

**KERALA STATE ELECTRICITY REGULATORY COMMISSION  
THIRUVANANTHAPURAM**

PRESENT: Sri.T.M. Manoharan, Chairman  
Sri.K.Vikraman Nair, Member  
Sri.S.Venugopal, Member

**OP No. 33/2012**

**In the matter of petition filed by M/s Tata Global Beverages Ltd., and M/s Kanan Devan Hill Plantations Company Private Ltd, Munnar, regarding the issues related to power purchase agreement with KSEB Ltd.**

**Petitioners**

1. M/s Tata Global Beverages Ltd.,  
(Formerly Tata Tea Ltd.)  
1, Bishop Lefroy Road, Kolkata 700 020
2. M/s Kanan Devan Hill Plantations Company Private Ltd,  
KDHP House,  
Munnar 685 612.

**Respondents**

1. Kerala State Electricity Board Limited,  
Vydyuthi Bhavanam,  
Pattom, Thiruvananthapuram 695 004.
2. Special Officer (Revenue)  
Kerala State Electricity Board Limited,  
Vydyuthi Bhavanam,  
Pattom, Thiruvananthapuram 695 004.

**OP No. 19/2015**

**Petitioner**

M/s Kanan Devan Hills Plantations Company Private Limited.,  
Munnar,

**Respondent**

Kerala State Electricity Board Limited,  
Thiruvananthapuram.

**In the matter of petition filed by M/s Kanan Devan Hill Plantations Company Private Ltd, Munnar, for approval of the Power Purchase Agreement with KSEB Ltd. under Regulation 45 of KSERC (Conduct of Business) Regulations, 2003.**

**Common Order Dated 30.07.2015**

**Per T.M. Manoharan, Chairman**

1. The petition No. 33/2012 has been filed by M/s Tata Global Beverages Ltd., Kolkata (formerly Tata Tea Ltd.) the First Petitioner and M/s Kanan Devan Hills Plantations Company Private Limited., Munnar, the Second Petitioner under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003, pursuant to the judgment of the Hon'ble High Court of Kerala dated 01.06.2012 in the writ petition W.P. (C) 139/2010. As per clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003, the Commission has powers to adjudicate upon the disputes between the licensees and generating companies and to refer any disputes for arbitration. The petitioners have prayed that the disputes between the petitioners as the distribution licensee and KSEB as the generation company in or in relation to the power purchase agreement dated 01.01.1990 and the order dated 30.11.2009 of KSEB may be adjudicated / resolved by the Commission. The petitioners have stated in the petition that the entire facts relating to the dispute that arose have been captured in two Writ Petition filed before the Hon'ble High Court of Kerala namely, Writ Petition (C) No.23095/2007 and the judgment rendered therein on 21.08.2007 as well as Writ Petition (C) No.139/2010 and the judgment rendered therein on 01.06.2012. In Writ Petition No. 23095/2007 the petitioner therein namely, M/s Kanan Devan Hills Plantations Company Private Limited., had prayed to the Hon'ble High Court to quash the demand letter dated 29.06.2007 for the remittance of a further security amounting to Rs.79,54,088/- and to direct KSEB to execute the power purchase agreement with it. In the judgment dated 21.08.2007 in Writ Petition No. 23095/2007 the Hon'ble High Court disposed of the matter directing KSEB and the Second Petitioner namely, M/s Kanan Devan Hills Plantations Company Private Limited., to negotiate and settle the terms and conditions of the power purchase agreement and to sign the agreement without any delay. In Writ Petition No. (C) 139/2010 the petitioner therein namely, M/s Tata Tea Ltd. had prayed to the Hon'ble High Court;

- (i) To call for records relating to the order dated 30.11.2009 issued by KSEB and to quash the same, and

- (ii) To call for records relating to the bill dated 04.01.2010 issued by KSEB and to quash the same.

In the judgment dated 01.06.2012, in Writ Petition (C) No. 139/2010, the Hon'ble High Court permitted the petitioner to approach this Commission under clause (f) of sub-section (1) of Section 86 of the Act. The said judgment was issued as per the submission made by the petitioner. It was also directed that if such an application is filed before the Commission within one month from the date of judgment, the same shall be considered and a reasoned order shall be passed after giving opportunity of hearing to all concerned. The petition No.33/2012 has been filed as per the said direction of the Hon'ble High Court of Kerala.

2. OP No.19/2015 has been filed by M/s Kanan Devan Hill Plantations Company Private Ltd, Munnar for the approval of power purchase agreement to be entered into with KSEB Ltd. M/s Kanan Devan Hill Plantations Company Private Ltd., is the present distribution licensee for Munnar area and has been purchasing energy from KSEB Ltd for its own use and for distribution among the consumers in its area of supply. M/s Kanan Devan Hill Plantations Company Private Ltd., is the successor in interest of M/s Tata Global Beverages Ltd. (formerly known as Tata Tea Ltd) who was originally the distribution licensee in Munnar area. The validity period of 5 years of the power purchase agreement dated 01.01.1990 with M/s Tata Global Beverages Ltd. had expired on 31.12.1994 and thereafter M/s Tata Global Beverages Ltd. continued to purchase energy from KSEB as distribution licensee in Munnar area. There were several issues to be settled before entering into a new power purchase agreement. The issues to be settled are covered in OP No.33/2012 and therefore the Commission felt that it would be appropriate to issue a Common Order in these petitions.
3. The issues involved in OP No.33/2012 and OP No.19/2015 have already been resolved by the petitioners and the respondent in the negotiations conducted by them in accordance with the directions issued by the Commission and by the Hon'ble High Court. Therefore the Commission does not propose to explain in detail each argument submitted by the petitioners and the respondent in their affidavits and other written submissions. However for the sake of completion of the order, the Commission is stating only the summary of arguments put forth by the petitioners and respondent and enumerating the important events in the proceedings relating to the case.
4. The First Petitioner namely M/s Tata Global Beverages Ltd., (formerly Tata Tea Ltd.) is a public limited company which was engaged in growing and manufacture of tea at its various estates situated in Munnar in Idukki District. The First Petitioner was also the distribution licensee for supply of electricity in and

around Munnar. The Second Petitioner namely, M/s Kanan Devan Hill Plantations Company Private Ltd, is a private limited company. With effect from 01.04.2005 the plantations of the First Petitioner in Munnar were transferred to the Second Petitioner by way of a long term lease. The licence for distribution of electricity was also transferred to the Second Petitioner. This Commission had granted licence under Section 14 of the Electricity Act, 2003, to the Second Petitioner as per its order No. 1/2007 dated 09.01.2007 read with order No. 11/2007 dated 26.03.2007. Thus the Second Petitioner namely, M/s Kanan Devan Hill Plantations Company Private Ltd, who is the the successor in interest of M/s Tata Global Beverages Ltd., (the First Petitioner) is the present distribution licensee responsible for the supply of electricity in and around Munnar.

5. M/s Tata Tea Ltd., who is the predecessor in interest of the first and second petitioners, was engaged in growing and manufacturing of tea in their estates in Kanan Devan Hill Village (KDH Village) in Munnar area. M/s Tata Tea Ltd., was also the distribution licensee in the said area. They had entered into a power purchase agreement (PPA) with Kerala State Electricity Board (KSEB) on 01.01.1990 for the purchase of 4000 kVA of power for their own use and for supply to consumers in and around Munnar. The said power purchase agreement was valid for a period of five years and the original contract period of five years expired on 31.12.1994. The First Petitioner was purchasing energy from KSEB at grid tariff. When the grid tariff was revised by KSEB with effect from October, 2002, it was challenged before the Hon'ble High Court by the First Petitioner in Writ Petition (C) 15833/2003. The Hon'ble High Court, in its interim order, granted a stay against realization of electricity charges from the First Petitioner at the revised grid tariff. Consequently the First Petitioner continued to pay electricity charges at the pre-revised grid tariff.
6. With effect from 01.04.2005, the plantations belonging to the First Petitioner in Munnar area were transferred to Kanan Devan Hills Plantations Company Pvt. Ltd., the second petitioner. Subsequently, the licence for distribution of electricity was also transferred from the First Petitioner to the Second Petitioner as per the orders of the Commission. M/s Tata Tea Ltd. had entered into PPA with KSEB on 01.01.1990 with a contract demand of 4000 kVA. The original contract period of five years of the said PPA expired on 31.12.1994. However the First Petitioner continued to purchase and KSEB continued to supply electricity even in the absence of a fresh power purchase agreement between the Petitioners and the Respondent, in view of clause 14 of the agreement dated 01.01.1990. This was done with a view to avoiding inconvenience and problems to the consumers.

7. Based on the request of the First Petitioner, KSEB had enhanced power allocation from 4000 kVA to 7000 kVA with effect from 09.09.1999. As per clause 16 (a) of the agreement dated 01.01.1990, a fresh agreement for the entire supply of electricity had to be executed for commencing the supply as per any additional power allocation.
8. As per the terms of the PPA, First Petitioner was eligible for a rebate of 5% on the electricity charges calculated at grid tariff, which was allowed in view of the 'background in which the PPA was executed and other aspects' as stated in the agreement dated 01.01.1990. While disposing of the petition for the approval of ARR and ERC for 2005-06 (TP 7 of 2005) the Commission had, on 28.06.2005, directed KSEB, inter-alia, to continue to allow the rebate of 5% on the power purchase cost to First Petitioner, provided the bills are paid promptly by the First Petitioner. Since the electricity charges were paid by First Petitioner at the pre-revised grid tariff in view of the stay order of the Hon'ble High Court in WP (C) 15833/2003, KSEB had taken a stand to the effect that the First Petitioner was not eligible for the 5% rebate since they were making only partial payment at pre-revised grid tariff and since such payment of electricity charges at pre-revised grid tariff cannot be treated as prompt and full payment.
9. When KSEB had approached the Commission through D.P. 14 of 2004 for settlement of disputes between KSEB and the First Petitioner, the Commission in its order dated 14.10.2004 had expressed its inability to interfere in the matter since there was no agreement governing the supply of electricity during the impugned period after 31.12.1994. The Commission had also directed the petitioner and the respondents therein to arrive at an agreement based on mutual discussions.
10. In compliance with the directions of the Commission in the order dated 14.10.2004 in DP No. 14/2004, several discussions were held between KSEB and First Petitioner. Based on such discussions, KSEB issued Board Order (FB) No.3621/2005 (Plg.Com. No.3545/1998) dated 20.12.2005 by which the decisions in the discussions dated 28.09.2005 and 29.09.2005 were approved by KSEB for implementation. The main decisions as per the said Board Order dated 20.12.2005, which according to KSEB were based on consensus in the above discussions, as follows,-
  - (a) The Contract Demand of M/s Tata Tea Ltd. shall be 7000 kVA from the date of power allocation, i.e. 09.09.1999 and billing has to be regulated with reference to 7000 kVA from 09.09.1999.
  - (b) The combined Maximum Demand shall be assessed by taking the arithmetic sum of the Maximum Demands recorded at Pallivasal and Madupetty, instead

of using the formula given in the B.O. dated 07.04.1999 and billing revised accordingly.

- (c) The Maximum Demand at each feedback points of K.S.E.Board, consumption will be calculated in proportion to the reading at the ToD meter at Vaguvara and based on actual energy consumption from each of the feedback points till installation of ToD meter by M/s Tata Tea at their own cost.
- (d) 5% rebate in tariff up to September 2002 is permitted as M/s Tata Tea Ltd. has remitted the dues at the then ruling rate.
- (e) 5% rebate already granted from October 2002 to October 2005 is withdrawn.
- (f) 5% rebate in tariff in future will be allowed from the date of payment of the existing arrears and be continued subject to the condition that M/s Tata Tea Ltd., makes prompt payment of bills raised by the Board at ruling tariff.
- (g) As a package to settle long pending arrears, interest on old arrears of Rs.40.1 lakh (arrear for the period prior to 01.04.1998) is waived.
- (h) As a package of one time settlement, interest on past arrears be calculated @ 12% per annum, provided M/s Tata Tea Ltd., clear the arrears in lump. This concession will be withdrawn, if M/s Tata Tea Ltd., do not agree.
- (i) The Special Officer (Revenue) shall issue revised demand for the arrears adopting the principles mentioned above. M/s Tata Tea Ltd., should be requested to make payment in one lump within 15 days of the revised demand notice.
- (j) M/s Tata Tea Ltd., will withdraw cases pending in the Courts.
- (k) M/s Tata Tea Ltd., should pay the bill on the date at ruling tariff to continue to get 5% rebate in future.
- (l) Decided to incorporate the above mentioned decisions regarding power allocation and past arrears in the new agreement to be executed.

11. In view of the above Board Order dated 20.12.2005, KSEB issued a demand notice to the First Petitioner for an amount of Rs.7,60,52,634/- on 03.05.2006 for clearing the arrears of charges payable to KSEB. When the application for transfer of the distribution licence from the First Petitioner to the Second Petitioner was taken up for hearing, the KSEB had objected to such transfer of licence on the ground that there was huge arrears due from the First Petitioner. The First Petitioner had remitted the amount under protest. The First Petitioner also withdrew WP (C) 15833/2003 on 26.09.2006.

12. The First Petitioner filed D.P. No.29/2006 before the Commission praying for allowing 5% rebate on monthly demands, unconditionally. While disposing of the above petition on 14.03.2007, the Commission held that the First Petitioner was not eligible for the rebate during the period in which payment of electricity charges was made at pre-revised grid tariff rate. Aggrieved by this decision, the First Petitioner challenged the above order of the Commission dated 14.03.2007, in Appeal no. 121/2008 before the Hon'ble APTEL contending that no consensus was arrived at between KSEB and the First Petitioner and that the rebate granted as per the agreement dated 01.01.1990 was not linked to prompt payment of electricity charges. The Hon'ble APTEL, while disposing of the above appeal, set

aside the impugned order of the Commission dated 14.03.2007 and remanded the matter to the Commission for fresh disposal. When the matter was considered again by the Commission, KSEB was unable to produce the proof of the minutes of the meeting wherein the consensus was said to have been arrived at. The Commission, while disposing of the petition on 12.08.2009, modified the order dated 14.03.2007 in D.P. No. 29/2006 and directed that rebate should be given to the petitioner for the period during which payment of electricity charges was made at the pre-revised grid tariff rate based on the stay order of the Hon'ble High Court of Kerala in W.P.(C) 15833/2003.

13. Thereafter KSEB took a stand to the effect that B.O. dated 20.12.2005, was issued on the belief that the decisions in the meetings dated 28.09.2005 and 29.09.2005 were taken on consensus. Since the First Petitioner had raised a contention to the effect that the decision was not taken on the consensus, the very basis of B.O. dated 20.12.2005 was lost. The petitioner cannot be allowed to approbate and reprobate at the same time. Therefore KSEB decided to withdraw B.O. dated 20.12.2005 and issued B.O. (CM) No.3048/2009 (LA.I/11029/2000) dated 30.11.2009 withdrawing B.O. dated 20.12.2005. The First and Second Petitioners filed W.P(C) 139 of 2010 before the Hon'ble High Court against the B.O. dated 30.11.2009 and obtained a stay order against the implementation of the said B.O. In the judgment dated 01.06.2012 in W.P(C) 139 of 2010 the Hon'ble High Court directed that " the Petitioners are permitted to approach the Commission for obtaining a reasoned order and the interim order dated 16.03.2010 granting the stay shall continue till the Commission issues a reasoned order." Accordingly this petition was filed before the Commission on 29.06.2012 which was admitted as O.P. No. 33/2012, in which the petitioners requested for adjudication of issues involved in the WP (C) 23095/2007 and WP (C) 139/2010. The petitioners submitted that the entire facts relating to the disputes are captured in the above Writ Petitions and they also submitted to the Commission, the paper books of the above Writ Petitions.

### **Proceedings in OP No.33/2012**

14. A summary of the main contentions of the petitioners in WP (C) 23095/2007 and WP (C) 139/2010 is given below. M/s Kanan Devan Hill Plantations Company Private Ltd., submitted that Writ Petition (C) 23095/2007 was filed when KSEB had insisted on remittance of additional cash deposit by the petitioner, as a pre-condition for signing fresh PPA. The petitioners contended that the B.O dated 20.12.2005 has to be honoured except in respect of the clause relating to withdrawal of rebate at the rate of 5% of the prevalent tariff. The First Petitioner had, in WP (C)15833/2003, challenged the revision of grid tariff applicable to it and they had obtained stay order against the revision of tariff. The WP

(C)15833/2003 was withdrawn by the First Petitioner on 26.09.2006 consequent to the B.O dated 20.12.2005. Only because of the withdrawal of WP (C)15833/2003, KSEB Ltd could claim electricity charges at revised tariff as per its bill HTB 21/1014/05-06 dated 03.05.2006 demanding an amount of Rs.7,60,52,634/-. While preparing the said bill, KSEB Ltd had illegally disallowed the rebate at 5% of the tariff, which was being enjoyed by the First Petitioner as per the terms of the agreement dated 01.01.1990. There were several other errors also in the said bill. In spite of the above facts the First Petitioner had remitted the entire amount of Rs.7,60,52,634/- under protest. The Second Petitioner namely, M/s Kanan Devan Hill Plantations Company Private Ltd., had signed the PPA which was forwarded by the KSEB as per their letter dated 31.05.2006. The petitioners had agreed to all the conditions in the B.O dated 20.12.2005 except in the matter relating to withdrawal of rebate and the petitioners had performed all their duties consequent to the B.O dated 20.12.2005. The petitioners argued that KSEB cannot go back on their decisions contained in the B.O dated 20.12.2005. In spite of the directions in the judgment in WP (C) No.23095/2007 KSEB did not execute PPA. On the other hand, KSEB withdrew the B.O dated 20.12.2005 by passing another B.O dated 30.11.2009 which led to filing of WP (C) No.139/2010. KSEB had unilaterally withdrawn the clause relating to rebate and made it contingent on prompt payment of the dues, whereas there was no such condition in the original agreement. The Commission had not directed the petitioner to withdraw WP (C) No.15833/2003 as a pre-condition for transfer of licence. The petitioners contended that KSEB is wrongly trying to establish that withdrawal of WP (C) No.15833/2003 was as a pre-condition for the transfer of distribution licence from the First Petitioner to the Second Petitioner and that the issuance of B.O dated 30.11.2009 is illegal. The petitioners have submitted that the contract demand was enhanced from 4000 kVA to 7000 kVA with effect from 09.09.1999 and there was no need for a fresh agreement to bring the above decision into practice. Charging of excess demand charges for the demand above 4000 kVA after 09.09.1999 was contrary to the decision of KSEB to enhance the contract demand as requested by the First Petitioner. Since there was consensus in respect of the decisions in B.O dated 20.12.2005 except in the case of rebate, the decision on which there was consensus should have been acted upon and implemented by KSEB. The issues relating to rebate has been decided by the Hon'ble Appellate Tribunal for Electricity and the Commission. Therefore rebate should be granted to the petitioners in accordance with the decision of Hon'ble Appellate Tribunal for Electricity and of the Commission to the effect that rebate is not contingent on prompt payment of dues by the petitioners, since there is no such mention in the original agreement dated 01.01.1990. The petitioners submitted that power was availed by them from KSEB as per clause 14 of the agreement dated 01.01.1990. The petitioners have further submitted that they have made earnest attempts to



settle the issues. They had participated in a series of discussions which culminated in the discussion on 25.04.2006. Consequently the First Petitioner had on 10.06.2006, given consent to the PPA drafted by KSEB. In March 2007 the licence was transferred to the Second Petitioner namely, M/s Kanan Devan Hill Plantations Company Private Ltd. Accordingly the Second Petitioner had also, on 14.07.2007, forwarded the draft PPA signed by it. But KSEB did not execute the PPA in spite of the above facts. Since the draft PPA was prepared by KSEB and sent to the petitioners as per their letter dated 31.05.2006 and since it was accepted by both the petitioners, the said PPA has to be treated as concluded contract. It was in view of the judgment of the Hon'ble High Court in WP (C)23095/2007, KSEB had passed an order dated 19.10.2007 calling upon the Second Petitioner to attend the negotiation. As per the minutes of the consequent meeting dated 13.03.2008, it can be seen that it was KSEB who was not willing to finalize PPA. According to the petitioners, the withdrawal of B.O dated 20.12.2005 as per B.O dated 30.11.2009 is illegal and the PPA should be prepared honouring the decisions in B.O dated 20.12.2005 and the decision of the Hon'ble APTEL and the Commission relating to rebate. The petitioners have alleged that the rebate as allowed by the Hon'ble APTEL and the Commission has not been refunded by KSEB. The petitioners have also submitted that the revision of tariff with effect from 01.12.2007 has been challenged by them and the case is now pending before the Hon'ble Supreme Court in CA 2144/2011. In view of their contentions, as summarized above, the petitioners had prayed to,-

- (i) Quash the order dated 30.11.2009 issued by KSEB.*
- (ii) Direct KSEB to honour the Power Purchase Agreement as per the terms and conditions of the draft forwarded by KSEB under cover of its letter of 31.05.2006 which was duly accepted and executed by the Second Petitioner and returned to KSEB under cover of the Second Petitioner's letter dated 14.07.2007 and thereby comply with the judgment dated 21.08.2007 in WP (C) No.23095/2007.*
- (iii) Refund / adjust the amounts due to the petitioner under the orders dated 14.03.2007 and 12.08.2009 of this Hon'ble Commission with interest to the petitioners / against future bills.*
- (iv) Pass such other reliefs that this Hon'ble Commission deems fit and proper in the facts and circumstances of the case."*

15. KSEB in its counter affidavit dated 16.10.2012 defended all the actions taken by it in respect of the issues involved in OP No.33/2012. A resume of the arguments submitted by KSEB is given below. The term of original agreement dated 01.01.1990 with a contract demand of 4000 kVA expired on 31.12.1994. The supply of power to the petitioner was being continued even in the absence of contractual obligations, in order to obviate the possible hardship to the

consumers. KSEB had agreed to enhance the contract demand of the petitioner from 4000 kVA to 7000 kVA with effect from 09.09.1999. The petitioner had to execute fresh agreement for enhancing the power as stated above. Instead of resolving the issues, the petitioner has been raising disputes and engaging in protracted correspondence. Thereupon KSEB had, on 22.05.2004, filed DP 14/2004 for settlement of disputes and to issue directions to the petitioners to execute agreement with it. KSEB has also submitted that the powers of the Commission to adjudicate disputes as per clause (b) of sub-section (1) of Section 86 of the Act can be exercised only in the cases where an agreement was in existence. KSEB has also pointed out the following decisions of the Hon'ble Supreme Court and of the Hon'ble High Court in support of their arguments,-

- (i) In *Tata Power Company Ltd Vs Reliance Energy Ltd*, (2009 (7) SCC 513), the Hon'ble Supreme Court held that clause (b) of sub-section (1) of Section 86 of the Act does not empower the State Commission to issue a direction to a generating company to supply electricity to a licensee. It was further held by the Hon'ble Supreme Court that the duration of the contract in regard to supply of electricity by and between Tata Power Company and Reliance Power (Rinfra) prior to the coming into force of the contract was of no consequence particularly when no written long term or short term contract had been entered into between them. Fairness or otherwise of the supply of electricity to different distribution companies being outside the jurisdiction of the Commission, the same by itself cannot be a ground for bringing back the license raj, which is not contemplated by the Act
- (ii) The Hon'ble High Court after examining the decision of the Hon'ble Supreme Court, in *Gujrat Urja Vikas Nigam Ltd Vs ESSAR Power Ltd* (2008 (4) SCC 755), had held that, the Commission can adjudicate disputes under clause (f) of sub-section (1) of Section 86 of the Act only if there is a contractual relationship between the parties.

It has been further stated that KSEB has endeavoured to discuss the issues and reach a consensus with the petitioners. In the meeting held on 28.09.2005 and 29.09.2005, decisions were taken based on consensus, as stated earlier. As per the said decisions the petitioners stood to gain about Rs.6.08 crore. KSEB Ltd issued B.O dated 20.12.2005 incorporating the above decisions. A draft PPA was also formulated and forwarded to the petitioner. The petitioner cleared the arrears under protest and refused to execute the PPA. On 09.01.2007, the licence of M/s Tata Tea Ltd was transferred to M/s Kanan Devan Hill Plantations Company Private Ltd., who unilaterally signed another PPA and forwarded the same to KSEB Ltd. The petitioners also contended that the decisions in the meetings dated 28.09.2005 and 29.09.2005 were not taken based on consensus.

In the petition filed by the petitioners, the Commission in its order dated 14.03.2007 had found that the petitioner was not eligible for rebate during the period in which they have made only part payment at pre-revised rate. In the order in the appeal from the said decision of the Commission, the Hon'ble Appellate Tribunal for Electricity had set aside the order of the Commission dated 14.03.2007. Since the petitioner could not be allowed to approbate and reprobate at the same time, the B.O dated 20.12.2005 was withdrawn by KSEB as per the B.O dated 30.11.2009. Aggrieved by the said order the petitioners filed WP (C) 139/2010. The Hon'ble High Court in its judgment in WP (C) 139/2010 remanded the case to the Commission. KSEB contended that the Commission can adjudicate the issues only if there was a concluded contract, in view of the judgments of the Hon'ble Supreme Court and the Hon'ble High Court. In the para wise remarks submitted by KSEB, it has given various grounds in support of the B.O dated 30.11.2009 and in support of their claim for electricity charges at the rates as revised by the Commission from time to time. Though the petitioners had contended that the tariff revision ordered by the Commission with effect from 01.12.2007 was stayed by the Hon'ble High Court vide its order in WP (C) 4963/2008, the Hon'ble High Court itself had allowed KSEB to demand electricity charges at the revised rates vide its order dated 09.07.2008 in WP (C) 17356/2008. KSEB has also submitted that the B.O dated 30.11.2009 was stayed by the Hon'ble High Court only for one month from 05.01.2010. Concluding their counter affidavit, KSEB requested to dispose of the OP No. 33/2012 directing the petitioner to settle the disputes by reaching consensus on various issues related to the power purchase by the petitioner from KSEB. Several documents were also submitted by KSEB to substantiate their arguments.

16. A hearing in the case was conducted on 16.10.2012. In the interim order dated 17.10.2012 the Commission directed the petitioners and the respondent to submit the details of issues to be adjudicated by the Commission. The said direction was issued in view of the fact that the supply of electricity by KSEB to the petitioners after 31.12.1994 was in the absence of a concluded contract relating to such supply of electricity.

17. In the reply affidavit dated 12.11.2012 M/s Kanan Devan Hill Plantations Company Private Ltd., (Second Petitioner) submitted their arguments in support of their claims for rebate and their terms and conditions for executing the PPA. It has been submitted by the Second Petitioner that the claim of KSEB for enhanced security deposit, the claim of KSEB for remittance of Rs.7,60,52,634/-, and the decision of KSEB withdrawing the rebate were illegal. It is also contended by them that the penal rates for excess demand charges could be claimed by KSEB only if the recorded maximum demand exceeded 7000 kVA,

since KSEB had already agreed to enhance the contract demand to 7000 kVA with effect from 09.09.1999. The First Petitioner had filed Writ Petition No. 15833/2003 challenging the revision of grid tariff with effect from 01.10.2002. According to the petitioners, the said Writ Petition was withdrawn on 26.09.2006 pursuant to the B.O. dated 20.12.2005 and not as a pre-condition for transfer of distribution licence from the First Petitioner, M/s Tata Tea Ltd to the Second Petitioner, M/s Kanan Devan Hill Plantations Company Private Ltd. The petitioners have, on 12.05.2006, remitted Rs.7.6 crores as per the bill dated 03.05.2006 issued by KSEB, consequent to B.O dated 20.12.2005. The petitioners have been availing power after 31.12.1994 in accordance with clause 14 of the agreement dated 01.01.1990. The petitioners have also submitted that execution of fresh PPA was not a pre-requisite for enhancing the contract demand to 7000 kVA. It is contended by the petitioners that the judgments of the Hon'ble High Court and the Hon'ble Supreme Court cited by KSEB, have no application in the instant case, since it has been specifically referred to the Commission as per the judgment in WP (C) 139/2010. The Second Petitioner more or less reiterated their arguments and submitted the following additional documents to substantiate their claims,-

- (i) B.O FM No.2376/2007 dated 19.10.2007.
- (ii) Minutes of the meeting held on 13.03.2008.
- (iii) Letter No. A&L/131/600/2008 dated 17.03.2008 of M/s Kanan Devan Hill Plantations Company Private Ltd.
- (iv) Letter No. KSEB/TRAC/967 / Tata Tea/R1/2003/205 dated 22.03.2008 of KSEB.
- (v) Letter No. A&L/131/661/2008 dated 24.03.2008 of M/s Kanan Devan Hill Plantations Company Private Ltd.
- (vi) Letter No. WE/KSERC dated 10.06.2006 of the First Petitioner
- (vii) KSEB/TRAC/R1/ARR Tata Tea/256/06/218 dated 28.03.2006 of KSEB.
- (viii) Letter No. SIED/130/928/2006 dated 21.04.2006 of the First Petitioner.
- (ix) Order of the Commission dated 10.05.2006 in the tariff petition for 2006-07 filed by the First Petitioner.

18. KSEB submitted an additional submission dated 11.12.2012 in response to the reply affidavit filed by the petitioners on 12.11.2012. In this additional submission KSEB has justified the issuance of B.O dated 30.11.2009 as perfectly legal and maintainable. No illegality or infirmity has been pointed out by the petitioners in respect of the B.O dated 30.11.2009. KSEB has also submitted that the B.O dated 30.11.2009 was issued since the petitioners contended that there was no consensus, as has been recorded by the Commission in its order dated 14.03.2007 in DP No.29/2007. The First Petitioner had withdrawn WP (C)15833/2003 only out of the compulsion for transferring the distribution licence

to the Second Petitioner. It was pointed out that the said Writ Petition was withdrawn not as a sequel to the B.O dated 20.12.2005 as can be seen from the fact that it was withdrawn only on 26.09.2006, which is nine months after the issuance of B.O dated 20.12.2005. KSEB has stated that the Commission had initially denied the transfer of distribution licence on the ground that several cases were pending and huge amounts payable to KSEB by the First Petitioner were in arrears. KSEB relied on the order dated 09.01.2007 of the Commission to substantiate their contentions in this regard. KSEB also submitted that the draft PPA forwarded by the petitioners on 27.01.2010 was not acceptable to it. Without signing of the agreement by KSEB there cannot be any concluded contract as claimed by the petitioners. Though the petitioners had filed Writ Petition 23095/2007 with a prayer to direct KSEB to enter into PPA, the Hon'ble High Court in its judgment dated 21.08.2007 had only directed that KSEB and the petitioners shall settle the issues and sign the agreement without delay. KSEB had justified their stance on refusal of rebate and issuance of B.O dated 30.11.2009. They have also submitted the following documents in support of their arguments,-

- (i) Copy of the minutes of the meeting dated 30.03.2008.
- (ii) Letter dated 10.06.2006 of the petitioners.
- (iii) Order dated 12.08.2009 of the Commission in the matter of rebate admissible to the First Petitioner.

19. The Commission, in the hearing dated 11.12.2012 had again directed KSEB to submit the details of issues to be adjudicated by the Commission and the issues which KSEB viewed that adjudication by Commission was not legally correct.

20. As per rejoinder dated 18.01.2003, the Second Petitioner namely, M/s Kanan Devan Hill Plantations Company Private Ltd., had, citing various reasons and grounds as indicated earlier, requested the Commission to set aside the B.O dated 30.11.2009 issued by KSEB and to direct KSEB to honour and execute the PPA forwarded by KSEB on 31.05.2006 which was returned duly signed and accepted by the Second Petitioner.

21. In letter No.KSEB/TRAC/KDHPCL/OP 33 of 2013/R1/185 dated 08.03.2013 submitted their views on the directions issued by the Commission on 11.12.2012. They submitted that the main issues involved in the dispute related to the supply of electricity to the First Petitioner after 31.12.1994, the date of expiry of the original contract period as per the agreement dated 01.01.1990 and to the matters dealt with in the B.O dated 20.12.2005 and the B.O dated 30.11.2009. The supply of electricity is being continued even in the absence of a concluded PPA. KSEB submitted that the major issues to be resolved are the following,-

- (i) Contract demand
- (ii) Measuring of billing demand
- (iii) Amount of old arrears
- (iv) Interest applicable to the arrears

KSEB requested the Commission to adjudicate on the above disputes raised by the petitioner in WP (C) 139/2010 based on the terms and conditions of existing agreement as well as the rules and regulations in force from time to time. KSEB had further submitted that when the draft PPA was forwarded to the First Petitioner on 31.05.2006, the First Petitioner who was the distribution licensee for Munnar area at that time, did not give consent to the terms and conditions of the agreement. Again based on the order dated 12.08.2009 of the Commission, a draft PPA was forwarded to Second Petitioner on 27.01.2010. The Second Petitioner also did not agree to the terms and conditions of the said PPA. The Commission had, as per its decision dated 27.07.2012 in DP No.82/2010, struck down the draft PPA forwarded by KSEB to M/s KINESCO which contained the terms and conditions similar to those in the PPA forwarded on 27.01.2010 to the Second Petitioner. KSEB has also expressed its willingness to enter into PPA with the Second Petitioner with terms and conditions formulated in accordance with the prevailing legal environment, after the First Petitioner clears all the dues to KSEB. It was also submitted that the draft PPA forwarded to the petitioners was not acceptable to them since it was based on the Board Orders which were stayed by the Hon'ble High Court.

22. In the additional reply dated 02.05.2013 the Second Petitioner submitted that the contract demand had been raised from 4000 kVA to 7000 kVA as per the bills preferred by KSEB. The petitioner had decided to set up a 66KV substation. The petitioners had requested to enhance power allocation to 12000 kVA. In the absence of enhancement of power allocation to 12000 kVA, construction of 66 KV sub-station would be unviable.
23. The next hearing was conducted on 08.05.2013. In the said hearing the petitioners submitted additional reply in which they reiterated their request to honour the PPA which was forwarded by KSEB on 31.05.2006 and which was duly accepted, signed and returned by M/s Kanan Devan Hill Plantations Company Private Ltd. on 14.07.2006. The Second Petitioner had argued that the parties to dispute had acted upon the B.O dated 20.12.2005 and therefore the B.O dated 30.11.2009 withdrawing the B.O dated 20.12.2005 is illegal. The petitioners also reiterated their claim relating to the enhancement of contract demand, interest on arrears and such other issues.

24. In the interim order dated 14.05.2013 in OP No. 33/2012 issued by the Commission after hearing the petitioners and the respondent on 08.05.2013, the Commission directed that the parties to the case may re-examine the issue in respect of clause 5 of B.O (FB) No.3621/2005 dated 20.12.2005 (on the issue of 5% rebate) with a view to working out mutually acceptable solutions. Since the distribution licence was transferred to M/s Kanan Devan Hill Plantations Company Private Ltd., both KSEB and M/s Kanan Devan Hill Plantations Company Private Ltd. should discuss the terms and conditions of the PPA and submit the same for approval by the Commission. It was directed that the discussions may be conducted on or before 10.07.2013 and the result of discussion may be submitted to the Commission on or before 31.07.2013. In letter No. KSEB/TRAC/KDHPCL/ OP 33 of 2012/ 620 dated 25.07.2013 KSEB requested for further time for completion of the discussions. In letter dated 02.09.2013 KSEB Ltd informed that M/s Tata Tea Ltd has agreed to forgo their claim for rebate subject to revising the arrear bill dated 03.05.2006. KSEB has also agreed to set right the discrepancies based on the order of the Commission dated 14.03.2007 in DP No. 29/2006. KSEB also informed that copy of the minutes would be submitted after approval by the respective Boards of Directors of the petitioner and KSEB. In letter dated 24.12.2013 KSEB submitted copy of the minutes of the meeting dated 31.08.2013 along with copies of letter dated 01.10.2013 from the petitioners. In letter dated 23.12.2013 KSEB has forwarded the draft PPA prepared in view of the decisions in the meeting dated 31.08.2013.

25. In the report dated 24.12.2013, KSEB Ltd., submitted that the petitioners and the respondent had discussed the issues on 31.08.2013 in compliance of the directions given by the Commission in the above interim order and that the following decisions were taken;

- (i) The petitioners shall forward the errors identified in the arrear calculations furnished by KSEB Ltd., on 03.05.2006.
- (ii) KSEB Ltd., will look into the discrepancies pointed out by First Petitioner and Second Petitioner for rectification in line with the orders in D.P. 29/2006 dated 14.03.2007 and revert back for reconciliation.
- (iii) The First Petitioner and Second Petitioner shall forgo the claim for rebate, for the period during which there was no prompt payment by M/s Tata Tea Ltd.
- (iv) KSEB Ltd., shall forward draft PPA to be entered into with M/s KDHPC Pvt Ltd., for their concurrence.

26. Accordingly, the accounts were perused and the errors pointed by M/s KDHPC Pvt Ltd., were examined. The amount refundable to M/s KDHPC Pvt Ltd., has been assessed at Rs.1,21,99,802/- as against the claim of M/s KDHPC Pvt Ltd., for Rs.1,22,33,645/-. The resultant difference of Rs.33,843/- is due to wrong application of multiplication factor for calculating MD charges during March 2001.

This position was concurred by M/s KDHPC Pvt Ltd., since the First Petitioner had accepted the condition that the matter of rebate for the period of remittance at pre-revised tariff can be settled as per clause 5 of B.O. dated 20.12.2005, subject to settling of arrear in line with the orders in D.P 29/2007 dated 14.03.2007. KSEB Ltd. has also informed its willingness to reinstate the B.O dated 20.12.2005.

27. A further hearing in OP No.33/2012 was held on 26.02.2014. In the said hearing Shri. P.M.Sreekrishnan, Executive Director, M/s KDHPC Pvt. Ltd, Munnar represented the petitioners and presented the progress of action taken pursuant to the order issued by the Commission on 08.05.2013. It was submitted that M/s KDHPC Pvt Ltd., had held detailed discussion with KSEB Ltd., on 31.08.2013 and had arrived at mutual agreement on the issue of rebate on electricity charges at the rate of 5%. It was further informed that KSEB Ltd., has to pay an amount of Rs.1,22,33,645/- on account of the excess remittance of demand charges by M/s KDHPC Pvt. Ltd, and its predecessor in interest. When the contract demand was 4000 kVA as per the power purchase agreement dated 01.01.1990 which expired on 31.12.1994, the First Petitioner had remitted demand charges at penal rates as and when the recorded maximum demand had exceeded 4000 kVA. Subsequently KSEB had agreed to increase the contract demand from 4000 kVA to 7000 kVA with retrospective effect from 09-09-1999. Consequently the amount of demand charges paid at penal rates for the recorded maximum demand in excess over 4000 kVA had to be re-assessed treating the permissible contract demand as 7000 kVA and the resultant excess remittance of demand charges was available for netting of the arrears of electricity charges payable by M/s KDHPCL Pvt. Ltd and its predecessor in interest. K.S.E.B.Ltd has agreed to net of the amount of such excess of demand charges towards the arrears of electricity charges till such excess demand charge is exhausted. Therefore till that date, M/s KDHPCL and its predecessor in interest should be deemed to have remitted the complete electricity charges in time and therefore M/s KDHPCL is entitled to avail the benefit of 5% rebate till that date. M/s KDHPC Pvt. Ltd has agreed to withdraw their claim for rebate at the rate of 5% with effect from that date.

28. Representing K.S.E.B.Ltd., Shri. B.Pradeep, Executive Engineer submitted in the hearing dated 26.02.2014, that the Commission had, in its order dated 08.05.2013, directed to discuss the issue of rebate at the rate of 5% and to submit the result on or before 31.07.2013. Due to various administrative problems the discussion could be held only on 31.08.2013. KSEB Ltd. had requested to condone the delay in submitting the report which was due on 31.07.2013. He informed that the decision in the discussion dated 31.08.2013 was communicated to M/s KDHPC Pvt. Ltd ,who in return informed that they



broadly agreed to the minutes subject to certain modifications suggested therein. They also informed that the Board has indicated its willingness to revive the B.O. (FB) No.3621/2005 (Plg.Com. No.3545/1998) dated 20.12.2005, if the decisions in the minutes of the meeting dated 31.08.2013 are agreed to by the petitioners.

29. After hearing both the parties on 26.02.2014, the Commission in its order dated 17.03.2014, expressed the following views. The power purchase agreement (PPA) entered into between K.S.E.B. Ltd and M/s KDHPC Pvt. Ltd on 01.01.1990 was valid only up to 31.12.1994. The contract demand as per the above PPA was 4000 kVA. The PPA has not since been renewed or revalidated and therefore the present power purchase is not covered by any agreement though the supply of power is being continued even in the absence of any contractual obligations with the petitioners, in order to avoid hardships to the consumers. The B.O. (FB) No.3621/2005 (Plg.Com. No.3545/1998) dated 20.12.2005 was issued by K.S.E.B. with a view to solving the problems relating to supply of electricity without PPA and consequent claims of M/s KDHPC Pvt. Ltd and its predecessor in interest. In the said B.O. it was stated that the order was being issued based on the consensus arrived at in the meeting dated 28.09.2005 and 29.09.2005. But M/s. KDHPC Pvt. Ltd has disputed that the Board Order was issued based on consensus and thus the denial of consensus by the Petitioners has cut at the very root of the said B.O. dated 20.12.2005. In fact the said B.O. dated 20.12.2005 has become null and void and inoperative on account of this argument put forth by M/s KDHPC Pvt. Ltd and its predecessor in interest. K.S.E.B. had cancelled the above B.O. dated 20.12.2005 as per B.O. (CM) No.3048/2009(LA.I/11029/2000) dated 30.11.2009 which was challenged by M/s KDHPC Pvt. Ltd before the Hon'ble High Court of Kerala. M/s. KDHPC Pvt. Ltd. has not properly explained why they had challenged the cancellation of the Board Order which they themselves had repudiated stating that it was not issued with their consensus. The Commission has issued order dated 14.03.2007 and order dated 12.08.2009 with a view to settling the issues. M/s. KSEB Limited has expressed their willingness to revive B.O. (FB) No.3621/2005 (Plg.Com. No.3545/1998) dated 20.12.2005 in view of the decision in the discussion on 31.08.2013 with M/s KDHPC Pvt. Ltd. Therefore the Commission felt that it would be appropriate to finalise the minutes of the meeting dated 31.08.2013 and 10.02.2014 and the jointly signed minutes be placed before the respective Board of Directors for their approval and issuance of formal orders. Therefore the petitioner and the respondents were directed to finalise the minutes and to obtain approval of such minutes from competent authorities and to issue orders on acceptance and implementation of the decisions in the minutes. It was also directed that the draft PPA should contain necessary clauses relating to the resolution of issues relating to supply of electricity from 01.01.1995 till the date of signing of the new PPA by both the parties. After initialing the draft PPA by both

the parties, the same may be submitted to the Commission for approval. In the meantime, if there are any disputes or cases relating to the above issues in any forum, the same may be amicably settled among the parties. All the follow up actions and formalities shall be completed on or before 31.05.2014.

30. In letter No. KSEB/TRAC/KDHPCL/ OP 33 of 2012/R1/2014/1493 dated 15.07.2014, KSEB informed that the terms and conditions of PPA were discussed between KSEB Ltd and M/s KDHPCL on 10.02.2014 and 13.06.2014 and the draft PPA which was modified in accordance with the decisions arrived at during the meetings, has been forwarded to M/s KDHPCL on 04.07.2014 for their concurrence. It was also informed that, in compliance of the directives of the Commission, necessary clauses relating to the resolution of issues with regard to the supply of electricity from 01.01.1995 till the date of signing of the new PPA have been incorporated in the draft PPA. KSEB Ltd also requested the Commission to direct M/s KDHPCL to withdraw cases, if any, relating to the issues during the period from 01.01.1995 considering the resolution of issues in the meetings on 31.08.2013, 10.02.2014 and 13.06.2014. KSEB Ltd has also submitted the minutes of the said meetings and copy of B.O (FTD) No. 1868/2014 dated 07.07.2014, by which the minutes of the above meetings and the modified draft PPA were approved.

31. The Commission has been, by sending a series of reminders, monitoring the progress made by the petitioners and the respondent in their negotiations to reach consensus on the issues involved in their dispute. The petitioners as well as the respondent requested for enlargement of time for finalizing the decisions in the negotiations and for getting approval from their respective Boards of Directors and submitted interim reports.

### **Proceedings in OP No.19/2015**

32. In OP No.19/2015 M/s Kanan Devan Hill Plantations Company Private Ltd., submitted a draft PPA for the purchase of energy from KSEB Ltd. The petition was filed on 14.04.2015. In letter No.KSEB/ TRAC/KDHPCL / OP/33 of 2012/2015/1676 dated 04.04.2015 KSEB Ltd also submitted a draft PPA initialed by both KSEB Ltd and M/s Kanan Devan Hill Plantations Company Private Ltd. After preliminary scrutiny, the petition was posted for hearing on 23.06.2015 in the Court Room of KSERC. A note on the preliminary observations of the Commission in the matter was also served on both the parties for ascertaining their views. The said note is quoted hereunder,-

*“The Commission has examined the draft PPA submitted by M/s KDHPCL as per their letter dated 16.04.2015. The Commission proposes to hear M/s KDHPCL and KSEBL at 11 a.m. on 23.06.2015. The main issues to be discussed are indicated below,-*

(1) *KSEBL is stated to be the supplier of electricity to M/s KDHPCL. As per 9th proviso under Section 14 of the Electricity Act, 2003, the distribution licensee need not have a separate licence for trading. The State Government has notified KSEBL as the State Transmission Utility (STU) under Section 39 (1) of the Electricity Act, 2003. As per the proviso under Section 39 (1) of the Act The STU shall not engage in the business of trading in electricity. In the Second Transfer Scheme in respect of KSEBL as notified by the Government, the functions of generation, transmission and distribution have been distributed among the Strategic Business Unit – Generation (SBU-G), Strategic Business Unit – Transmission (SBU-T) and Strategic Business Unit – Distribution (SBU-D). In view of the above legal provisions, the supplier of electricity to M/s KDHPCL should be a SBU other than SBU-T. Though KSEBL remains as a single unit administratively, there should be separate entities for performing the statutory functions of distribution licensee and STU. This aspect may please be got examined in the legal departments of the respective licensees.*

(2) *The Commission has already issued KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2014. Therefore appropriate changes have to be incorporated.*

(3) *The contract demand of M/s KDHPCL is stated to be 7000 kVA. There are 13 feedback points through which KSEBL avails power for distribution in its area of supply. Therefore there should be more clarity on the computation of the net contract demand for which demand charges should be paid by M/s KDHPCL.*

(4) *Article 2 relates to settlement of issues during the period from 01.01.1995 to the date of signing of the new power purchase agreement. Earlier the KSEB had issued a Board Order on 20.12.2005 based on the decisions in the meeting dated 28th and 29th September, 2005. M/s KDHPCL had contested that the said Board Order was not issued based on consensus as stated in the Board Order. Article 2.6 relates to admissibility of rebate at the rate of 5% of the tariff, which was being allowed in view of Article 11 of the original agreement dated 01.01.1990. The Hon'ble Appellate Tribunal for Electricity has issued an order on this aspect. Article 2.6 in the proposed PPA may please be examined with special reference to the order the Hon'ble Appellate Tribunal for Electricity.*

(5) *In Article 4.2 of the proposed PPA it has been stated that supply is provisionally arranged primarily from Pallivasal Hydro Electric Generating Station and from Madupetty Hydro Electric Generating Station as and when Madupetty generation is available. It requires a clarification as to whether such clause would lead to certain future claims for hydro-electric power and related tariff.*

(6) *Rates of penal interests / charges should be specified.*

(7) Article 2.2 states that the provisions and settlements of transactions and issues shall be subject to final disposal of petition No. OP 33/2012 by this Commission. Article 2.11 states that this agreement shall not cause any prejudice to M/s KDHPCL in appeal No. 2144/2011 before Hon'ble Supreme Court. The Commission would like to know the implications of such clauses.

(8) M/s KDHPCL has filed OP No.33/2012 with the following prayer,-

*"It is therefore prayed that this petition may be taken on record and the disputes between the petitioner as licensee and KSEB as Generation Company in or in relation to the power purchase agreement and the order dated 30.11.2009 of the KSEB may be adjudicated / resolved by the Hon'ble Regulatory Commission"*

*The Commission would like to frame issues to be settled as per OP No. 33/2012.*

*M/s KSEB and M/s KDHPCL are requested to come prepared for hearing with special reference to the above points."*

33. The final hearing in OP No. 33/2012 and OP No. 19/2015 was held on 23.06.2015. The petitioners as well as the respondent submitted their views on the points raised by the Commission and reported that the draft PPA would be finalized without any more delay. After hearing both the parties the Commission on 23.06.2015, directed them to submit the revised draft of the PPA prepared in view of their submissions during the hearing.

34. The views expressed by M/s Kanan Devan Hill Plantations Company Private Ltd., are contained in their letter dated 23.06.2015 submitted to the Commission. Paras 3, 4, 5, 6, 7 and 8 of the said letter are quoted hereunder,-

*"3. The PPA only provides for Contract Demand of 7000 kVA for KDHP and does not provide for any Contract Demand for the 13 feedback points. Therefore PPA does not provide for net Contract Demand. Schedule III to the agreement provides for manner of computation of Billing Demand for KDHP. Therefore Demand Charges will have to be paid by KDHP on the Billed Demand at the applicable tariff rate with penalty on the Billed Demand exceeding the Contract Demand.*

*4. KSEB had increased the tariff with effect from 1st October 2002 vide its Board Order No. 426/03(TRAC/TO 1/2002) dated 2.04.2003. The increase in the Tariff was challenged by the predecessor Licencee to KDHP, M/s Tata Tea Limited (TTL), before the Hon. Kerala High Court and obtained a stay on the operation of the increased tariff. Thereafter due to other developments TTL and KSEB agreed to mutually discuss the matter and arrive at a settlement on the same. Following the discussions*

*KSEB issued the Order BO. 3621/2005(Plg.Com 3545/98) dated 20.12.2005 containing the terms for settlement of the dispute. Among others, the BO provided that TTL will not be eligible for the 5% rebate on the basic tariff which they were being allowed all along, for the period for which the dispute has arisen and for which TTL was settling the bills raised by KSEB only as per the earlier tariff leaving an outstanding payment against each bill raised by KSEB as such part payment did not amount to prompt payment to be eligible for the rebate. Again by the same Order KSEB had provided for regularisation of the Contract Demand by enhancing the same to 7000 KVA from 09.09.1999. Based on the BO. KSEB raised a Demand in May 2006 for the arrears. TTL while making the payment stated that they should be paid the 5% rebate on the amount of the bills raised as per the revised tariff or, at least, proportionate to the amount actually paid against the amount of the bills raised per the new tariff. They had also stated that following regularisation of the Contract Demand, part of the penalty paid by them for exceeding the Contract Demand for the period from 9th September 1999 had become refundable to them and the amounts so accumulated together with payment made by TTL per the Old tariff on the bills raised by KSEB per the new tariff since October 2002 will be sufficient to settle the bills per new tariff in full up to June 2003 and therefore 5% rebate should be allowed on the bills raised by KSEB per new tariff up to June 2003. As KSEB was not agreeable to the contention of TTL, the matter was raised by TTL before the Hon. KSERC in DP No 29 Dt. 26.07.2007. The Commission vide Order dated 14th March 2007 ruled that for the period up to June 2003, TTL was eligible for the rebate and the period beyond that for which KSEB's bills were only settled in part, the 5% rebate was not allowed. TTL challenged the Order before the Hon. APTEL in Appeal no. 121/2008 and in the Order dated 3rd March 2009, the APTEL based on the records made available to it observed that the 5% rebate was built into the power purchase cost itself without linking the same to prompt payment of bills and that the delay in payment was to be met by clause of interest. However if the parties had arrived at a consensus whereby TTL had voluntarily given up the rebate then TTL was not eligible for the rebate. Since no evidence of any consensus between the parties was made available to the Tribunal, the Tribunal Ordered the matter to be remanded to the Commission to take evidence on the consensus and pass a fresh Order. Following the remand after hearing the matter further, the Hon. Commission vide its Order dated 12th August 2009 allowed the 5% rebate to TTL even for the period during which payment of the electric charges was made by TTL at pre-revision rate based on the stay order from the Hon. High Court of Kerala.*

*However to facilitate an early settlement of the matter and enter into a PPA with KSEB, TTL, now Tata Global Beverages Limited (TGBL), despite it being eligible for 5% rebate, as decided by APTEL and the Hon. Commission, on the bills raised on it by KSEB has agreed to forego the 5% rebate that it was eligible for the period from July 2003 to November*

*2005 when payments to KSEB by TTL as per the new tariff were in arrears.*

*On mention in the PPA regarding provisional supply from Pullivasal /Madupatty Hydro Electric Generating Station, we are agreeable to any suitable amendment to Article 4.2 that may be required to reflect the correct position.*

*6. Rates of penal interests /charges and situations leading to levy of interest/charges can be specified as applicable*

*7. OP 33/2012 was filed by TTL before the Hon. Commission seeking direction for entering into PPA between the Licensee and KSEB. The Commission in the course of proceedings vide Order dated 17.03.2014 in O P 33/2012 directed that the parties finalize the draft PPA with clauses relating to the resolution of issues to supply of electricity from 1st January 1995 till the date of signing of the new PPA. The PPA has therefore been drafted containing the clauses suggested by the Hon. Commission and since the PPA is a subject before the Hon. Commission, the same has been made subject to the disposal of OP 33/2012.*

*In appeal no 2144/2011 KDHP has challenged the increase in tariff proposed by KSEB for KDHP with retrospective effect from 1st December 2007 and allowed by the Commission vide its Order dated 25th May 2010. The intention of making the PPA not prejudicial to the said appeal before the Supreme Court of India is that the contents of the PPA should not held against KDHP in the proceedings and contentions that KDHP may present in the said appeal before the Supreme Court of India.*

*8. In OP No. 33/2012 taking into account the developments and subsequent proceedings since the filing of the petition, the prayers of KDHP would be:*

*Record KSEB's intention to revive BO FB No 3021/2005 (Pig. Com No. 3535/1998) dated 20.12.2005 and in consequent thereof withdraw their Order No 3048/2009 (LA.1/11029/2000) dated 30.11.2009."*

35. Accordingly as per letter dated 09.07.2015 M/s Kanan Devan Hill Plantations Company Private Ltd., submitted the revised draft PPA and a copy of the minutes of the meeting held between M/s Kanan Devan Hill Plantations Company Private Ltd., and KSEB Ltd on 08.07.2015 to discuss and finalize the modifications in the PPA as directed by the Commission on 23.06.2015 during the hearing of the OP No. 33/2012 and OP No.19/2015. The minutes has been signed by the Executive Director, M/s Kanan Devan Hill Plantations Company Private Ltd., and the Chief Engineer (Commercial and Tariff), KSEB Ltd.

36. In letter No.KSEB/TRAC/KDHPCL/OP/33 of 2012/2015/R1/1982 dated 13.07.2015 KSEB Ltd submitted their views and a copy of the revised PPA. The remarks submitted by KSEB Ltd are quoted hereunder,-

*“In this regard, KSEB Ltd. may be allowed to furnish the following para-wise submission with regard to the observations made by the Commission on the draft PPA as under:*

*Para 1. It is confirmed that the supplier of power to KDHPCL is not SBU-T of KSEB Ltd. Further, Hon. Commission has desired to have the 1st point vetted by the legal department. Accordingly, the views of legal department is furnished as under:*

*In exercise of the powers conferred under sub-sections (1),(2),(5),(6) and (7) of section 131 and section 133 of the Electricity Act, 2003 (Central Act 36 of 2003), (in short the Act) the Govt. of Kerala vide the notification GO (Ms) No. 37/2008/PD dated 25.09.2008 (Kerala Electricity First Transfer Scheme, 2008) vested all functions, properties, interests, rights, obligations and liabilities of Kerala State Electricity Board with the State Government till it re-vested the same in a corporate entity.*

*In exercise of the powers conferred under sub-section (2) of section 131 of the said Act, the Govt. had vide notification G.O (P) No. 46/2013/PD dated 31.10.2013 (Kerala Electricity Second Transfer Scheme (Re-vesting), 2013) notified that the functions, properties, interests, rights, liabilities, proceedings and personnel of the Board vested in the State Government stands re-vested to the Company viz, Kerala State Electricity Board Limited, a Company incorporated under the Companies Act, 1956 fully owned by the Government of Kerala, in accordance with section 131 and section 133 of the Electricity Act, 2003.*

*As per the 5th proviso to Section 14 of the Act, the Government Company or the company referred to in sub-section (2) of section 131 of the Act shall be deemed to be a licensee under the Act. According to section 14, the license may be to transmit electricity as a transmission license or to distribute electricity as a distribution licensee or to undertake trading in electricity as an electricity trader. As stated in the proviso to section 14 a distribution licensee shall not require a license to undertake trading in electricity.*

*In the Second Transfer Scheme the Strategic Business Units (SBUs) are defined as the three Units of the Kerala State Electricity Board Limited through which the KSEB Ltd. shall manage the activities of Transmission, Generation and Distribution, namely SBU-T (Transmission Unit), SBU-G (Generation Unit) and SBU-D (Distribution Unit).*

*As per clause 5(v) of the second transfer scheme, except as otherwise provided the KSEB Ltd shall be responsible for all functions, contracts, rights, deeds, schemes, bonds, agreements and other instruments of whatever nature to which the erstwhile KSEB was a party.*

*As per clause 5(viii), within one year from the date of revesting, the accounts of the three SBUs shall be segregated so as to facilitate the evaluation of financial performance of these units.*

*As defined in clause 2(m) the "property" means and include the licenses also. Under the Second Transfer Scheme and the Schedules appended thereto, the assets, liabilities, properties and proceedings belonging to the Kerala State Electricity Board concerning the Transmission, Generation and Distribution as listed in Schedules A1, A2 and A3 shall vest in the Kerala State Electricity Board Limited.*

*From the above it is clear that KSEB Ltd has been incorporated as a single corporate entity in the place of KSEB. Strategic Business Units (SBUs) have no status as separate legal entities and the unit-wise division has been made for the purpose of functional convenience and to ensure greater accountability, improved performance etc.*

*Para 2. Appropriate modification is made in the modified draft initialed PPA thereby deleting the para in pre-amble of the draft PPA earlier submitted.*

*Para 3. The observation has been taken care of under Article 9.7 and Schedule – III of the draft PPA. As per the formulae provided in Schedule – III, the demands of KSEB's 13 feedback points shall be netted off from the simultaneous demand of KDHPCL to arrive at the Computed Maximum Demand of KDHPCL, for the purpose of billing.*

*Para 4. Regarding the observation made by the Hon. Commission vide para 4, it is submitted that B.O. dated 20-12-2005 containing various provisions including that relating to rebate was issued by KSEB in view of the consensus arrived at during the meeting on September 28th and 29th, 2005 with Tata Tea Limited (TTL) – the predecessor of the KDHPCL. However, TTL disputed that there was any consensus and appealed before Hon. Appellate Tribunal for Electricity, New Delhi (APTEL) in Appeal No. 121 of 2008 and Hon. APTEL remanded the matter to the Hon. Commission to pass fresh orders based on categorical finding as to whether there was consensus between both parties during the meeting on September 28th and 29th, 2005. Accordingly, Hon. Commission vide order dated 12-08-2009 modified the order dated 14-03-2007 in D.P.No. 29 of 2006 and directed that rebate for the disputed period should be given to the petitioner since there was no record to conclude whether there was any consensus on the matter. Since TTL, being one of the parties in the meeting during 2005, has countered that there was any consensus, KSEB vide B.O. (CM) No. 3048/2009 (LA.I/11029/2000) dated 30-11-2009 has withdrawn B.O. (FB) No. 3621/2005 (Plg.Com.No. 3545/1998) dated 20-12-2005. The matter again came before Hon. Commission vide O.P. No. 33 of 2012 wherein Hon. Commission directed the parties to further discuss and decide on the contentious issue. Accordingly vide minutes of the meeting dated 31-08-2013 and 10-02-2014, TTL has agreed to forego the rebate in view of various concessions agreed by KSEB in B.O. (FB) No. 3621/2005 (Plg.Com.No. 3545/1998) dated 20-12-2005. Hon. Commission further directed to incorporate these understandings in the*



*PPA as “The draft PPA shall contain necessary clauses relating to the resolution of issues relating to supply of electricity from 01.01.1995 till the date of signing of the new PPA by both the parties. After initialing the draft PPA by both the parties, the same may be submitted to the Commission for approval”. The articles under Article – 2 of the PPA were incorporated accordingly.*

*Para 5. Considering the observation of the Hon. Commission, Article 4.2 of the PPA is modified suitably.*

*Para 6. Article 9.8 of the PPA modified incorporating rate of penal interest.*

*Para 7. It is submitted that Appeal No. 2144 of 2011 filed by KDHPCL before Hon. Supreme Court of India is against APTEL order dated 28-01-2011 in Appeal No. 140 of 2010 wherein APTEL upheld the demand raised by KSEB based on Commission’s order in T.P. 69 of 2009.*

*Para 8. It is submitted that since both parties had agreed and arrived at consensus on the issues raised in O.P. 33 of 2012 and KDHPCL filed O.P. 19 of 2015 for approval of PPA initialed by both parties, O.P. 33 of 2012 has become infructuose.*

*Further, it is submitted that the PPA submitted to the Hon. Commission as part of O.P. 19 of 2015 is now modified based on the remarks submitted during the hearing and based on minutes of the meeting dated 08-07-2015, a copy of which is attached herewith.”*

### **Analysis and decision**

37. M/s Tata Global Beverages Ltd (formerly Tata Tea Ltd), the First Petitioner in OP No.33/2012 was the licensee for distribution of electricity in and around Munnar. The First Petitioner had entered into an agreement with KSEB on 01.01.1990 for the supply of electricity for its own use and for supply among the consumers. The contract demand was 4000 kVA. The original contract period was five years which expired on 31.12.1994. Even after expiry of the original contract period, the KSEB continued to supply electricity and the First Petitioner continued to purchase electricity in terms of clause (14) of the agreement dated 01.01.1990. The issues involved in OP No.33/2012 relates to the supply of electricity by KSEB to the petitioners after the expiry of the original contract period, even in the absence of a formal written contract. The original contract dated 01.01.1990 contained a clause to the effect that the First Petitioner would be eligible for a rebate at the rate of 5% of the tariff applicable to it. KSEB had agreed to enhance the contract demand to 7000 kVA with effect from 09.09.1999. In the absence of a fresh formal contract, KSEB refuse to grant the rebate and to accept the contract demand of 7000 kVA for billing purposes. This has been challenged by the petitioners. Further the petitioners have challenged the

revision of grid tariff applicable to them. The main bones of contention between the petitioners and respondent relate to the above issues.

38. Certain conditions relevant to the issues involved in the dispute are indicated hereunder,-

- (a) Clause 3 of the said agreement deals with security deposit to be furnished by the First Petitioner to KSEB. It has been stipulated therein that the security deposit shall be to the extent of two months current charges as fixed by the Chief Engineer (Distribution- South). Whenever the security furnished was found insufficient, the Chief Engineer or his authorized representative could demand in writing for replenishing or enhancing the security deposit. The KSEB was at liberty at any time, to appropriate and apply any security so furnished in or towards payment or satisfaction of all or any moneys which shall become due from or owing by the First Petitioner to KSEB in respect of supply of electricity or otherwise under the agreement.
- (b) As per clause 11 (a) of the agreement the First Petitioner was eligible for a rebate on electricity charges at the rate of 5% on the grid tariff. It has been stated in the said clause that, 'taking into consideration, the background in which this agreement is executed and other aspects, the supplier agrees to allow a rebate of 5 (five) percent on the grid tariff for the supply to them'.
- (c) As per clause 14 it has been stipulated that, 'this agreement shall be valid for a period of 5 (five) years from First January, one thousand nine hundred and ninety and after that period the agreement shall continue to be in force until it is terminated by either party by issue of three month notice sent by registered post.' It was also stipulated therein that the Board will have the right for realizing from the First Petitioner, the electricity charges at the grid tariff in force from time to time.
- (d) Clause 16 (a) deals with the procedure for availing additional power in excess of the contracted power of 4000 kVA. It has been stipulated that the First Petitioner should give a notice to KSEB specifying the increased quantity of power. Such additional power would be supplied if sufficient surplus power was available with KSEB at the corresponding point of supply at the specified time.
- (e) Clause 22 deals with assessment of recorded maximum demand for the purpose of billing. KSEB had been drawing power from the distribution system of the First Petitioner for supply of electricity to the consumers outside the area of distribution of the First Petitioner. It was stipulated that the contract demand, as also the actual maximum demand of the First Petitioner shall be exclusive of the maximum demands of the supplies taken by KSEB.

39. When the issue was presented before the Commission on an earlier occasion, KSEB had raised objection to the effect that the Commission cannot adjudicate on the disputes in the absence of a concluded contract. The Commission therefore directed the petitioners and respondent to arrive at a consensus. The consequent negotiations culminated in the issuance of a Board Order dated 20.12.2005 which according to KSEB was based on consensus. But the petitioners contended that they had not agreed to the decision for withdrawal of rebate. Subsequently the KSEB withdrew the B.O dated 20.12.2005 by another B.O dated 30.11.2009. The B.O dated 30.11.2009 has also been challenged by the petitioners. The main issues to be decided related to the admissibility of rebate, the enhancement of contract demand, measuring of billing demand, arrears of electricity charges payable to KSEB and the interest applicable to such arrears.
40. In view of the decisions taken in the series of discussions between the petitioners and the respondent, all issues except the issue relating to rebate could be settled earlier. But the issue relating to rebate could not be resolved. In the meantime the Commission adopted the policy of uniform retail tariff for all the consumers in the State and differential bulk supply tariff for the licensees purchasing energy from KSEB. The tariff is determined by the Commission after assessing the aggregate revenue requirements of a licensee, which consists of cost of power purchase, depreciation on capital assets, return on equity, interest on capital liabilities, employee cost, repairs and maintenance charges and administration and general expenses. The expected revenue from electricity charges at the existing tariff is also assessed. If there is a revenue gap between the aggregate revenue requirement and expected revenue at prevailing tariff, the tariff is increased to meet the revenue gap. The methodology for working out differential bulk supply tariff is as follows. The aggregate revenue requirement of the licensee except power purchase cost is worked out. The expected revenue at the revised retail tariff is also worked out. The difference between the expected revenue at the revised retail tariff and the aggregate revenue requirement except power purchase cost is worked out and it is reckoned as the power purchase cost of the licensee. The said power purchase cost is divided by the units of energy purchased by the licensee in order to arrive at the bulk supply tariff applicable to it. If any rebate is availed by the licensee, it will result in corresponding increase in bulk supply tariff. Therefore neither the petitioners nor the respondent would be ultimately affected by the rebate. Presumably because of these reasons, the petitioners and the respondent could resolve the issue relating to rebate also. Ultimately all the issues involved in OP 33/2012 stand resolved. The draft PPA jointly submitted by the Second Petitioner and KSEB, duly initialed by them is approved. KSEB may issue appropriate orders for implementing the decisions taken on consensus in the discussions with the petitioners in this regard. This is

also made clear that the orders issued by the Commission in these petitions are subjected to the decisions of the Hon'ble Supreme Court in CA 2144/2011.

**Orders of the Commission**

41. In conspectus of the above facts and circumstances and the statutory provisions the following orders are issued,-

- (i) The draft PPA submitted by the Second Petitioner namely M/s Kanan Devan Hill Plantations Company Private Ltd, and the respondent KSEB Ltd is hereby approved.
- (ii) The Second Petitioner namely M/s Kanan Devan Hill Plantations Company Private Ltd, and the respondent KSEB Ltd are directed to execute power purchase agreement in accordance with the draft PPA approved by the Commission.
- (iii) KSEB shall issue appropriate orders for implementing the decisions taken on consensus in the discussions with the petitioners in this regard.
- (iv) The above directions shall be complied with on or before 30.09.2015 and a report on compliance of the above directions shall be submitted on or before 31.10.2015.

This order issued by the Commission in these petitions are subject to the decisions of the Hon'ble Supreme Court in CA 2144/2011.

The petition No. 33/2012 and the petition No. 19/2015 are disposed of accordingly.

Sd/-  
K. Vikraman Nair  
Member

Sd/-  
S. Venugopal  
Member

Sd/-  
T.M.Manoharan  
Chairman

Approved for issue

Secretary