

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

O.P. No. 5 of 2014

**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.**

Petitioner : The Chairman, Palakkad Small Hydro Co. Ltd.

Respondent : K.S.E.B.Ltd.

**Present : Shri T.M. Manoharan, Chairman
Shri Mathew George, Member**

Order dated 12.01.2015

Introduction:

The Government of Kerala vide G.O. (M.S.) No. 15/98/PD dt 22-04-1998, had allotted the Meenvallom Small Hydro Project to the District Panchayat, Palakkad. It was originally envisaged as a 2.4 MW project. Later the Government of Kerala had accorded approval to modify the capacity as 3 MW vide G.O.(MS) 21/2002/PD dt.02-09-2002 in view of detailed project report (DPR) (2 x 1.5 MW). The District Panchayat, Palakkad had formed a company namely M/s. Palakkad Small Hydro Co. Ltd., for execution and management of the project with equity share capital from District Panchayat, 8 Block Panchayats and 13 Grama Panchayats in the Palakkad District. The proposal was to construct a Small Hydro Project (S.H.P) in Thumpanadu puzha at Meenvallom in Karimba Grama Panchayat in Mannarkad Taluk with installed capacity of 3 MW to generate 8.37 MU annually.

The Government of Kerala had issued several orders to facilitate the implementation of the project. The estimated project cost in 2002 was Rs.10.11 crore. In their efforts to arrange financing the project, NABARD turned up with a precondition of executing Power Purchase Agreement (PPA) with K.S.E.B. Accordingly, the draft PPA was approved by the Government in 2002. Subsequently, after conducting hearing, the Commission had also approved the draft PPA on 29-12-2006, after incorporating some modifications. Consequently, the PPA was entered into by the Petitioner with K.S.E.B. on 23-01-2007. Pursuant to that, the work was entrusted to M/s. SILK, a public sector undertaking of Government of Kerala. It is submitted by the petitioner company that the execution of the project was

unexpectedly delayed due to various reasons and the project could not be commissioned for the last 7 years. At present, all the civil works and equipment erection have been completed. Mechanical spinning was done on 27-02-2014. The project was finally commissioned on 29-08-2014.

The Chairman, Palakkad Small Hydro Co. Ltd., has filed a petition seeking intervention of the Commission for review and modifying certain articles in the already executed PPA with K.S.E.B. In respect of the Meenvallom Small Hydro Project it was submitted that at the time of executing the PPA, their only objective was to get the same executed to approach the financiers. Hence the legal infirmities in the agreement had not come to their attention. The petition was for adjudication of disputes and the generating company has sought modifications in certain articles in the PPA, which they claim are contrary to the provisions of Electricity Act, 2003 and Regulations. The same was admitted as O.P. No. 5/2014. The petition fee of Rs. 20,000/- was remitted by the Petitioner.

Prayers of the Petitioner:

The main prayers in the petition are to,

- i. direct that the PPA entered into between the Petitioner and K.S.E.B. shall be modified in the matter of Article 8 Tariff (8.2 and 8.4),
- ii. modify Article 14.1, Resolution of Disputes in accordance with the provisions of Electricity Act, 2003,
- iii. modify Articles 3.3 & 3.4 to ensure fair play to both the parties of the agreement, and
- iv. to allow an interim tariff of Rs. 4.88 per unit, until the modified PPA is signed.

Hearing of the matter:

The matter was heard on 24-04-2014 in the Court room of the Commission's office. Adv. Pramod represented the Petitioner company, M/s. Palakkad Small Hydro Company Ltd. Sri. P.V.Sivaprasad, Exe. Engineer, TRAC, K.S.E.B.Ltd. presented the arguments of the Respondent.

Arguments presented by the Petitioner:

It is submitted by the Petitioner company that a few legal shortcomings and infirmities are in the PPA executed in 2007, which are to be rectified.

1. *"As per Article 2.1(e), one of the Conditions Precedent is that "the tariff of the project shall be approved by KSERC." The tariff rates noted in Article 8.4 have not been scrutinised by the Hon: Commission as provided in Section 61,62 and 86 (1) of the Electricity Act, 2003. The Tariff had not been determined by the Hon. Commission as provided in the Section 5 of the K.S.E.R.C (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2006. The Hon. Commission had not sought the details such as Capital Cost, PLF, O&M expenses, debt-equity details etc. nor computed the eligible tariff as per the approved norms or as provided in the Regulations. Hence the tariff rate in Article 8.4 of PPA is in contradiction to Article 2.1 and not legally sustainable".*

2. *“As per sub section (a) of Section 62 of the Electricity Act, 2003, the Hon. Commission shall determine the tariff at which a generating company may supply electricity to a distribution company, by considering the actual and admissible costs of the generating company. The Commission shall adopt the tariff, if such tariff has been determined through transparent bidding process as per Section 63 of the Electricity Act, 2003. The Hon. Commission can also decide preferential tariff based on standard norms, for renewable generating sources. In the case of Meenvallom project, the tariff is not arrived at by following any of these procedures. Hence Article 8.4 deserves to be revised”.*
3. *“K.S.E.B. as the distribution licensee can procure power and enter into PPA with generating companies either by determining the price through a transparent bidding process or by the tariff determined by the Commission. In this case, the tariff was unilaterally computed by K.S.E.B. and the Petitioner was made to accept the rates and PPA accordingly. This is illegal”*
4. *“The sub section (1) of section 61 of the Electricity Act, 2003 stipulates that the Hon. Commission shall be guided by the National Electricity Policy and tariff policy while specifying the terms and conditions for determination of tariff. The tariff for the Meenvallom project has not been approved by the Commission considering the above policy guidelines”.*
5. *“In the order on **O.P. No. 19/13** (Viyat Power vs. K.S.E.B. in the case of Iruttukanam Stage I), the Commission has accepted that infirm tariff has no relevance in the case of small hydro projects, since capacity charges are not paid to them. The Petitioner pleads that the same approach shall be taken in the case of Meenvallom and all the energy injected from the date of commissioning may be allowed at full tariff rates. Hence the Article 8.2 specifying the infirm energy tariff @ Rs.0.18 per kWh may be cancelled”.*
6. *“As per Article 14.1 (c) “ If the Dispute is not amicably settled within 30 days of such meeting between the two, the dispute may be referred to the Government and the decision of the Govt. shall be binding on both the parties and shall be final”. After the enactment of the Ele. Act, 2003, the authority for adjudication and dispute resolution is the Commission as per Section 86(1)(f) of the Ele. Act, 2003. Inserting such a clause in the agreement executed in 2007 is not legally correct. This Article also has to be modified”.*
7. *“Article 16.1 stipulates that the agreement shall remain ‘operative’ for a period of 25 years from COD. Since the project has not been commissioned till date the agreement has not become operative till now. Hence the Respondent need not raise any objection against revising the clauses in the agreement”.*

8. *“In addition to these, several clauses in the PPA are marked by unfair unilateral penal clauses against the company. Provision for liquidated damages for the delay in completion of the project as per Articles 3.3 and 3.4 is an example. The Petitioner pleads to modify these clauses to ensure fair play to both the parties”.*
9. *“The estimated project cost in 2002 was Rs.10.11 Crore. The capital cost expected on completion of the project is around 20 Crores with cost per MW equal to Rs. 6.7 Crores. The K.S.E.R.C (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2013 envisage a project cost of Rs. 6 Crores per MW. If the norms adopted by the Commission for Small Hydro Projects of capacity below 5 MW are adopted, the Meenvallom project is eligible for a levelised tariff of Rs. 5.45 per unit for 35 years. It is prayed that until revised PPA is executed, the energy injected from the plant shall be allowed an interim tariff of Rs. 4.88/ unit as per KSERC (Power procurement from renewable sources by distribution licensees), 2013”.*

Arguments presented by K.S.E.B.Ltd:

The respondent has submitted that there is a concluded PPA and it is to be examined whether the Commission can interfere with the tariff already approved by the State Government and accepted by both the parties. The counter arguments of the respondent are briefed below.

- *The petitioner has alleged that the Commission has not scrutinised the tariff of the project and that the tariff has not been determined by the Commission as provided in the Section 5 of the K.S.E.R.C (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2006. The Government of Kerala has allotted the project to the District Panchayat during 1998, much before the enactment of the Electricity Act, 2003 and even before the constitution of the Commission. The articles of the PPA including the tariff were approved by the then State Government on 06-06-2002 and hence the tariff cannot be linked to the provisions of the Electricity Act, 2003 and subsequent regulations notified by the Commission. Further, the tariff as per Article 8.4 of the signed PPA was mutually agreed between the Petitioner and the Respondent. Moreover, the project cost and tariff calculations were evaluated by a joint committee comprising experts from the Energy Management Centre in the State Government and the tariff so decided by was approved by the Commission.*
- *The request of the Petitioner to cancel the Article 8.2 of the PPA, stipulating infirm energy of Rs.0.18 per kWh, in the light of the order in O.P.19/2013 is not acceptable. It is submitted that the above cited order is in respect of a specific case and not generic in nature. Moreover, in the case of Meenvallom project, the tariff for infirm energy and firm energy has been mutually agreed in the PPA signed on 23-1-2007 and hence cannot be changed based on the orders issued subsequently for another case.*
- *The Petitioner has not raised any dispute on the tariff or other issues at the time of signing the PPA on 23-1-2007.*

- *It is further submitted that the gestation period of a Small Hydro Project is about 5-6 years from the date of allocation. This includes the time for land acquisition, bidding, civil works, erection and commissioning works. The Meenvallom SHP allotted during 1998 could have been completed by 2003 and the prolonged delay led to cost and time overrun. As per Article 2.1 of PPA, the company should have obtained all the clearances from the Ministry of Environment and Forest within 90 days of signing the PPA. The Petitioner company ought to have obtained all these clearances and met all the Conditions Precedent including financial closure of the project. As per Article 1.50 of the PPA, the 'Scheduled date of completion' means the date on Completion of 548 days from the occurrence of fulfillment of Conditions Precedent pursuant to Section 2.1. The claim of the petitioner that they have obtained forest land only on 23-6-2009, causing delay of the project deserves no merit. Since the delay occurred in completing the project was entirely on the part of the company in securing financial closure for the project, the company has no right to claim the present tariff.*
- *The PPA was based on the model PPA formulated by the State Government for the Small Hydel Projects being developed in the State through IPP route. The model PPA was made available to the Petitioner also and K.S.E.B. has not incorporated any unfair or unilateral penal clauses as alleged by the Petitioner. Provision for liquidated damages to compensate for delay in completion of work is part of all PPAs and cannot be termed as unfair or unilateral. The provision for penalty is not unilaterally imposed on the Petitioner alone. In fact, the Article 3.4 of the PPA is a penal clause applicable to K.S.E.B. for any delay in entry into commercial service for the project on account of K.S.E.B. Further, Article 9.10 also has penal clauses for K.S.E.B.Ltd. which imposes interest to be paid by the Respondent to the Petitioner company for delayed payment of energy charges. Moreover, the PPA conditions are not arrived unilaterally.*
- *It is submitted that the levelised tariff as per the K.S.E.R.C (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2013 cannot be made applicable for Meenvallom SHP, considering the following:*
 - i. *The tariff for the project is approved much before the enactment of the Electricity Act, 2003 and constitution of the Commission. .*
 - ii. *The PPA between the Petitioner and K.S.E.B.Ltd. has already been signed. Article 8 deals with tariff for the electricity generated from the project.*
 - iii. *The delay in execution of the Meenvallom project cannot be construed as a reason for claiming the higher tariff as per K.S.E.R.C (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2013.*

Analysis and Decisions of the Commission

This is a special case in which the promoter company namely M/s Palakkad Small Hydro Company Limited, with equity share capital from the District Panchayat Palakkad, 8 Block Panchayats and 13 Grama Panchayats in Palakkad District, had executed power purchase agreement with KSEB Limited even before the construction of the project was commenced. The Government of Kerala had, as per G.O (MS) No.15/1998/PD dated

22.04.1998, allotted the project to the District Panchayat Palakkad and subsequently as per G.O (MS) No.21/2002/PD dated 02.09.2002 increased the installed capacity from 2.4 MW to 3 MW. Further the Government of Kerala had approved the power purchase agreement with KSEB Limited with a tariff of Rs.2.50 / unit for the first 5 year from the date of commercial operation and Rs.2.12 / unit for the next 20 years. The original project cost as approved in 2002 was only Rs.10.11 crore. When the tariff was approved by the Government in 2006, the normative capital cost per MW was Rs.4.88 / MW and the normative tariff was Rs.2.44 per unit. Adv. Pramod, the Counsel for the petitioner explained in detail the administrative, legal and financial reasons for delay in execution of the project. Getting forest clearance and getting the site cleared of the tree growth took more time than what was expected. There was delay in getting loans from the financial institutions. Being a company promoted by Panchayati Raj Institutions, they had to follow transparent procedures for bidding, purchase etc. According to the petitioner, by the time the project could be completed and commissioned, the project cost had increased to Rs.6.7 per MW. The normative project cost as per KSERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2006 was only Rs.4.88 crore per MW. The project was commissioned in August, 2014. As per KSERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2013 the normative project cost is Rs.6 crore. It is well known fact that during the period from 2006 to 2014 the cost of materials and labour has gone up. In fact, the Commission cannot alter, modify or nullify a power purchase agreement entered in to between two Government institutions namely, Palakkad Small Hydro Company Limited and KSEB Limited especially in view of the fact that said power purchase agreement and the rate of power were approved by the Government. At the same time the Commission has got responsibility to promote renewable energy and to ensure that the project proponent gets reasonable tariff to enable him to repay the loans and to sustain the continued operation of the project. The counsel for the petitioner has also explained the above points. In view of the above facts the Commission would like to examine each prayer of the petitioner.

The first prayer of the petitioner is to direct that the PPA entered in to between the petitioner and KSEB Limited shall be modified in the matter of Article 8 – Tariff with special reference to clauses 8.2 and 8.4. Article 8 of the PPA is quoted hereunder;

8.1 Tariff Period

The Tariff period for the 25 years shall be reckoned from the day of Commercial operation. The tariff for sale of energy for the tariff period of 25 years is as per rate mentioned in article 8.4.

8.2 In respect of **infirm energy**, tht the sale of energy if any to the Board prior to the Commercial Operation of the project shall be at a rate of Rs. 0.18 per kWh.

8.3 The tariff for sale of Energy generated from the project and supplied by the Company to the Board at the point of Supply as mentioned in article 5.6 of this agreement.

8.4 The Tariff for sale of Energy to the Board by the Company shall be at a rate of Rs. 2.50 per unit for the first five years from the date of Commercial Operation and for the next 20 years, the tariff shall be at the rate of Rs. 2.12 per unit.

As per clause 8.2, the sale of infirm energy shall be at a rate of Rs.0.18 / kWh. As per clause 8.4 the tariff for sale of energy to KSEB Limited from the project shall be at a rate of Rs.2.50 / unit for the first 5 years from the date of commercial operation and at the rate of Rs.2.12 / unit for the next 20 years. As pointed out by the counsel for the petitioner the above rates were included in the PPA executed on 27.12.2006, well before the project construction works were even commenced. There is considerable force in the argument of the counsel that the said rates were agreed to by the petitioner for the purpose of financial closure for obtaining financial assistance from NABARD or such other financial institutions. The Commission had issued KSERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2006 on 24th June, 2006 as per which the project cost was Rs.4.88 crore / MW. The normative project cost has been increased to Rs.6 crore / MW as per KSERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2013, which is in force from 01.01.2013. It has been stipulated in sub-regulation (2) of regulation 6 of the 2013 regulations as follows;

“(2) the levelised tariff for Small Hydel Projects (5 MW to 25 MW), Small Hydel Projects (Below 5 MW) and Wind Energy Generation Plants are prescribed as Rs.4.16/unit, Rs.4.88/unit and Rs.4.77/unit as in Annexure- A, Annexure B and Annexure C respectively. Small Hydel Project (5 MW to 25 MW) shall enter in to PPA for a period of 13 years with tariff rate Rs.4.16/unit, Small Hydel Project (Less than 5 MW) shall enter into PPA with tariff rate Rs.4.88/unit for 35 years and Wind Energy Generation Plants shall enter into PPA with tariff rate Rs.4.77/ unit for 13 years with the Distribution Licensees:

Provided that the tariff given above shall be applicable for the projects commissioned / synchronized on or after 01.01.2013 only. Provided also that this Tariff shall be in force for the Financial Year 2013-14 also. The generic tariff shall be applicable for all the projects developed during the Control Period and the Developers need not obtain approval from the Commission for the tariff applicable for their individual projects.”.

It is admitted that due to various reasons beyond the control of the petitioner, the completion of the project had been delayed. Meanwhile, the Commission has issued KSERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2013, as per which any Small Hydro Project which has started commercial operation on or after 01.01.2013 is eligible for the promotional tariff at the rate of Rs. 4.88 per unit. As per Article 8.4 of the impugned PPA dated 23.01.2007, "the tariff for sale of Energy to the Board by the company shall be at the rate of Rs. 2.50/ unit for the five years from the date of commercial operation and for next 20 years, the tariff shall be @ Rs. 2.12/ unit" As per Article 8.2 of the PPA, "the tariff in respect of infirm energy, i.e. the sale of energy, if any, to the Board prior to Commercial operation of the Project, shall be @ Rs. 0.18 / kWh." The Chairman, Palakkad Small Hydro Co. Ltd has filed a petition before the Commission for reviewing the tariff as per the said PPA executed on 23.01.2007, as the project is being completed and commissioned during 2014 only, in accordance with the Regulations cited. Now the project has been commissioned on 29-08-2014. The average project cost as submitted by the petitioner is Rs.6.6 crore / MW which is above the normative average project cost of Rs.6.00 crore / MW. The petitioner has also submitted audited accounts to substantiate their claims. It is also learnt that the average capital cost per MW of the similar projects undertaken by KSEB Limited during this period is above the normative cost. Therefore the preferential tariff of Rs.4.88 / unit for small hydro projects commissioned after 01.01.2013, approved by the Commission based on normative average capital cost of Rs.6.00 crore / MW is admissible to Meenvallom Small Hydro Project also.

Further the Commission has consistently held that in the case of small hydro projects the tariff is only single part. Only where tariff is two part consisting of fixed charge and variable charge, there is relevance for a separate rate for infirm power. In the order dated 10th October 2013 in OP No.19/2013 filed by M/s Viyyat Power Private Ltd, Thiruvananthapuram, the Commission has accepted that in the case of infirm power also the preferential tariff is applicable.

It is true that the power purchase agreement already entered between the two parties is a concluded contract and cannot be modified unless both the parties come to a consensus. Commission can also settle only issues and disputes arising out of the agreement. Though the Meenvallom project was allotted to M/s. Palakkad Small Hydro Co. Ltd. in 1998 the power purchase agreement was approved by the Commission only on 29.12.2006 and executed by the parties on 23.1.2007. It should also be noted that the draft PPA was approved by the Government also in 2002. This was approved by

the Commission in 2006 as the final PPA. Thus many of the principles of the Electricity Act, 2003 and policies, rules and regulations made thereunder could not be incorporated in the PPA. Since the Government had approved the original terms and conditions of the draft PPA, Commission is of the view that it would only be proper to keep Government also informed of the facts, while considering the petition seeking modification of the terms and conditions especially commercial conditions like tariff, penalty for delay in execution and dispute resolution mechanism. Accordingly, the matter was taken up with the Government as per letter dated 06-08-2014 of the Commission. Government has not given any response to the said letter. Therefore the Commission is of the view that the tariff admissible to Meenvallom Small Hydro Project of M/s. Palakkad Small Hydro Co. Ltd. can be declared in accordance with the provisions of the KSERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2013.

Though the project was allotted to the petitioner as early as 1998 and the capital cost envisaged at the time of entering into PPA was only about 10 crore the execution was delayed for reasons beyond the control of the developer resulting in substantial cost overrun. The project is commissioned in August 2014 only. Estimated capital cost as per the petition is approximately Rs.20 crore which is financed partly through equity and partly by loan. District Panchayat, Block Panchayats and Grama Panchayats together raised an equity of Rs.6,27,43,770 and loan from NABARD was Rs. 7,70,33,000. Significant physical progress of the project is seen achieved only after the execution of PPA i.e. after 2007. The average capital cost per megawatt comes to Rs. 6.60 crore which is comparable to similar projects undertaken by KSEB during this period. Commission has taken a capital cost of Rs.6.00 crore per MW while determining the tariff of Rs.4.88 per unit as preferential tariff for small hydro projects applicable to those commissioned after 01.01.2013. There is every justification for applying this tariff to the Meenvallom project which is commissioned much later incurring a cost of Rs.6.60 crore per megawatt. Articles 3.3 and 3.4 of the PPA deal with penalties for delay in completion of the project on account of the Company and delay of entry into service on account of Board. From the available records it can be seen that the project was delayed for reasons beyond the control of the developer. This unique venture of a small hydro project by a local body was reported to be the first of its kind in India and the developers were novices to the field. The respondent has also not raised the issue of penalty for delay in execution so far and even in their written submission they have only argued that the petitioner is not entitled to the preferential tariff of Rs.4.88 per unit applicable for projects commissioned after 01.01.2013, since the PPA has already been executed.

Though Commission has expressed its above views on the various reliefs sought for by the petitioner, modification of the commercial conditions of the PPA calls for a consensus of the parties to the agreement already executed. The disputes being among bodies under Power Department and Local Self Government Department Government may take steps to resolve the issue.

Orders of the Commission:

1. The preferential tariff of Rs.4.88 / kWh is admissible for the energy, generated from Meenvallom Small Hydro Project of M/s Palakkad Small Hydro Company Limited in accordance with the provisions of KSERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2013.
2. The above rate is applicable to infirm power also.
3. M/s Palakkad Small Hydro Company Limited may approach M/s KSEB Limited and the State Government for their concurrence to apply the above rates to the energy supplied from Meenvallom Small Hydro Project and to modify the terms and conditions in the PPA executed on 23.01.2007.

Sd/-

Mathew George
Member

Sd/-

T.M.Manoharan
Chairman

Approved for issue

Secretary