argument of the petitioner that the rehabilitation works was done with the consent of KSEB Ltd and State Government **(see paragraph 24 of the order of the Commission dated 24.04.2020)**. The relevant portion of the order is extracted below.

“ (8) As discussed above, from the various communications, the State Government and KSEB Ltd has not given any consent or commitment that, the additional amount incurred by the petitioner over and above the insurance proceed shall be allowed to be recovered through compensatory tariff. Hence there is no merit in the issue raised by the petitioner that, the rehabilitation works was done with the consents of all parties.”

- (6) Commission also ordered that, the order of the CERC dated 21.02.2014 in petition No. 155/MP/2012 referred by the petitioner in support of the claim for compensatory tariff is not relevant in the present case
(see paragraph 25 of the order dated 24.04.2020).
- (7) The Commission has also examined in detail the order dated 12.01.2015 in OP No. 05 of 2014, of the Commission 'in the matter of review and modifications in the PPA executed between Palakkad Small Hydro Co. Ltd and KSEB in respect of MEENVALLOM Small Hydro Project, referred by the Petitioner, in support of the claim of the petitioner for compensatory tariff. The Commission ordered that the issues in Meenvallom project is entirely different from the case of the petitioner.
(Paragraph 26 of the order dated 24.04.2020)
- (8) Commission, vide paragraph 26 of the order dated 26.04.2020 further ordered that,
“Considering all these facts, the Commission is of the firm opinion that it cannot allow the recovery of any compensatory tariff for the Iruttukkanam SHP over and above the insurance proceeds. The Commission also noted that the petitioner had underinsured the Iruttukkanam project to the extent of Rs. 3.39 crore and consequently this amount was denied to the petitioner. It is also not understood as to why instead of contesting the insurance payment, the petitioner without any protest and demur accepted payment of Rs. 7.095 Crore against a loss claim of Rs. 12.23 crore claim and that too in a situation when there was no such provision in the PPA or Implementation Agreement for entertaining any such claims”.
- (Last proviso to Paragraph 26 of the order dated 24.04.2020).
- (9) **As detailed above, the Commission has considered all the above aspects in detail based on documentary evidence, while rejecting their prayer for the determination of Compensatory tariff. The petitioner, in this review petition has also not pointed out any error or objections against the said findings of the Commission in the order dated 24.04.2020.**
17. In addition to the above issues, under paragraph 27 of the Order dated 24.04.2020, the Commission had also examined the concerns raised by the petitioner that, with the commissioning of the Sengulam Augmentation Scheme of KSEB Ltd, the power generation from the Iruttukkanam project will get reduced from 22.5 MU per annum to 10.50 MU per annum. The petitioner also raised the issue that, without compensatory tariff, it may be difficult for the petitioner to meet the loan repayment obligation etc. The Commission has appraised all these aspects in detail under paragraph-27 of the Order dated 24.04.2020. The abstract of the findings of the Commission on this issue raised by the petitioner is given below:

- (i) The petitioner is aware of the fact that, the Iruttukkanam SHP was intended to utilize the inflow from the 21.45 sq.km catchment area downstream of the Sengulam Augmentation Scheme of KSEB Ltd, excluding its catchment area of 53.5 sq.km.
- (ii) The State Government vide GO (MS) No.19/05/PD dated 13.07.2005 approved the TEFR of the Iruttukkanam project Stage-I of the petitioner subject to the condition that *'the project authority will not have any claim over the water from the catchment upstream of the proposed diversion weir of Sengulam Augmentation scheme and will not make any claim on account of this in future.'*
- (iii) Further, while allotting and approving the TEFR of the project by the State Government vide the order GO (Rt) No. 117/2011/PD dated 25.05.2011, it is stated that the *'Company is willing to take the risk in case the water shortage is felt, if the diversion of water to KSEB's Sengulam Augmentation scheme is effected. The TEFR approval committee recommended to sanction the project for setting up additional unit of 1.5 MW on the condition that any loss on account of this investment may not be factored into the pricing of power from the project.'*
- (iv) A Supplementary Implementation Agreement was signed by the petitioner with the State Government on 22.09.2011, for the implementation of the Iruttukkanam Stage-II project, wherein it is specified as under; ***"The Company will not have any claim over the water from the catchment stream of the proposed diversion weir of the Sengulam augmentation scheme and will not make any claim on account of that in future"***.
- (v) The designed energy as per the Techno Economic Feasibility Report (TEFR) approved by the State Government is as follows.
Iruttukkanam stage-1 = 11.92 MU per annum
Iruttukkanam stage-2 = 3.84 MU
- (vi) But due to the reasons best known to KSEB Ltd, Sengulam Augmentation scheme of the KSEB Ltd is delayed and yet to be commissioned. Due to this delay, the petitioner could utilize the inflow from the catchment area of Sengulam scheme of 53.5 sq.km also, over and above the inflow from the own catchment area of 21.45 sq.km earmarked for Iruttukkanam project.

The Iruttukkanam stage-1 (3MW) was commissioned in the year 2010 and the Iruttukkanam stage-2 (1.5 MW) was commissioned in the year 2012. Since then till date, the petitioner could utilize the inflow from the 53.5 sq.km catchment area which is earmarked for Sengulam Scheme of KSEB Ltd in addition to the 21.45 sq.km own catchment area of the projects of the petitioner. Due to this, the actual generation from the projects of the petitioner from the date of CoD till date was much higher than the design energy as per the TEFR approved by the State Government.

From the generation details available in the public domain, it is found that the petitioner could generate 35.56 MU from Stage-1 and 9.70 MU from Stage-2 during the period from the date of CoD till the end of the FY 2017-18 over the design energy as per the TEFRR approved by the State Government. By making use of this excess generation, the petitioner earned an additional revenue of Rs 12.45 crore from the date of CoD till the year 2017-18.

- (vii) The Commission observed these facts under paragraph-27 of the Order of the Commission dated 24.04.2020. The Commission rejected the prayer of the petitioner for the determination of the compensatory tariff ***not due to the additional revenue earned by the petitioner through excess generation due to the delay in commissioning of the Sengulam Augmentation Scheme of KSEB Ltd as submitted.*** In order to get clarity on this issue, the paragraph 27 of the Order of the Commission dated 24.04.2020 is extracted below for ready reference.

“27. The Commission has also examined the issue raised by the petitioner that, with the commissioning of the Sengulam Augmentation by KSEB Ltd, the power generation from the Iruttukkanam project will get reduced from 22.5 MU per annum to 10.5 MU/annum. The petitioner submitted that, without compensatory tariff, it may be difficult for the petitioner to meet the loan repayment obligation etc. The Commission has examined all these aspects in detail, including the actual generation from the projects after COD, from the FY 2010-11 to 2017-18 and noted the following.

- (1) *As per the Schedule-1, Project facilities attached to the PPA dated 7th June 2007 signed with KSEB Ltd, the important features of the project are:*
- *Catchment area- 21.45 sq.km.
This catchment is excluding the catchment area of the Sengulam Augmentation scheme of KSEB Ltd.*
 - *Installed capacity- 3 MW*
 - *Annual Designed Energy - 11.92 MU*
- (2) *Subsequently, as proposed by the petitioner, and at his own risk, the Government vide the orders dated 12.01.2011 and 25.05.2011, has granted permission to install an additional capacity of 1.5 MW as Iruttukkanam stage-II.*

*A supplementary implementation agreement was signed with the State Government on 22.09.2011, for the implementation of the Iruttukkanam Stage-II project, wherein it is specified as under; **“The Company will not have any claim over the water from the catchment stream of the proposed diversion weir of the Sengulam augmentation scheme and will not make any claim on account of that in future”.***

However, the action of the petitioner of taking up an already known and agreed fact that once the Sengulam Augmentation scheme of the KSEB Ltd is commissioned, there will be reduction in

generation from the Iruttukkanam Stage-I & Stage-II project is not correct. This is against the provisions in the sanction orders of the Government dated 25.05.2011 and Supplementary Implementation Agreement dated 22.09.2011.

- (3) The Commission also noted that, due to the delay in commissioning of the Sengulam Augmentation Scheme by KSEB Ltd, the petitioner is immensely benefited, the details are given below.
- (i) As already mentioned, the designed energy of the Iruttukkanam Stage-1 is 11.92 MU and that of Iruttukkanam Stage-II is 3.87 MU.
- (ii) As against the designed energy, the actual generation from Iruttukkanam- I & II, as per the invoice is detailed below.

Year	Designed Energy (MU)		Actual generation (MU)		Excess generation (MU)		Remarks
	Stg-1	Stg-2	Stg-1	Stg-2	Stg-1	Stg-2	
2011-12	11.92		17.62	0.00	5.70	0.00	Stage-II Commissioned in April-2012 only
2012-13	11.92	3.87	14.01	4.55	2.09	0.68	
2013-14	11.92	3.87	17.41	5.65	5.49	1.78	
2014-15	11.92	3.87	17.50	5.68	5.58	1.81	
2015-16	11.92	3.87	18.74	6.09	6.82	2.22	
2016-17	11.92	3.87	15.08	4.90	3.16	1.03	
2017-18	11.92	3.87	18.64	6.05	6.72	2.18	
Total	83.44	23.22	119.00	32.92	35.56	9.70	

- (iii) The tariff of the electricity generated and supplied to KSEB Ltd from Iruttukkanam Stage-I is billed @Rs 2.70/unit and the tariff of the electricity generated and supplied from Iruttukkanam Stage-II is billed @ Rs 2.94/unit. Accordingly, the additional revenue earned by the petitioner by excess generation, mainly on account of the delay in commissioning of the Sengulam Augmentation by KSEB Ltd is estimated as below.

Year	Excess generation (MU)		Additional revenue (Rs. Cr)		
	Stg-1	Stg-2	Stg-1 @Rs. 2.70/unit	Stg-2 @Rs 2.94/unit	Total
2011-12	5.70	0.00	1.54	0.00	1.54
2012-13	2.09	0.68	0.56	0.20	0.76
2013-14	5.49	1.78	1.48	0.52	2.01
2014-15	5.58	1.81	1.51	0.53	2.04
2015-16	6.82	2.22	1.84	0.65	2.49
2016-17	3.16	1.03	0.85	0.30	1.16
2017-18	6.72	2.18	1.81	0.64	2.46
Total	35.56	9.70	9.60	2.85	12.45

As detailed above, the petitioner had earned additional revenue of Rs 12.45 crore, by selling the excess energy over and above the designed energy at the tariff approved for the designed energy. It may be noted that, additional cost involved in hydel plant over designed energy is very meager. Hence, the additional revenue earned as above is the additional profit available to the petitioner, over and above the regulated Return on Equity (RoE) allowed to the petitioner.

Usually, the excess energy generated over the designed energy is billed at a rate much less than the designed energy. However, in the case of Iruttukkanam SHP, there is no such provisions in the PPA signed by the petitioner with KSEB Ltd, and hence the entire additional revenue of Rs 12.45 crore was allowed to be retained by the petitioner. This amount was also available to the petitioner to meet the additional cost, if any over and above the insurance proceeds, incurred for rehabilitation work.

- (iv) *However, once the Sengulam Augmentation of the KSEB Ltd is commissioned, the excess energy available to the petitioner over and above the designed may not be available to the Company. The petitioner company was aware of these facts at the time of bidding for the project, and it was specified under Schedule-1 of the PPA that the catchment of the project of the petitioner as 21.45 sq.km, which is excluding the upper catchment area of 53.5 sq.km belongs to the Sengulam Augmentation project. In the Supplementary Implementation Agreement dated 22.09.2011 signed with the State Government, it is specified that "The Company will not have any claim over the water from the catchment stream of the proposed diversion weir of the Sengulam augmentation scheme and will not make any claim on account of that in future". Hence there is no rational in raising this issue at this stage. However, to the advantage of the petitioner, there is still uncertainty on the schedule of commissioning of the Sengulam Augmentation project of KSEB Ltd, and hence the excess surplus energy over designed energy is available to the petitioner for few more years."*
- (viii) As brought out in the proceeding paras, the petitioner could generate excess electricity and get additional revenue due to the delay in commissioning of the Sengulam Augmentation Scheme of KSEB Ltd. Had KSEB Ltd completed the Sengulam Augmentation Scheme as originally envisaged by the year 2010-11, this excess generation and additional benefit would not have been available to the petitioner. However, since the Sengulam Project of KSEB Ltd was delayed, the petitioner was benefited. It is also a fact that, the State Government while sanctioning the project had included the condition that, the petitioner shall not have any claim on the water diverted from the Sengulam Augmentation Scheme of KSEB Ltd. The Commission had duly considered these facts in the Order of the Commission dated 24.04.2020. **Hence the prayer of the petitioner for the determination of compensatory tariff was rejected by the**

Commission not by considering the excess generation and additional revenue earned by the petitioner due to the delay in commissioning of the Sengulam Augmentation Scheme of KSEB Ltd, as claimed by the petitioner.

- (ix) However, the petitioner filed this review petition on the wrong presumption and notion that, the Commission rejected the prayer of the petitioner for determination of compensatory tariff based on the additional revenue earned from **the excess generation due to the delay in implementation of the Sengulam Augmentation Scheme of KSEB Ltd**. This is not correct and not in line with the paragraph 27 of the Order dated 24.04.2020.
18. During the deliberations of this review petition, the petitioner raised the issue that, in earlier on 30th March 2010, the petitioner had filed a petition for re-determination of tariff based on the actual tried up capital cost as on CoD. This Commission vide the Order dated 02.11.2010 in Petition No. TP 86/2010 had rejected the plea of the petitioner for determination of tariff on the ground of increased capital costs. If the petitioner was aggrieved by the said Order, they were at liberty to file an appeal against the said Order by invoking the provisions under Section 111 of the EA-2003 within the time limit specified therein. However, the petitioner did not file any appeal against the said Order and hence the Order reaches finality. The Commission cannot re-consider the same plea again and again.
19. During the deliberations of the review petition, the petitioner produced a copy of the judgment of the Hon'ble Supreme Court dated 05.07.2016 in Civil Appeal Nos. 5875 of 2012 & 1973-1974 of 2014 in support of the claim that the Commission can re-determine the tariff in a concluded PPA. However, the issues discussed and decided in the said judgment is not relevant in the present case, since the petitioner was selected by the State Government and awarded the project based on the tariff based competitive bidding.
20. As per the Section 94 of the EA-2003, the review jurisdiction of the Commission is very limited in reviewing its orders and directions. The relevant Sections is extracted below:

“(i) Section 94. (Powers of Appropriate Commission): --- (1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -

- (a) summoning and enforcing the attendance of any person and examining him on oath;*
- (b) discovery and production of any document or other material object producible as evidence;*
- (c) receiving evidence on affidavits;*
- (d) requisitioning of any public record;*
- (e) issuing commission for the examination of witnesses;*
- (f) reviewing its decisions, directions and orders;*

(g) any other matter which may be prescribed.

(ii) Order 47 Rule 1 of the Code of Civil Procedure dealing with review of the orders and decisions of a Civil court is quoted below:

“

Application for review of judgment.-(1) Any person considering himself aggrieved,—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation : The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment.”

As extracted above, as per the provisions of the Electricity Act - 2003 and Order 47 Rule 1 of the Code of Civil Procedure, the review jurisdiction of the Commission is very limited. For reviewing its decisions, discovery of new and important matter or evidence, which was not within the knowledge of the petitioner or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on face of record, or for any other sufficient reason.

However, as detailed under paragraph 16 of this order, the petitioner has not pointed out any apparent mistake or error on the face of records. Further, in the Review petition, the review petitioner has not raised any new facts which were not raised during the deliberations of the original petition. Hence, the Commission observes that neither the provisions of the EA, 2003 nor the review jurisdiction of the Commission under Order 47, Rule 1 of the Code of Civil Procedure, 1908 is violated while passing the original Order dated 24.04.2020 in OA No. 30/2019. Hence, this review petition is not sustainable as per the above provisions and accordingly, the Commission rejects this Review Petition.

Orders of the Commission

21. The Commission after examining the Review Petition dated 15.06.2020 filed by M/s Viyyat against the order of the Commission dated 24.02.2020 in petition OA No 30/2019, as per the provisions of the Electricity Act, 2003 and Kerala State Electricity Regulatory Commission (Conduct of Business) Regulations, 2003 and its amendments, hereby orders to reject the Review Petition dated 15.06.2020 filed by M/s Viyyat Power Private Ltd against the order dated 24.04.2020 in OA No. 30/2019 due to the reasons cited in the preceding paragraphs.

The petition disposed off.

**Sd/-
Preman Dinaraj
Chairman**

Approved for issue

C R Satheeshchandran
Secretary (i/c)