

**Kerala State Electricity Regulatory Commission**  
**Thiruvananthapuram**

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

**OP 34/ 2015**

In the matter of : Application filed by M/s BSES Kerala Power Limited (BKPL) on 20.11.2017, subsequent to the final order dated 31.10.2017 of the Hon'ble High Court of Kerala in Writ Petitions WP(C) No 40257 of 2016, WP(C) No. 540/2017 & WP(C) No22464 of 2017

Petitioner - BSES Kerala Power Ltd  
Udyogamandal P.O,  
Kochi 683 501

Respondent - Kerala State Electricity Board Limited  
Vydyuthi Bhavanam, Pattom

Petitioner represented by - Adv. Joseph Kodianthara  
Adv P G Jayasankar  
Sri. Robin Sebastian, M/s BKPL

Respondent represented by - Adv. Raju Joseph  
Adv. K Bhuvanachandran  
Sri B Pradeep, KSEB Ltd  
Sri Bipin Sankar, KSEB Ltd  
Smt. Latha S.V, KSEB Ltd

**Order dated 05.10.2018**

**Background of the case**

1. M/s BSES Kerala Power Ltd (BKPL), an Independent Power Producer of the State, established a Naphtha based power plant at Kochi, with the approval of the State Government during the year 2000. Further, earlier with the approval of the State Government, the erstwhile Kerala State Electricity Board (KSEB) had entered into PPA with the BKPL on 03.05.1999 for purchasing the electricity from the plant. The fixed charges and variable cost for the electricity generated, payable by KSEB to BKPL, was as per the terms and conditions specified in the PPA. The original PPA was valid till 30.10.2015.

2. The clause 15.1 of the PPA dated 03.05.1999, which provides for extension of the term of PPA beyond 30.10.2015, is extracted below,-

*“The agreement can further be extended for a period of 10 tariff periods beyond the 15th tariff period on a mutually agreed tariff as per clause 7.4 taking into account the fuel charges, operation and maintenance charges and a nominal net residual value of the project which the company would have normally expected on dismantling and selling the same at its cost”*

3. M/s BKPL had filed a petition on 05.10.2015 before the Commission with the following prayers to,-

- (i) Admit the petition.
- (ii) Approve the agreement for extension of PPA between KSEB Ltd and BKPL including tariff for two years as prayed with effect from the first November 2015, pending finalization of the proposal submitted to KSEB Ltd for gas conversion of the plant and extension of PPA term.
- (iii) Grant interim approval for continuing purchase of power from BKPL by KSEB Ltd during the intervening period beyond 31.10.2015 till the time extension of PPA is approved and signed, at the tariff proposed in the draft agreement for extension of PPA, subject to adjustment with respect to tariff approved by the Hon'ble Commission.
- (iv) Condone any inadvertent omissions / errors / rounding of differences / short comings in the petition.
- (v) Allow additions / alterations / changes / modifications / amendments to the petition at a future date.
- (vi) Dispose of the petition expeditiously.
- (vii) Pass any such orders as deemed fit.”

4. During the proceedings of the petitions, the following associations/ trade unions were impleaded in the subject matter.

- (1) The Kerala High Tension and Extra High Tension Industrial Electricity Consumers Association, Productivity House, Jawaharlal Nehru Road, Kalamassery.
- (2) Kerala State Productivity Council, Productivity House, Jawaharlal Nehru Road, Kalamassery.
- (3) KSEB Officers Association, TC 25/2969, Mallor Road, Vanchiyoor, Thiruvananthapuram.
- (4) Sri. A. N. Rajan, Ambattumelil House, Kolazhi P.O, Thrissur.
- (5) BSES employee unions.

5. The Commission conducted public hearings on the petition on 27.10.2015, 22.06.2016 and 10.08.2016.

6. KSEB Ltd vide its letter No. KSEB/TRAC/ KSERC/BSES/2015-16/ 2233 dated 26.10.2015 and the oral submission made during the hearings submitted that the parties to the PPA dated 03.05.1999 have not agreed on the tariff of the electricity, especially in view of the differences in assessment of O&M cost, return on equity, interest on working capital etc.
7. The petition submitted by BKPL is for approving the Power Purchase Agreement (PPA) for procurement of power by KSEB Ltd under Section 86(1)(b) of the Electricity Act, 2003. The original PPA dated 03.05.1999 was signed much before the enactment of Electricity Act, 2003. After the enactment of the Electricity Act, 2003, KSERC as the appropriate Commission has to regulate the power purchase including price of electricity of KSEB Ltd. Hence the Commission vide the daily order dated 28-10-2015, issued the following directions to the petitioner BKPL and respondent KSEB Ltd that,
  - (i) KSEB Ltd shall submit a detailed appraisal on the demand and supply position of power during 2016 and 2017 duly considering the availability of power from its hydel stations, Central Generating Stations, power purchase agreements with traders / generators, KSEBL's own diesel stations, other liquid fuel stations including RGCCPP-Kayamkulam and from short-term market, the average cost of power purchase for a period of two years from November 2015, availability of corridor and such other details to substantiate the necessity for extending the PPA with BKPL for a further period of two years from November 2015 for which in principle sanction has been accorded by the Board of Directors of KSEB Ltd
  - (ii) KSEB Ltd may, if found necessary, file petition under clause (b) of sub-section (1) of Section 86 of the Electricity Act, 2003, for the extension of the original PPA dated 03.05.1999 as per the Article 15.1 and Article 7.4 therein, with mutually agreed tariff and terms and conditions incorporated in the draft PPA, which is initialed by both the parties to the agreement.
  - (iii) Time up to 27.11.2015 is granted to the petitioner BKPL and the respondent KSEB Ltd for complying with the directives (i) & (ii) above.
  - (iv) KSEB Ltd and BKPL may, till 30.11.2015, extend the PPA dated 03.05.1999 as per the Article 15.1 and Article 7.4 therein subject to the condition that the payment for the period of one month from 01.11.2015 to 30.11.2015 shall be as decided by the Commission in the final order.
8. In compliance of the direction of the Commission, the respondent KSEB Ltd vide letter dated 25.4.2016 has submitted that:
  - (i) Government of Kerala vide the order dated 24-2-2016 accorded 'in principle sanction' for extending the PPA between KSEB Ltd and M/s. BKPL for the combined cycle power plant at Kochi for two more years from the date of expiry of the existing PPA, subject to the condition that no Government Guarantee will be allowed for any payment obligations of KSEB Ltd and the final tariff shall be decided by KSERC be brought

back to Government and approval of Government obtained. It was also ordered that KSEB Ltd is permitted to study and firm up its decision on the option of fuel conversion of the plant from naphtha to LNG in consultation with KSERC and obtain Government approval at the appropriate stage.

- (ii) Since a mutually agreed tariff and terms and conditions could not be arrived at in spite of the repeated discussions with M/s. BKPL, KSEB Ltd vide the letter dated 08.12.2015 informed M/s BKPL that KSEB Ltd will not be liable for payment of fixed charges or any other charges with effect from 1.12.2015.
  - (iii) KSEB Ltd and M/s. BKPL could not arrive at a consensus on the tariff for the extended period. The differences between the two parties were mainly on the following tariff parameters.
    - (1) Return on Equity.
    - (2) O&M Charges.
    - (3) Cost of spares included in the computation of Interest on Working Capital.
    - (4) Calculation of fuel stock for the computation of Interest on Working capital.
    - (5) Reimbursement of Tax on Returns.
    - (6) Reimbursement of Land Lease charges payable by BKPL to TCCL.
    - (7) Effective date of application of the extended PPA for the purpose of payment of fixed charge.
  - (iv) KSEB Ltd. stated that the power position of the state improved due to a combination of factors, like commissioning of Mysore-Arecode 400KV line, commissioning of Narendra-Kolhapur 765KV line at 400KV level and resolution of disputes with CTU through orders of Hon'ble CERC. This resulted in substantial improvement in flow of quantum of imported power.
  - (v) The costliest source of power purchase of KSEB Ltd (except for liquid fuel stations) was IGSTPS(Jhajjar) and the rate at KSEB periphery was Rs.5.671/unit. The power allocation from Jhajjar was discontinued from March 2016. The next in the bottom of merit order is the short term contract with PTC-Simhapuri and the rate at KSEB end was Rs.5.477/unit which also expired in May-2016. The costliest source of power on expiry of these contracts is from NLC-II Expansion and the rate at KSEB end is Rs.5.00/unit. The delivered rate of power from other sources (except for liquid fuel stations) is below Rs.5 per unit.
9. During the proceedings of the subject matter, M/s BKPL submitted that, KSEB Ltd vide its letter dated 13.07.2015 communicated their willingness to extend the PPA for a period of two more years from the date of expiry of existing PPA subject to the following conditions,-

- (i) Terms of existing PPA have to be suitably modified.
  - (ii) Re-ascertain the fixed charges applicable for the extended period, as the existing plant is a fully depreciated one.
  - (iii) Obtaining approval from KSERC for the above.
10. M/s BKPL, vide letter dated 27<sup>th</sup> July 2016 has submitted request for certain amendments in the petition, explaining the power of the Commission to adjudicate upon the issues with respect to the PPA. The additional request made by the petitioner is to “ *adjudicate and a take a decision on the points of differences raised by the respondent in relation to the initialed draft PPA submitted before this Hon’ble Commission by the respondent*”.
11. The Commission vide the daily order dated 16-08-2016 has expressed that, ‘a PPA cannot be imposed on KSEB Ltd. The agreement to purchase power would be a valid agreement only if it is characterized by consensus - ad – idem, arrived out of free will of the parties to contract. So far what has been made clear is that M/s BKPL is willing to sell the power. KSEB Ltd, as per its order No. CP/BSES/2015-16 /164 dated 14.7.2015 has only shown its willingness to extend the contract subject to the terms and conditions to be finalised. Government order No. GO (MS) No. 03/2016/PD dated 24.02.2016 does only show an in principle sanction for extending the PPA. Only when KSEB Ltd submits the application for approval of PPA, the Commission can take a view’.
12. The Commission vide the order dated 26.10.2016 disposed the petition with the following direction and orders.

*“ 27. Considering all these factors, the Commission is of the considered view that, the petition filed by M/s BKPL under section 86(1)(b) of the Electricity Act-2003 for approval of the extension of power purchase agreement (PPA) dated 03-05-1999 between KSEB and M/s BKPL is not maintainable. However, as and when KSEB Ltd submits application with a proper PPA initialed by both KSEBL and BKPL as per Regulation 78 of the Tariff Regulation, 2014 read with clause (b) of sub section (1) of section 86 of the Electricity Act-2003, with mutually agreed tariff as stipulated under clause 15.1 of the PPA dated 03-05-1999, the Commission would take a decision on merits as per the provisions of the Electricity Act-2003 and relevant regulations.*

**Order of the Commission**

*Considering the oral and written submissions of the petitioner M/s BKPL, the respondent KSEB Ltd and other stakeholders, the Commission is of the considered view that, the petition filed by M/s BKPL purporting to be a draft PPA under section 86(1)(b) of the Electricity Act-2003 for approval of agreement for extension of power purchase agreement dated 03-05-1999 between KSEB and M/s BKPL is an inchoate document and is not maintainable under the relevant provisions of the Act and the relevant regulations. Hence the petition is dismissed.”*

13. Aggrieved by the order of the Commission, M/s BKPL filed the Writ Petition WP (C) No. 540/2017 before the Hon’ble High Court.
14. In the meanwhile, serious apprehension was raised before the Hon’ble High Court against the safety of the balance stock of the Naphtha at the premises of the BKPL and at the nearby premises of the fuel supplier IOC as on

31.10.2015, i.e., as on at the time of the expiry of the original PPA dated 03.05.1999. In this matter, Hon'ble High Court in its interim order dated 04.04.2017 in W.P.(C).No.540/2017 and in W.P.(C).No.40257/2016, ordered as follows.

*5. This court however is disturbed with the report of the Senior Joint Director of Factories and Boilers that the naphtha storage tanks have valid explosive licence only upto 31.12.2017. There after the storage tanks have to be emptied, cleaned and maintenance if any, has to be carried out, before submitting the storage tanks for inspection. Normally the stock of naphtha available in the premises of the petitioner would be around 6500MT, which is about 58% of the total capacity of the plant. The petitioner cannot, hence continue the storage of naphtha beyond the period as indicated herein, when the explosive licence expires. The maintenance and cleaning of the storage tanks also would require the naphtha to be removed. It is also indicated from the report of the Officers of IOCL that there is no possibility of the stored naphtha in the premises of the petitioner being transmitted back to the IOCL. The IOCL is also storing 6000 KL of naphtha, procured for the purpose of the petitioner's power generation, which is also stored in the premises of the IOCL; which also does not have any other market than disposal by power generation.*

*6. Considering the fact that the explosive licence of the petitioner will expire on 31.12.2017; despite the opinion of the IOCL as also the KSEB as to the safety of the naphtha stored in the petitioner's premises, one cannot completely ignore the human error, which could lead to a major disaster. The classification of the petitioner's unit as a Major Accident Hazardous (MAH) Unit and the DCS as also the parameters being available in the PCR all would depend upon human efficiency, which could be compromised by a slight error, causing a disaster as is apprehended by the Disaster Management Authority. For the present, this Court is of the opinion that it is expedient that the naphtha in the petitioner's premises and the premises of the IOCL be used up, in the interest of public safety. This would necessarily require consideration of the larger issue projected of the feasibility of extension of PPA and the sustainability of Ext.P18.*

*7. With respect to the challenge against Ext P18, the petitioner and KSEB have rival contentions. The Board is of the opinion that there could be no extension of the PPA since as of now, the Board is procuring power from the sources at far lesser prices and procurement of power from the petitioner would only result in public fund being frittered away. The Board asserts that the decision taken by the Government, relied on by the petitioner company is only a sanction accorded to the Board to decide on extension. The Board independently decided not to go ahead with the PPA, which in any event as there for only 15 years and extension is not of right. The petitioner company however has a contention that, the Government and KSEB had agreed for the extension of the PPA for another two years within which time, the petitioner was also required to convert the plant to one generating power from LNG. The KSEB however submits that the petitioner was not willing for extension, on the terms as stipulated by KSEB and hence, there would be no extension possible. It is also submitted by the learned senior counsel that the petitioner cannot have any claim of legitimate expectation since PPA itself stood expired, on expiry of 15 years and there was no agreement by the KSEB that the naphtha procured during the time of the agreement would be used up after the expiry of the PPA.*

8. *The compelling concern of this Court, at present, is the apprehended disaster and this Court is of the opinion that the option submitted by the KSEB has to be put into effect, subject however to further orders passed in the writ petition. The option for disposal of naphtha, as suggested by the KSEB, has been placed on record in the report of the District Collector, which are as follows:*

1. *Generating power on Unscheduled Interchange (UI) basis in co-ordination with the Load Dispatch Centre of KSEBL subject to the approval from KSERC thereby consuming the naphtha stock.*
2. *M/s BKPL could explore possibilities on generation of power and sale to any one by utilizing the grid of KSEBL as open access is being permitted now.*
3. *Any other feasible option including transfer to other naphtha consuming industries like nearby FACT availing the service of oil marketers like IOCL.*

9. *The petitioner could definitely explore possibilities at option numbers 2 and 3, but however the same would have to be finalised, within a period of one month from today and the disposal of the naphtha as per either of the options started within the said period and concluded within the time herein after stipulated. If the petitioner does not intend to carry out the said options, then they shall generate power on Unscheduled Interchange (UI) basis in co-ordination with the Load Dispatch Centre of KSEBL; subject to approval of KSERC and also subject to further orders to be passed in the writ petition. The petitioner could definitely approach the KSEB immediately for such generation of power on UI basis. It is made clear that the entire naphtha available at the petitioner Companies premises and that available at IOCL would be disposed of before 01.07.2017. If the same is not so disposed of, then definitely, the Chairman of the Disaster Management Authority, the District Collector would be entitled to take such steps for disposal of the naphtha without even reference to this Court. All issues raised by all parties are left open for consideration in the writ petition. The petitioner Company shall file periodic reports before the District Collector, i.e.; every three weeks as to the stage of disposal of naphtha as directed herein.”*

15. M/s BSES Kerala Power Limited has, vide application No. BKPL/KSERC/PPA Extension/2015-16/17 dated 18.04.2017, requested for granting necessary approval in connection with the implementation of the interim order of the Hon'ble High Court dated 04.04.2017 in Writ Petition WP(C) No. 540/2017. The issues raised by the BKPL are extracted below for ready reference.

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1. *The Hon'ble High Court of Kerala has, in its order dated 04.04.2017 in WPC No.540/2017 directed BSES Kerala Power Limited (BKPL) to generate electricity to use up, in the interest of public safety, the 6879 MT Naphtha stored in our premises and the 6000 KL of Naphtha stored in the premises of Indian Oil Corporation Limited (IOCL). The said order has been issued by the Hon'ble Court considering the fact that the generating unit of BKPL is a Major Accident Hazard (MAH) unit and the explosive license granted to BKPL will expire on 31.12.2017.*
2. *The Hon,ble High Court also observed that the possibility of human error, leading to a major disaster cannot be totally excluded in spite of the satisfactory safety and security arrangements made by us.*
3. *The Hon'ble High Court has directed that the stock of naphtha has to be exhausted on or before 01.07.2017. Since exhausting naphtha can be prudently done only by*

*way of generation of electricity, the Hon'ble High Court has directed that power can be generated in co-ordination with the load dispatch centre of KSEBL, subject to the approval of KSERC and also subject to further orders to be passed by the Hon'ble High Court in the Writ Petition.*

- 4. It has also been clarified by the Hon'ble High Court that the entire Naphtha available at the premises of BKPL and at the premises of IOCL should be disposed off before 01.07.2017. It has further been clarified by the Hon'ble High Court that all issues raised by all parties are left open for consideration in the writ petition.*
- 5. The only feasible and prudent option to dispose naphtha is to generate electricity. For purchase of power by any licensee approval of KSERC is inevitable. Since the approval of KSERC is mandated under the interim order dated 04.04.2017 of the Hon'ble High Court, it is respectfully requested that the Hon'ble KSERC may be pleased to Issue directions to KSEBL and State Load Dispatch Centre (SLDC) to schedule power from BKPL, to use up the Naphtha available with BKPL and at the premises of IOCL as per the terms of the referred PPA in accordance with law.*
- 6. All the other issues, including the rate, being sub judice, and as directed by the Hon'ble High Court, are left open, the above prayer is without prejudice to our rights under the PPA, and only intended for the purpose of implementation of the orders passed by the Hon'ble High Court. We specifically reserve our rights under the PPA to proceed against the licensee, subject to our rights under the PPA."*

16. KSEB Ltd vide its letter dated 25.04.2017, submitted the comments on the applications filed before this Commission regarding the scheduling of power from BKPL plant on UI basis and prayed before the Commission that,

- “
- (1) KSEBL may not be enforced to purchase power from BKPL at a rate higher than UI rate ordered by Hon'ble High Court.*
  - (2) KSEBL may not be enforced to schedule and absorb power that would result in surrender of already tied up power.*
  - (3) KSEBL may not be enforced to purchase more power than that could be generated from reported and existing stock of BKPL.*
  - (4) BKPL may be directed to exercise other options ordered by Hon'ble High Court viz*
    - (a) Selling of power through open access and exchanges to any other party.*
    - (b) Selling back to any party or transfer to other naphtha consuming industries, the excess naphtha fuel stock with them, and*
    - (c) KSEBL may be enforced to buy power as last resort only."*

17. The Commission, considering the submissions of the petitioner BKPL and respondent KSEBL, in its order dated 27.04.2017, disposed the application filed by the BKPL for exhausting the Naphtha as per the direction of the Hon'ble High Court in its interim order dated 04.04.2017. The relevant portion of the order of the Commission is extracted below.

*“ 8. The Commission has examined in detail, the application filed by BKPL for the implementation of the interim order of the Hon'ble High Court dated 04.04.2017, in Writ Petition W.P. (C)No. 540/2017, the submissions of KSEB Ltd regarding the disposal of naphtha available at the premise of BKPL and with IOCL. From the facts and records submitted before the Commission, it is noticed that,-*

- (i) The total stock of naphtha available premises of the petitioner BKPL is about 6500 MT, and the stock of naphtha available with IOCL for power generation at BKPL is 6000 KL (4450 MT) . The fuel required for generating 1 unit of electricity at BKPL is about 176 gram. Thus, the total electricity can be generated with the fuel stored at the premise of*



BKPL and at the storage facility at IOCL is about 62 Million Units (MU) of electricity. The installed capacity of the BKPL plant is 157 MW. After accounting the auxiliary consumption etc, the maximum generation possible from BKPL plant is about 3.00 MU/day. Thus, even the plant is operated continuously for 24 hrs per day, about 21 days will take to dispose the entire naphtha stored at the premise of the BKPL and at the storage facility at IOCL.

- (ii) Hon'ble High Court has directed the petitioner BKPL to explore the possibilities to dispose the naphtha as option-2 and option-3, as stated in the interim order dated 04.04.2017, i.e., (1) the possibilities of generation of power and sale to any one by availing open access facility and, (2) the possibilities of transferring the naphtha to the FACT or other similar naphtha consuming industries. However, BKPL has not submitted any details on the efforts taken for disposal of the naphtha, by exploring the possibilities at the options 2 and 3. Hence it is reasonably concluded that, the petitioner has not so far explored the possibilities at the options 2 and 3, for the disposal of naphtha as per the interim direction of the Hon'ble High Court.
- (iii) Hon'ble High Court, in its interim order dated 04.04.2017 in Writ Petition W.P (C) 540/2017 had made it clear that, if BKPL does not adopt the options-2 and 3 for the disposal of the naphtha, the BKPL shall generate power on UI basis, subject to the approval of the KSERC .

9. The Commission had, in para 10.3 of the tariff order dated 30.04.2013 for the financial year 2013-14, given the following directive to KSEB Ltd in view of the prohibitive cost of naphtha and of the electricity generated therefrom,-

*"10.3 On expiry of the prevailing PPA with liquid fuel based IPPs and such as BSES, KPCL etc., power should not be drawn from these stations under any circumstances, unless the developers convert the stations to LNG or pool sufficient quantum of cheaper power from other sources, so that the pooled tariff is well within the merit order for dispatch. Appropriate advance notice may be issued to such developers within 3 months from the date of issue of this order."*

Accordingly no approval was given for scheduling power from BKPL, though provision was approved for payment of fixed charges as per the PPA. Similarly in the tariff order dated 14.08.2014 for the financial year 2014-15 also no approval was given by the Commission for scheduling power from BKPL. The validity of the said order dated 14.08.2014 has been extended till 16.04.2017. As per the tariff order dated 17.04.2017 for the financial year 2017-18 also, no approval has been granted by the Commission for scheduling power from BKPL. The Commission had also dismissed the application filed by BKPL for granting permission to extend the PPA beyond 31.10.2015, the date of expiry of the original PPA. Therefore after 31.10.2015, there is no approval for scheduling power from BKPL or for payment of fixed charges.

10. Clause (b) of sub-section (1) of Section 86 of the Electricity Act, 2003, states as follows,-  
*"86. Functions of the State Commission.- (1) The State Commission shall discharge the following functions, namely:-  
(b) regulate electricity purchase and procurement process of distribution licensees, including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State."*

Therefore, approval of the Commission is necessary for scheduling power. The Hon'ble High Court has also, in para 9 of its order dated 04.04.2017, stated that if BKPL does not intend to carry out options 2 and 3, then they shall generate power on unscheduled interchange basis in coordination with load dispatch centre of KSEB Ltd: subject to approval of KSERC and also subject to further orders to be passed in the Writ Petition. The Hon'ble High Court has also given directions to the effect that the entire naphtha available at the petitioners company premises and that available at IOCL should be disposed of before 01.07.2017. It has been further clarified by the Hon'ble High Court that, all the issues raised by all the parties are left open for consideration in the Writ Petition.

Therefore, the Commission has to issue only the approval under clause (b) of sub-section (1) of Section 86 of Electricity Act, 2003, in accordance with the directions of the Hon'ble High Court.

11. The Commission has also noted the following facts. The 157 MW power plant of BKPL is an intra-state generating station within the State. KSEB/ KSEB Ltd has been scheduling power from the plant as and when required from the project, on merit order, duly considering the energy and peak demand, energy availability from its on hydel and thermal sources, CGS, traders, generators etc. The validity of the PPA entered into between KSEB and BKPL on 03.05.1999 expired on 31.10.2015. The present direction of the Hon'ble High Court is only to schedule power from plant for the sole purpose of disposal of the naphtha available at the premises of BSES and IOCL through power generation, in view of the probable major accident hazard of storing such huge quantity of inflammable fuel, as expressed by the Hon'ble High Court in public interest.
12. The variable cost of generation of electricity from naphtha is much higher than the energy available from other sources including traders, energy exchanges etc. Any amount incurred by KSEB Ltd for purchase of power from BKPL at an additional cost shall have to be ultimately borne by the 120 lakh consumers of the State. In the tariff order dated 17.04.2017, the Commission has, in table 9.15 in para 9.38, approved the purchase of 1946.98 MU of power by way of short term purchase at a rate of Rs.4.00 per unit. Hence, the Commission here by directs KSEB Ltd to purchase power from BKPL to the extent of 62 MU that can be generated by BKPL from the naphtha available at its premises and at the premises of IOCL, on unscheduled interchange basis as directed by the Hon'ble High Court in its order dated 04/04/2017.

### **Order of the Commission**

In view of the facts, circumstances and statutory provisions explained above, approval under clause (b) of sub-section (1) of Section 86 of the Electricity Act, 2003, is granted in accordance with the directions of the Hon'ble High Court in its order dated 04.04.2017, to the SLDC of KSEB Ltd for scheduling power and to Strategic Business Unit-Distribution of KSEB Ltd for purchasing the power generated on unscheduled interchange basis, from the 6500 MT of naphtha purchased and stored in the premises of BKPL and the 6000 kilo litre of naphtha purchased and stored by BKPL in the premises of IOCL.

This order is being issued only for the purpose of implementing the interim order dated 04.04.2017 of Hon'ble High Court in Writ Petition No.540/2017.”

18. Hon'ble High Court in the final judgment dated 31.10.2017 in WP (C) No. 540/2017 has ordered on this issue as follows.

“ The only other point on which the Commission would have to take a decision, while passing orders as directed above, is the rate/tariff that would govern the quantum of electricity supplied by the petitioner company to KSEBL, pursuant to the interim order dated 04.04.2017 of this court. While this issue is not raised in the petition before the Commission, being a subsequent event, the petitioner does have a case that, in as much as the Naphtha, that was used for the generation of the said electricity, was part of the consignment that was stored to meet the requirements of KSEBL under the PPA that held the field till 31.10.2015, the rates under the said PPA should govern the supply. The Commission shall therefore adjudicate on the said issue, as regards the rate applicable in respect of the above supply of electricity, also, untrammelled by any of the findings in its order dated 27.04.2017 (produced as Ext.P46 in W.P.(C).No.540/2017 and as Ext.P27 in W.P.(C).No.22464/2017) granting approval to the KSEBL to purchase the electricity on unscheduled interchange basis.”

19. M/s BSES Kerala Power Limited (herein after referred to as the petitioner or BKPL), on 20.11.2017, placed a copy of the judgment of the Hon'ble High Court of Kerala, dated 31.10.2017 in Writ Petition WP(C) No. 540/2017 for

compliance and to issue subsequent orders. The relevant portion of the judgment of the Hon'ble High Court dated 31.10.2017 is extracted below.

*" I, therefore, quash Ext.P18 order of the KSERC, as also Ext.P51 consequential order passed by the KSEBL, which is based entirely on Ext.P18 order. The KSERC shall consider and pass orders on merits, in respect of the issues raised in Ext.P8 petition filed under Section 86(1)(b) of the Electricity Act, 2003, within a period of three months from the date of receipt of a copy of this judgment. Both the parties before the KSERC shall be at liberty to produce additional material before the said Forum, to substantiate their contentions on merits. The KSERC shall take note that this Court has not pronounced on the merits of any of the issues in the petition before it, and all issues are left open to be decided by the Commission. The only other point on which the Commission would have to take a decision, while passing orders as directed above, is the rate/tariff that would govern the quantum of electricity supplied by the petitioner company to KSEBL, pursuant to the interim order dated 04.04.2017 of this court. While this issue is not raised in the petition before the Commission, being a subsequent event, the petitioner does have a case that, in as much as the Naphtha, that was used for the generation of the said electricity, was part of the consignment that was stored to meet the requirements of KSEBL under the PPA that held the field till 31.10.2015, the rates under the said PPA should govern the supply. The Commission shall therefore adjudicate on the said issue, as regards the rate applicable in respect of the above supply of electricity, also, untrammelled by any of the findings in its order dated 27.04.2017 (produced as Ext.P46 in W.P.(C).No.540/2017 and as Ext.P27 in W.P.(C).No.22464/2017) granting approval to the KSEBL to purchase the electricity on unscheduled interchange basis."*

**Summary of the deliberations and documents placed before this Commission consequent to the judgment of the Hon'ble High Court dated 31.10.2017 in WP(c) 540/2017**

20. M/s BKPL vide the letter dated 20.11.2017 produced a copy of the judgment of the Hon'ble High Court dated 31.10.2017 before the Commission. The Commission has forwarded a copy of the judgment to the respondent KSEB Ltd for their comments.
21. In the meanwhile, the BKPL vide the letter dated 18.12.2017 has prayed before the Commission to,
  - (a) Declare that the respondent Board is liable to pay the petitioner the price of energy generated and the fixed charges and other reimbursements as per the provisions of the PPA, as modified by the points of difference adjudicated in relief No. (ba) in the main petition.
  - (b) Direct the respondent Board to pay an amount of Rs 157.34 crore, with interest, as stipulated in the PPA (being base rate declared by State Bank of India from time to time plus two percent), from the date on which the arrears fell due till the date of realization.

The summary of the amount claimed by the BKPL is given below.

Sl No	Claim	Unit	First tariff period after 31-10-2015 (from 01.11.2015 to 31.10.2016)	Second tariff period after 31-10-2016 (from 01.11.2016 to 31.10.2017)	Total claim
1	Annual Fixed charges	Rs Cr	37.67 ( 1 <sup>st</sup> tariff period)	39.07 ( second tariff period)	
2	Land lease charges	Rs Cr	5.42	0	
3	Tax on RoE	Rs Cr	2.79	2.79	
	Subtotal	Rs Cr	45.88	41.86	87.74
4	Variable charges for scheduling power from BKPL for exhausting the Naphtha	Rs Cr			69.60
5	Total	Rs Cr			157.34

22. The subject matter was heard on 23.01.2018. The Commission has also issued notices to the following parties who participated in the proceedings of the original petition.

- (i) The Kerala High Tension and Extra High Tension Industrial Electricity Consumers Association, Productivity House, Jawaharlal Nehru Road, Kalamassery.
- (ii) Kerala State Productivity Council, Productivity House, Jawaharlal Nehru Road, Kalamassery.
- (iii) KSEB Officers Association, TC 25/2969, Mallor Road, Vanchiyoor, Thiruvananthapuram.
- (iv) Sri. A. N. Rajan, Ambattumelil House, Kolazhi P.O, Thrissur.
- (v) BSES employee unions
- (vi) Shri. Dejo Kappen, Managing Trustee, Centre for consumer education, Pala, Kottayam.

23. Sr.Adv Joseph Kodianthara presented the matter on behalf of the petitioner M/s BKPL and the main issues raised by him are mentioned below:

- (i) Extension of the PPA between the BKPL and KSEB Ltd dated 03.05.1999 beyond 30.10.2015.

As per the clause 7.4 of the original PPA dated 3.5.1999, KSEB Ltd on 13.7.2015, has communicated in principle approval to extend the original PPA for 2 more years from date of expiry on 31.10.2015. The only difference of opinion at that point of time was regarding fixed charges applicable during the extended periods. The fixed charges proposed by KSEB Ltd was Rs 0.29/unit whereas BKPL proposed Rs 0.35/unit. There was no dispute on variable charge payable for scheduling energy from the plant. BKPL filed the petition for approval of extension of PPA before the Commission based on the direction of KSEB Ltd.

There is a case of promissory estoppels and BKPL is fully eligible for the fixed charges for the extended period of two years.

- (ii) Variable charge payable for the energy scheduled from BKPL during the period from 25.05.2017 to 24.06.2017

The schedule of power from BKPL during the period from 25.05.2017 to 24.06.2017 is for exhausting the fuel stocked at the premise of BKPL and nearby premises of IOCL, which was stocked during the PPA period for the intended use of KSEB Ltd. There is no dispute on variable charges payable for the energy generated from the plant using Naphtha. Hence KSEB Ltd is liable to pay the variable charges based on the actual cost of the Naphtha stocked.

24. Sr.Adv. Raju Joseph, representing KSEB Ltd admitted that negotiations started for extending the term of PPA before expiry of PPA. However, no consensus was reached and no formal agreement was signed. A contract will be valid only if the parties to the contract make an unconditional acceptance of the contract. But, no agreement could be reached on the terms of PPA and hence there was no concluded PPA. There is also no question of any promissory estoppels in the present case. Further, the draft PPA is to be approved by the Commission. Therefore, KSEB Ltd is not liable to pay any fixed charges.

As per the PPA dated 3.5.1999, there was no provision to deal with the balance stock of Naphtha if any, available with the generator BKPL at the end of the period of the PPA. However, as per the provisions of the PPA, BKPL is bound to stock sufficient quantity of Naphtha to schedule power from the plant as and when KSEB Ltd issues dispatch instructions. KSEB Ltd has no liability on the stock of Naphtha available with BKPL after the period of the PPA, with effect from 01.11.2015.

However, there was threat on safety to the public at large regarding the Naphtha stocked at the premises of the BKPL without necessary security staff and safety arrangements. Based on the report of the District Collector Ernakulam, Hon'ble High Court of Kerala vide the interim order dated 04.04.2017 ordered to exhaust the balance stock of Naphtha available at the premises of BKPL. Hon'ble High Court recommended three options to BKPL for the disposal of balance stock of Naphtha. The third option was to schedule power under UI basis. The other two options were either to generate power utilizing Naphtha and sell through open access to third party or to transfer Naphtha to other Naphtha consuming industries. BKPL has not explored the possibility of other options to dispose the Naphtha available with them. Hence, KSEB Ltd scheduled power from BKPL during the period from 25.05.2017 to 24.06.2017, as per the third options based on the interim order of the Hon'ble High Court, i.e., to schedule power from BKPL to exhaust the Naphtha on UI basis, and subsequent order of this Commission dated 27.4.2017.

25. Sri. Ratheesh, representing HT & EHT association stated that there was no requirement of power from BKPL considering availability of power from other cheaper sources. He requested the Commission to reject the proposal to

extend the PPA and thus relieve the consumers of Kerala from this additional burden.

26. Sri. Jayathilakan, representing Kerala State Productivity Counsel stated that the scheduling of BKPL was done for exhausting Naphtha due to safety reasons and not as per requirement of KSEB Ltd, and therefore cannot attract variable charges. He prayed that tariff of common people may not be affected due to the scheduling of power generated from Naphtha stored at BKPL. He expressed concern on the employees of the plant and stated that the plant should be taken over by Government and kept as a stand by for emergency operation. He had also mentioned that public did not participate in the earlier hearing since it was mentioned in the order of High Court that it should be scheduled at UI rates.
27. Sri Jacob Laser, representing Kerala Electricity Workers Federation (AITUC) stated that Sri A. N. Rajan was party to the original petition filed by BKPL at the Hon'ble High Court. The present order dated 31.10.2017 was issued by the Hon. High Court without hearing him. Hence, he filed a petition before the Hon. Court and the Court admitted the same. He requested that the issue may be settled such a way that the consumers of the State may not be adversely affected by the generation of power from BKPL.
28. Sri Dijo Kappen stated that at the time of establishing the project there was power deficit and now India is having surplus power. Since there was no valid agreement, Commission shall not approve the claim of the BKPL.
29. Sri B Pradeep, representing KSEB Ltd, asserted the arguments submitted by their Counsel. He added that KSEB Ltd, has honoured all the legitimate claims of BKPL during the period of PPA, including the fixed cost for the deemed generation.
30. Based on the deliberations of the subject matter, the Commission vide the daily order dated 08.02.2018 had issued the following directions to the petitioner M/s BKPL, the respondent KSEB Ltd and other stake holders and interested parties:
  - (1) BKPL shall submit the following documents before the Commission latest by 19<sup>th</sup> February 2018;
    - (i) The audited accounts for the year 2015-16, 2016-17 and provisional accounts for the FY 2017-18.
    - (ii) Month wise details of the average stock of Naphtha stocked by BKPL for the past 15 years.
    - (iii) A copy of the PPA between BKPL and KSEB Ltd with amendments, if any.
    - (iv) The original fuel supply agreement between BKPL and IOC. Also copy of the approval of the same given by erstwhile KSEB as per the provisions of the PPA.

- (v) Documentary evidence on BKPL's efforts to materialize the alternate options suggested in the Court order dated 4.4.2017, i.e.,
  - (i) third party sale of power
  - (ii) transfer of Naphtha to other Naphtha consuming industries
- (vi) Month wise employee strength retained with BKPL from 01.11.2015 to till 31.10.2017, with supporting documents.
- (vii) Argument note and additional information, if any.

A copy of the above details may be provided to KSEB Ltd also for their comments

- (2) The respondent KSEB Ltd, may also submit argument note and any additional details, if required, on or before 19<sup>th</sup> of February 2018 with copy to BKPL
  - (3) All the stakeholders are also free to submit their views on or before 19<sup>th</sup> of February 2018.
  - (4) BKPL and KSEB Ltd, may submit further comments if any, on or before 26<sup>th</sup> of February 2018.
31. In compliance of the directions issued by the Commission, the petitioner M/s BKPL had submitted the argument notes on 04.02.2018 and the additional details sought by the Commission on 17.02.2018. KSEB Ltd has submitted the argument note on 09.02.2018. The petitioner M/s BKPL submitted the reply to the argument note filed by KSEB Ltd on 26.02.2018.
32. In the meanwhile, Hon. High Court of Kerala vide the judgment dated 29.1.2018 in a petition filed by Sri A N Rajan against the final order dated 31.10.2017, has issued the following directions:

*"3. The only grievance of the petitioner is the purported finding of the learned single judge with respect to the existence of an agreement.*

.....

*4. It is the common case that the existence of an agreement also can be considered by the KSERC. It is pointed out by all parties that the KSERC had already heard the matter and appellant was also heard and now orders have been reserved. **In view of the common case of all the parties that the existence of an agreement is also left to be adjudicated before the KSERC, we are of opinion that the writ appeal can be disposed of, making it clear that the said issue would also be adjudicated by the KSERC. It would be open for the KSERC to reopen arguments, if found necessary, on the question as to whether there is an agreement in existence. This would not be necessary, if the issue has already been addressed before the KSERC.***

Since Mr. A. N. Rajan was a party before the Commission during the deliberation of the original order dated 26.10.2016, the Commission has issued notice for the hearing scheduled on 23.01.2018 in compliance of the directions

of the Hon'ble High Court dated 31.10.2017 in WP(c) 540 of 2017. However, there was no formal representation from Mr.A.N Rajan during the hearing held on 23.01.2018. The issue raised by Sri. A. N. Rajan before the Hon'ble High Court is on existence of an agreement between M/s BKPL and KSEB Ltd beyond 31.10.2015, i.e, the validity of the original agreement dated 03.05.1999 beyond 31.10.2015. This is one of the two issues referred by the Hon'ble High Court in the judgment dated 31.10.2017 in WP(C)No. 540 of 2017 and the matter was deliberated in detail by the petitioner M/s BKPL, the respondent KSEB Ltd and other stakeholders presented during the hearing held on 23.01.2018. Hence it is decided that, no further hearing is required based on the decision of the Hon'ble High Court dated 29.01.2018 in WA No. 237 of 2018.

### **Analysis and Decision**

33. The issues now deliberated before this Commission are the matters remanded back to this Commission by the Hon'ble High Court of Kerala vide its judgment dated 31.10.2017 in WP(C)No. 540/2017. The relevant portion of the judgment is extracted below.

*“ I, therefore, quash Ext.P18 order of the KSERC, as also Ext.P51 consequential order passed by the KSEBL, which is based entirely on Ext.P18 order. The KSERC shall consider and pass orders on merits, in respect of the issues raised in Ext.P8 petition filed under Section 86(1)(b) of the Electricity Act, 2003, within a period of three months from the date of receipt of a copy of this judgment. Both the parties before the KSERC shall be at liberty to produce additional material before the said Forum, to substantiate their contentions on merits. The KSERC shall take note that this Court has not pronounced on the merits of any of the issues in the petition before it, and all issues are left open to be decided by the Commission. The only other point on which the Commission would have to take a decision, while passing orders as directed above, is the rate/tariff that would govern the quantum of electricity supplied by the petitioner company to KSEBL, pursuant to the interim order dated 04.04.2017 of this court. While this issue is not raised in the petition before the Commission, being a subsequent event, the petitioner does have a case that, in as much as the Naphtha, that was used for the generation of the said electricity, was part of the consignment that was stored to meet the requirements of KSEBL under the PPA that held the field till 31.10.2015, the rates under the said PPA should govern the supply. The Commission shall therefore adjudicate on the said issue, as regards the rate applicable in respect of the above supply of electricity, also, untrammelled by any of the findings in its order dated 27.04.2017 (produced as Ext.P46 in W.P.(C).No.540/2017 and as Ext.P27 in W.P.(C).No.22464/2017) granting approval to the KSEBL to purchase the electricity on unscheduled interchange basis.”*

34. Accordingly, as per the judgment of the Hon'ble High Court of Kerala, dated 31.10.2017, this Commission has to decide on the following issues.

**Issue No.1** Consider the Exhibit P8 petition filed by the petitioner BKPL under Section 86(1)(b) of the Electricity Act, 2003 and pass orders on



merit on the issues raised therein, within a period of three months from the date of receipt of a copy of the judgment.

**Issue No.2** Adjudicate on the rate/tariff that would govern the quantum of electricity supplied by the petitioner company to KSEB Ltd, pursuant to the interim order dated 04.04.2017.

As per the directions of the Hon'ble High Court of Kerala in the judgment dated 31.10.2017, the Commission has appraised the above two issues in details and the findings of this Commission is given below.

35. **Issue No.1.**

The prayer of the petitioner in the Exhibit P8 petition, filed by M/s BKPL on 05.10.2015 is given below.

- (i) Admit the petition.
- (ii) Approve the agreement for extension of PPA between KSEB Ltd and BKPL including tariff for two years as prayed with effect from the first November 2015, pending finalization of the proposal submitted to KSEB Ltd for gas conversion of the plant and extension of PPA term.
- (iii) Grant interim approval for continuing purchase of power from BKPL by KSEB Ltd during the intervening period beyond 31.10.2015 till the time extension of PPA is approved and signed, at the tariff proposed in the draft agreement for extension of PPA, subject to adjustment with respect to tariff approved by the Hon'ble Commission.
- (iv) Condone any inadvertent omissions / errors / rounding of differences / short comings in the petition.
- (v) Allow additions / alterations / changes / modifications / amendments to the petition at a future date.
- (vi) Dispose of the petition expeditiously.
- (vii) Pass any such orders as deemed fit."

36. The Commission has examined each of the prayer raised by the petitioner in the Exhibit P8 petition as per the direction of the Hon'ble High Court.

37. **First prayer of Exhibit P8:**

The Commission on 14.10.2015 had admitted the petition as OP No. 34/2015. Hence there is no relevance on the first prayer of the Exhibit P8 petition referred in the judgment dated 31.10.2015.

38. **Second prayer of Exhibit P8:**

The second prayer in the Exhibit P8 petition is to approve the agreement for extension of PPA for two more years with effect from the 1<sup>st</sup> November 2015, pending finalization of the proposal submitted to KSEB Ltd for gas conversion of the plant and extension of PPA term.

The findings and decision of the Commission on this issue is given below.

- (1) The Commission is a statutory authority and a quasi judicial body, functioning as per the provisions of the Electricity Act, 2003. The statutory powers, authority and functions of the Commissions are specified in the Electricity Act, 2003.
- (2) KSEB Ltd is the deemed distribution licensee in the State of Kerala, and its predecessor in interest, KSEB, was established in the year 1957. The Electricity Act, 2003 came into force in June 2003. After the enactment of the Electricity Act 2003, all the activities including power purchase of KSEB and subsequently its successor entity in interest, KSEB Ltd, has been regulated by this Commission.
- (3) As per Section 86 (1) (b) of the Electricity Act, 2003, regulating the power purchase and procurement process of the KSEB Ltd, including the price at which electricity shall be procured from Generating Companies is one of the statutory function of this Commission. Section 86(1)(b) of the EA-2003 is extracted below for ready reference.

“86. (1) The State Commission shall discharge the following functions, namely:

.....

(b)regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;”

- (4) Regulation-78 of the KSERC (Terms and Conditions for determination of Tariff) Regulation, 2014 (hereafter referred to as Tariff Regulation, 2014) deals with the procedures for approval of the power purchase agreement/ arrangement between the distribution licensee from the generating company/ from other sources. The relevant provisions in the Tariff Regulation, 2014 is extracted below.

**78. Approval of power purchase agreement/arrangement.** – (1) *Every agreement or arrangement for procurement of power by the distribution business/licensee from the generating business/company or licensee or from other source of supply entered into after the date of coming into effect of these Regulations shall come into effect only with the approval of the Commission:*

*Provided that the approval of the Commission shall be required in accordance with this regulation in respect of any agreement or arrangement for power procurement by the distribution business/licensee from the generating business/company or licensee or from any other source of supply on a standby basis:*

*Provided further that the approval of the Commission shall also be required in accordance with this regulation for any change to an existing agreement or arrangement for power procurement, whether or not such existing agreement or arrangement was approved by the Commission.*

(2) *The Commission shall examine an application for approval of power purchase agreement/arrangement having regard to the approved power procurement plan of the distribution business/licensee and the following factors:-*

*(a) requirement of power under the approved power procurement plan;*

*(b) adherence to a transparent process of bidding in accordance with guidelines issued by the Central Government under Section 63 of the Act;*

*(c) adherence to the terms and conditions for determination of tariff specified under chapter VI of these Regulations where the process specified in clause (b) above has not been adopted;*

*(d) availability (or expected availability) of capacity in the intra-State transmission system for evacuation and supply of power procured under the agreement/arrangement; and*

*(e) need to promote co-generation and generation of electricity from renewable sources of energy.*

*(3) Where the terms and conditions specified under chapter VI of these Regulations are proposed to be adopted, the approval of the power purchase agreement/arrangement between the generating business/company and the distribution business/licensee for supply of electricity from a new generating station may comprise of the following two steps, at the discretion of the applicant:-*

*(a) approval of a provisional tariff, on the basis of an application made to the Commission at any time prior to the application made under clause (b) below; and*

*(b) approval of the final tariff, on the basis of an application made not later than three months from the cut-off date.*

- (5) Regulation 78 of the Tariff Regulations, 2014 mandate that, every agreement or arrangement for procurement of power by the distribution business/ licensee entered into after coming into force of these Regulations shall come into force only with the approval of the Commission. The sub regulation (2) of Regulation 78 specifies the procedures to be followed by the Commission while examining the applications for approval for power purchase, this include the assessment of requirement of such power under the approved power procurement plan.
- (6) BSES Kerala Power Limited (herein after referred as BKPL), is a private Independent Power Producer, established in the land of Travancore Cochin Chemicals (TCC) at Eloor Ernakulam during the year 1999. Naphtha is the prime fuel used for power generation. The original power purchase agreement with supplying electricity from the plant was entered into between KSEB on 03.05.1999. All the conditions governing the supply of electricity from the plant, including the scheduling of electricity from the plant, payment of fixed charges, variable charge etc were as per the provisions of the said PPA.
- (7) Considering the excessive variable cost of power generation from the plant, the Commission in its tariff order dated 30.04.2013 in OP No. 02/2013 has issued direction to KSEB that, on expiry of the PPA with BKPL, the power should not be scheduled from these stations under any circumstances, unless the developers convert the stations to LNG or

pool sufficient quantum of cheaper power from other sources. The relevant portion of the order of the Commission dated 30.04.2013 in OP No. 02/2013 is extracted below.

*“Chapter-10.*

*Para 10.3 : On expiry of the prevailing PPA with liquid fuel based IPPs such as BSES, KPCL etc., power should not be drawn from these stations under any circumstances, unless the developers convert the stations to LNG or pool sufficient quantum of cheaper power from other sources, so that the pooled tariff is well within the merit order for dispatch. Appropriate advance notice may be issued to such developers within 3 months from the date of issue of this order.”*

- (8) Cclause 15.1 of the PPA dated 03.05.1999 provides for extension of the term of PPA as stipulated hereunder,-

“The agreement can further be extended for a period of 10 tariff periods beyond the 15<sup>th</sup> tariff period on a mutually agreed tariff as per clause 7.4 taking into account the fuel charges, operation and maintenance charges and a nominal net residual value of the project which the company would have normally expected on dismantling and selling the same at its cost”

As extracted above, there is a provision in the PPA for extension of the PPA beyond the expiry of the original PPA period on 31.10.2015, at mutually agreed tariff, upto a maximum period of 10 years.

- (9) Before the expiry of the original PPA dated 03.09.1999, the KSEB Ltd vide its letter dated 13.07.2015 communicated their willingness to extend the PPA for a period of two more years from the date of expiry of existing PPA, subject to the following conditions,-

- (i) Terms of existing PPA have to be suitably modified.
- (ii) Re-ascertain the fixed charges applicable for the extended period, as the existing plant is a fully depreciated one.
- (iii) Obtaining approval from KSERC for the above.

- (10) Subsequently, KSEB Ltd vide the letter dated 29.09.2015 has informed the BKPL to file a petition before the KSERC for the approval of the tariff and PPA for the period of two years from the expiry of PPA on 31.10.2015, subject to the following conditions.

- (i) The components in the Annual Fixed Charges shall be
  - a. Operation & Maintenance expenses
  - b. Interest on Working Capital
  - c. Return on Equity
- (ii) Since KSERC has not specified any norms to calculate the O&M expenses for Small gas turbine power generating stations, average of the previous five year O&M expenses (from 2009-10 to 2013-14) is to be taken for calculation of AFC. O&M expenses for 2014-15 shall not be considered as it is found exorbitant compared to previous years' and realistic average could not be worked out.

- (iii) While arriving at the Interest on Working Capital, cost of fuel is to be taken as the average of last 3 months just prior to the date of PPA renewal. The same may be reviewed and modified after one year from the date of renewal of PPA, if necessary. It may be noted that actual PLF of the plant for the last three years is less than 30% and the tank capacity is 11375MT only. As storage of 11375 MT fuel is only possible and actual PLF is less than 30%, cost of fuel shall be calculated based on the above.
  - (iv) Also while calculating Interest on Working Capital, receivables for 15 days shall be taken, since KSEBL is making weekly payment and considering the processing time for settlement of bills.
  - (v) Regarding RoE, as detailed in Clause 7.4 of the PPA, a nominal net residual value of the Project which the Company would have normally expected on dismantling and selling the same at its cost shall be taken, As per Companies Act, depreciation is 95% of the original cost and hence nominal net residual value is only 5% of the original cost.
  - (vi) M/s BKPL's claim on correction in heat rate cannot be agreed.
  - (vii) Major overhauling of the machines after 4000hr running, may be considered when such a situation arises, with the concurrence of the Commission.
  - (viii) Non tariff income, if any, shall be deducted from the Fixed Cost.
  - (ix) For calculation of monthly fixed charges, plant availability of the particular month limited to 80% maximum shall only be considered. In other words the payment of fixed charge based on PLF would be strictly restricted to the PLF of each month.
  - (x) The proposal of the company that in case of the two years cumulative PLF exceeds 40%, then the tariff applicable for the entire tariff period will be the tariff for PLF of more than 40% cannot be agreed to.
- (11) However, till the time of filing the petition Exhibit P8 before the Commission on 03.10.2015 and/or till the time of the hearing of the said petition on 27.10.2015, the petitioner BKPL and the respondent KSEB Ltd could not reach a consensus on the tariff for the extended period. Considering these aspects in detail, the Commission vide the daily order dated 28.10.2015 had issued the following directions to both the petitioner BKPL and the respondent KSEB Ltd.

“

- (i) *KSEB Ltd shall submit a detailed appraisal on the demand and supply position of power during 2016 and 2017 duly considering the availability of power from its hydel stations, Central Generating Stations, power purchase agreements with traders / generators, KSEBL's own diesel stations, other liquid fuel stations including RGCCPP-Kayamkulam and from short-term market, the average cost of power purchase for a period of two years from November 2015 and such other details to substantiate the necessity for extending the PPA with BKPL for a further period of two years from November 2015 for which in principle sanction has been accorded by the Board of Directors of KSEB Ltd.*

- (ii) *KSEB Ltd may, if found necessary, file petition under clause (b) of sub-section (1) of Section 86 of the Electricity Act, 2003, for the extension of the original PPA dated 03.05.1999 as per the Article 15.1 and Article 7.4 therein, with mutually agreed tariff and terms and conditions incorporated in the draft PPA initialed by both the parties to the agreement.*
- (iii) *Time up to 27.11.2015 is granted to the petitioner BKPL and the respondent KSEB Ltd for complying with the directives (i) & (ii) above.*
- (iv) *KSEB Ltd and BKPL may, till 30.11.2015, extend the PPA dated 03.05.1999 as per the Article 15.1 and Article 7.4 therein subject to the condition that the payment for the period of one month from 01.11.2015 to 30.11.2015 shall be as decided by the Commission in the final order.”*
- (12) However, both the parties could not comply with the directions issued by the Commission as above within the time specified therein. The original PPA dated 03.05.1999 expired on 31.10.2015. There was no valid PPA between the petitioner BKPL and KSEB Ltd with effect from 01.11.2015. KSEB Ltd vide the letter dated 02.12.2015 submitted that, despite repeated discussions with the petitioner, they could not reach consensus on the tariff for extending the PPA beyond 31.10.2015.
- (13) KSEB Ltd vide letter dated 8.12.2015 has communicated to the petitioner as follows:
- “ Please refer to the above. You are aware that a mutually agreed tariff and terms and conditions as ordered by the Hon’ble KSERC could not be arrived at inspite of discussions between KSEB Ltd and BKPL. Hence, I am directed to inform you that KSEB Ltd will not be liable for payment of Fixed charge or any other charges with effect from 01.12.2015 and will not entertain any claim in this regard as terms and conditions for extension of PPA could not be agreed upon among the parties”.
- (14) In the meantime the Government of Kerala vide the order dated 24-2-2016 accorded *‘in principle sanction for extending the PPA between KSEB Ltd and M/s. BKPL for the combined cycle power plant at Kochi for two more years from the date of expiry of the existing PPA, subject to the condition that no Government Guarantee will be allowed for any payment obligations of KSEBL and the final tariff shall be decided by KSERC and be brought back to Government and approval of Government obtained. The KSEBL is also permitted to study and firm up its decision on the option of fuel conversion of the plant from Naphtha to LNG in consultation with KSERC and obtain Government approval at appropriate stage’.*
- (15) In compliance of the directions given in the daily order dated 28.10.2015, KSEB Ltd vide its letter dated 25.04.2016 submitted that, it had contracted sufficient quantum of power from outside the State through competitive tenders on long term and medium term to meet the power requirement of the State. With the commissioning of the Mysore-Areekode 400 kV line, commissioning of Narendra-Kolhapur 765 kV line and the resolution of disputes with CTU with the intervention of the CERC, the power contracted from sources is expected to flow in to the State as scheduled. The month wise details of the demand and supply

position submitted by the KSEB Ltd also reveals that, probability of any power shortages within the next few years is very remote.

KSEB Ltd also placed a draft PPA for the proposed extended period before the Commission with points of disagreement on the following:

- (i) The effective date of the PPA, which according to the KSEB Ltd is only from the date of approval by KSERC.

According to BKPL, the effective date of the PPA is from 01.11.2015.

- (ii) Fixed charges or any other charges from 01.12.2015 till the date of the agreement.

According to KSEB Ltd, they shall not be liable to pay fixed charge or any other charges with effect from 01.12.2015 till the date of signing the agreement with the approval of KSERC. Further, KSEB Ltd vide the letter dated 08.12.2015 has communicated that, KSEB Ltd shall not be liable to pay fixed charge or any other charges from 01.12.2015.

But, BKPL demanded the fixed charges and other charges from 01.11.2015 onwards, irrespective of the date of approval of the Commission.

- (iii) Lease rent: There is neither a tripartite agreement nor KSEB Ltd is a lessee. Lease rent is a payment to be made by a lessee to a lesser. KSEB Ltd cannot agree suomotu to pay the land lease. BKPL claimed that, while proposing the tariff, the lease rent payable to the TCC is considered separately.

- (iv) Reimbursement of Tax on returns: KSEB Ltd cannot agree to pay tax on returns.

BKPL claimed that, as per Tariff Regulations, 2014, the generator is eligible for reimbursement of tax on returns.

- (v) Tariff component: RoE. Residual value of the project shall be 5% of the GFA of Rs 561.00 crore. BKPL claimed the same at 10% of the capital cost.

- (vi) O&M charges

According to KSEB Ltd, the O&M charges shall be the average for the period from 2009-10 to 2013-14 without any escalation. Since there is abnormal O&M charges for the year 2014-15, the same may be disregarded to arrive the realistic average. Further as the plant is kept as stand by and the regular operation is very limited, escalation in O&M charges cannot be considered. Further the trend of actual O&M expenses from 2009-10 is showing a declining trend.

According to BKPL, the average O&M cost for the period 2010-11 to 2014-15 has been taken as the median value for the period and escalated three time @5.85% as per the KSERC Tariff Regulations, 2014 to arrive the O&M cost for 2015-16 and further escalated to arrive the O&M cost for subsequent periods.

- (vii) Historical cost used for calculation of spares  
According to KSEB Ltd, the cost of spares shall be 1% of the residual value calculated as per the Companies Act. Cost of spares for the purpose of inclusion in fixed cost shall be 1% of the residual value calculated as per Companies Act. Since 95% of the original cost (Rs 561 crore) has been written down, only 1% of the 5% of the original cost can be considered as cost of spares. This aspect is clearly mentioned in the Article 7.4 of the expired PPA.

According to BKPL, cost of spares should be 1% of the historical cost (original project cost) of Rs 561 crore as per KSERC Tariff Regulations, 2014. Hence the cost of spares used for IWC calculation should be 1% of Rs 561.00 crore, i.e., Rs 5.61 crore. Also BKPL currently holds inventory worth more than Rs 9.00 crore. With ageing of the plant O&M expenses will increase.

- (viii) Fuel stock for IWC  
According to KSEB, since they are making weekly payment, only 14 days stock of operation at 80% PLF shall be considered for calculating the cost of fuel used in IWC. Review of the actual purchase of fuel made by BKPL was revealed that fuel can be purchased and stored at frequent intervals and with varied quantities.

According to BKPL, fuel cost for calculating the IWC shall be taken as per BKPL naphtha storage capacity as agreed during previous discussions. Also sourcing of fuel on short notices is not possible and will adversely affect the cost of fuel.

As above, the draft PPA placed before the Commission is without consensus on almost all the issues including the effective date of PPA, the tariff payable till the date of signing the PPA, lease rent, reimbursement of income tax, RoE, O&M expenses, fuel stocks etc.

- (16) As detailed in the sub paragraphs 9 and 10 above, there was a conditional offer from the respondent KSEB Ltd to extend the PPA for two more years from 01.11.2015, as per the clause 15.1 of the expired PPA. However, both the petitioner and the respondent could not reach consensus on the mutually agreed tariff for the extended period as per clause 15.1 of the expired PPA. Hence the Commission vide the daily order dated 28.10.2015, had granted time extension till 27.11.2015, to the petitioner and respondent to approach the Commission with mutually agreed tariff and initialed PPA, along with proper appraisal on demand



supply position of power during 2016 and 2017, for extension of PPA beyond 31.10.2015. However, during the said period also, both the parties could not reach a consensus on the tariff for the proposed extension period from 01.11.2015.

- (17) It is the duty and responsibility of the KSEB Ltd as the distribution licensee to appraise before the Commission the necessity of the extension of the PPA, with proper appraisal on the electricity demand and supply position of the State. Before granting approval for any power purchase by KSEB Ltd, the Commission has to examine the following:
- (i) Whether the proposed power purchase is essential for meeting the electricity demand of the State?.
  - (ii) What is the cost of electricity generated from the project, including the fixed cost and variable cost (the cost of fuel required for producing one unit of electricity from the plant).
  - (iii) Impact of such power purchase on the ultimate consumers of the State.
  - (iv) What are the alternate sources of power available and its cost.

After appraising the above, if the power purchase proposed by KSEB Ltd is not viable/ required for the State and the consumers based on the analysis of existing market conditions, demand supply gap and the trend of market price of power, the Commission has all the statutory authority to reject the proposal of such power purchase by the licensee.

- (18) However, in the present case, the petitioner BKPL and the respondent KSEB Ltd could not reach a consensus for the extension of the PPA. Without the consensus or mutual agreement of the extension of the PPA, the Commission cannot approve term of the PPA. Further, the Commission also cannot direct the KSEB Ltd to extend the expired PPA, without the mutual consensus of the parties. Even if the parties decided to extend the PPA, it is up to the Commission to approve it or not, as per the provisions of the Electricity Act, 2003 and Regulations notified by the Commission.
- (19) The Commission vide the daily order dated 28.10.2018, ordered that *“KSEB Ltd and BKPL may, till 30.11.2015, extend the PPA dated 03.05.1999 as per the Article 15.1 and Article 7.4 therein subject to the condition that the payment for the period of one month from 01.11.2015 to 30.11.2015 shall be as decided by the Commission in the final order”*. However no agreement could be reached between the petitioner and the respondent licensee regarding the terms and conditions for extension of the PPA beyond 31.10.2015.
- (20) Considering these facts, and the conditional approval granted by the Commission for the extension of PPA for one month from the date of expiry of the PPA dated 03.05.1999 for continuing the negotiations, but no agreement was reached between the parties of the extension of PPA even during the said period also, the Commission cannot approve the

agreement for extension of PPA from 01.12.2015, merely based on the conditional offer given by the respondent KSEB Ltd.

39. Third prayer of the Exhibit P8 petition:

The third prayer of the Exhibit P8 petition is to 'grant interim approval for continuing purchase of power during the interim period beyond 31.10.2015 till the time the extension of PPA is approved and signed at the tariff proposed in the draft agreement for extension of the PPA, subject to the adjustment with respect to the tariff approved by the Commission. The Commission has examined the matter in detail, and the observation and findings of the Commission is given below.

- (1) Due to the excessive variable cost, the power was not scheduled even during the validity of the expired PPA dated 03.05.1999 for meeting the power requirement of the State. Further, after the details placed before the Commission, the respondent KSEB Ltd has not given any schedule from the plant after the expiry of the original PPA.
- (2) The Commission vide the daily order dated 28.10.2015, directed the respondent to submit the following:  
  
*' (i)KSEB Ltd shall submit a detailed appraisal on the demand and supply position of power during 2016 and 2017 duly considering the availability of power from its hydel stations, Central Generating Stations, power purchase agreements with traders / generators, KSEBL's own diesel stations, other liquid fuel stations including RGCCPP-Kayamkulam and from short-term market, the average cost of power purchase for a period of two years from November 2015 and such other details to substantiate the necessity for extending the PPA with BKPL for a further period of two years from November 2015 for which in principle sanction has been accorded by the Board of Directors of KSEB Ltd.'*
- (3) In compliance of the directions given in the daily order dated 28.10.2015, KSEB Ltd vide its letter dated 25.04.2016 submitted that, it had contracted sufficient quantum of power from outside the State through competitive tenders on long term and medium term to meet the power requirement of the State. With the commissioning of the Mysore-Areekode 400 kV line, commissioning of Narendra-Kolhapur 765 kV line and the resolution of disputes with CTU with the intervention of the CERC, the power contracted from sources is expected to flow into the State as scheduled. The month wise details of the demand and supply position submitted by the KSEB Ltd also reveals that, probability of any power shortages within the next few years is very remote
- (4) Further, considering the excessive variable cost of generation from the plant, the Commission in its tariff order dated 30.04.2013 in OP No. 02/2013 has issued direction to KSEB that, on expiry of the PPA with BKPL, the power should not be drawn from these stations under any circumstances, unless the developers convert the stations to LNG or pool sufficient quantum of cheaper power from other sources. The relevant portion of the order of the Commission dated 30.04.2013 in OP No. 02/2013 is extracted below.

*“Chapter-10.*

*Para 10.3 : On expiry of the prevailing PPA with liquid fuel based IPPs such as BSES, KPCL etc., power should not be drawn from these stations under any circumstances, unless the developers convert the stations to LNG or pool sufficient quantum of cheaper power from other sources, so that the pooled tariff is well within the merit order for dispatch. Appropriate advance notice may be issued to such developers within 3 months from the date of issue of this order.”*

- (5) The respondent KSEB Ltd, has not raised any absolute essentiality for continuing the power purchase from BKPL, till the time of extension of the PPA is approved and signed for meeting the power requirement of the State.
- (6) Considering due consideration of the facts mentioned above and the Commission’s order dated 28.10.2018, wherein it is ordered that *“KSEB Ltd and BKPL may, till 30.11.2015, extend the PPA dated 03.05.1999 as per the Article 15.1 and Article 7.4 therein subject to the condition that the payment for the period of one month from 01.11.2015 to 30.11.2015 shall be as decided by the Commission in the final order”* and further considering the fact that no agreement could be reached between the petitioner and the respondent licensee regarding the terms and conditions for extension of the PPA beyond 31.10.2015, the Commission does not grant approval for continuing the power purchase agreement from BKPL beyond 30.11.2015.

40. Fourth prayer of the Exhibit P8 petition:

The fourth prayer of the Exhibit P8 petition is to condone any inadvertent omissions/ errors/ rounding of differences/ short comings in the petitions. This matter has been addressed during the course of the deliberations in the Commission’s hearing of the subject matter.

41. Fifth prayer of the Exhibit P8 petition:

The fifth prayer of the petitioner is to ‘allow additions/ alterations/ changes / modifications/ amendments to the petition at a future date. The details of the amendments / alterations proposed by the petitioner and the decision of the Commission is discussed below.

- (i) The petitioner BKPL on 27.07.2016 filed an amendment to the Exhibit P8 petition, the details are given below.

(A) In the cause title, modified as ‘In the matter of: Petition under Section 86 of the Electricity Act, 2003, filed by the above named petitioner under Regulation 22 of the KSERC (Conduct of Business) Regulations, 2003, for approval of agreement for extension of PPA submitted by the parties, and for adjudicating the point of difference raised by the parties.

(B) In Chapter-3 of the original petition on ‘Statutory and Regulatory Framework for Filing the instant petition, the petitioner had submitted

that, as per the Regulation 22 of the KSERC (Conduct of Business) Regulations, 2003, any affected party can approach this Commission and can initiate proceedings. The petitioner herein, being a generating company, from whom electricity has to be purchased by the respondent, is an affected party, and hence, the petitioner is entitled to initiate proceedings before this Commission.

(C)The paragraphs in the chapter-3 may be permitted to be suitably amended.

(D)By invoking the powers of the Commission under the provisions of section 86(1)(b) and (f) of the Electricity Act-2003, praying for the approval of the draft initialed draft PPA submitted by the respondent before this Commission by its letter dated 25.04.2016, and for approving the tariff after adjudicating the points of difference raised by the parties.

(E)The prayer in 7.1.1(b) may be permitted to be substituted with the following.

Approve the agreement submitted before this Hon'ble Commission by the Respondent after adjudicating the points of difference.

(F)The following relief may be permitted to be incorporated after relief No.(b) and before (c):

(ba) Adjudicate and take a decision on the points of difference raised by the Respondent in relation to the initialed draft PPA submitted before this Commission by the respondent.

- (ii) As discussed under paragraph 35 above, the prayer of the original exhibit P8 petition dated 05.10,2015 was to (i) approve the agreement for extension of PPA between the KSEB Ltd and BKPL including the tariff for two more years with effect from November-2015 and (ii) to grant interim approval for continuing purchase of power from BKPL by KSEB Ltd during the interim period from 01.11.2015 till the time extension of PPA is approved and signed, at the tariff proposed in the draft agreement for extension of PPA, subject to the adjustment in tariff approved by the Commission.

However, in the amendment petition dated 27.07.2016, the prayer of the petitioner is to adjudicate the points of difference between the petitioner BKPL and respondent KSEB Ltd, in the draft PPA placed before this Commission by the respondent KSEB Ltd for the extension of expired PPA from 01.11.2015 for two more years.

- (iii) The amendment petition filed by the petitioner BKPL on 27.07.2016, is for adjudicating the points of difference in the draft for extension of the PPA beyond 31.10.2015. It is true that, negotiation were conducted between the parties for extension of the PPA, but during the negotiation stage itself, there were points of difference on many issues including, effective date of PPA, the tariff payable till the date of signing the PPA,

lease rent, reimbursement of income tax, RoE etc. As per the provision of the original agreement signed on 03.05.1999, the extension of the same should be on mutually agreed tariff. However there is no mutual agreement between the parties despite the negotiations.

- (iv) It is also a fact that the respondent licensee had as early as in 08.12.2015, communicated to the petitioner BKPL as extracted below

*“you are aware that a mutually made tariff and terms and conditions as ordered by the Hon’ble Kerala State Electricity Regulatory Commission could not arrived inspite of discussions between KSEB Ltd. and BKPL. Hence I am directed to inform you that KSEB Ltd. will not be liable for the payment of fixed charges or any other charges with effect from 01.12.2015 and will not enter any claim in this regard as the terms and conditions for extension of PPA cannot be mentioned to participants”.*

Hence from this correspondence it is clear that inspite of the window of one month provided by the Commission from 01.11.2015 to 30.11.2015, the parties could not arrive at a mutually acceptable PPA. No further extension of time was granted by the Commission, hence it can be concluded that there was no mutual agreement between the petitioner ie., BKPL and the Licensee ie., KSEB Ltd for extension of the PPA.

- (v) As per the Section 86(1)(f) of the Electricity Act, 2003, adjudication of the disputes between the licensees and generating companies and to refer any dispute for arbitration is one of the functions of this Commission. The relevant Section of the Electricity Act, 2003 is extracted below.

*“86. (1) The State Commission shall discharge the following functions, namely:*

*-*

*(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;”*

Section 86 (1) of the Electricity Act, 2003 defines the functions of the State Commission and Section 86 (1) (f) mentioned above confers the power upon the State Commission to adjudicate upon disputes between licensee and the generating companies and to refer any disputes for arbitration. A reading of the above sub-section clearly indicates that the adjudication process can take place between the parties provided, there is a valid agreement between the parties. The Commission notes that the parties to the dispute could not arrive at any mutually acceptable resolution and the respondent licensee, as early as in December, 2015, communicated to the petitioner that they are not liable for the payment of fixed charges or any other charges with effect from 01.12.2015 nor shall they entertain any claim in this regard. Further there has been no valid Power Purchase Agreement explicitly between the licensee and generator, after 31.10.2015.

It is also a fact that the draft PPA was placed by the respondent before the Commission only in compliance of its order dated 28.10.2015. However, as discussed in para 38(15) above the draft PPA placed by

the Licensee before the Commission was without consensus on almost all the issues including the effective date of PPA, the tariff payable till the date of signing the PPA, lease rent, reimbursement of income tax, RoE, O&M expenses, fuel stocks etc. The Commission being a quasi judicial body cannot adjudicate the terms of the draft PPA which is under discussion between the parties. Hence, this plea of the amendment petition is declined.

42. Additional submissions of the petitioner and respondent subsequent to the final judgment of the Hon'ble High Court dated 31.10.2017.

The Commission has also examined the additional submission of the petitioner BKPL and the respondent KSEB Ltd, subsequent to the final judgment of the Hon'ble High Court dated 31.10.2017. The details are given below.

(i) The petitioner BKPL vide the letter dated 18.12.2017, prayed before the Commission the following.

- (a) Declare that the respondent Board is liable to pay the petitioner the /price of energy generated and the fixed charges and other reimbursements as per the provisions of the PPA, as modified by the points of difference adjudicated in relief No. (ba) in the main petition.
- (b) Direct the respondent Board to pay an amount of Rs 157.34 crore, with interest, as stipulated in the PPA (being base rate declared by State Bank of India from time to time plus two percent), from the date on which the arrears fell due till the date of realization.

The summary of the amount claimed by the BKPL is given below.

Sl No	Claim	Unit	First tariff period after 31-10-2015 (from 01.11.2015 to 31.10.2016)	Second tariff period after 31-10-2016 (from 01.11.2016 to 31.10.2017)	Total claim
1	Annual Fixed charges	Rs Cr	37.67 ( 1 <sup>st</sup> tariff period)	39.07 ( second tariff period)	76.74
2	Land lease charges	Rs Cr	5.42	0	5.42
3	Tax on RoE	Rs Cr	2.79	2.79	5.58
	Subtotal	Rs Cr	45.88	41.86	87.74
4	Variable charges for scheduling power from BKPL for exhausting the Naphtha	Rs Cr			69.60
5	Total	Rs Cr			157.34

The petitioner BKPL further submitted that, KSEB Ltd vide the letter dated 13.07.2015 has accorded in principle sanction to extend the PPA of the BKPL plant to run on Naphtha for two more years. Further, the State Government also vide the order dated 24.02.2016 granted 'in principle sanction' extension of the PPA for two more years from the date expiry of the original PPA. The petitioner was in an 'operational condition' maintaining the plant due to the legitimate expectation based

on the assurance and expectation made by KSEB Ltd and State Government. There is a case of promissory estoppel and BKPL is fully eligible for the fixed charges for the expected period of two years.

Accordingly, the petitioner claimed Rs 76.74 crore as fixed charges for the period from 01.11.2015 to 31.10.2017. Further, during the said period, the petitioner had claimed Rs 5.42 crore as land lease charges and Rs 5.58 crore towards tax on RoE.

- (ii) In their response, KSEB Ltd submitted that, negotiations started for extending the term of PPA even before expiry of PPA dated 03.05.1999, but no consensus was reached in spite of the one month period given by the Commission beyond 31.10.2015 and no formal agreement was signed. On the other hand KSEB Ltd had on 08.12.2015 informed the petitioner that since no agreement was arrived at, they are not liable for the payment of fixed charges or any other charges beyond 30.11.2015. A contract will be valid only if the parties to the contract make an unconditional agreement of the terms and conditions of the contract. But, no agreement could be reached on the terms of PPA and hence there was no PPA concluded. Hence the question of any promissory estoppels beyond 31.11.2015 does not arise in the present case.
- (iii) The Commission has examined the submissions of the petitioner BKPL and respondent KSEB Ltd on this issue. As discussed under sub paragraph 38(9) and 38(10) above, there was a conditional offer from the respondent KSEB Ltd to extend the PPA for two more years, but subject to fulfillment of specified conditions. The conditions stipulated therein include a mutually agreed tariff and also subject to the approval of this Commission. However, the conditions stipulated for arriving at an agreement could not be reached and accordingly no fresh PPA was neither signed nor approved by the Commission.

Further, the in principle sanction granted by the State Government vide order dated 24.02.2016 for extending the PPA between the KSEB Ltd and BKPL was also conditional, and unequivocally stated therein that, no Government guarantee will be allowed for any payment obligation of KSEB Ltd. It means that the entire liability for extending the PPA shall be borne by KSEB Ltd to be ultimately passed on to the consumers of the State. Further the preamble of the Electricity Act, 2003 vide para 3 mentioned that “ *one of the objective of the Electricity Act, 2003 is to distancing the regulatory responsibilities from the Government to the Regulatory Commissions*”. Hence it was the intend of the Act to separate the functions of the respondent KSEB Ltd, from the direct intervention of the State Government and therefore even this order is not tenable as per the intent of the Act. It is also a fact that KSEB Ltd, is a body corporate functioning under its own seal and fully responsible for the contractual obligations on the strength of the Companies Act as well as the Contract Act. As made clear in the above order, the Government did not intend to assume any responsibilities that may arise due to the extension of the PPA. Hence the above Government Order cannot be relied upon as a

basis to justify the extension of the Power Purchase Agreement beyond 31.10.2015.

- (iv) In this matter, the Commission has also examined the provisions of the Indian Contract Act, 1872, particularly Sections 7,8 and 9 of the said Act, which is extracted below.

*“7. Acceptance must be absolute .*

*In order to convert a proposal into a promise, the acceptance must —*

*(1) be absolute and unqualified;*

*(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.*

*8. Acceptance by performing conditions, or receiving consideration.— Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.*

*9. Promises, express and implied.— In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.”*

In the present case, though there is a proposal between the parties, there was no acceptance of the conditions of the proposal.

- (v) The term of “Contract” has been defined under Sec.2 (h) of Indian Contract Act, 1872, as an agreement enforceable by law. Therefore, the two ingredients of a valid contract are “agreement” as well as “enforceability”. The term “Agreement” has been defined under Sec.2 (e) of the Indian Contract Act as “every promise and every set of promises, forming the consideration for each other”.
- (vi) Agreement is essential to any contract. Before a contract, there must be a consensus ad idem. Therefore, there must be a meeting of the minds between the parties to enter into a legally binding contract. If negotiation is going on, it cannot be termed as an agreement. To form a contract, there must be an offer by one side and an acceptance of the offer by the person to whom the offer was made. Without both an offer and an acceptance, there can be no *consensus ad idem* or a meeting of the minds which is essential to form a contract. “Meeting of minds” implies that understanding the same thing; in same sense. The acceptance must be clear and absolute and without conditions attached. No conditions can be attached to the acceptance and the terms of the offer cannot be changed. If conditions are attached, such agreement cannot be a conclusive one.



- (vii) In the present case, the negotiations for extension of the original PPA dated 03.05.1999, started much before the expiry of the said PPA on 31.10.2015. KSEB Ltd communicated its in principal acceptance of extension of the PPA for two more years, subject to certain conditions, including re-ascertaining of the fixed charges for the extended period and obtaining approval of the Commission. However, the petitioner BKPL and the respondent KSEB Ltd could not reach a consensus on the various terms of the agreement for the extended period. The purported "agreement" placed before the Commission is a document with points of differences on many issues, as detailed under paragraph 38(15) above and therefore cannot be treated as an agreement.
- (viii) The willingness of KSEB Ltd to extend the PPA was conditional and subject to disagreement on many terms. It cannot be held to be an agreement, unless and the points of disagreement were resolved and an unconditional and mutually agreed PPA agreed at. Since there was no consensus ad idem between the parties for extending the PPA; there is no valid agreement between the parties after 31.10.2015.
- (ix) As per the provisions of the Electricity Act, 2003, only this Commission can grant final approval for extending the PPA beyond 31.10.2015. While doing so, this Commission shall consider the factors that specified under paragraph 38(17) above, and the approval shall be strictly as per the Regulation-78 of the Tariff Regulations, 2014 notified by this Commission, which is extracted under paragraph 38(4) above. While doing so, this Commission has to ascertain whether such an approval shall ultimately results in reduction in the cost of electricity to the consumers of the State. In this matter, Hon'ble High Court in the final judgment dated 31.10.2017 has observed as under.

*'This would mean that the Kerala State Electricity Regulatory Commission, in the instant case, had to look into the agreement between the petitioner and the Kerala State Electricity Board Limited to ascertain whether the general terms of the agreement and the trading margins envisaged therein could be fixed in such a way that it **would reduce the cost of electricity to the consumers**'.*

- (x) The petitioner is pleading on the principle of legitimate expectation on the basis of promissory estoppels. The principle of promissory estoppels and consequent legitimate expectation is well settled one. In this matter, paragraph 25 of the Hon'ble Supreme Court in judgment dated 08.01.2010, in Civil Appeal No. 5182/2002 (2010 KHC 2010) is extracted as under:

25. The doctrine of promissory estoppel as developed in the administrative law of this country has been eloquently explained in Kasinka Trading v. Union of India (1995) 1 SCC 274 by Dr. A.S. Anand, J, in the following words:-

"11. The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the

other party an unequivocal promise or representation by word or conduct, which is intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance or the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties.

12. It has been settled by this Court that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority "to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make". There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. In our opinion, the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation."

- (xi) Herein, the offer made by the respondent KSEB Ltd vide the communication dated 13.07.2015 and 29.09.2015, was conditional and the conditions stipulated therein could not fulfilled and therefore no agreement was reached between them. Further, KSEB Ltd had already made alternate arrangements to meet the electricity demand of the State.
- (xii) From the document and records available before this Commission, the petitioner has not done any thing based on the communication of the respondent dated 13.07.2015 of the in principle sanction for extension of the PPA and the conditions specified under the in principle sanction of the State Government dated 24.02.2015. Moreover, BKPL being a generator in the power sector is well aware of the provisions of the Electricity Act, that it is Commission which has to give the final approval of power purchase and the Commission had earlier made an assessment of the cost structure of this plant and finding it unviable had specifically ordered that power should not be drawn from this source after the expiry of the earlier contract. The principle of estoppel, cannot override a provision of statute. Thus the promissory estoppel is not applicable here in this situation. There was no binding contract except a

proposal for extension which was not eventually approved by this Commission.

- (xiii) It is also true that, the respondent KSEB Ltd vide its communication dated 08.12.2015, communicated to the petitioner BKPL that, the respondent is not liable for payment of fixed charges or any other charges with effect from 01.12.2015, and will not entertain any claim in this regard as the terms and conditions for extension of PPA could not be agreed upon among the parties. Considering these facts, it is concluded that, there is no promissory estoppels based on the conditional offer of KSEB Ltd dated 13.07.2015 and 29.09.2015.
- (xiv) This Commission also vide the daily order dated 28.10.2015, had ordered as follows.

*“ KSEB Ltd and BKPL may, till 30.11.2015, extend the PPA dated 03.05.1999 as per the Article 15.1 and Article 7.4 therein subject to the condition that the payment for the period of one month from 01.11.2015 to 30.11.2015 shall be as decided by the Commission in the final order.’*

Though, the petitioner BKPL and the respondent did not extend the PPA till 30.11.2015, as directed above, as per the provisions under Article 15.1 and Article 7.4 of the PPA dated 03.05.1999, however, this Commission is of the view that, the petitioner is eligible for fixed charges for the month of November-2015, since this Commission vide the daily order dated 28.10.2015 granted permission for extension of the PPA from 01.11.2015 to 30.11.2015, and the KSEB Ltd vide the letter dated 08.12.2015 raised dispute of payment of fixed charges and other charges only from 01.12.2015 onwards. KSEB Ltd may therefore make the fixed cost payments for the month of November 2015, at the rate agreed by them.

- (xv) Based on the deliberations of the subject matter and on examining the documents, evidences and other materials placed before the Commission, it is concluded that, there was no consensus on extending the PPA dated 03.05.1999, beyond 31.10.2015, as provided under Article 15.1 of the original PPA. It is a fact that there was also no power purchase agreement (PPA) between the petitioner BKPL and the respondent KSEB Ltd for purchasing the electricity generated from the Naphtha based power plant established by the petitioner, with effect from the date of expiry of the original PPA on 31.10.2015. This Commission also has not granted approval for the extension of PPA beyond 30.11.2015. Taking into consideration the prohibitively high cost of fuel, the Commission had given very clear direction not to schedule power from these stations under any circumstances, unless the developers convert the stations to LNG or pool sufficient quantum of cheaper power from other sources, so that the pooled tariff is well within the merit order for dispatch.
- (xvi) As per the information filed before the Commission, the licensee had made alternative arrangement for procuring cheaper power and the supply position existing in the state was sufficient to cater to the

demand. Considering the above facts, the petitioner BKPL is not eligible to claim fixed cost, lease rent, income tax or any other charges during the period from 01.12.2015 to 31.10.2017. The KSEB Ltd also is not bound to pay fixed charges, lease rent income tax and other charges to the petitioner during the said period from 01.12.2015 to 31.10.2017. However, KSEB Ltd has to make payment of fixed charges to the petitioner at the rate agreed by them and submitted before the Commission for the month of November-2015, in view of the order of the Commission dated 28.10.2015 and letter of the KSEB Ltd dated 08.12.2015.

**43. Issue No.2:  
Adjudicate with regard to the rate applicable to the quantum of electricity supplied by M/s BKPL to KSEB Ltd, pursuant to the interim order of the Hon'ble High Court dated 04.04.2017 in W.P.(C) No. 22464/2017**

The observation and findings of the Commission on this issue is given below.

- (1) Hon'ble High Court vide the judgment dated 31.10.2017 in WP(C) 540/2017 has remanded back the issue before this Commission with the following directions.

*“ The only other point on which the Commission would have to take a decision, while passing orders as directed above, is the rate/tariff that would govern the quantum of electricity supplied by the petitioner company to KSEBL, pursuant to the interim order dated 04.04.2017 of this court. While this issue is not raised in the petition before the Commission, being a subsequent event, the petitioner does have a case that, in as much as the Naphtha, that was used for the generation of the said electricity, was part of the consignment that was stored to meet the requirements of KSEBL under the PPA that held the field till 31.10.2015, the rates under the said PPA should govern the supply. The Commission shall therefore adjudicate on the said issue, as regards the rate applicable in respect of the above supply of electricity, also, untrammelled by any of the findings in its order dated 27.04.2017 (produced as Ext.P46 in W.P.(C).No.540/2017 and as Ext.P27 in W.P.(C).No.22464/2017) granting approval to the KSEBL to purchase the electricity on unscheduled interchange basis.”*

Accordingly, this issue was also heard along with the other issue remanded back by the Hon'ble High Court vide the final order dated 31.10.2017.

- (2) During the deliberations of the subject matter on 23.01.2018, the learned counsel of the petitioner, Adv. Joseph Kodianthara, argued that, ' the schedule of power from BKPL during the period from 25.05.2017 to 24.06.2017 was for exhausting the fuel stocked at the premise of BKPL and nearby premises of IOCL, which was stocked during the PPA period for the intended use of KSEB Ltd. There is no dispute on variable charges payable for the energy scheduled from the plant using Naphtha. Hence KSEB Ltd is liable to pay the variable charges based on the actual cost of the Naphtha stocked'.

- (3) On the very same issue, the learned counsel of the respondent KSEB Ltd submitted the following:

' As per the PPA dated 3.5.1999, there was no provision to deal with the balance stock of Naphtha if any, available with the generator BKPL at the end of the validity period of the PPA. However, as per the provisions of the PPA, BKPL is bound to stock sufficient quantity of Naphtha to schedule power from the plant as and when KSEB Ltd issues dispatch instructions. KSEB Ltd has no liability on the stock of Naphtha available with BKPL after the period of the PPA, with effect from 01.11.2015.

However, there was threat to the safety of the public at large regarding the Naphtha stocked at the premises of the BKPL without necessary security staff and safety arrangements. Based on the report of the District Collector Ernakulam, Hon'ble High Court of Kerala vide the interim order dated 04.04.2017 ordered to exhaust the balance stock of Naphtha available at the premises of BKPL. Hon'ble High Court recommended three options to BKPL for the disposal of balance stock of Naphtha. One of the option was to schedule power under UI basis. The other two options were either to generate power utilizing Naphtha and sell through open access to third party or to transfer Naphtha to other Naphtha consuming industries. BKPL has not explored the possibility other than scheduling power on UI basis, to dispose the Naphtha available with them. Hence, BKPL generated electricity from BKPL plant during the period from 25.05.2017 to 24.06.2017, on UI basis based on the interim order of the Hon'ble High Court dated 27.04.2017, to exhaust the stock of Naphtha available at the premises of BKPL.

- (4) In the meanwhile, the petitioner M/s BKPL vide the additional submission dated 18.12.2017 has claimed Rs 69.60 crore as fuel charge for the 61.90 MU of the electricity generated from BKPL and supplied to KSEB Ltd on UI basis from 25.05.2017 to 24.06.2017. As per the claim of BKPL, the average rate of power comes to Rs 11.43/unit.

- (5) Subsequently, the petitioner vide the argument note dated 04.02.2018 and subsequent reply dated 26.02.2018 has raised the following.

(i) The petitioners premises have four Naphtha storage tanks, having total capacity of 11375 MT. The Naphtha was procured from the fuel supplier Indian Oil Corporation Ltd. As per the PPA dated 03.05.1999, the petitioner has to generate electricity as and when scheduled by the respondents. The scheduling of electricity is at short notices, typically at less than 24 hours. As such the generator has to take all precautions for ensuring fuel stock for generation and supply of electricity to KSEB Ltd.

(ii) The present stock of Naphtha was replenished in its tanks during November-2014, during the currency of the PPA dated 03.05.1999 and much before the expiry 31.10.2015. From November 2014 onwards, a balance stock of 7565 MT of Naphtha was available at the premise of BKPL and 4100 MT of Naphtha

was available at the premise of IOCL. The entire Naphtha was procured during the term of the PPA dated 03.05.1999 and for ensuring continuous generation of electricity to the respondent.

- (iii) The electricity was generated using the balance stock of Naphtha and supplied to the respondent pursuant to the interim order of the Hon'ble High Court dated 04.04.2017 and order of this Commission dated 27.04.2017. As per the final judgment of the Hon'ble High Court dated 31.10.2017, this Commission has to decide on the tariff applicable to such power generated from the plant of BKPL from 25.05.2017 to 24.06.2017, for exhausting the Naphtha available at their premises.
- (iv) Regarding the additional claim of Rs 69.60 crore as variable charges for the electricity generated, the petitioner in its reply dated 26<sup>th</sup> February 2018 has submitted that, '*the additional claim is not in respect of any unspent fuel, but in respect of the energy charges relating to the generation of electricity, pursuant to the interim order dated 04.04.2017 of the Hon'ble High Court, which was binding on the petitioner as well as the respondent KSEB Ltd*'.
- (v) The payment of deemed generation is the fixed charges, and this is the amount liable to be paid under the PPA. The discharge of their liability under PPA is not an excuse for not paying the fuel/energy costs (variable charges) for generation made pursuant to the interim order dated 04.04.2017 of the Hon'ble High Court.
- (vi) Regarding the other options for disposal of the stock of Naphtha available at their premises, as specified by the Hon'ble Court in its order dated 04.04.2017, the petitioner clarified as follows.

'Hon'ble High Court had, in the interim order itself, clarified that the petitioner is free to take up any of the options stated therein, and that they can even directly opt to exercise the first option of generation of electricity. The petitioner reiterated that, in view of the specific direction of the Hon'ble High Court (both in the interim order as well as in the final judgment), this issue has become redundant, and is only to be ignored.
- (vii) The petitioner had again raised the issue that, once the generation of power is done as per the scheduling instructions of the SLDC, the said power cannot be termed as UI. Moreover, under the scheme of Electricity Act, 2003, no scheduling of generation and consequential sale of power can be undertaken as UI basis.
- (viii) The petitioner has been declaring the availability of the plant on all days after 31.10.2015. The petitioner has been maintaining its plant in the most efficient and safe manner.

(6) The summary of the issues raised by the respondent KSEB Ltd vide the counter affidavit filed on 23.01.2018 and the argument note filed on 09.02.2018 is given below.

- (i) Senior Joint Director of Factories and boiler, in his report dated 15.12.2016 reported that, the 42 workers of the plant were laid off, 11 officers were transferred to other units, and this has resulted in the risk of storing Naphtha at the premise of the petitioner.
- (ii) The respondent produced a copy of the report of the District Collector regarding the safety threat of the Naphtha stored at the premise of the petitioner.
- (iii) In order to exhaust the Naphtha stored at the premise of the petitioner, the respondent KSEB Ltd has suggested the following different options, before the Hon'ble High Court of Kerala.
  - (1) *Generating power on Unscheduled Interchange (UI) basis in co-ordination with the Load Dispatch Centre of KSEBL subject to the approval from KSERC thereby consuming the naphtha stock.*
  - (2) *M/s BKPL could explore possibilities on generation of power and sale to any one by utilizing the grid of KSEBL as open access is being permitted now.*
  - (3) *Any other feasible option including transfer to other naphtha consuming industries like nearby FACT availing the service of oil marketers like IOCL.*
- (iv) Hon'ble High Court in the interim order dated 04.04.2017 placed on record the options suggested by KSEB Ltd for disposal of Naphtha. Hon'ble Court ordered that, the petitioner could definitely explore possibilities mentioned at option numbers 2 and 3, but however the same would have to be finalized, within a period of one month from the date of the order (04.04..2017) and the disposal of the naphtha as per either of the options mentioned above and same to be concluded within the time stipulated.

If the petitioner does not intent to carry out the options 2 and 3 for disposal of the Naphtha, then they shall generate power on Unscheduled Interchange basis in coordination with the load despatch center of KSEB Ltd, subject to the approval of the KSERC and subject to further orders to be passed in the Writ Petition.

- (v) The tariff of the petitioner in the original PPA dated 03.05.1999 was formulated based on the guidelines issued by the Ministry of Power in 1992, for determination of tariff for sale of electricity by Generating Companies to the SEBs. A copy of the said guidelines was also placed on record. As per the said guidelines, the interest on working capital is computed based on the fuel cost of one month and fuel stock for 30 days calculated on normative plant load factor basis. The normative plant load factor as per the PPA

with the petitioner is 80%. Even if, KSEB Ltd give no schedule, the petitioner shall get full fixed cost, which include the interest on working capital also.

- (vi) There is no provision in the PPA which cast a responsibility on the respondent to ensure that Naphtha tanks are exhausted with the expiry of the PPA. In view of the above, the claim of the petitioner to allow the fuel stock at PPA tariff is devoid of merit and rejected.
  - (vii) The petitioner is a generating company and trading company. They could have generated electricity and utilized the transmission facilities of the respondent under open access and could sell the same to various consumers within and outside the State.
  - (viii) The price of electricity has decreased drastically, and it is available in the market from Rs 1.50/unit to Rs 3.00/unit. Instead of making attempts to sell the energy through power market, the petitioner is indirectly trying to fleece the utility under the garb of a non existent PPA and raising unreasonable claims on imaginary grounds. If the petitioners claim is entertained under any circumstances, the ultimate burden has to be shouldered by the consumers of this State.
- (7) The Commission has examined in detail the deliberations of the subject matter, the additional documents, argument notes and other details placed before it by the petitioner and the respondent.. Based on the above, the Commission decided to appraise the following **‘two aspects’** in detail for deciding on the rate applicable for electricity generated from the power plant of the petitioner from 25.05.2017 to 24.06 2017 for exhausting the stock of Naphtha available at the premises of the petitioner, as per the interim order of the Hon’ble High Court dated 04.04.2017.
- (i) Whether KSEB Ltd has any liability on the balance stock of fuel at the premises of the petitioner as on the date of expiry of the PPA on 31.10.2015?
  - (ii) What is the rate to be paid by the respondent KSEBL for the electricity generated from the power plant of the petitioner, for exhausting the stock of Naphtha at the premise of the petitioner and in the premises of IOCL on account of the compelling concern raised by the Hon’ble High Court on the safety aspects raised in its interim order dated 04.04.2017.

The analysis and decisions of the Commission on the above issues are discussed below.



44. **Whether KSEB Ltd has any liability on the balance stock of fuel at the premises of the petitioner as on the date of expiry of the PPA on 31.10.2015?.**

The findings of the Commission on this aspects is given below.

- (1) As stated elsewhere in this order, the power purchase agreement (PPA) between the petitioner BKPL and KSEB was entered on 3-5-1999 and the validity of the PPA expired on 31.10.2015.
- (2) As per Article 7 of the PPA dated 03.05.1999, the tariff for electricity generated from the plant of BKPL consists of (a) fixed charges and (b) fuel cost. The fixed charge was payable by the buyer KSEB, during the entire tariff periods of '15 years from November 2000 to October-2015'. The generator shall get the fixed cost in full, irrespective of whether the buyer scheduled power from the plant or not, provided the annual plant load factor including deemed generation is upto and above 80%. However, if the PLF including deemed generation is less than 80%, there will be a reduction in fixed charges payable by KSEB to the generator BKPL.

The fuel cost is the actual cost of fuel used for generating electricity from the plant. As per the PPA, 176.3 gram of Naphtha is required for producing one unit of electricity from the plant.

- (3) It is reported by both the petitioner BKPL and respondent KSEB Ltd that , at the time of entering into PPA between the parties, the Tariff Notification dated 30<sup>th</sup> March 1992, notified by the Ministry of Power, Government of India was in force. As per the said notification, the annual fixed cost of a generating company shall consist of the following components.
  - a) Interest on long term loan
  - b) Depreciation
  - c) O&M expenses
  - d) Return on equity
  - e) Income tax and
  - f) Interest on working capital.

The petitioner has submitted that, the fixed cost of the plant was arrived at duly considering the provisions of the said 'Tariff notification'. As stated above, the fixed cost covers the cost recovery of capital used for creation of the fixed assets. Further, the cost of maintaining the current assets including the stock of fuel is recovered through interest on the working capital as explained in subsequent paragraphs.

- (4) As per the Tariff notification of the GoI, the Working Capital shall cover:
  - (i) fuel cost for one month and reasonable fuel stocks as actually maintained but limited to fifteen days for pit head stations and

thirty days for non pit-head stations, calculated on normative plant load factor basis;

- (ii) sixty days stock of secondary fuel oil, calculated on normative plant load factor basis;
- (iii) operation and maintenance expenses (cash) for one month;
- (iv) maintenance spares at actuals subject to a maximum of one per cent of the capital cost but not exceeding one year's requirements less value of one fifth of initial spares already capitalised; and
- (v) receivables equivalent to two months' average billing for sale of electricity calculated on normative plant load factor basis"

As detailed above, the interest on the working capital, which is one of the components of fixed cost, include the stock of fuel for one month calculated on normative plant load factor basis and fuel cost for one month. The normative plant load factor of the plant is 80% and as per the PPA the fuel required to produce one unit of electricity is 176.3 gm. Based on the above, the stock of fuel included in the working capital is about 16756 MT. It means that, irrespective of the actual stock of fuel maintained by the generator, the fixed cost of the plant includes the 30 days stock of fuel calculated based on the normative PLF of 80%.

- (5) As per the details submitted by the petitioner, the average stock of fuel maintained by the generator during the month of April from the financial year 2000-01 to 2015-16 is given below.

Year	Avg stock of Naphtha maintained by BKPL (MT)	Fuel stock required for 30 days generation @80% PLF(MT)	Percentage of stock of fuel maintained by BKPL, compared to the stock for 30 days
Apr-00	2074	16756	12.38%
Apr-01	3313		19.77%
Apr-02	923		5.51%
Apr-03	2124		12.68%
Apr-04	7262		43.34%
Apr-05	3826		22.83%
Apr-06	4467		26.66%
Apr-07	3108		18.55%
Apr-08	8311		49.60%
Apr-09	4155		24.80%
Apr-10	5223		31.17%
Apr-11	5802		34.63%
Apr-12	5131		30.62%
Apr-13	2699		16.11%
Apr-14	4061		24.24%
Apr-15	7864	46.93%	
<b>Average</b>	<b>4396</b>		<b>26.24%</b>

As seen from the table above, when compared to the stock of fuel maintained by the petitioner, it had maintained only an average fuel stock of 26.24% during the previous 15 years. However as per the tariff

notification issued by Government of India, the norm for assessing the working capital includes cost of fuel for 30 days. When comparing the fuel stock maintained by the BKPL with the requirement of maintaining 30 days stock, the stock maintained never exceeded 50% of the stock to be maintained and in one financial year was as low as 5.51%. Hence the actual stock of fuel maintained by the petitioner was much less than that required to be mentioned on normative basis. However, irrespective of the actual stock maintained by the petitioner, 30 days of stock of fuel was included in the working capital requirement, and its interest is included in the fixed charges given to the petitioner.

- (6) Further, one month fuel cost corresponding to the normative plant availability factor @80% is also included in the working capital, irrespective of the actual generation from the plant. Due to the excessive cost of Naphtha and resulting fuel cost, this Commission has been not approving the schedule from the plant except during contingencies. But irrespective of the schedule from the plant, this Commission has been approving the full fixed cost of the plant, which include interest on 30 days of cost of fuel and 30 days stock of fuel, at normative PLF of 80%, irrespective of generation.

Further, two months receivables at normative PLF of 80% was also included in the working capital requirements. Two months receivable @80 % PLF includes two months fixed cost and two months fuel cost at the normative PLF @80%. However the actual average PLF of the plant was only 9.70%, which is much less than the normative PLF of 80%. The details of the actual generation and the PLF during the years from 2000-01 to 2015-16 is given below.

Year	Actual energy generation	Energy that can be generated at the normative PLF of 80%	Annual PLF	Fixed Cost paid	
	(MU)	(MU)	(%)	(Rs. Cr)	
2002-03	264.47	1156	18.3%	83.30	
2003-04	992.15		68.6%	108.78	
2004-05	110.14		7.6%	108.21	
2005-06	36.92		2.6%	105.39	
2006-07	183.26		12.7%	97.81	
2007-08	353.20		24.4%	86.43	
2008-09	847.29		58.6%	90.74	
2009-10	576.70		39.9%	90.14	
2010-11	223.30		15.4%	88.09	
2011-12	46.61		3.2%	88.70	
2012-13	131.33		9.1%	95.21	
2013-14	337.78		23.4%	85.79	
2014-15	146.93		10.2%	71.19	
2015-16 (till Oct'15)	5.15		678	0.4%	36.65
Total	4255.22			9.7%	1236.43

Though the actual average PLF of the plant during the currency of the PPA is only 9.70% as against the normative PLF of 80%, the petitioner BKPL had been getting the full fixed cost of the plant as per the

provisions of the PPA, which include the interest for the ' cost of maintaining 30 days stock of fuel at the normative PLF of 80% and fuel cost of month at the normative PLF @80%, and also two months fuel cost as part of two months receivables estimated at the normative PLF of 80% '.

- (7) As per the provisions of the PPA dated 03.05.1999, the generator is responsible to schedule the electricity generation from the plant as per the dispatch instructions of the KSEB, as per the procedures specified under schedule 5 of the said PPA. In order to ensure continuous generation from the plant, it is the responsibility of the petitioner generator to stock sufficient quantum of fuel at the storage facilities available at the premises of the petitioner.
- (8) However, the actual schedule of power by the distribution licensee depends on many factors including the following.

- (i) Electricity demand
- (ii) Cost of electricity from the available sources.
- (iii) Technical consideration.

But, irrespective of scheduling, during the currency of the PPA, the distribution licensee has to bear the full fixed cost liabilities, provided the plant availability of generator is as per the norms specified.

- (9) Accordingly, the buying entity KSEB Ltd has been bearing the cost of the stock of fuel required to be maintained at the normative plant availability of 80%, irrespective of whether the generator was stocking the fuel or not, for the entire period of the PPA.
- (10) Here the petitioner has raised the issue that, if the fuel purchased is not utilized during the currency of the PPA, the buying entity is liable to bear the entire liabilities arising out of such purchase of fuel, even after the validity period of the PPA. As already explained, the fuel stocked during the currency of the PPA is part of the obligation of the generator to ensure continuous generation of the plant as per the schedule given by the buying licensee KSEB Ltd. The financing cost of the stock of fuel maintained by the generator is allowed to recover through fixed cost as interest on working capital. It is up to the distribution licensee to schedule power from the plant or not, based on the merit order principles stipulated by the Commission. Irrespective of scheduling power from the plant, the buying licensee has to bear the full fixed cost. If the buying licensee schedule power from the plant, they have to pay fuel cost for such schedule in addition to the fixed cost payable.
- (11) Further, there is no provision in the impugned PPA dated 03.05.2015 that, the balance fuel stock at the time of expiry of PPA is the liability of the KSEB Ltd.
- (12) The stock maintained by the petitioner BKPL is the current assets of the petitioner. After the expiry of the PPA, the petitioner BKPL has the right

as the generator to utilize the fuel stock available with them at their will and choice. The petitioner had the option to sell the electricity generated using the balance stock of fuel as on the expiry of the PPA through Power Exchanges, bi-lateral contracts with consumers/ licensees/ traders inside and outside the State etc. However, the petitioner BKPL did not explored such options available to exhaust the balance stock of Naphtha with them.

- (13) As per the Article 15.1 of the PPA, the term of the PPA is 15 years from November 2000 to October 2015. After the expiry of the PPA, all the assets including plant and machinery and other assets such as inventories are left with the possession of BKPL and there is no obligation cast upon the buyer to compensate for any assets or inventories once the terms of PPA is over. As in the case of the plant and machinery, any other asset left over can be disposed of by the company to recover its costs. In such circumstances, once the term of PPA is over, the respondent cannot be asked to bear the cost of any items which is an asset of the company.
- (14) Considering these aspects in detail, this Commission is of the considered view that, there is no liability on KSEB Ltd due to the outstanding fuel stocked at the premises of the petitioner as on the expiry of the original PPA dated 03.05.1999.

Hence the claim of the petitioner for payment of energy charges based on the ruling price of naphtha at the time of its purchase cannot be substantiated, considering the fact that the petitioner has already been provided with relief far in excess on their actual expenditure. Therefore the claim of the petitioner is not agreed to.

- (15) It is also to be appreciated that the present situation was triggered due to two major factors viz., (a) the excessive cost of fuel which made it unprofitable for the petitioner company to generate power and sell it to another party and (b) the inherent dangerous nature of the material, which if not properly attended to would likely cause a dangerous situation to the common public which is made evident by the report of the District Collector. Here the plaintiff knowingly and voluntarily assumed the risks inherent in storing this explosive material, when he chose to execute the original PPA with the licensee. Further there are no clauses in the PPA which hold the licensee responsible to bear the cost of fuel stored, other than the liability to pay the fixed cost. Hence the demand of the petitioner that they are eligible for the energy charges for the electricity generated for exhausting the naphtha from 25.05.2017 to 24.06.2017 based on the weighted average cost of Naphtha also stands rejected.

45. **The rate of electricity generated by the petitioner BKPL and supplied to the respondent KSEB Ltd during the period from 25.05.2017 to 24.06.2017**

The decision of the Commission on this aspect is discussed below.

- (1) The background of generating electricity by the petitioner BKPL from their plant and supplying the same to the respondent KSEB Ltd are explained in detail by the petitioner and respondent during the deliberations of the subject matter, consequent to the final judgment of the Hon'ble High Court dated 31.10.2017 in WP(C) No. 540/2017. Summary of the deliberations before this Commission is extracted below for ready reference.
- (2) The Senior Joint Director of Factories and Boilers, after visiting the premises of the petitioner reported that, consequent to the 'lay off' of 41 workers and transfer of 11 officers from the power plant of the petitioner; there is safety threat on the stock of Naphtha available at the premises of the petitioner. Three alternatives are suggested in the report of the Senior Joint Director of Factories and Boilers for disposing the Naphtha.
  - (a) Generating power and consume the stock of Naphtha at the earliest.  
OR
  - (b) Dispose off the existing stock of Naphtha.  
OR
  - (c) Maintain the required manpower for the safe handling of the Naphtha storage until it is consumed/ disposed.
- (3) The report submitted by the District Collector, Ernakulam before the Hon'ble High Court, reiterated the safety threat of the Naphtha stocked at the premises of the petitioner and, recommended that, the storage of Naphtha be exhausted by temporarily operating the plant for power generation without considering economical benefit.
- (4) Hon'ble High Court in its interim order dated 04.04.2017 has expressed compelling concerns on the safety threat of the Naphtha stocked at the premises of the petitioner.
- (5) The respondent KSEB Ltd submitted before the Hon'ble High Court that, 'the Board is procuring power from other sources at far lesser prices and procurement of power from the petitioner would only result in public fund being frittered away.
- (6) The respondent KSEB Ltd suggested before the Hon'ble High Court, the following three alternative options for the disposal of Naphtha at the premises of the petitioner:
  1. *Generating power on Unscheduled Interchange (UI) basis in co-ordination with the Load Dispatch Centre of KSEBL subject to the approval from KSERC thereby consuming the naphtha stock.*
  2. *M/s BKPL could explore possibilities on generation of power and sale to any one by utilizing the grid of KSEBL as open access is being permitted now.*

3. *Any other feasible option including transfer to other naphtha consuming industries like nearby FACT availing the service of oil marketers like IOCL.*

(7) Hon'ble High Court in the interim order dated 04.04.2017 in WP(C) 540/2017 has ordered as follows.

*8. The compelling concern of this Court, at present, is the apprehended disaster and this Court is of the opinion that the option submitted by the KSEB has to be put into effect, subject however to further orders passed in the writ petition. The option for disposal of naphtha, as suggested by the KSEB, has been placed on record in the report of the District Collector, which are as follows:*

1. *Generating power on Unscheduled Interchange (UI) basis in co-ordination with the Load Dispatch Centre of KSEBL subject to the approval from KSERC thereby consuming the naphtha stock.*
2. *M/s BKPL could explore possibilities on generation of power and sale to any one by utilizing the grid of KSEBL as open access is being permitted now.*
3. *Any other feasible option including transfer to other naphtha consuming industries like nearby FACT availing the service of oil marketers like IOCL.*

*9. The petitioner could definitely explore possibilities at option numbers 2 and 3, but however the same would have to be finalised, within a period of one month from today and the disposal of the naphtha as per either of the options started within the said period and concluded within the time herein after stipulated. If the petitioner does not intend to carry out the said options, then they shall generate power on Unscheduled Interchange (UI) basis in co-ordination with the Load Dispatch Centre of KSEBL; subject to approval of KSERC and also subject to further orders to be passed in the writ petition. The petitioner could definitely approach the KSEB immediately for such generation of power on UI basis. It is made clear that the entire naphtha available at the petitioner Companies premises and that available at IOCL would be disposed of before 01.07.2017. If the same is not so disposed of, then definitely, the Chairman of the Disaster Management Authority, the District Collector would be entitled to take such steps for disposal of the naphtha without even reference to this Court. All issues raised by all parties are left open for consideration in the writ petition. The petitioner Company shall file periodic reports before the District Collector, i.e.; every three weeks as to the stage of disposal of naphtha as directed herein."*

(8) As per the interim order of the Hon'ble High Court as above, the petitioner BKPL has to take the following steps to exhaust the Naphtha available at their premises.

- (a) Explore the possibilities of disposal of naphtha as suggested by KSEB Ltd as option-2 and Option-3, and the same would be finalized within a period of one month from 04.04.2017. The option-2 is to explore the possibilities on generation of power and sale to any one utilizing the grid of KSEB Ltd as open access being permitted now. The option-3 is for transfer of naphtha to other naphtha consuming industries like FACT availing the service of oil marketers like IOCL. The disposal of naphtha envisaged in either of the options-2 and 3 be started and concluded as ordered by the Hon'ble High Court dated 04.04.2017.
- (b) If the petitioner BKPL does not intend to carry out the said options, then BKPL shall generate power on Unscheduled Interchange (UI) basis in co-ordination with the Load Despatch Centre of KSEB Ltd; subject to the approval of the KSERC and also subject to further

orders to be passed in the writ petition. The petitioner BKPL shall approach the KSEB Ltd immediately for such generation of power on UI basis.

- (c) The entire naphtha available at the premises of the BKPL and that available at IOCL shall be disposed of before 01.07.2017.
- (d) If the petitioner BKPL could not dispose the naphtha within the time limit specified by the Hon'ble Court, the Chairman of the Disaster Management Authority, the District Collector should take necessary steps for disposal of Naphtha without even reference to the Court.
- (9) It is noted that, the petitioner has not tried the option-2 and option-3 as ordered by the Hon'ble High Court in its order dated 04.04.2017. However, the petitioner preferred the option-1 for exhausting the Naphtha available at their premises, and approached this Commission for approval for generating electricity and supply to KSEB Ltd, in pursuance of the interim order of the Hon'ble High Court dated 04.04.2017.
- (10) During the course of the deliberations of the subject issue before this Commission during April 2017, KSEB Ltd has submitted that, it does not have the requirement of 65.00 MU of BKPL, since it had already tied up its requirement of power in advance for the said period under long term and medium term contracts.  
They also submitted that,
- a. *KSEBL may not be enforced to purchase power from BKPL at a rate higher than UI rate ordered by Hon'ble High Court.*
  - b. *KSEBL may not be enforced to schedule and absorb power that would result in surrender of already tied up power.*
  - c. *KSEBL may not be enforced to purchase more power than that could be generated from reported and existing stock of BKPL.*
  - d. *BKPL may be directed to exercise other options ordered by Hon'ble High Court viz*
    - i. *Selling of power through open access and exchanges to any other party.*
    - ii. *Selling back to any party or transfer to other naphtha consuming industries, the excess naphtha fuel stock with them, and*
    - iii. *KSEBL may be enforced to buy power as last resort only."*
- (11) This Commission vide its order dated 27.04.2017, granted approval under clause (b) of sub section (1) of Section 86 of the Electricity Act,2003, in accordance with the directions of the Hon'ble High Court in its interim order dated 04.04.2017, to the SLDC of KSEB Ltd for scheduling power and to Strategic Business Unit-Distribution of KSEB Ltd for purchasing the power generated on unscheduled interchange basis, from the 6500 MT of naphtha purchased and stored in the premises of BKPL and the 6000 kilo litre of naphtha at the premises of IOCL.
- (12) Accordingly, as per the approval granted by this Commission to generate electricity from the power plant of the petitioner for exhausting the Naphtha available with them, and to supply such generated power to KSEB Ltd on UI basis, the petitioner in co-ordination with the SLDC of



KSEB Ltd scheduled 61.90 Million Units (MU) during the period from 25.05.2017 to 24.06.2017 and thus the entire stock of Naphtha has been exhausted.

- (13) Subsequently, KSEB Ltd vide the letters dated 05.06.2017, 07.06.2017, 13.06.2017 and 23.06.2017 has communicated the energy scheduled from the plant on weekly basis, the average frequency during the week and average deviation settlement rate under UI, and requested the petitioner to raise the invoices accordingly for preferring the payments. KSEB Ltd also clarified that, they will not be liable for any interest for delayed payment, due to non-raising of invoice for the injected power by the petitioner.
- (14) But the petitioner has not raised any invoices for the energy generated and supplied to KSEB Ltd during the said period from 25.5.2017 to 24.06.2017 for exhausting the Naphtha based on UI basis. According to the petitioner, they are eligible to get the actual cost of fuel used for power generation from the petitioner as per the provisions of the PPA dated 03.05.1999.
- (15) According to the respondent KSEB Ltd, they are liable to bear only the UI rates, since the electricity generated and supplied to KSEB Ltd was not for meeting the power requirement of the State, but only for exhausting the stock of Naphtha available at the premises of the petitioner to avoid the safety threats as ordered by the Hon'ble High Court in its order dated 04.04.2017, wherein it is clearly stipulated to schedule power on UI basis, that too as the last option out of the three options placed before the Hon'ble High Court for exhausting the Naphtha.
- (16) The Commission has examined the context of generating electricity by the petitioner BKPL from 25.05.2017 to 24.06.2017. The District Collector, Ernakulam in his report submitted before the Hon'ble High Court, reiterated the safety threat of the Naphtha stocked at the premises of the petitioner and, recommended that, the storage of Naphtha shall be exhausted by temporarily operating the plant for power generation without considering the economical benefit. The Hon'ble High Court in the interim order dated 04.04.2017 in WP(C) 540/2017 has ordered that the petitioner could explore possibilities on generation of power and sale to any one by utilizing the grid of KSEBL as open access as is being permitted now or any other feasible option including transfer to other naphtha consuming industries like nearby FACT availing the service of oil marketers like IOCL. If the petitioner does not intend to carry out the said options, then they shall generate power on Unscheduled Interchange (UI) basis in co-ordination with the Load Dispatch Centre of KSEBL; subject to approval of KSEB and also subject to further orders to be passed in the writ petition. The Hon'ble High Court also made it clear that the entire Naphtha available at the petitioner Companies premises and that available at IOCL would be disposed of before 01.07.2017. If the same is not so disposed of, then definitely, the Chairman of the Disaster Management Authority, the District Collector would be entitled to take such steps for disposal of the naphtha without even reference to this Court.

- (17) The petitioner BKPL has exercised the option of generating power on Unscheduled Interchange (UI) basis in co-ordination with the Load Dispatch Centre of KSEBL and approached this Commission for approval. The Commission, considering the submissions of the petitioner BKPL and respondent KSEBL, in its order dated 27.04.2017 granted approval in accordance with the directions of the Hon'ble High Court in its order dated 04.04.2017, to the SLDC of KSEB Ltd for scheduling power and to Strategic Business Unit-Distribution of KSEB Ltd for purchasing the power generated on unscheduled interchange basis, from the 6500 MT of naphtha purchased and stored in the premises of BKPL and the 6000 kilo liters of naphtha purchased and stored by BKPL in the premises of IOCL. From the above it is concluded that the petitioner BKPL has generated power for exhausting the naphtha stock by exercising the option of their choice.
- (18) Hon'ble High Court vide the interim order dated 04.04.2017 has granted one month time from the date of the said order, exploring the options 2 and 3 for the safely disposal of the Naphtha stocked at the premises of the petitioner. The option-2 is on exploring the possibilities on generation of power and sale to any one by utilizing the grid of KSEB Ltd by availing open access. The option-3 is on exploring other options including transfer of Naphtha to Naphtha consuming industries like nearby FACT availing the service of oil marketers like IOCL.

This Commission on the basis of the deliberations of the subject matter during the hearing on 23.01.2018 in the daily order dated 08.02.2018 has directed the petitioner to submit documentary evidence on BKPL's efforts to materialize the alternate options suggested in the Court order dated 4.4.2017 for the disposal of the Naphtha by (i) third party sale of power and (ii) transfer of Naphtha to other Naphtha consuming industries.

However, BKPL did not produce any documents on the efforts taken by them for disposal of Naphtha consequent to the interim order of the Hon'ble High Court dated 04.04.2017. The documents the petitioner placed on records vide the letter dated 04.02.2017 are the correspondence of the petitioner with MRPL, BPCL etc during the period from 19.01.2017 to 03.02.2017. These correspondence are done much before the interim order of the Hon'ble High Court dated 04.04.2017.

However, without exercising the options 2 and 3, the petitioner BKPL has exercised the option -1, on generating power on Unscheduled Interchange (UI) basis in co-ordination with the SLDC of KSEB Ltd.

- (19) The Commission has also examined whether the electricity generated for exhausting the Naphtha stock was required for meeting the electricity demand of this State from 25.05.2017 to 24.06.2017. KSEB Ltd, submitted that, it had made sufficient arrangements for procuring power from cheaper sources for meeting the electricity demand of the State and procurement of power from the petitioner would only results in public

funds being frittered away. Hon'ble High Court in its interim order dated 04.04.2017 has recorded the submission of KSEB Lt in this regard. This Commission in its tariff order dated 17.4.2017 has approved the energy requirement of the State for the year 2017-18, by purchase of power from Central Generating Stations, Long term PPAs, Own generation and the balance requirement from short term market at an average ceiling price of Rs 4.00/unit. This Commission, while approving the cost of power purchase for the financial year 2017-18, has not approved any power purchase from liquid fuel stations due to its prohibitively high variable cost, including the electricity generation from the power plants owned by the respondent KSEB Ltd - Brahmapuram Diesel Power Plant (BDPP) & Kozhikode Diesel Power Plant (KDPP), the Rajiv Gandhi Combined Cycle Power Plant (RGCCPP) of NTPC Ltd.

- (20) From the details placed before the Commission, it is concluded that the electricity generated for exhausting the Naphtha stock was not required for meeting the electricity demand of the State from 25.05.2017 to 24.06.2017, but generation was only to exhaust the stock of Naphtha to avoid the safety threats as ordered by the Hon'ble High Court in its order dated 04.04.2017.
- (21) As per Section 32 of the Electricity Act,2003, the State Load Despatch Centre is the apex body to ensure integrated operation of the power system in the State. The State Load Despatch Centre shall -
- (a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State;
  - (b) monitor grid operations;
  - (c) keep accounts of the quantity of electricity transmitted through the State grid;
  - (d) exercise supervision and control over the intra-State transmission system; and
  - (e) be responsible for carrying out real time operations for grid control and despatch of electricity within the State through secure and economic operation of the State grid in accordance with the Grid Standards and the State Grid Code.

Any generator can inject power in to the power system of this State, with the approval of the Kerala SLDC only. In the instant case the approval for injection of power was issued on specific direction in the order of this Commission dated 27.04.2017 in compliance with the order of the Hon'ble High Court dated 04.04.2017. Hence the argument of the petitioner that they are eligible for the energy charges based on the cost of Naphtha cannot be agreed to.

- (22) This Commission has analysed the scenario of power system management of respondent KSEBL for accommodating the electricity generated for exhausting the stock of Naphtha from 25.05.2017 to 24.06.2017. KSEBL is scheduling power from CGSs, long term

contracts, own generation, short term purchases transactions including power exchanges and over drawal from the system under Deviation Settlement Mechanism(UI) strictly on merit order principles as instructed by this Commission. If the power from CGS and long term contracts are surrendered to absorb the energy injected by the petitioner, KSEB Ltd would be liable to pay fixed charges to them without scheduling power, which will result in increase in power purchase cost. The other alternative is to reduce own generation or avoid power purchase from the power exchanges or over drawal from the system under Deviation Settlement Mechanism(UI) or combination of all.

- (23) The Commission has examined the source wise electricity generation and power purchase by KSEB Ltd during the months of April-2017, May 2017(till 24<sup>th</sup>) prior to the generation and injection of power by BKPL, and from 25.05.2017 to 24.06.2017 during the period of generation and injection of power by BKPL, the details are given below.

Source of Generation	Periods prior to injection of power from BKPL				During the period of injection of power from BKPL	
	Apr-17		May-17 (up to 24.05.2017)		25.05.2017 to 24.06.2017 (31 days)	
	(MU) for the month	MU/day	(MU) for 24 days	MU/Day	(MU) total for 31 days	MU/ day
Hydro	513.84	17.1	356.90	14.87	313.54	10.11
Solar, wind etc	13.74	0.46	10.71	0.45	24.71	0.80
CGS	853.94	28.4	636.58	26.52	878.26	28.33
CGS surrender	0.00	0.00	0.00	0.00	14.58	0.58
Long term/ Medium term contracts	640.50	21.3 5	534.53	22.27	669.75	21.60
UI/ DSM	60.64	2.02	47.20	1.97	59.45	1.92
Power Exchanges	115.88	3.86	108.32	4.51	43.56	1.41
BSES					62.12	2.00
Total	2198.54	73.2 8	1694.24	70.59	2065.98	66.64

- (24) In pursuance of the interim order of the Hon'ble High Court dated 04.04.2017 and subsequent order issued by this Commission, the petitioner was allowed to generate electricity from their plant and to inject into the State grid. BKPL had generated and injected average 2 MU/day during the period from 25.05.2017 to 24.06.2017. In order to absorb the energy generated by the petitioner without affecting the system security and grid stability, KSEB Ltd had reduced the average purchase from power exchange to 1.41MU/day from the average power purchase of 4.51 MU during the previous period. Commission also noted that, there is not much variation in the electricity availed by KSEB Ltd on UI/ DSM basis. So, if the power from the BKPL is not injected to the State Grid from 25.05.2017 to 24.06.2017, KSEB Ltd might have purchased equal quantum from power exchanges on day ahead basis.

So, the opportunity cost to KSEBL for the power injected by the BKPL during the said period is the average round the clock (RTC) price in the power exchanges during the said period.

- (25) As already mentioned above the present situation was triggered due to two major factors viz., (a) the excessive cost of fuel which made it unprofitable for the petitioner company to generate power and sell it to another party and (b) the inherent dangerous nature of the material, which if not properly attended to would likely cause a dangerous situation to the common public which is made evident by the report of the Collector. Here the plaintiff knowingly and voluntarily assumed the risks inherent of storing this explosive material, when they chose to execute the original PPA with the licensee and there are no clauses in the PPA which hold the licensee responsible to bear the cost of fuel stored, other than the liability to pay the fixed cost. Hence the demand of the petitioner that they are eligible for the full energy charges for the electricity generated for exhausting the naphtha from 25.05.2017 to 24.06.2017 based on the weighted average cost of Naphtha cannot be agreed to.
- (26) Considering all the above this Commission is of the considered view that the most equitable rate that can be allowed for the energy charge is the opportunity cost of the respondent KSEB Ltd, i.e., the weighted average RTC price of the IEX during the period from 25.05.2017 to 24.06.2017. Hence, KSEB Ltd shall pay the petitioner the charges for electricity injected into the State Grid at the average RTC rate of IEX during the period from 25.05.2017 to 24.06.2017, duly certified by the SLDC of Kerala.
- (27) In order to arrive the rate of the energy generated and supplied to it, the following procedures may be adopted.
- (i) The SLDC has to certify the quantum of electricity injected to the State grid from the power plant of the petitioner for each day from 25.05.2017 to 24.06.2017.
  - (ii) The SLDC also shall certify the average RTC clearing price of IEX in S3 region each day from 25.05.2017 to 24.06.2017.
- The petitioner BKPL and the respondent KSEB Ltd shall settle the accounts of electricity generated from the plant of the petitioner and injected to the grid of the respondent KSEB Ltd within one month from the date of this order.

#### 46. **Order of the Commission**

The Commission having duly considered the arguments of the subject matter during the hearings on 23.01.2018, and after examining all the documents and other details placed before the Commission during the proceedings of the subject petition, and after duly considering the directions of the Hon'ble High Court in its interim order dated 04.04.2017 in WP (C) 540/2017 and the final

judgment of the Hon'ble High Court dated 31.10.2017 in WP(C) 540/2017, the Commission issues the following orders as per the provisions of the Electricity Act, 2003 and the Tariff Regulations, 2014:

- (1) There is no power purchase agreement between the petitioner BKPL and the respondent KSEB Ltd with effect from 01.12.2015, i.e, after one month from the date of the expiry of the PPA dated 03.05.1999.
- (2) The petitioner BKPL is not eligible to claim fixed cost, lease rent, income tax or any other charges during the period from 01.12.2015 to 31.10.2017.
- (3) KSEB Ltd is not bound to pay fixed charges, lease rent, income tax and other charges to the petitioner during the period from 01.12.2015 to 31.10.2017.
- (4) KSEB Ltd shall make fixed cost payments to BKPL for the month of November 2015, at the rate agreed to by KSEB Ltd.
- (5) KSEB Ltd do not have any liability on the balance stock of fuel as on 31.10.2015, available at the premises of BKPL and at the nearby premises of IOCL, from the date of expiry of the PPA dated 03.05.1999.
- (6) KSEB Ltd shall be liable to pay electricity charges to the petitioner BKPL for the energy generated and injected into the grid during the period from 25.05.2017 to 24.06.2017 at the average RTC clearing price of Indian Energy Exchange (IEX) in each day in S3 region in the day ahead market.

Petition disposed off. Ordered accordingly.

Sd/-  
**K.Vikraman Nair**  
**Member**

Sd/-  
**S.Venugopal**  
**Member**

Sd/-  
**Preman Dinaraj**  
**Chairman**

**Approved for issue**  
**Sd/-**  
**Santhosh Kumar K B**  
**Secretary**