

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

Present : Sri. T.K. Jose, Chairman
Adv. A.J Wilson, Member

RP No. 03/2023

In the matter of : Petition seeking Review of Order dated 10.05.2023
passed by the Commission in OP No.05/2021

Petitioner : Kerala State Electricity Board Limited,
Vydhuthi Bhavanam, Pattom, Thiruvananthapuram

Respondents : 1. Additional Chief Secretary to Government
Power (B) Department , Government of Kerala
2. Jhabua Power Limited
Unit No. 307, Third floor, ABW Tower,
M.G. Road, Gurgaon, Haryana- 122002
3. Jindal Power Limited,
Jindal Centre, 12, Bhikaji Cama Place, New
Delhi 110 066
4. Jindal India Thermal Power Limited Plot No.2,
Pocket-C, Second Floor, Nelson Mandela
Road, Vasanth Kunj, New Delhi-110 070
5. The Kerala High Tension & Extra High Tension
Industrial Electricity Consumers' Association,
Productivity House, HMT Road, Kalamasserry,
Cochin -683104
6. Dejo Kappen, Chairman, Democratic Human
Rights & Environment Protection Forum,
Journalist Garden, Kodimatha, Kottayam.

Date of hearing : 01.12.2023, 10:30 AM
Venue : Court Hall of the Commission

Order dated 29.12.2023

1. Kerala State Electricity Board Ltd (hereinafter referred to as 'KSEBL' or the 'Petitioner' filed petition on 10.11.2023, in the matter of 'seeking Review of Order dated 10.05.2023 passed by the Commission in OP No.05/2021', with the following prayers.

- (i) Allow the present Review Petition and recall / review the order dated 10.05.2023 passed by this Hon'ble Commission in OP No. 05 / 2021; and
- (ii) Pass an order thereby allowing OP No. 05 / 2021 and granting the reliefs sought therein, particularly, granting approval to the following PSAs executed between the Petitioner and the respective generators:-
 - (a) PSA for 115 MW capacity (under Bid-1) with Jhabua Power Ltd. dated 31.12.2014;
 - (b) PSA for 100 MW capacity (under Bid-2) with Jhabua Power Ltd. dated 26.12.2014;
 - (c) PSA for 150 MW capacity (under Bid-2) with Jindal Power Ltd. dated 29.12.2014;
 - (d) PSA for 100 MW capacity (under Bid-2) with Jindal India Thermal Power Ltd. dated 29.12.2014; and
- (iii) Pass such other or further order(s) as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case in the interest of justice.

2. The summary of the petition filed by KSEBL is given below;

- (1) The instant petition is filed for seeking review of the order dated 10.05.2023 passed by this Hon'ble Commission in OP No. 05 / 2021 in the facts and circumstances stated herein.
- (2) KSEBL had been filed an appeal against the Order dated 10.05.2023 in OP No. 05/2021 before the Hon'ble Appellate Tribunal for Electricity (APTEL), being Appeal No. 518/2023. The said Appeal has been disposed of by Hon'ble APTEL vide its order dated 31.10.2023 granting liberty to the Petitioner herein to file the present Petition before this Hon'ble Commission seeking review of the above-mentioned order dated 10.05.2023 passed by this Hon'ble Commission.
- (3) KSEBL had filed the petition OP No. 05/2021 and the subsequent application dated 22.03.2023 before the Commission praying for final orders with respect to drawal of power and approval of the four Power Supply Agreements (PSAs) executed between the Petitioner and the respective generating companies namely:-
 - (i) PSA for 115 MW capacity (under Bid-1) with Jhabua Power Ltd. dated 31.12.2014;
 - (ii) PSA for 100 MW capacity (under Bid-2) with Jhabua Power Ltd. dated 26.12.2014;
 - (iii) PSA for 150 MW capacity (under Bid-2) with Jindal Power Ltd. dated 29.12.2014;
 - (iv) PSA for 100 MW capacity (under Bid-2) with Jindal India Thermal Power Ltd. dated 29.12.2014.
- (4) KSEBL submitted that, the aforesaid PSAs had been executed by the Petitioner with the respective generators pursuant to the bidding process(es) carried out by the Petitioner in the year 2014, for procuring

power at competitive tariff, in terms of the Design, Build, Finance, Own & Operate (DBFOO) Guidelines dated 08.11.2013, issued by the Government of India under section 63 of the Electricity Act, 2003. Two separate bidding processes had been carried out by the Petitioner for procurement of 850 MW power, in the following manner:-

	<u>Quantum</u>	<u>Date of RFQ (Request for Qualification)</u>	<u>Date of commencement of supply.</u>
Bid-1	450 MW	05.03.2014	December 2016
Bid-2	400 MW	25.04.2014	October 2017

- (5) In both the bid process, the L1 bidder had not bid for the entire quantum. In Bid-1, the L1 bidder namely M/s Jindal Power Ltd (JPL) had submitted bid for supply of 200MW power at the tariff of Rs 3.60/unit. In Bid-2, the lowest bidder namely, M/s BALCO had submitted bid for supply of 100MW at the tariff of Rs 4.29/unit.
- (6) In such a scenario where the L-1 bidders had not submitted the bid for the entire quantum, Clause 1.1.4 of the RFP (in terms of the DBFOO Guidelines issued by the Government of India) had envisaged the tendering authority to invite other bidders to match the tariff quoted by the L-1 bidder for supply of the balance quantum of power under the said bidding process. For ready reference, clause 1.1.4 of the RFP is reproduced as under:-
- “1.1.4 Applicants may bid for the capacity specified in Clause 1.1.1, or a part thereof, not being less than 25% (twenty five per cent) of such capacity. Provided, however, that the Utility may, in its sole discretion, accept only those Bids which match the lowest Bid.”*
- (7) KSEBL also submitted that, the guidelines and RFP does not lay down specific provision for dealing with the situation of ‘none of the other bidders agreed for matching the L1 tariff for supply of balance quantum of power.
- (8) KSEBL further submitted that, it had proceeded with the bidding process in the following manner.
- (i) In Bid-1, the other bidders, i.e. L-2 to L-4 bidders were invited to match the tariff of the L-1 Bidder [Rs. 3.60 / unit], for the balance quantum of power. However, none of the other Bidders agreed to match the tariff of the L1 Bidder. The tariff quoted by the L-2 bidder was for Rs. 4.15 per unit for a quantum of 115 MW.
- (ii) In Bid-2, the other bidders, i.e., L-2 to L-6 bidders were invited to match the tariff of the L-1 bidder i.e. Rs. 4.29 per unit. Out of the said other bidders, the L-2 to L-5 bidders agreed to match the tariff of the L-1 Bidder and based on the said agreement, Power Supply

Agreements (PSAs) were executed between the Petitioner and the L-1 to L-5 bidders in Bid-2.

- (iii) After the opening of Bid-2, the tariff quoted by the L-2 bidder in Bid-1 (Rs. 4.15 per unit) was found to be lesser than the tariff of the L-1 bidder in Bid-2 process (Rs. 4.29 per unit). Thus, a decision was taken in the interest of procuring cheaper power for the State, to enter into Power Supply Agreement (PSA) with the L-2 bidder of Bid-1 for the quantum of 115 MW.

- (9) In view of the above, KSEBL has executed the following PSAs with the respective generators under the above two bidding process carried out as per DBFOO guidelines;-

Sl. No.	Generator	Region	Power (MW)	Tariff (Rs./kWh)	PSA Date	Date of start of supply
Bid-1						
1	Jindal Power Limited	WR	200	3.6	29-12-2014	Dec-16
2	Jhabua Power Limited	WR	115	4.15	31-12-2014	Dec-16
Bid-2						
3	Bharat Aluminium Co. Ltd	WR	100	4.29	26-12-2014	Oct-17
4	Jindal India Thermal Power Ltd	ER	100	4.29	29-12-2014	Oct-17
5	Jhabua Power Limited	WR	100	4.29	26-12-2014	Oct-17
6	Jindal Power Limited	WR	150	4.29	29-12-2014	Oct-17
7	East Coast Energy Private Ltd *	SR	100	4.29	02-02-2015	Oct-17
	Total		865			
<p><i>*The PSA for 100 MW capacity executed with East Coast Energy Pvt. Ltd. was subsequently terminated as the plant had not achieved the CoD. Thus, the total quantum for which power supply materialized under Bid-2 is only 450MW.</i></p>						

- (10) KSEBL on 21.04.2015 had filed a petition being OP No. 13/2015 before the Commission for adoption of tariff discovered through competitive bidding process (Bid-1 and Bid-2) for the procurement of power under the said PSAs.
- (11) The Commission, vide its order dated 30.08.2016, had granted approval for the procurement of power in terms of the PSAs between the Petitioner and the L-1 bidders of Bid-1 and Bid-2 respectively, namely, Jindal Power Ltd. and BALCO. However, the decision in relation to the other bidders in Bid-1 and Bid-2 was deferred by this Hon'ble Commission by its said order dated 30.08.2016. The Petitioner was directed to obtain the views of the Government of India and the Government of Kerala in relation to the process followed by the Petitioner while awarding the contract to these other Bidders. This Hon'ble Commission, *inter alia*, observed that there has been a deviation from the DBFOO guidelines, while carrying out the bidding process.

- (12) KSEBL promptly addressed communications to the Government of India as well as the Government of Kerala, seeking their views in relation to the issues highlighted by this Hon'ble Commission in its order dated 30.08.2016.
- (13) The Central Government, by its communication dated 18.11.2016, had left it to this Commission to take a decision in relation to the said bidding process conducted by KSEBL, and the PSAs executed with the respective generators. However, the decision in relation to the approval of the said PSAs, i.e., the PSAs with the Bidders other than the L-1 Bidders in Bid-1 and Bid-2 - was deferred by this Commission.
- (14) In view of the urgent requirement of power, the Commission vide its orders dated 22.12.2016 and 22.10.2017, had granted "Provisional Approval" for procurement of power from the said PSAs. In view of the Provisional Approval granted by this Commission, the Petitioner procured power under these PSAs.
- (15) Subsequently, the Commission vide its Orders dated 14.02.2020 and 27.04.2020, in the matter of approval of fuel surcharge for first and second quarter of the FY 2019-20 observed that, it had not approved the 3 PSAs [i.e. PSAs with the L-2 to L-4 Bidders in Bid-2], and the claim for fuel surcharge under these 3 PSAs was not allowed.
- (16) The Petitioner had filed Review Petitions seeking review of the observations made by the Commission in its orders dated 14.02.2020 and 27.04.2020 to the effect that the PSAs in question had not been approved by this Hon'ble Commission. The Petitioner also prayed before the Commission to pass final orders on the prayer for drawal of power under the said PSAs. The Review Petitions were rejected by the Commission by order dated 14.08.2020, *inter alia*, observing that the prayer cannot be allowed in a Review Petition as there was no such prayer in the original petition.
- (17) In the above background, the Petitioner on 12.11.2020, filed Petition OP No. 05/2021 before this Hon'ble Commission, praying for passing of final orders in relation to the 3 PSAs.
- (18) In the meanwhile, one of the generators, viz. M/s Jindal India Thermal Power Ltd. filed an appeal before Hon'ble APTEL against the orders dated 14.02.2020 and 27.04.2020 and 14.08.2020 passed by the Commission. Hon'ble APTEL passed an interim order dated 20.11.2020 in the said appeal (DFR No. 369/2020), directing that, this Commission shall decide the fresh petition filed by KSEBL (OP No. 05/2021) expeditiously. Further, Hon'ble APTEL granted an order of *status quo ante* for the dispensation prevailing immediately anterior to the orders dated 14.02.2020 and 27.04.2020 passed by the Commission.

- (19) This Commission filed an appeal before the Hon'ble Supreme Court against the order dated 20.11.2020, passed by Hon'ble APTEL (being Civil Appeal No. 41/2021). In this said appeal, the Hon'ble Apex Court, by its order dated 27.01.2021, granted stay of the order dated 20.11.2020 of Hon'ble APTEL.
- (20) In the meanwhile, the Commission, vide its Order dated 25.06.2022, observed that all 4 PSAs [i.e. the PSA with L-2 Bidder of Bid-1 and the PSAs with L-2 to L-4 Bidders of Bid-2] are "unapproved" PSAs, and that the Petitioner shall discontinue the procurement of power from these PSAs. The generators filed appeals before the Hon'ble APTEL against the orders of the Commission.
- (21) Subsequently, Hon'ble Apex Court by its order dated 10.02.2023, disposed of the appeal filed by this Hon'ble Commission by, *inter alia*, directing as under:-
"..... When the matter was taken up for hearing, a consensus has been arrived at between the parties that the interim order if decided by this Court either way is not going to ultimately decide the fate of O.A. No. 5 of 2021 pending before the Commission, which has to be independently decided on its own merits in accordance with law and interim orders always merge after the final decision is taken by the Commission.
In the given facts and circumstances, we consider appropriate to observe that the mechanism, which is in place after passing of the interim order of this Court dated 27.01.2021, shall continue and the electricity may be supplied by the respondents herein in terms of Power Supply Agreement on the same terms and conditions, which may be subject of the outcome of the pending O.A. No. 5 of 2021.
We expect that the Commission will take a call and decide O.A. No. 5 of 2021 as expeditiously as possible but in no case later than three months and both the parties shall cooperate in getting expeditious disposal of the pending O.A.
We further make it clear that the present interim arrangement shall continue up to the date of the disposal of O.A. No. 5 of 2021 and for a further period of two weeks thereafter.
We direct the parties to appear before the Commission on 20.02.2023 at 10.30 a.m.
The present appeal stands disposed of in the above terms.
We have not expressed any opinion on merits of the case and the Commission may decide the pending O.A. on its own merits in accordance with law."
- (22) In terms of the order dated 10.02.2023 passed by the Hon'ble Supreme Court, the Petition OP No. 05 / 2021 was finally heard by this Hon'ble Commission, and issued the final order on 10.05.2023, whereby the Commission had rejected the petition of the KSEBL, i.e., Petition OP No. 05/2021.
- (23) KSEBL has filed appeal, being Appeal No. 518/2023 before the Hon'ble APTEL.

- (24) KSEBL further submitted that pursuant to the order dt. 10.05.2023, the generators viz. M/s Jhabua Power Ltd. (215 MW) stopped supply of power from 01.06.2023 onwards, M/s JITPL (100 MW) from 03.06.2023 onwards and M/s Jindal Power Ltd. (150 MW) from 06.06.2023 onwards.
- (25) In the meanwhile, grave power crisis faced by the State due to failure of monsoon together with the unavailability of 465MW power under the 4 unapproved PSAs. The rate of power in the market is much higher than the rate of power from the 4 PSAs. Considering the precarious power situation in the State, the State Government, in exercise of the powers vested under Section 55 of Article of Association of KSEBL vide its Letter No. B1/137/2023-PD dt. 01.06.2023 directed the Petitioner - KSEBL to take urgent steps to file an appropriate petition before this Hon'ble Commission praying for continuation of the interim arrangement for drawl of power.
- (26) In compliance of the directions of the Government, KSEBL, on 02.06.2023, filed the Petition OP No. 24 / 2023 seeking continuation of the interim arrangement [drawal of power from the 4 PSAs at the L1 rate of Bids], till KSEBL is able to make alternative arrangement for procurement of power or till the decision in the application of the interim relief filed by KSEBL before Hon'ble APTEL whichever is earlier; or, in the alternate, pass orders granting permission to KSEBL to procure / generate power from alternate sources, at the tariff becoming available through such sources, for meeting the power deficit in the State of Kerala.
- (27) The Commission, vide its order dt. 07.06.2023 issuing, *inter alia*, the following directions:-

“..... Orders of the Commission

24. The Commission, after examining the petition filed by KSEB Ltd dated 02.06.2023, the deliberations of the subject matter during the hearing scheduled on 06.06.2023, the provisions of the Electricity Act, 2003, KSERC (Terms and Conditions of Determination of Tariff) Regulations, 2021, Tariff Policy 2016, and other documents and records, hereby Orders the following.

(1) KSEB Ltd is permitted to make arrangements for power procurement by continuing the interim arrangement of scheduling power from the four unapproved DBFOO which was in force for a period of two weeks from 10.05.2023 as per the direction of the Hon'ble Supreme Court, for a further period of 75 days from the date of this Order, or till the alternate arrangements of procuring 500MW RTC power on medium term basis, which ever earlier.

(2) The payment for the power supply during the interim arrangement shall be as per the interim Orders of the Hon'ble APTEL dated 21.10.2022, 16.12.2022, 10.02.2023 and 17.04.2023, make payment at L1 rate of Bid-2 subject to the final disposals of the pending appeal petitions before the Hon'ble APTEL.

(3) The interim arrangement as above, shall be subject to the final decision of the Hon'ble APTEL in IA 1183/2023 filed by KSEB Ltd in DFR No. 325/2023, against the Order of the Commission dated 10.05.2023 in petition OP No. 05/2021.....”

- (28) One of the generators, M/s. JITPL has filed an appeal before Hon'ble APTEL [Appeal No. 572 / 2023] challenging the order dt. 07.06.2023. The said order had also been assailed by Jhabua Power Ltd. by way of filing Appeal No. 583 / 2023 before Hon'ble APTEL.
- (29) KSEBL also submitted that, there was zero scheduling of power by Respondent Nos. 1-3 from all the 4 PSAs, till 20.06.2023. From 21.06.2023 onwards, Respondent Nos. 1 and 3 commenced the supply / scheduling of power, Respondent No. 2 (JITPL) did not resume the scheduling of power to the Petitioner (KSEBL). However, respondent No. 1 [Jhabua Power Ltd.] and Respondent No. 3 [Jindal Power Ltd.] continued with the scheduling of power only upto 20.08.2023, and thereafter discontinued the scheduling of power to the Petitioner (KSEBL).
- (30) On 24.07.2023, the Appeals filed by Respondent Nos. 1 and 2 against the order dt. 07.06.2023 passed by the Commission were disposed of by Hon'ble APTEL while recording the submission on behalf of the Commission that the order dt. 07.06.2023 cannot be construed as compelling generators to sell power to KSEB Limited at L1 rates and that it is for the respective generators to decide whether or not to supply power to KSEB Limited, in terms of the order dt. 07.06.2023 of the Commission.

Policy Directive under Section 108 of the Electricity Act, 2003 issued by the Government of Kerala

- (31) Taking cognizance of the public interest involved in the approval of the above mentioned 4 PSAs, the grave consequences being faced by the State of Kerala and the grave prejudice to public interest and consumer interest, on account of the disapproval of the said 4 PSAs, the Government of Kerala, exercising jurisdiction u/s 108 of the Electricity Act, 2003, has been pleased to issue a policy directive dated 10.10.2023 to this Hon'ble Commission.
- (32) In view of the subsequent development in the matter, of the issue of the Policy Directive and that the Hon'ble Commission is to be guided by the policy directives issued by the State Government, the Policy Directive was placed before the Hon'ble APTEL in Appeal No 518 / 2023. The Hon'ble APTEL has been pleased to pass the following order dated 31.10.2023 while disposing of the said Appeal No. 518 / 2023:-

“..... We consider it appropriate, in such circumstances, to permit the Appeal to be withdrawn, with liberty to the Appellant to invoke the

review jurisdiction of the Commission. It is made clear that the order now passed by us shall not disable the Appellant, if need be later, from availing their appellate remedy against the original order passed by the Commission dated 10.05.2023.....”

- (33) In view of the above and having regard to the issues considered, the policy decision taken in public interest by the State Government and the directions issued vide the Policy Directive dt. 10.10.2023 by the State Government u/s 108 of the Electricity Act, 2003, KSEBL prayed that the order dt. 10.05.2023 be reviewed by this Hon'ble Commission. The Commission may be pleased grant approval to the 4 PSAs mentioned above executed between the Petitioner (KSEBL) and the respective generators.
- (34) In view of the aforesaid submissions, KSEBL submitted that there are sufficient reasons for review and modification of the order dated 10.05.2023 passed by this Hon'ble Commission. KSEBL further submitted that, orders by this Hon'ble Commission allowing the present Review Petition shall meet the ends of justice and shall also be in the interest of the public / the consumers in the State of Kerala. It is submitted that orders by this Hon'ble Commission allowing the present Petition shall be in public interest.
3. The Commission admitted the petition as RP No. 03/2023 and uploaded the petition at the website of the Commission on 10.11.2023. The hearing on the petition was scheduled on 01.12.2023 at the Court Hall of the Commission at Thiruvananthapuram and issued notices to the petitioner and the respondent generators M/s Jhabua Power Limited, M/s Jindal Power Ltd and M/s Jindal India Thermal Power Ltd.

The Commission has also decided to implead the following parties as additional respondents.

- (1) Additional Chief Secretary, Power Department, Government of Kerala. The petitioner KSEBL had filed the instant petition in view of the policy directives issued by the State Government under Section-108 of the EA-2003, the Commission has decided to implead the State Government as additional respondent.
- (2) M/s The Kerala High Tension & Extra High Tension Industrial Electricity Consumers' Association (herein after referred to as HT&EHT Association) was one of the Additional respondent in the petition OP No. 05/2023. Hence the HT&EHT Association is impleaded as one of the additional respondent in the instant petition and issued notice to them regarding the schedule of the hearing.
- (3) The Commission has decided to implead Shri. Dejo Kappen, Chairman, Democratic Human Rights & Environment Protection Forum, as additional respondent, since he was also a respondent in the original petition OP No. 05/2023.

Written comments of the respondents

4. One of the respondent M/s Jhabua Power Ltd, vide its submission dated 25.11.2023 submitted that, the review petition filed by KSEBL is not maintainable on the following grounds.

- (1) A review petition can be admitted only if either of the following grounds are satisfied;
 - (i) Discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the knowledge of the Review Petitioner and could not be produced by him at the time when the decree was passed or order made;
 - (ii) On account of some mistake or error apparent on the face of record;
 - (iii) Any other sufficient reason, which is esjudem generis to the above mentioned two grounds.

However, KSEBL has relied on the following subsequent events namely,

- (i) Disposal of Appeal No. 518 of 2013 by the Hon'ble Tribunal vide Order dated 31.10.2023;
- (ii) OP No. 24 of 2023 which was heard by this Hon'ble Commission on 06.06.2023 and an order dated 07.06.2023 was passed which directed the continuation of interim arrangement of power supply from the generators despite the Order dated 10.05.2023 disapproving the PSAs;
- (iii) Appeal No. 583 of 2023 which was filed by Jhabua Power against the Order dated 07.06.2023 and disposed by the Hon'ble Tribunal vide Order dated 24.07.2023;
- (iv) Policy Directive under Section 108 of the Electricity Act as issued by the Government of Kerala.

The respondent submitted that, the occurrence of some subsequent event or development cannot be taken note of for declaring the initial order as vitiated by error apparent.

- (2) The respondent further submitted that, the policy directive of the State Government under Section 108 (2) of the EA-2003 is a subsequent event. However it does not alter the scope by which the Order dated 10.05.2023 had been passed.

A policy directive dated 10.10.2023 is not binding on the Commission. The policy directive was issued by the Government of Kerala in light of the financial implications accruing to KSEBL due to unapproval of the DBFOO contracts and the power crisis in the State of Kerala. The directive directs this Hon'ble Commission to review the orders passed in

OP No 5/2021 filed by KSEB in accordance with public interest. The relevant portion of the Policy Directive dated 10.10.2023 is extracted hereinafter:

“NOW THEREFORE, after detailed examination of the matter, considering all facts and observations, without prejudice to any enquiry ongoing in the matter and without ratifying the procedural irregularities pointed out by KSEB, keeping in view the larger interest of the public, the Government deems it appropriate to invoke the power under section 108 of Electricity Act 2003 and accordingly, in exercise of the said power, Government hereby direct Kerala State Electricity Regulatory Commission to reconsider/review their orders in O.P No.5/2021 filed by Kerala State Electricity Board Limited, in accordance with the policy of the Government for the best interest of the State and public at large.”

The said policy directive is only an after thought. Further, the directive under Section 108 is not mandatory or binding on the State Commission.

- (3) Since PSAs had been disapproved vide Order dated 10.05.2023, and even the period of 75 days ended on 20.08.2023 and the counsel for this Hon'ble Commission itself took a stand before the Hon'ble Tribunal that there is no mandate but only an option to the generators to supply electricity for a period of 75 days, Jhabua Power has tied up its un-tied power by entering into a Long Term PPA dated 27.09.2023 with NTPC Vidyut Nigam Limited (hereinafter referred to as “NVVN”) for selling its power to Discoms/states/industrial customers/bulk consumers/Power exchange etc through bilateral arrangement/competitive bidding/other modes on back-to-back basis for balance life of the plant.

Jhabua Power does not have any free power to supply to KSEBL, any order passed in exercise of review jurisdiction cannot bind Jhabua Power or force it to rescind other validly entered PPAs. It is submitted that generators cannot be expected to maintain the free quantum against unapproved DBFOO contracts and leaving behind the opportunities for long term tie-ups which are coming in the market in a hope that these might get approved later on. As a commercial undertaking, generators also have to sustain operations.

In these circumstances, the respondent M/s Jhabua Power Ltd submitted that, there is no merit in the Review Petition filed by KSEBL and it is therefore liable to be dismissed.

5. The respondent M/s Jindal India Thermal Power Ltd vide its letter dated 29.11.2023 has submitted the following against the Review Petition RP 03/2023 before the Commission.

- (1) The Review Petition is not maintainable in terms of Order 47 read with Section 94(1)(f) of the Electricity Act, 2003. It is a settled law that a

change in law or subsequent decision/ judgment of a larger bench, or of a superior court cannot be regarded as a ground for review.

(2) The directive under Section 108 also a subsequent event and cannot be relied upon to alter the scope by which the Order under review is passed. It is also settled principle of law that directions issued by the State Government under Section 108 of the Act are not binding on SERCs.

(3) M/s JTPL has participated in a tender floated by Noida Power Company Ltd and as the successful bidder, it had executed PPA on 15.11.2023 with Noida Power Company Limited for supply of 95MW of power.

Since the JTPL has already entered into PPA/PSA with other DISCOMs and is therefore no longer capable of supplying power to the petitioner, no capacity/ quantum is available with the respondent for supply of power to the petitioner due to such alternate PPAs entered/ executed with other DISCOMs.

(4) Based on the above, the respondent M/s JTPL has submitted the following for the considerations of the Commission.

(a) The captioned review petition is not maintainable in terms of Order 47 Rule 1 of CPC read with Section 94 of the Electricity Act, 2003.

(b) The PSA dated 29.12.2014, executed between the Petitioner and the Answering Respondent is non- existent and non-enforceable.

(c) The Answering Respondent has made alternative arrangements with other Distribution Licensees, pursuant to the order under review dated 10.05.2023, whereby the PSA dated 29.12.2014 was not approved.

(d) The Section 108 Directive, issued by the State Government, is a mere after thought considering the same was issued only on 10.10.2023, i.e., 5 months after the issuance of the order under review.

(e) The Section 108 directive is not binding on this Hon'ble Commission and is merely guiding in nature.

(f) Notwithstanding the Answering Respondent's inability to restart supply of power to the Petitioner, the latter is liable to clear all the outstanding dues payable to the Answering Respondent for the power supplied from 01.10.2017 till 03.06.2023.

6. The respondent M/s Jindal Power Ltd vide its affidavit dated 30.11.2023 has submitted the following;

(i) Inview of the directions of the State Government under Section 108 of the EA-2003 and are binding in nature, this Commission may exercise its review jurisdiction considering the subsequent event/ development in

the matter, and allow the review petition filed by KSEBL and approve the PSA of the answering respondent M/s JPL and also acknowledge its continuous supply of power to KSEBL since 01.10.2017.

M/s JPL also submitted that, while approving the PSA, the Commission may issue appropriate directions to KSEBL to make payments of outstanding dues for supply of power in terms of the tariff agreed under PSA.

- (ii) MoP, GoI vide the letters dated 18.11.2016 and 11.12.2019, granted liberty to the State Government, the Commission and KSEBL were granted liberty to resolve the deviations in the bidding process and take appropriate decisions with regard to the approvals of the PSAs L2 to L4.

The deviations alleged by the State Commission, which are procedural/ technical in nature, were required to be approved while passing the Order under review in the interest of the public at large.

- (iii) Regarding the issue of two different rates in Bid-1 and Bid-2 for the supply of power from the same unit of the respondent, M/s JPL submitted that,

- Bifurcation of the tariff into fixed charge and variable charges is well within the commercial wisdom of the generator/supplier who bid under Section 63 power procurement route under EA-2003.
- There are multifarious commercial reasons and decisive factors that influence the said decisions at the given point of time.
- Section 63 of the EA-2003, does not require an examination of such commercial logic and rational behind the decision of submitting bid price by this Hon'ble Commission.

- (iv) The respondent further submitted that, the quantum, timing and manner of inviting bid are in the sole discretion of the procuring entity. The guidelines only lay down the clauses for the bidding process. The clause 1.2.5 of the RFQ clearly provides for inviting bids other than the L1 bidder to match the L1 tariff, in case the full quantum is not offered by the L1 bidder.

- (v) As per the judgment of the Hon'ble Supreme Court in Energy Watchdog vs CERC reported in (2017) 14 SCC 80, and judgment of the Hon'ble APTEL in Appeal No. 82 of 2011, it was held that,
"a. The Appropriate Commission has to adopt the PSA, including the tariff in totality, or completely reject the same. There is no provision of ad-hoc or temporary approval of bid under the EA-2003;

(b) The jurisdiction of the Commission is extremely limited under Section 63, if the bidding process is transparent and the tariff is market aligned'.

- (vi) The respondent requested before the Commission to ought to allow the captioned Review Petition filed by KSEBL, thereby approve the PSA of

JPL. The respondent further submitted that, in the absence of approval of PSAs in accordance with laws, the answering respondent cannot be mandated supply/ continue to supply power that otherwise ought to have been supplied under PSA once the same got approved under Section 63 of the Act.

- (vii) In view of the above, the respondent concurred with the prayer made by the review petitioner KSEBL, i.e. approval of the PSAs executed with JPL, amongst others, however subject to KSEBL paying Rs 124.40 crore being the amount computed, due and payable in terms of the rate agreed under PSA in respect of the supply made during the period from August, 2020 to till date along with applicable interest and carrying cost, without any further delay.

7. The Additional Chief Secretary to Government of Kerala, Power Department, vide the letter dated 30.11.2023 had submitted the following before the Commission.

“Hon'ble KSERC by its order dated 30 th August 2016 in OP. No. 13/2015, among the seven power purchase agreements, had only approved the purchase of 200 MW of power from M/s.Jindal Power Ltd (L1) at the rate of Rs.3.60/kWh for 25 years as per Bid-1 dated 05.03.2014 which was opened on 30.10.2014 and the purchase of 100 MW of power from M/s Bharath Aluminium Company Ltd.(L1) at the rate of Rs.4.29/kWh for 25 years as per Bid-2 dated 25.05.2014 which was opened on 14.11.2014. The Commission further ordered that the approval of the remaining power purchase agreements will be considered only after getting the approval from Central Government for the deviations from the guidelines and on getting the views from Government of Kerala in this regard.

While the matter was in consideration of Government, O.P No.5/2021 was filed by KSEBL before the Commission, praying for issuance of final orders in the matter of granting approval of four power supply agreements executed with the respective generating agencies, including that seeking for issuance of final orders pursuant to order dated 22.12.2016. However the Commission by its order dated 10.05.2023, rejected the petition of KSEBL.

Consequence to the above order of Hon'ble Commission, Chairman & Managing Director, Kerala State Electricity Board Limited requested intervention of the Government of Kerala in the matter highlighting the impact of the KSERC orders on the power position of the State.

CMD, KSEBL had reported Government the following technical and financial implications that may lead to chaotic situation and huge financial losses, consequence to the unapproval of DBFOO contracts.

Technical implications

1) *For meeting the evening peak demand, KSEBL is procuring power from the market to the order of 400 MW to 600 MW, even after scheduling of power from generators of four unapproved contracts, depending upon the impact of summer rains.*

2). *Non-scheduling from four unapproved contracts will reduce the availability from 1033.22 MW to 652.73 MW at Kerala periphery.*

3) If the demand soars high, the deficit in the peak will be of the order of 1100 MW. Currently the market prices are of the order of Rs.10/- from 19:00 hrs. onwards till 24 hrs.

4) There is a chance of scarcity in availability of power as the demands picks up in the Country, which is now slightly declined due to the impact of summer rains.

5) Even after availing power from DBFOO stations, hydel storage position is sufficient to meet the state demand up to 1st week of June 2023 due to the impact of heat wave, with summer rains, this can extend a little further.

6. For meeting the swap commitments starting from 16th June 2023, the reservoir levels were managed so as to have around 750 MU at the beginning of this water year 2023-24. Situation will be aggravated further with the nonavailability of 380.49 MW from these stations.

7) Load restrictions needs to invoke throughout the day to balance the increasing demand with depletion of hydel reserves and delayed monsoon.

8) 465 MW is inevitable to manage the LGB of the state. If 465 MW of power needs to be curtailed, the same may be done after contracting from equivalent alternate source. Tender procedure for re-tendering of 500 MW RTC power on Medium Term basis is undergoing, which may take around 3- 4 months for finalization including time period for seeking KSERC approval. Alternatively, a fresh tender for the long term period for the balance period of DBFOO contracts (around 18 years) will take minimum six months to finalize.

9) Also, due to fluctuating rate in power market it is not able to ensure purchase of power at affordable rate. Hence the tariff may go up exorbitantly.

10) In the worst scenario, KSEBL may be forced to impose power restrictions in the state of Kerala including to those on Industrial Consumers.

Financial Implications

1. In case on termination of Agreement by Utility, as per Clause 31.3.2 of DBFOO PPA, KSEBL will be liable to pay damages. The termination payment of the four unapproved DBFOO Contracts amount to Rs.500 Crore approx.

2. In addition to the above, KSEBL have to make immediate disbursement of the pending amount to be disbursed to the generator on account of restrictions as per KSERC Order and APTEL Orders is around Rs.270 Crore which includes Rs. 171.46 crores disputed in PRAAPTI portal.

3. As per the current market trend, the per unit energy charge to replace the above shortfall comes around Rs. 5 - 6/unit which in turn leads to tariff hike.

4. It is pertinent to note that the Ministry of Power/CEA, vide communication dated 23.05.2023 has sought the willingness of other beneficiaries of North/West/ South region for availing the power from Jhabua Power Ltd. to the extent of 215 MW on account of the orders dated 10.05.2023 of Hon'ble KSERC.

CMD, KSEBL also informed Government that they are buying power at huge cost difference. As monsoon is weak, in all probability they will have to go for forward contract through power exchange transactions - Long Duration Contract - in that scenario they have to pay 50% advance of the cost at per unit cost of around Rs.6.50/unit to Rs.10/unit. In future even if the situation improves, they have to pay the cost at that rate. CMD has also pointed out that the approximate cost for 200 MW for

3 months will be Rs. 246.24 Crores and this will pose another problem from the point of audit also.

Chairman & Managing Director, KSEBL further informed that, in order to limit the financial implications due to purchase of additional power from the market within manageable levels so as to avoid tariff shocks to the consumers and to ensure sustainability of the utility, demand side management by way of power cut or load restriction or both is the only way out and also requested to consider the gravity of the matter and issue directions on imposing load shedding/power cut if the monthly power purchase cost crosses Rs.900 crores.

Addl Chief Secretary further submitted that, Government observed that consequent to nonapproval, of power purchase agreements by the Commission, substantial amounts are due to the generation companies, in pursuance to the agreements executed with the KSEBL. In the event of non-approval of power purchase agreements, State will be put to power crisis and consequential power restrictions, which will not be in the best interest of the State.

It is also observed that since the year 2010, the State of Kerala has been witnessing recurring rampant power restrictions. Consequent to the said power restrictions, the cost of power procurement was increased from year to year. During the summer of 2010 to 2012 and from 09/2012 to 05/2013, the State of Kerala was facing severe power deficit and was constrained to impose load shedding and power restrictions throughout the State. It was in the said compelling circumstances that steps were initiated by the KSEBL, so as to procure adequate quantity of power through open access mechanisms, on a long term basis. The demand of power in the State was projected an increase at the rate of 7% to 8 %, on an annual basis. Accordingly, the Board had invited tenders for procurement of power, which had culminated in execution of seven power purchase agreements, as stated herein afore. So much so, as is seen therefrom, the public purpose involved therein is apparent and evident.

Government observed that any cancellation of unapproved power purchase agreements at this length of time will not be in the best interest of the State and KSEBL, despite earnest efforts, is not in a position to come up with an alternate arrangement to overcome the impending power crisis in the State.

Government also observed that KSEBL was bound to follow the instructions laid down by KSERC regulations. If any mistake occurred, alternative means should have been sought earlier so as to avoid the losses. Now the public should not be held liable for the shortcomings due to procedural flaws.

Hence it is submitted that for the reasons stated in the preceding paragraphs, in the best interest of the consumers of power in the State and to avoid the impending power crisis, it is only apposite for the State Government to take a policy decision, in public interest, enabling to issue necessary directions, as is contemplated under Section 108 of the Electricity Act of 2003, in the facts and circumstances of the case in hand.

The Additional Chief Secretary to Government, Power Department further submitted that, after a detailed examination of matter, considering all facts and observations, without prejudice to any enquiry in the matter and without ratifying the procedural irregularities pointed out by KSERC, considering the larger interest of the public , the Government deems it appropriate to invoke the power under section 108 of Electricity Act 2003 and accordingly, in exercise of the said power, directed Kerala State Electricity Regulatory Commission to review their order dated 10.05.2023 in O.P

Public hearing on the review petition RP No. 03/2023

8. The Commission has conducted the hearing of the petition on 01.12.2023 through hybrid mode. The deliberations during the hearing is summarized below.

(1) Sri. M.G. Ramachandran, Senior Advocate appeared on behalf of the State Government and the petitioner KSEBL. Summary of the issues raised by the petitioner is given below.

(i) The present petition was filed in view of the policy directions issued by the State Government under Section 108 of the Electricity Act, 2003, after taking into consideration of the public interest and critical requirement of the State for procurement of power from the four PSAs whose approval was denied vide the Order dated 10.05.2023.

(ii) It is a settled position that, the policy direction issued by the State Government under public interest is and it involves public interest is binding on the State Commissions. This position was held by the Hon'ble Supreme Court in the following judgments.

(a) Paschimanchal Vidyut Vitran Nigam Ltd. & Ors. Vs. Adarsh Textiles & Anr., (2014) 16 SCC 212, relevant paragraphs whereof are reproduced as under:-

“..... 21. The Electricity Act, 2003 was enacted by Parliament. Section 62 whereof confers the power upon the Commission to determine the tariff. Section 65 of the Electricity Act, 2003 enables the State Government to grant subsidy to any consumer or class of consumers in the tariff determined by the State Commission under Section 62. Section 108 of the 2003 Act deals with the power to issue directions by the State Government. **The Commission shall be guided by such directions in the matter of policy involving public interest as the State Government may give to it in writing**.....

..... 23. It is apparent from a bare reading of the aforesaid provisions of the Electricity Act, 2003 and the Reforms Act, 1999 that **in discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing. Such decision/direction of the State Government in the matter of policy, subsidy and public interest shall be final**.....”

(b) Real Food Products Ltd. & Ors. Vs. A.P. State Electricity Board & Ors., (1995) 3 SCC 295, relevant paragraphs whereof are reproduced as under:-

“..... 8. The only surviving question is with regard to the nature and effect of the direction given by the State Government under Section 78-A of the Act. The question has to be examined in the context of the facts of the present case which is confined to the charging of a flat rate per H.P. for agricultural pump-sets. The nature of the function of the Board in fixing the tariffs and the manner of its exercise has been considered at length in the earlier decisions of this Court and it does not require any further elaboration in the present case. **Section 78-A uses the expression “the Board shall be guided by such directions on questions of policy as may be given to it by the State Government”. It does appear that the view expressed by the State Government on a question of policy is in the nature of a direction to be followed by the Board in the area of the policy to which it relates.** In the context of the function of the Board of fixing the tariffs in accordance with Section 49 read with Section 59 and other provisions of the Act, the Board is to be guided by any such direction of the State Government. **Where the direction of the State Government, as in the present case, was to fix a concessional tariff for agricultural pump-sets at a flat rate per H.P., it does relate to a question of policy which the Board must follow.**.....”

(c) ***Dwaraka Resorts Pvt. Ltd. Vs. State of Orissa & Ors., 2014 SCC Online Ori 498***, relevant paragraphs whereof are reproduced as under:-

“..... 24. Section 108 of the Electricity Act, 2003 not only mandates that in the discharge of its functions, the State Electricity Commission is to be guided by directions issued by the State in matters of policy involving public interest, but also recognizes the dominant position of the State Government in deciding as to whether any direction issued by the State Government relates to a matter of policy involving public interest. **In other words, in the matter of policy involving public interest, decision of the State Government is final.** All the instrumentalities of the State are required to speak with one voice.....”

In view of the principles of law laid down in the above-mentioned judgments, KSEBL submitted that the policy directive dated 10.10.2023 issued by the Government of Kerala, which clearly recording the reasons and grounds, basis which the Government of Kerala has acted in the public interest, requiring this Hon'ble Commission to reconsider / review its orders in OP No. 05 / 2021, would deserve to be followed by this Hon'ble Commission, by allowing the prayers in the Review Petition and passing orders for granting approval to the four (4) Power Supply Agreements(PSAs) in question.

(iii) KSEBL further submitted that, the review jurisdiction of the Commission is also available to the Commission for “any sufficient reason” as laid down under the provisions of Section 94 of the EA-2003 read with Order XL VII of the Code of Civil

Procedure (CPC). The relevant provisions, for ready reference, are reproduced as under;-

SECTION 94(1) OF ELECTRICITY ACT, 2003

“94. Powers of Appropriate Commission.—

- (1) *The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely: —*
- (a) *summoning and enforcing the attendance of any person and examining him on oath;*
 - (b) *discovery and production of any document or other material object producible as evidence;*
 - (c) *receiving evidence on affidavits;*
 - (d) *requisitioning of any public record;*
 - (e) *issuing commission for the examination of witnesses;*
 - (f) ***reviewing its decisions, directions and orders;***
 - (g) *any other matter which may be prescribed.”*

ORDER XLVII(1) OF CODE OF CIVIL PROCEDURE (CPC)

“ORDER XLVII

REVIEW

1. Application for review of judgment.—

- (1) *Any person considering himself aggrieved —*
- (a) *by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
 - (b) *by a decree or order from which no appeal is allowed, or*
 - (c) *by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or **for any other sufficient reason**, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.....”*

KSEBL further submitted that it has been clearly laid down by the Hon'ble Apex Court that the jurisdiction for review can be exercised even for *any sufficient reason*, and the existence of “*sufficient reason*” would be considered in the facts and circumstances of each case. In this behalf, reliance has been placed by the Petitioner on the judgment of the Hon'ble Apex Court in the case of **Board of Control for Cricket in India v. Netaji Cricket Club**, (2005) 4 SCC 741, relevant paragraphs whereof are reproduced as under:-

“..... 89. Order 47 Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the

record but also if the same is necessitated on account of some mistake **or for any other sufficient reason.**

90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. **An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words “sufficient reason” in Order 47 Rule 1 of the Code are wide enough** to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine “actus curiae neminem gravabit”

..... 93. **It is also not correct to contend that the Court while exercising its review jurisdiction in any situation whatsoever cannot take into consideration a subsequent event.** In a case of this nature when the Court accepts its own mistake in understanding the nature and purport of the undertaking given by the learned Senior Counsel appearing on behalf of the Board and its correlation with as to what transpired in the AGM of the Board held on 29-9-2004, the subsequent event may be taken into consideration by the Court for the purpose of rectifying its own mistake.....”

Applying the principles laid down in the above-mentioned judgment to the facts and circumstances of the present case, KSEBL submitted that the Section 108 directions issued by the State Government in the present case, having regard to the public interest and the interest of consumers in the State of Kerala, would squarely constitute “*sufficient reasons*”, requiring this Hon’ble Commission to exercise its review jurisdiction for allowing the Review Petition and granting the relief(s) sought therein.

- (iv) KSEBL further submitted that, it is a settled position of law that, the jurisdiction and power of the Regulator while discharging its regulatory functions is much wider and different from the jurisdiction and power exercised by a Court. A Regulator revisiting an earlier decision in the discharge of its regulatory functions - is not bound by principles of *res judicata* etc. In this behalf, KSEBL has placed reliance on the judgment of the Hon’ble Supreme Court in the case of ***U.P. Power Corpn. Ltd. v. NTPC Ltd., (2009) 6 SCC 235***. The relevant paragraphs of the said judgment is extracted below.

“..... 22. *The Central Commission in terms of the 1998 Act as also the Regulations framed thereunder exercises diverse powers. It exercises legislative power, power of enforcement of the Regulations as also the adjudicatory power. Each of its functions although are separate and distinct but may be overlapping. The power of the Central Commission is extensive.....*

..... 34. *While exercising its power of review so far as alterations or amendment of a tariff is concerned, the Central Commission stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order 47 Rule 1 thereof. Its jurisdiction, in that sense,*

as submitted by Mr Gupta, for the aforementioned purposes would not be barred in terms of Order 2 Rule 2 of the Code of Civil Procedure or the principles analogous thereto.

35. Revision of a tariff must be distinguished from review of a tariff order. Whereas Regulation 92 of the 1999 Regulations provides for revision of tariff, Regulations 110 to 117 also provide for extensive power to be exercised by the Central Commission in regard to the proceedings before it.

36. Having regard to the nature of jurisdiction of the Central Commission in a case of this nature, we are of the opinion that even principles of *res judicata* will have no application.....

..... 38. The Central Commission, as indicated hereinbefore, has a plenary power. Its inherent jurisdiction is saved. Having regard to the diverse nature of jurisdiction, it may for one purpose entertain an application so as to correct its own mistake but in relation to another function its jurisdiction may be limited. The provisions of the 1998 Act do not put any restriction on the Central Commission in the matter of exercise of such a jurisdiction. It is empowered to lay down its own procedure.....

..... 40. Regulations 92 and 94, in our opinion, do not restrict the power of the Central Commission to make additions or alterations in the tariff. Making of a tariff is a continuous process. It can be amended or altered by the Central Commission, if any occasion arises therefor. The said power can be exercised not only on an application filed by the generating companies but by the Commission also on its own motion.

41. Assuming that Regulation 103 of the 1999 Regulations would be applicable in a case of this nature, the same also confers a wide jurisdiction. The Commission, apart from entertaining an application for review on an application filed by a party, may exercise its *suo motu* jurisdiction. While the Central Commission exercises a *suo motu* jurisdiction, the period of limitation prescribed in Regulation 103 shall not apply. There cannot, however, be any doubt whatsoever that while exercising such jurisdiction, the Central Commission must act within a reasonable time. Furthermore, the statute does not provide for the manner in which a petition is to be filed before the Central Commission or the manner in which the tariff order is to be passed or revision or non-revision thereof. Section 28 of the 1998 Act empowers the Central Commission to determine the terms and conditions for fixation of tariff.....

..... 46. The concept of regulatory jurisdiction provides for revisit of the tariff. It is now a well-settled principle of law that a subordinate legislation validly made becomes a part of the Act and should be read as such.

47. There cannot be any doubt whatsoever that the word "regulation" in some quarters is considered to be an unruly horse. In *Bank of New South Wales v. Commonwealth* [(1948) 76 CLR 1] Dixon, J. observed that the word "control" is an unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than "restraint", something equivalent to "regulation". But, indisputably, the regulatory provisions are required to be applied having regard to the nature, textual context and situational context of each statute and case concerned.....

..... 49. Even otherwise the power of regulation conferred upon an authority with the obligations and functions that go with it and are

incidental to it are not spent or exhausted with the grant of permission. (See State of U.P. v. Maharaja Dharmander Prasad Singh [(1989) 2 SCC 505] at SCC p. 522, para 52.) In that sense, the power of the Central Commission stricto sensu is not a judicial power.....”

(v) In view of the submissions made hereinabove, KSEBL submitted that after taking into consideration all facts and circumstances in their totality, including the competitive tariff determined pursuant to the bidding process, the critical requirement of power by the State, the tariff as well as non-availability of power from alternate sources, as well as the overall interest of the consumers in the State of Kerala - the State Government has taken well considered policy decision in public interest and thereby issued the policy directive dated 10.10.2023 under section 108 of the 2003 Act in light of the settled principles of law and having regard to the public interest and in the interest of the consumers. KSEBL further prayed before this Commission that the said policy directive dated 10.10.2023 would deserve to be followed / applied by this Hon'ble Commission by allowing the present Review Petition and granting the reliefs prayed for therein. Such an order by this Hon'ble Commission allowing the present Review Petition shall meet the ends of justice. KSEBL prays accordingly.

(2) Sri. K.R. Jyothisal, Additional Chief Secretary to Government, Power Department, Government of Kerala, submitted the following before the Commission during the hearing.

(i) The policy directive of the State Government vide its letter dated 10.10.2023, clearly states that the facts and circumstances of the case, which necessitated to issue the said policy directives to the State Commission under Section 108 of the EA-2003 to review the Order of the Commission dated 10.05.2023 in the matter of the approval of the power procurement from the four unapproved DBFOO contracts in question.

It is also a settled position that, as per the Section 108(2) of the EA-2003, the policy directives issued by the State Government in view of the public interest to safeguard and protect the interest of the electricity consumers in the State is final and binding on this Commission.

(ii) The State Government vide its letter dated 30.11.2023 also submitted the detailed comments on the review petition RP No. 03/2023 filed by KSEBL in compliance of the policy directives of the State Government, wherein also the State Government has communicated its considered decision of the necessity to review/reconsider the Order of this Hon'ble Commission dated 10.05.2023 in Petition OP No. 05/2021.

- (iii) KSEB Ltd is fully owned by the State Government and 100% of its equity is with the State Government. Various policy directives of the Central Government and State Government is being implemented through KSEBL. Hence KSEBL is bound to comply with the various policy directives of the State Government.
- (iv) The electricity demand in the State is increasing at an alarming rate of 12% per annum. The power demand of the State during the last summer was more than 5000 MW, and the daily energy consumption was also exceeded 100MU. With the present demand growth, the electricity demand in the State may get doubled by the year 2028. Further, with the large penetration of the electric vehicles, the electricity demand may further increase exponentially. The State Government is committed to ensure 24x7 power supply at affordable rate to the consumers of the State.
- (v) There is wide difference between the demand and availability in the State. The internal generation is just sufficient to meet less than 30% of the demand of the State, and the balance power is being met by purchasing from the sources outside the State. The power situation may aggravate further with the non-approval of the 465MW RTC power contracted through DBFOO contracts.
- (vi) KSEBL reported before the Government that, the electricity prices in the day ahead and short-term markets is excessively high. The average rate of power purchase from short term market/ power exchanges to meet the short fall in power availability due to the non approval of the DBFOO contracts is about Rs 6.00 per unit.
- (vii) Though KSEBL has initiated steps to procure power through medium term contracts, the rates derived is excessively high.
- (viii) KSEBL, with the permission of the State Government and this Commission has been scheduling power from these unapproved DBFOO contracts since the year 2017.
- (ix) The Additional Chief Secretary to Government, Power Department, further submitted that, the cancellation of the four unapproved DBFOO contracts with the total quantum of 465MW at this point of time is against the interest of the consumers of the State, since it may results in power restrictions. Otherwise, the additional liability for purchasing power from alternate sources at higher tariff rates may pass on to the consumers through increase in tariff.

Moreover, the public should not be put in peril for the irregularities/ mistakes/ deficiencies happened due to the procedural lapses and technical reasons. Though directions was issued to KSEBL

to arrange power from alternate sources, it could not be in a position to come with alternate arrangement to over come the impending power crisis in the State.

- (x) The Sovereign Government has the responsibility to rise up to the situation and hence decided to intervene to tide over the severe power crisis and financial implications in view of the public interest involved in this matter. As contemplated under Section 108 of the EA-2003, the Government has decided to issue directions to the Commission to review/ reconsider the Order dated 10.05.2023 in petition OP No. 05/2021.
 - (xi) Considering the above submission and facts, the Additional Chief Secretary requested before the Commission to review the Order dated 10.05.2023 in petition OP No. 05/2021 and requested to permit KSEBL to schedule power from these four DBFOO contracts which was denied earlier.
- (3) Adv. Shri. Biju Mattam, on behalf of the respondent M/s Jindal Power Ltd (JPL) submitted the following;

- (i) The directions issued by the State Government under Section 108 of the EA-2003 are binding in nature to the State Commissions. Hence this Commission may exercise its review jurisdiction considering the subsequent event/ development in the matter and allow the review petition filed by KSEBL and approve the PSAs including that of the answering respondent M/s JPL.

While approving the PSA, appropriate directions may be issued to KSEBL to make payments of outstanding dues for supply of power interms the tariff agreed under PSA.

- (ii) As per the judgment of the Hon'ble Supreme Court in Energy Watchdog vs CERC reported in (2017) 14 (SCC 80), it was held that,

“a. The Appropriate Commission has to adopt the PSA, including the tariff in totality, or completely reject the same. There is no provision of ad-hoc or temporary approval of bid under the Act;

(b) The jurisdiction of the Commission is extremely limited under Section 63, if the bidding process is transparent and the tariff is market aligned’.

- (iii) The Hon'ble Commission had allowed KSEBL to procure power from JPL for 5-6 years since 01.10.2017. The aforesaid procurement was in terms of the letters issued by the State Government dated 21.10.2017 and 22.12.2017. The same amounts to a deemed approval, as there cannot be any temporary

approval of an agreement executed pursuant to a bidding process conducted under Section 63 of the EA-2003.

- (iv) Inview of the above, Hon'ble Commission while exercising its review jurisdiction ought to approve the PSA under Section 86(1)(b) read with Section 63 of the EA-2003 thereby allowing JPL to continue supply of power to KSEBL at the tariff provided under the PSA.
- (4) Shri. Sajan Poovayya, Senior Advocate, on behalf of the respondent generator M/s Jindal India Thermal Power Limited submitted the following before the Commission.
- (i) The Review Petition is not maintainable in terms of Order 47 read with Section 94(1)(f) of the Electricity Act, 2003. As per the Order 47 of the Code of Civil Procedure, a review petition is maintainable subject to the following conditions;
 - (a) Discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the knowledge of the Review Petitioner and could not be produced by him at the time when the decree was passed or order made;
 - (b) On account of some mistake or error apparent on the face of record;
 - (c) Any other sufficient reason, which is esjudem generis to the above mentioned two grounds.

It is a settled law that, a change in law or subsequent decision/ judgment of a larger bench, or of a superior court cannot be regarded as a ground for review.

The respondent has made reference to the Supreme Court Judgments of Military Dairy Farm, Jabalpur v Dhan Prasad Yadav, reported in 2016 SCC 239 , and also State of West Bengal and Ors V Kamal Sengupta and Anr reported in (2008) SCC 612. In these judgments, Hon'ble Supreme Court observed that the review petition must be confined to the material which was available at the time of initial decision. Hence the Commission cannot consider Section 108 directive as a basis for reviewing the Order dated 10.05.2023.

- (ii) Section 108 directive is not binding on the Commission. The respondent JTPL submitted that, it is a settled position of law that, directions issued under Section 108 of the EA-2003 by State Government are not binding on the SERCs and are merely guiding in nature.

The respondent has made reference to the decisions of the Hon'ble APTEL in Appeal No. 92 of 2013 (Tamil Nadu Electricity Consumers Association V TNERC and Ors), Appeal No. 41, 42 and 43 of 2010 (Polyplex Corporation Limited Vs UERC).

- (iii) Mere filing an appeal does not amount to stay of the Order under challenge. Order 41 Rule 5(1) of the CPC clearly state that, "An appeal shall not operate as a stay proceedings under a decree or Order appealed from except so far as the Appellant Court may Order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellant Court may for sufficient cause order stay of execution of such decree.

Though the petitioner KSEBL has preferred an appeal, being Appeal No. 518 of 2013 was preferred by the petitioner KSEBL before the Hon'ble APTEL, however the petitioner was unable to secure an interim relief. Hence, there was no restraint on the respondent for making alternate arrangements for supply of power. There is no compulsion on the part of the respondent to supply power to the respondent.

- (iv) Non availability of power to supply to the petitioner. The respondent is no longer able to supply power to the petitioner KSEBL since the required quantum is no longer available with the respondent, as the same is tied up with another distribution licensee. The respondent participated in a tender floated by Noida Power Company Ltd, after being declared as a successful bidder, LoA was issued in its favour on 07.11.2023. The respondent executed a medium-term power purchase agreement dated 15.11.2023 with the Noida Power Company Limited for supply of 95MW of power for a period of five years. Hence the JTPL is no longer capable of supplying power to the petitioner.

- (5) Smt. Swapna Seshadri, Advocate, on behalf of the respondent M/s Jhabua Power Limited, submitted the following during the hearing;

- (i) The review petition is not maintainable under Section 94(1)(f) of the EA-2003, which confines the power of review of SERCs to the power of the Civil Court under Code of Civil Procedure, 1908 (CPC). In support of their argument, the respondent has relied on the judgment of the Hon'ble Supreme Court in State of West Bengal and Ors. v. Kamal Sengupta and Anr. (2008) 8 SCC 612. The relevant paragraph is extracted below.

“35. The principles which can be culled out from the above noted judgments are:

- (i) The power of the Tribunal to review its order/decision under Section 22(3)(f) of the Act is akin/analogous to the power of a civil court under Section 114 read with Order 47 Rule 1 CPC.*
 - (ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.*
 - (iii) The expression “any other sufficient reason” appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.*
 - (iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under Section 22(3)(f).*
 - (v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.*
 - (vi) A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.*
 - (vii) While considering an application for review, the tribunal must consider its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.*
 - (viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.”*
- (ii) A review cannot be preferred only on the grounds that there is a mandate under Section 108 to this Hon’ble Commission to review a judicial order. Further, the directive under Section 108 is not mandatory or binding on the State Commission. The petitioner has cited the following Judgements of the Hon’ble APTEL in support of their claim.
- Judgment dated 02.05.2023 in Appeal No. 352 of 2022- Fatehgarh Bhadla Transmission Company Limited v. Central Electricity Regulatory Commission and Ors.
 - Judgment dated 31.10.2022 in Appeal No. 189 of 2022, 369 of 2022 and 4 of 2021- Steel City Furnace Association v. PSERC & Ors
 - Judgment dated 18.08.2010 in Appeal No. 5 of 2009- Kerala State Electricity Board v. KSERC & Ors.

The respondent further submitted that, this Commission therefore, ought not to mandatorily consider the directions under Sections 108. Any direction of such nature cannot

impinge on the nature of activity performed by the State Commissions and the Central Electricity Regulatory Commission. Further, the directive is not binding on this Hon'ble Commission and there is no error apparent made out by KSEB for reconsideration of the Order dated 10.05.2023.

- (iii) The review petition cannot impact the commercial decisions taken by Jhabua Power Limited by tying up power with NTPC Vidyut Nigam Ltd. Since PSAs had been disapproved vide Order dated 10.05.2023, and even the period of 75 days ended on 20.08.2023 and the counsel for this Hon'ble Commission itself took a stand before the Hon'ble Tribunal that there is no mandate but only an option to the generators to supply electricity for a period of 75 days, Jhabua Power has tied up its un-tied power by entering into a Long Term PPA dated 27.09.2023 with NTPC Vidyut Nigam Limited (hereinafter referred to as "NVVN") for selling its power to Discoms/states/industrial customers/bulk consumers/Power exchange etc through bilateral arrangement/competitive bidding/other modes on back-to-back basis for balance life of the plant.

Jhabua Power does not have any free power to supply to KSEB, any order passed in exercise of review jurisdiction cannot bind Jhabua Power or force it to rescind other validly entered PPAs.

The respondent further submitted that, the generators cannot be expected to maintain the free quantum against unapproved DBFOO contracts and leaving behind the opportunities for long term tie-ups which are coming in the market in a hope that these might get approved later on. As a commercial undertaking, generators also have to sustain operations.

- (6) The Kerala High Tension & Extra High Tension Industrial Electricity Consumers' Association, Productivity House, HMT Road, Kalamasserry, Cochin -683104, was a respondent in the petition OP No. 05/2021, against which the present review petition was filed by KSEBL. The Commission has included them also as additional respondent and issued notice to them for participating and offer their views during the deliberations of the subject. However, the HT&EHT Association had not participated in the public hearing held on 01.12.2023, and also not submitted written comments on the review petition filed by KSEBL.
- (7) Sri. Dejo Kappen, Chairman, Democratic Human Rights & Environment Protection Forum, Journalist Garden, Kodimatha, Kottayam, was also impleaded as additional respondent in the petition OP No.05/2021. Hence the Commission had impleaded them also as a respondent and served written notice to him to participate in the deliberations of the

review petition. However, Sri. Dejo Kappen also not participated in the public hearing held on 01.12.2023, and also not submitted written comments on the review petition filed by KSEBL.

- (8) Sri. Sibikutty Francis, Kerala Electricity Employees Confederation, INTUC, Shri. Noushad, AEE, SOURA, KSEBL, Shri. Saju A H, KSEBWA(CITU), and Shri. Lathish P V, KSEB Officers Association were participated in the public hearing held on 01.12.2023. All of them requested before the Commission to review/ reconsider the Order of the Commission in view of the policy directions of the State Government dated 10.10.2023 and also to tide over the emerging critical power situation of the State.
- (9) During the hearing, the Commission has directed the petitioner KSEBL to clarify the following;
- (i) Power purchase rates for RTC power of KSEBL during the period from 2016-17 to 2022-23.
 - (ii) The rate of short-term power purchase tied up during the year 2023-24.
 - (iii) Whether there is possibility of DBFOO power become excess in the event of excess monsoon in the coming years.?
 - (iv) Whether the discovered rates in the DBFOO contracts are reasonable or not?

9. The petitioner KSEBL vide the additional submission dated 06.12.2023 has submitted the following details before the Commission.

- (1) The details of the power purchase rates of coal based thermal power stations having long term contracts

Details of the long term contracts for power purchase

	Station	Year of CoD/ contract	Source	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23
				(Rs/ unit)						
I. Central Generating Stations & IPPS (Tariff determined by CERC & DAE, as per Section 62 of the EA-2003)										
1	RSTPS – I & II	1989	Thermal	2.89	3.03	3.30	3.29	3.24	3.69	4.89
2	RSTPS – III	2004	Thermal	3.07	3.05	3.31	3.32	3.12	3.82	4.68
3	TALCHER – II	2004	Thermal	2.55	2.26	2.48	2.78	2.66	2.57	3.21
4	SIMHADRI TPS- II	2012	Thermal	4.13	4.45	4.81	4.95	5.65	5.70	6.54
5	NLC II STAGE 1	1987-88	Thermal	4.47	3.73	3.22	3.43	4.64	3.53	5.64
6	NLC II STAGE 2	1992-93	Thermal	4.48	3.58	3.22	3.50	3.85	3.53	4.97
7	NLC I EXPANSION	2003	Thermal	4.03	3.59	3.53	4.03	3.85	3.56	5.26
8	NLC II -EXPN	2015	Thermal	5.29	5.69	4.75	4.91	5.33	5.13	4.79
11	MAPS	1984	Nuclear	2.37	2.79	2.74	2.92	2.99	2.60	2.60
12	KAIGA	2000	Nuclear	3.21	3.63	3.72	3.50	3.45	3.42	3.53
13	KKNPP	2013	Nuclear	3.29	4.09	4.35	4.18	4.10	4.14	4.41

10	VALLUR STPS	2015	Thermal	4.32	4.75	5.43	6.32	8.73	6.24	5.55
9	NTPL	2015	Thermal	4.16	5.02	4.94	4.79	5.12	6.06	6.19
14	NTPC KUDGI	2017-18	Thermal		5.69	6.02	8.71	8.17	8.24	8.22
15	NNTPS	2019	Thermal					4.32	4.12	4.49
16	Maithon I	2012	Thermal				4.24	3.95	3.82	4.28
17	Maithon II	2012	Thermal				4.22	3.95	3.81	4.28
18	DVC Mejia	2012	Thermal				4.11	3.71	4.67	5.90
19	DVC RTPS	2016	Thermal				3.86	3.67	5.22	5.65
II. DBFOO contracts										
	Jindal Power Ltd	2016	Thermal	3.87	3.69	3.71	3.71	3.70	3.67	3.72
	BALCO	2017	Thermal	0.00	4.13	4.15	4.10	4.08	3.96	4.06

(2) The details of the power purchase agreements with RE sources

Sl No	Source	Year of CoD/ contract	Levelized tariff (Rs/ unit)
			(Rs/ kWh)
I	Wind		
1	Ramakkalmedu	2008-09	3.14
2	Agali	2008-09	3.14
3	Koundikkal	2010	3.14
4	Wind Ahalya	2016	5.24
5	INOX	2017	4.09
6	Kosamattom	2018	3.93
7	SECI	2021	2.89
II	Small Hydro		
1	Ullunkal	2008	2.44
2	Iruttukanam Stage-1	2010	2.70
3	Iruttukanam Stage-2	2012	2.94
4	Karikkayam HEP	2014	4.16
5	Meenvallom	2014	4.88
6	Pathamkayam	2017	3.94
7	Anakampoil	2021	4.15
8	Arippara	2021	4.30
III	Solar		
1	IREDA	2017	3.83
2	THDCL	2019	3.10
3	Kushalmanam- ANERT	2016	2.69
4	NTPC-KYLM- Floating solar	2022	2.94
5	KSEBL- Solar Bid- TATA	2023	2.44
6	KSEBL- Solar Bid- NTPC	2024	2.77
7	SECI (300 MW)	2023	2.44

(3) The rate of short-term power purchase arrangements made from June 2023 to May 2024.

Sl No	Period	Required Quantity (MW)	Duration	Bidder	Generator/Trader	Quantity (MW)	Rate (Rs/kWh)
1	04-08-23 to 31-08-23	220	RTC	L1	Tata Power Trading Company Limited	50	5.23
				L2	Adani Enterprises Ltd	100	5.23
				L3	Tata Power Trading Company Limited	45	5.23
				L4	PTC India Limited	25	5.23
2	Sep-23	250	RTC	L1	Tata Power Trading Company Limited	75	5.38
				L2	Tata Power Trading Company Limited	50	5.38
				L3	Tata Power Trading Company Limited	45	5.39
				L4	JINDAL POWER LIMITED	80	5.42
3	Oct-23	150	RTC	L1	Tata Power Trading Company Limited	100	5.12
				L2	Tata Power Trading Company Limited	50	5.14
4	Nov-23	250	RTC	L1	Tata Power Trading Company Limited	150	5.38
				L2	GMR ENERGY TRADING LIMITED	25	5.38
				L3	JINDAL POWER LIMITED	75	5.46
5	Dec-23	250	RTC	L1	GMR ENERGY TRADING LIMITED	25	5.48
				L2	Tata Power Trading Company Limited	150	5.48
				L3	NTPC VIDYUT VYAPAR NIGAM LIMITED	75	5.50
6	Jan-24	175	RTC	L1	GMR ENERGY TRADING LIMITED	25	5.49
				L2	NTPC VIDYUT VYAPAR NIGAM LIMITED	100	5.49
				L3	NTPC VIDYUT VYAPAR NIGAM LIMITED	50	5.49
7	Feb-24	250	RTC	L1	NTPC VIDYUT VYAPAR NIGAM LIMITED	100	5.58
				L2	NTPC VIDYUT VYAPAR NIGAM LIMITED	50	5.58
				L3	GMR ENERGY TRADING LIMITED	25	5.58
				L4	Tata Power Trading Company Limited	45	5.75
				L5	Adani Enterprises Ltd	30	5.82
8	Mar-24	225	RTC	L1	NTPC VIDYUT VYAPAR NIGAM LIMITED	100	6.13
				L2	NTPC VIDYUT VYAPAR NIGAM LIMITED	50	6.13
				L3	GMR ENERGY TRADING LIMITED	25	6.13
				L4	Manikaran Power Limited	25	6.25
				L5	Manikaran Power Limited	25	6.34
9	Apr-24	250	RTC	L1	GMR ENERGY TRADING LIMITED	25	6.10
				L2	NTPC VIDYUT VYAPAR NIGAM LIMITED	100	6.10
				L3	NTPC VIDYUT VYAPAR NIGAM LIMITED	50	6.10
				L4	Ambitious Power Trading Company Limited	75	6.24
10	May-24	250	RTC	L1	GMR ENERGY TRADING LIMITED	25	6.12
				L2	NTPC VIDYUT VYAPAR NIGAM LIMITED	100	6.12
				L3	NTPC VIDYUT VYAPAR NIGAM LIMITED	50	6.12
				L4	Ambitious Power Trading Company Limited	75	6.24

- (4) Regarding the clarification sought by the Commission on 'whether the DBFOO power become surplus in the event of excess monsoon received in the subsequent years, KSEBL submitted the following before the Commission for considerations.

Under normal monsoon years also, the State is facing energy shortage and peak power requirement even with the unapproved DBFOO contracts. The electricity demand in the State is increasing at an alarming rate of about 6% annually. As per the 20th the EPS published by CEA, the peak demand and the energy requirement of the State by the year 2031-32 is as follows.

	2022-23 (Existing)	2026-27	2031-32
Energy Requirement (MU)	28000	33903	42885
Peak Demand (MW)	5200	5549	6967

With the large penetration of electric vehicles, the demand may increase further.

The Commission, while approving the ARR as per the MYT Order dated 25.06.2022 has acknowledged that, even with the unapproved DBFOO contracts, KSEBL expect to have a shortage upto 1000MW during peak hours.

Moreover, the contracted quantum of the DBFOO contracts is 465MW only, which is less than 10% of the total peak demand of the State.

Considering these reasons, it is not advisable to terminate the already entered PSAs with thermal stations whose cost is lower.

- (5) In reply to the clarifications sought by the Commission regarding whether the discovered rates of DBFOO contracts are reasonable and serve the public interest, KSEBL submitted the following;
- (i) During the period upto 2013-14, there was major power crisis in the State and KSEBL has been imposing load shedding and power restrictions with the approval of this Commission. The details of the reduction in energy consumption due to power restrictions and load shedding in the State is detailed below.

Month	2010-11			2011-12			2012-13			2013-14
	Restri ctions	Shedd ing	Total	Restri ctions	Shedd ing	Total	Restri ctions	Shedd ing	Total	Sheddin g
	(MU)	(MU)	(MU)	(MU)	(MU)	(MU)	(MU)	(MU)	(MU)	(MU)
April	6.58	2.34	8.92	13.31	0.00	13.31	2.90	57.73	60.63	141.00
May	7.48	4.86	12.34	18.58	0.00	18.58	7.08	50.60	57.68	126.14
June	1.95	1.10	3.05	11.31	8.31	19.62	15.72	0.00	15.72	52.20
July	1.44	0.00	1.44	11.34	0.00	11.34	20.54	0.00	20.54	
August	1.06	0.00	1.06	12.29	0.00	12.29	18.28	0.00	18.28	
September	3.08	0.00	3.08	9.05	6.61	15.66	24.63	11.08	35.71	
October	2.22	0.00	2.22	12.89	19.62	32.51	0.00	82.50	82.50	

November	3.19	1.19	4.38	14.81	0.00	14.81	0.00	75.57	75.57	
December	2.39	0.70	3.09	21.78	0.00	21.78	0.00	78.88	78.88	
January	8.64	3.51	12.15	18.27	14.77	33.04	0.00	88.42	88.42	
February	10.60	3.80	14.40	15.53	8.03	23.56	0.00	100.14	100.14	
March	4.78	0.94	5.72	18.47	2.24	20.71	20.50	28.21	48.71	
April	53.38	18.44	71.82	177.62	59.58	237.19	109.64	573.11	682.75	319.34

There was no power restriction or load shedding in 2014-15, 2015-16 and even in the draught year 2016-17.

- (ii) The discovered rates of the unapproved DBFOO contracts are reasonable with the other contracts of KSEBL and other utilities for procuring RTC power on long term basis at that point of time. The tender discovered rates by other States during 2014-15 and 2015-16 period approved by other SERCs are given below.

Utility	Bid Year	Quantum	Rate	Approval of State Commission
UPPCL (Long Term)	2013	L1 : 300MW L2: 390 MW L3: 423.90 MW L4: 350 MW L5 : 1000 MW L6: 361 MW L7: 800 MW	L1: Rs.4.486/unit L2: Rs.4.886/unit L3: Rs.5.074/unit L4: Rs.5.088/unit. L5: Rs.5.588/unit L6: Rs.5.73/unit. L7: Rs.5.849/unit	Order dated 24-6-2014 in Petition No.911 of 2013 UPERC adopted L2, L3, L5 and L6. L1 and L4 did not submit CPG
Rajasthan Rajya Vidyut Prasaran Nigam Ltd. (Long Term)	2013	L1: 250 MW L2: 250 MW	L1: Rs.4.51/unit L2: Rs. Rs.4.81/unit	Order dated 22.07.2015 Petition No. RERC/431/13
Southern Power Distribution Company of Andhra Pradesh (Long Term)	2015	600MW from L1 to L3	L1: Rs.4.439/unit L2 and L3 matched L1	Order dated 14-8-2018 in Letter No.1070/CGM/IPC/APSPDCL dated 13-12-2016
TANGEDCO (Long Term)	2013	3330 MW from all bidders who matched L1	L1: Rs.4.91/unit	Order dated 29-07-2016 in P.P.A.P. No.3 of 2014
Kerala (Medium Term)	2013	300MW from NVVN	Rs.4.49/unit	Order No. 828/C.Engg/Case 1/KSERC/2013/594 dtd.24-5-2013
Kerala (Medium Term)	2013	100MW from PTC BALCO	Rs.4.45/unit	

- (iii) KSEBL further submitted that, the power purchase rates/ bid discovered rates of DBFOO contracts were reasonable compared to the short-term power purchase rates prevalent during the year 2013 and 2014. The details are given below.

2013		2014	
Month	Rate (S2) (Rs/unit)	Month	Rate (S2) (Rs/unit)
Jan	7.27	Jan	7.25
Feb	7.29	Feb	6.93
Mar	7.55	Mar	-
Apr	8.44	Apr	-
May	6.47	May	11.01
Jun	4.43	Jun	5.03
Jul	5.19	Jul	5.38
Aug	3.54	Aug	5.63
Sep	3.97	Sep	4.60
Oct	5.74	Oct	8.15
Nov	6.95	Nov	6.67
Dec	6.97	Dec	5.39

- (iv) KSEBL also submitted that, during the period upto the year 2014-15, the licensee is heavily depending on the liquid fuel stations to meet the electricity demand of the State. The details submitted by the KSEBL is given below.

Liquid fuel stations	2010-11		2011-12		2012-13		2013-14		2014-15		2015-16		2016-17	
	Quantity (MU)	Rate (Rs/kWh) (VC only)												
BDPP	87.96	7.68	54.29	10.11	83.59	10.81	29.00	11.33	8.43	11.97	12.12	10.37	4.59	8.60
KDPP	216.56	7.87	227.55	9.97	449.11	10.57	192.00	10.81	199.27	10.03	133.41	6.87	36.34	5.37
RGCCPP	1008.23	8.96	486.40	10.08	1517.59	11.30	947.15	11.30	798.81	12.22	138.90	7.60	6.77	13.50
BSES	223.30	12.37	46.61	9.76	131.34	9.76	337.92	9.76	146.93	9.76	5.15	9.76		
KPCL	27.06	10.73	10.05	11.19	2.60	11.19					7.21	6.77		
Total	1563.11	9.25	824.90	10.05	2184.23	11.04	1506.07	10.89	1153.44	11.53	296.79	7.40	47.70	6.83
Total amount (RS.CR)	1446.32		828.78		2411.04		1640.50		1329.51		219.69		32.60	

- (6) KSEBL further submitted that, as directed by the Commission vide the MYT Order dated 25.06.2022, KSEBL invited bid for medium term power procurement of 500MW power from generators having linkage coal with the period of commencement of supply from April 2023 with bid start date on 04.11.2023. The tender was given wide publicity and the last date of submission of bid was extended several times. Despite all these efforts, only two firms submitted the bids through DEEP portal, and the total offered quantum was 250MW as against the requisitioned capacity of 500MW. Both the bidders participated in the bid fails to qualify. Hence KSEBL cancelled the bids.

KSEBL with the approval of the Commission had re-tendered in June 2023 for procuring 500MW RTC power on medium term basis from January 2024 onwards. Two bidders only participated in the bids and the total quantity offered was 403 MW, with the L1 traiff @Rs 6.88/unit.

10. Regarding the various objections raised by the respondent generators M/s JTPL and M/s Jhabua Power Limited, KSEBL vide the written submission dated 06.12.2023 has submitted the following before the consideration of the Commission.

- (1) The judgments cited by the Respondents are not in relation to any broad policy decision taken by the Government in public interest, rather the said judgments deal with decisions related to any particular quantum of tariff or in relation to other similar issues, which are not in the nature of a broader policy decision. The said judgments have no applicability in the facts of the present case, where the decision by the State Government is a policy decision on an issue concerning public interest, and the interest of the consumers in the State of Kerala.
- (2) KSEBL also submitted the relevant facts of the judgments cited by the respondents during the hearing held on 01.12.2023, and are tabulated below.

<u>S.No.</u>	<u>Judgment cited by Respondents.</u>	<u>Facts of the case.</u>
1.	Fatehgarh Bhadla Transmission Company Ltd. Vs. CERC & Ors., Judgment dt. 02.05.2023 in Appeal No. 352 / 2022.	<ul style="list-style-type: none"> • The Central Government had issued a direction u/s 107 of the Electricity Act, 2003 to the CERC, directing the CERC to amend its Regulations in relation to sharing of Transmission Charges, levy of penalties, commencement and extension of period of LTA for renewable energy generators, Force Majeure definitions etc. (para 32 of the judgment). • It is in this context that the Hon'ble APTEL held that the power to frame Regulations vested in the CERC, and that the Central Government could not have directed the CERC to amend its Regulations (para 59 of the judgment).
2.	Steel City Furnace Association Vs. PSERC & Ors., Judgment dt. 31.10.2022 in Appeal No. 189 / 2022, 369 / 2022 and 4 / 2021.	<ul style="list-style-type: none"> • The Government of Punjab had directed PSERC, <i>inter alia</i>, to exempt Industrial Consumers from payment of Fixed Charges for a period of two months, and also directing that the Renewable Purchase Obligation (RPO) for 2019-20 and 2020-21 shall be reduced to 1.50% and 2.00% respectively (para 3 of the judgment).
3.	Tamil Nadu Electricity Consumers' Association Vs. Tamil Nadu Electricity	<ul style="list-style-type: none"> • The State Government had directed the State Commission to implement the Solar Purchase Obligation (SPO) of 6%

	Regulatory Commission & Ors., Judgment dt. _____ in Appeal No. 92 / 2013.	mandated by the State Government for HT / LT Consumers, and that this SPO shall be mandated only on the HT / LT commercial consumers and not on TANGEDCO (para 14 of the judgment) .
4.	Kerala State Electricity Board Ltd. Vs. KSERC & Ors., Judgment dt. 18.08.2010 in Appeal No. 5 / 2009.	<ul style="list-style-type: none"> • The Government of Kerala had directed this Hon'ble Commission to allow the depreciation of Rs. 459.30 crores claimed by KSEBL, for determination of ARR and ERC – which would have resulted in determination of tariff (para 19 of the judgment). • It is in this context that the Hon'ble APTEL held that “..... <i>all the policy directions are not binding on the State Commission since the State Government cannot curtail the powers of State Commission in the matter of determination of tariff.....</i>” (para 22 of the judgment).

(3) KSEBL submitted that, the said cases dealt with peculiar facts and circumstances where the direction of the State Government was not a policy decision in public interest, rather the decision pertained to specific issues in relation to determination of tariff etc. The said judgments are distinguishable and have no applicability in the present case.

(4) In the present case, the policy directive under Section 108 of the EA-2003 has been issued by the Government of Kerala are that, as a Sovereign, the Government has perceived on merits the criticality of the non-availability of power from the four PSAs. The PSAs are executed pursuant to a tariff based competitive bidding process under Section 63 of the EA-2003, and the tariff has been determined in terms of the Section 63 of the EA-2003. All PSAs are on the tariff quoted by the L1 bidder. The exorbitant increase in the base load availability price, and consequences of not getting power from the said generators, and cost of arranging alternate power being prohibitively high, have been considered by the Sovereign. These are clearly important policy issues, critical in public interest, and squarely covered under Section 108 of the EA-2003.

In the facts and circumstances mentioned in the policy directive dated 10.10.2023, there is good and sufficient cause for this Commission to be guided by such directive and the same will be in accordance with law.

(5) The Petitioner has filed the Review Petition after getting the orders of the Hon'ble APTEL to withdraw the Appeal filed by it for consideration of the matter by this Hon'ble Commission and to avoid multiple fora being required to deal with the situation arising from the issuance of the Policy Directive.

The Review Petition filed by the Petitioner is specifically based on the issuance of Policy Directive and in the submissions of the Petitioner, there are sufficient reasons for this Commission to exercise the review power to revisit the approval of four PSAs.

It is erroneous and misconceived for the Respondents to contend that the jurisdiction for review of its order can be exercised by this Hon'ble Commission only if there is any error apparent on the face of the record or discovery of any new fact or evidence. There is one other ground for exercise of review power which squarely applies to the present case. It is respectfully submitted that the said jurisdiction of review is also available to this Hon'ble Commission for "*any sufficient reason*" as laid down under the provisions of Section 94 of the 2003 Act read with Order XLVII of Code of Civil Procedure (CPC).

- (6) KSEBL further submitted that the Respondents are signatories to the Power Supply Agreement(s) (PSAs) with the Petitioner herein. The Respondents are themselves bound by the terms and conditions of the said PSAs which provides, *inter alia*, for the parties to seek the approval of this Hon'ble Commission, for the said PSAs, in terms of Regulation 78 of the KSERC (Terms and Condition for Determination of Tariff) Regulations, 2014, it would not be permissible, at all, for the Respondents, being bound by the terms and conditions of the said PSAs, to which they are signatories, to raise any contentions against the prayer for approval of the said PSAs by this Hon'ble Commission. Any such contention of the Respondents, contrary to their own obligations under the PSAs executed by them, shall be rejected outrightly by this Hon'ble Commission.
- (7) The contention on behalf of the Respondents that they have entered into PPAs with third parties, during the pendency of the proceedings, would deserve to be rejected as entirely misconceived and unsustainable. It is respectfully submitted that the issue relating to the approval of PSAs - has remained alive during the pendency of the Appeals before the Hon'ble APTEL, including Appeal No. 518 / 2023 filed by the Petitioner herein (KSEBL). Thereafter, the Petitioner seeking liberty from the Hon'ble APTEL and which was granted to it by the order dated 31.10.2023 of Hon'ble APTEL, the Petitioner had filed the present Review Petition before this Hon'ble Commission.

During this entire period, the issue relating to the approval of the PSAs has remained sub-judice before the Hon'ble APTEL and thereafter before this Hon'ble Commission. The principles of *lis pendens* would also squarely apply in the present case, in that, any rights sought to be created by the Respondents during the pendency of the proceedings, would always remain subject to the outcome of the proceedings pending before Hon'ble APTEL / this Hon'ble Commission.

- (8) KSEBL further submitted before the Commission that, the Respondent – Jhabua Power Ltd. (JPL) claims to have entered into a PPA with its own sister concern namely NVVN (NTPC Vidyut Nigam Ltd.) and not with any third party. They have done so with open eyes and being fully conscious that they have entered into PSAs with Petitioner- KSEBL, the prayer for approval whereof is pending before Hon'ble APTEL and before this Hon'ble Commission.

Similarly, the Respondent - Jindal India Thermal Power Ltd (JITPL) appears to have entered into an agreement dated 15.11.2023 with one Noida Power Company Ltd. Further, JITPL has entered into such a PPA only on 15.11.2023 i.e. after the order dated 31.10.2023 had been passed by Hon'ble APTEL granting liberty to the Petitioner to file a Review Petition before this Hon'ble Commission and even after the filing of the present Review Petition on 09.11.2023, as well as after the hearing notice dated 14.11.2023 had been issued by this Hon'ble Commission. The Respondent has done so at its own risk and peril and cannot be permitted to take advantage of its own wrong to defeat the judicial process.

Both the Respondents M/s Jhabua Power Limited and JITPL being party(ies) to the PSA executed with KSEBL, and being bound by the terms thereof, which also requires the parties to seek approval of this Hon'ble Commission - cannot be permitted to rely on any such misconceived contention to seek to defeat the prayer for approval of the PSAs by this Hon'ble Commission. All such contentions on behalf of the Respondents would deserve to be rejected by this Hon'ble Commission.

- (9) In view of the submissions made hereinabove, KSEBL submitted that after taking into consideration all facts and circumstances in their totality, including the critical requirement of power by the State, the tariff as well as availability of power from alternate sources, as well as the overall interest of the consumers in the State of Kerala - the State Government has taken well considered policy decision in public interest and thereby issued the policy directive dated 10.10.2023 u/s 108 of the 2003 Act in light of the settled principles of law and having regard to the public interest and in the interest of the consumers.

KSEBL further submitted that the said policy directive dated 10.10.2023 would deserve to be followed / applied by this Hon'ble Commission by allowing the present Review Petition and granting the reliefs prayed for therein. Such an order by this Hon'ble Commission allowing the present Review Petition shall meet the ends of justice.

Analysis and Decision of the Commission

11. The Commission has examined in detail the Review Petition filed by KSEBL in the matter of 'seeking review of the Order dated 10.05.2023 passed by the Commission in Petition OP No. 05/2021', the provisions of the Electricity Act, 2003, various judgments of the Hon'ble Supreme Court, Hon'ble APTEL, views expressed by the respondents during the deliberations of the subject petition, and other facts and circumstances of the case, has decided as follows.
12. The present petition filed by KSEBL is for seeking review of the Order of the Commission dated 10.05.2023 in Petition OP No. 05/2021, in view of the policy directions dated 10.10.2023, issued by the State Government by invoking the powers conferred on it under Section 108 of the Electricity Act, 2003.
13. Background and circumstances necessitated for issuing the Order dated 10.05.2023 in Petition OP No. 05/2021 is summarized below.
 - (1) KSEB Ltd, vide its petition dated 21.04.2015 had sought approval of the adoption of tariff and power supply agreement (PSAs) of the following power purchase arrangements based 'Design, Build, Finance, Own and Operate (DBFOO)' basis through two separate open competitive bidding (Bid-1 and Bid-2) under Section 63 of the Electricity Act, 2003.

Details of PSAs executed by KSEB Ltd based on Bid 1

Sl. No.	Name of Firm	Quantum of power in MW	Tariff as on Bid Date (Rs./kWh)	Date of execution of PSA
1	Jindal Power Limited	200	3.60	29-12-2014
2	Jhabua Power Limited	115	4.15	31-12-2014

Details of PSAs executed by KSEB Ltd based on Bid 2

Sl. No.	Name of Firm	Quantum of power in MW	Tariff as on Bid Date (Rs./kWh)	Date of execution of PSA
1	Bharat Aluminium Company Limited	100	4.29	26-12-2014
2	Jindal India Thermal Power Limited	150	4.29	29-12-2014
3	Jhabua Power Limited	100	4.29	26-12-2014
4	Jindal Power Limited	100	4.29	29-12-2014
5	East coast Energy Private Limited	100	4.29	02-02-2015

- (2) After detailed deliberations of the subject petition, the Commission vide the Order dated 30.08.2016 in OP No. 13/2015, has decided as follows;

“40. In view of the facts, circumstances and legal provisions explained above the Commission hereby issues the following orders,-

- (1) The purchase of 200 MW of power by KSEB Ltd from M/s Jindal Power Ltd, New Delhi at the rate of Rs.3.60 / kWh as per the Bid -1 dated 05.03.2014 which was opened on 31.10.2014, is approved.*
- (2) The purchase of 100 MW of power by KSEB Ltd from M/s Bharat Aluminium Company Ltd, Chhattisgarh at the rate of Rs.4.29/ kWh as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014, is approved.*
- (3) The approval of the following purchases of power by KSEB Ltd from the bidders other than the lowest bidder (L1) will be considered on getting the approval from Government of India for the deviations from the guidelines and on getting the views from Government of Kerala on the issues raised in paragraphs 34 and 38 of this order.*

(a)	The purchase of 115 MW of power by KSEB Ltd from M/s Jhabua Power Ltd, Gurgaon at the rate of Rs.4.15/ kWh as per the Bid -1 dated 05.03.2014 which was opened on 31.10.2014.
(b)	The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jindal India Thermal Power Ltd, New Delhi (L2) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.
(c)	The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jhabua Power Limited, Gurgaon (L3) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.
(d)	The purchase of 150 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jindal Power Limited, New Delhi (L4) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.
(e)	The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s East Coast Energy Private Limited, Andhra Pradesh (L5) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.

- (4) A copy of this order will be submitted to Government of Kerala with request to communicate their views after duly considering the relevant facts and legal provisions in view of the Government Order GO (MS) No. 45/2014/PD dated 20.12.2014 sanctioning the purchase of 865 MW of power by KSEB Ltd on DBFOO basis.*
- (5) KSEB Ltd is directed to follow up the matter in Government of India and in Government of Kerala and to submit the results to the Commission as early as possible, considering the fact that the power purchases as per Bid-1 will have to commence with effect from December, 2016.*
- (6) All the orders above are subject to the final decisions of the Hon'ble High Court in Writ Petition No. WP (C) 33100/2014. “*

As detailed above, the Commission vide the Order dated 30.08.2016 had approved the tariff and PSA of L1 in Bid-1 for procuring 200MW @Rs 3.60/unit, and L1 in Bid-2 for procuring 100MW @Rs 4.29/unit. In the said Order, the Commission had further clarified that, the approval of the tariff and PSA of the power purchases, other than the L1 in Bid-1 and Bid-2 will be considered on getting approval of the Government of India for the deviations from the guidelines pointed out in the said Order and on getting views from Government of Kerala on the issues raised in paragraphs 34 and 38 of the said Order dated 30.08.2016.

- (3) Subsequent to the Order dated 30.08.2016, the Commission, vide its letter dated 08.09.2016 has forwarded a copy of the Order dated 30.08.2016 to the Additional Chief Secretary, Power Department,

Government of Kerala, and directed to submit the views of the Government for taking a decision on the approval of power purchase contracts other than L1 in Bid-1 and L1 in Bid-2. In the said letter, the Commission has cited the following deviations noticed by it, from the standard bidding documents and guidelines issued by the Gol on 08.11.2013 and 09.11.2013, in the bidding documents adopted by KSEBL.

“

- (i) *KSEB Ltd has awarded power purchase contract to the second lower bidder at its quoted rate of Rs.4.15 / kWh which is higher than the lowest rate of Rs.3.60 / kWh in Bid-1, whereas the guidelines issued by the Government of India are only for the selection of the lowest bidder.*
- (ii) *KSEB Ltd has not invited all the remaining bidders other than L1 to revalidate or extend their respective bid security and to match their rates with that of L1.*
- (iii) *KSEB Ltd has purchased 550 MW of power in Bid-2 as against the tendered quantity of 400 MW.*
- (iv) *KSEB Ltd has obtained only 200 MW from the lowest bidder in Bid-1 at a rate of Rs.3.60 / kWh. Thereafter 115 MW power from L2 has also been purchased at a higher rate of Rs.4.15 / kWh. Thus a total quantity of 315 MW was purchased as against the tendered quantity of 450 MW leaving a balance of 135 MW. KSEB Ltd has purchased more quantity of power than the tendered quantity in Bid-2 stating the reason that it could not get the full tendered quantity in Bid-1. Such purchase of more than the tendered quantity is not in accordance with the general principles of tender process.*
- (v) *Even if the above 135 MW is considered for procurement from Bid-2, the total quantity that can be purchased is only 535 MW (400 MW + 135 MW). However KSEB Ltd has purchased 550 MW deviating from the conditions prescribed by Government of India in the para 3.3.3 in the guidelines notified by Government of India on 5th May 2015, which has been relied upon by KSEB Ltd to justify award of power purchase contracts to bidders other than the lowest bidder in Bid-2.*
- (vi) *KSEB Ltd has not obtained prior approval from Government of India for the deviations from the standard bidding documents and the guidelines.*
- (vii) *KSEB Ltd has not obtained approval from the Commission before executing the power purchase agreements.*
- (viii) *KSEB Ltd has not included any clause in the impugned PPAs to the effect that the PPA shall have the effect only with the approval by the Commission as specified in sub-regulation (1) of regulation 78 of the Tariff Regulations, 2014.”*

- (4) The Commission vide its letter dated 08.09.2016 had also forwarded a copy of the Order dated 30.08.2016 to the Secretary (Power), Government of India and requested to have the approval of the Government of India on the selection of bidders done by KSEB Ltd for taking a decision on the approval of the power purchase from DBFOO contracts other than L1 in Bid-1 and Bid-2. The Commission has also pointed out the deviations made by KSEBL in the standard bidding documents and guidelines issued by the Gol on 08.11.2013 and 09.11.2013, as detailed in sub-paragraph-3 above.

- (5) The Commission vide the letter dated 08.09.2016 had also directed KSEBL to follow up the matter with the Government of Kerala and Government of India, and report the decision to the Commission at the earliest so that the Commission can consider the same for taking a decision on this matter.
- (6) In the meantime, Hon'ble High Court vide its Order dated 16.02.2017 has dismissed the writ petition WP(C) No. 33100/2014 as not pressed.
- (7) Further, one of the bidder in Bid-2, M/s East Cost Energy Private Limited, could not complete its generating station, as per the tender conditions and hence the PSA signed with them on 02.02.2015 was terminated. Hence, the approval of power purchase from the following four DBFOO contracts are pending before the Commission vide the Order dated 30.08.2016 for want of approval of the Central Government and views of the State Government on the deviations made by KSEBL in the bidding documents.

Details of the DBFOO contracts not approved by the Commission vide the Order dated 30.08.2016

Sl. No.	Name of Firm	Bid	Quantum of power in MW	Tariff as on Bid Date (Rs./kWh)	Date of execution of PSA
1	Jhabua Power Limited	Bid-1	115	4.15	31-12-2014
2	Jindal India Thermal Power Limited	Bid-2	150	4.29	29-12-2014
3	Jhabua Power Limited	Bid-2	100	4.29	26-12-2014
4	Jindal Power Limited	Bid-2	100	4.29	29-12-2014

Views communicated by Central Government

- (8) Regarding the deviations pointed by the Commission, the Ministry of Power, Government of India, vide the letter No. 23/39/2016-R&R dated 18th November 2016, clarified as follows;

"The deviations as pointed out by KSERC would have been got vetted and approved by the Central Government before issuance of the RFQ, RFP and PSA and not this stage. As per the Guidelines, deviations on the provisions of the bidding documents are approved, if necessary and not the actions taken by the Utility as per practice or precedent.

In view of the above, Government of Kerala/ KSEB Ltd may take action as appropriate in consultation with KSERC"

- (9) On this matter, Ministry of Power, Government of India, vide the letter No. 23/12/2018-R&R dated 11th December 2019 had again clarified as follows;

"I am directed to refer to letters mentioned above (copy enclosed) seeking advice of Ministry of Power on the approval given by Govt of Kerala for long

term procurement of 865 MW power through Case-1 bidding under DBFOO Model conducted during the year 2014.

2. It is informed that Ministry of Power had already communicated its response to Govt. of Kerala vide letter dtd 18.11.2016 (Copy enclosed). Subsequently, Govt. of Kerala vide letter dtd 20.01.2018 has requested to render advice from Ministry of Power that whether it will be irregular to confirm the purchase?

3. KSEB Ltd. vide letter dtd. 24.07.2019 has informed that on the above mentioned bidding process, as on date KSEB is availing total 765 MW based on the approval given by Govt of Kerala and subsequently allowed by KSERC. However final approval for 350 MW PPA is still pending with KSERC on the issue of certain clarifications required on the deviations made by KSEB from the Guidelines and Model Bidding Documents issued by Ministry of Power.

4. The matter has been further examined. The views of Ministry of Power as communicated earlier vide letter dated 18.11.2016 are reiterated. The deviations as pointed by KSERC would have been got vetted and approved by the Central Government before issuance of RFQ, RFP and PSA and not at this stage. Govt. of Kerala/KSEB Ltd. may take action as appropriate in consultation with KSERC.

5. This issues with the approval of competent authority”

(10) As detailed under sub paragraph (8) and (9) above, the Central Government has clarified that, appropriate actions on the the deviations pointed by the KSERC may be taken by Government of Kerala/KSEB Ltd in consultation with KSERC.

(11) However, KSEBL could not get and submit the views of the State Government on the issues pointed out by the Commission vide the Order dated 30.08.2016 and also vide the letter dated 08.09.216, addressed to the State Government on the subject matter, till the final disposal of the petition OP No. 05/2021 vide the order dated 10.05.2023.

As stated earlier, the Commission had also issued direction to the CMD, KSEBL to follow up the matter with State Government considering its importance, but the licensee could not get final rectification/ approval/ view of the State Government in time till the policy direction issued by the State Government dated 10.10.2023.

Permission granted by the Commission for scheduling power from the unapproved DBFOO contracts.

14. Though the Commission vide the Order dated 30.08.2016 had not granted approval for the four DBFOO contracts with a total capacity of 465MW vide the Order dated 30.08.2016, this Commission had granted permission to draw power from these stations for meeting the precarious power situation of the State, as requested by the Government and KSEBL from time to time. The details are given below.

- (1) The State Government vide the Order GO (Rt) No. dated 30.11.2016, had permitted KSEBL to procure 115 MW Jhabua Power Limited (L2 in Bid-1 of the DBFOO contracts) from 01.12.2016 onwards, for the reasons specified in the Government Order.

Subsequently, in compliance of the Order of the State Government dated 30.11.2016, KSEB Ltd has requested before the Commission to grant approval for the purchase of 115MW from M/s Jhabua Power Limited. The Commission vide the Order dated 22.12.2016 had granted approval for the same. The relevant paragraph of the Order is extracted below.

“8. In view of the facts, circumstances and urgency explained by KSEB Ltd and in view of the decision of Government of Kerala in GO (Rt) No.238/2016/PD dated 31.11.2016, the Commission hereby approves provisionally the purchase of 115 MW of power by KSEB Ltd from M/s Jhabua Power Ltd at the rate of Rs.4.15 / kWh as per the power purchase agreement dated 31.12.2014, subject to the clearance from Government of India and subject to the final decision of the Hon'ble High Court in Writ Petition No. WP (C) 33100/2014.”

- (2) Subsequently, the State Government vide the GO (Ms) No. 22/2017/PD dated 21.10.2017 had ordered as follows;

“ KSEBL has concluded long term agreements for 25 years for 550 MW of power on the basis of e-tenders on DBFOO terms with effect from 01-10-2017. These contracts were concluded on the basis of an analysis of the demand-supply gap in Kerala and the projected availability of transmission corridors from the States in which the generating plants are located, to Kerala. Pending detailed consideration of the matter. Government are pleased to hereby permit KSEBL to draw the contracted power with effect from 1-10-2017. Final orders in the matter shall be issued in due course.”

The Commission, duly considering the permission granted by the State Government to KSEBL to draw the power from the DBFOO contracts including the unapproved contracts from Bid-2 with effect from 01.10.2017, the Commission vide the letter dated 22.12.2017 has granted permission to draw the contracted power on DBFOO from 01.10.2017 onwards. But it is clarified therein that the 'Commission may approve the power purchase proposal including the rate for the pending approvals under DBFOO contracts only after the State Government accords the final approval for the entire power purchase under DBFOO basis. The relevant portion of the communication of the Commission dated 22.12.2017 is extracted below.

“The Commission has examined the order of State Government vide order No G.O. (Ms)No.22/2017/PD dated 21.10.2017 permitting K S E B Ltd. to draw the power contracted power and the request of K S E B Ltd., to grant approval to draw the power contracted power under DBFOO from 01/10/2017 on wards.

In view of the State Government order dated 21.10.2017, K S E B Ltd. may draw the contracted power on DBFOO from 01/10/2017 onwards. It may please be noted that the Power Department G.O dated 21.10.2017 is only an interim measure and final orders are yet to be issued. Since the Government is yet to give its final decision, it is informed that, the Commission may approve the power purchase proposal including the rate for the pending approvals under DBFOO only after the State Government accords the final approval for the entire power purchase under DBFOO.”

- (3) The Commission vide the ARR Order dated 08.07.2019 for the MYT period from 2018-19 to 2021-22 has also considered the schedule of power from the DBFOO contracts then pending before the Commission for want of approval of deviations from Central Government and views of the State Government on such deviations. The relevant portion of the ARR Order dated 08.07.2019 is extracted below.

“5.104 Hence the Commission has considered scheduling power from the three projects of Bid-2, ie., 100 MW of power from M/s Jindal India Thermal Power Ltd, New Delhi, 100 MW of power from M/s Jhabua Power Limited and 150 MW of power M/s Jindal Power Limited for the limited purpose of estimating the ARR&ERC for the control period. Since the required approvals from Gol and State Government is still awaited, the Commission is constrained to use the rate equivalent to the cost of power from Balco, which is the L1 of Bid 2. The Commission emphasises that this consideration is only for the purposes of estimating the cost of power provisionally in the ARR and shall not be construed as an approval of the power purchase, rate or of the PPA itself as per Section 63 of the Act which can be considered only after the fulfilment of conditions specified by the Commission in its order dated 30-8-2016...”

As above, vide the MYT Order dated 08.07.2019, the Commission has granted permission to draw power from the DBFOO contracts for the period from 2018-19 to 2021-22 which were pending before the Commission. The Commission further clarified in the said Order that, the cost of power purchase of these contracts for the estimation of ARR was done at the rate of L1 in Bid-2 , i.e. rate applicable to the generator BALCO, which was supplying 100MW RTC power under L1 of Bid-2 on DBFOO basis.

Subsequent disputes arises due to claiming fuel surcharge on the DBFOO contracts pending before the Commission for approval.

15. While claiming the fuel surcharge for the 1st and 2nd quarter of the FY 2019-20, KSEBL has claimed fuel surcharge for the unapproved DBFOO contracts pending before the Commission. However, the Commission vide its Orders dated 14.02.2020 and 27.04.2020 has rejected the claim citing that the adoption of tariff of the unapproved DBFOO contracts is yet to be approved by the Commission. The Commission has estimated the ARR of the MYT period from 2018-19 to 2021-22 at the lumpsum tariff of L1 in Bid-2. The Commission had not approved the fixed charge and variable charges of these unapproved

contracts. KSEBL has filed review petitions against the said Orders, which was also rejected by the Commission vide the Order dated 14.08.2020.

16. In the meanwhile, without getting the approval of the Central Government on the deviations in the bidding guidelines and also without getting the views of the State Government on the unapproved DBFOO contracts, KSEBL had filed a petition OP No.05/2021 before the Commission for final approval of the unapproved DBFOO contracts. Since the Commission vide the original Order dated 30.08.2016 has already clarified that, the final approval of the pending DBFOO contracts can be considered only after getting the approval of the Central Government and views of State Government, the Commission could not proceed in the matter.

Appeal Petition filed before the APTEL against the Orders on fuel surcharge for the 1st and 2nd quarter of the FY 2019-20

17. During this period, one of the generators under unapproved DBFOO contracts, M/s Jindal India Thermal Power Limited (JTPL) filed an appeal petition before Hon'ble APTEL against the orders dated 14.02.2020 and 27.04.2020 and 14.08.2020 passed by the Commission, rejecting the claim of fuel surcharge of the unapproved DBFOO contracts. After hearing the parties, Hon'ble APTEL passed an interim order dated 20.11.2020 in the said appeal (DFR No. 369/2020) with the direction to the Commission to decide the petition OP No. 05/2021 filed by KSEBL before the Commission and also granted an order of *status quo ante* for the dispensation prevailing immediately anterior to the orders dated 14.02.2020 and 27.04.2020 passed by the Commission.

Appeal petition filed before the Hon'ble Supreme Court

18. This Commission filed an appeal before the Hon'ble Supreme Court against the order dated 20.11.2020, passed by Hon'ble APTEL (being Civil Appeal No. 41/2021). In this said appeal, the Hon'ble Apex Court, by its order dated 27.01.2021, granted stay of the order dated 20.11.2020 of Hon'ble APTEL. Subsequently, Hon'ble Apex Court by its order dated 10.02.2023, disposed of the appeal filed by this Hon'ble Commission by, *inter alia*, directing as under:-

“..... When the matter was taken up for hearing, a consensus has been arrived at between the parties that the interim order if decided by this Court either way is not going to ultimately decide the fate of O.A. No. 5 of 2021 pending before the Commission, which has to be independently decided on its own merits in accordance with law and interim orders always merge after the final decision is taken by the Commission.

In the given facts and circumstances, we consider appropriate to observe that the mechanism, which is in place after passing of the interim order of this Court dated 27.01.2021, shall continue and the electricity may be supplied by the respondents herein in terms of Power Supply

Agreement on the same terms and conditions, which may be subject of the outcome of the pending O.A. No. 5 of 2021.

We expect that the Commission will take a call and decide O.A. No. 5 of 2021 as expeditiously as possible but in no case later than three months and both the parties shall cooperate in getting expeditious disposal of the pending O.A.

We further make it clear that the present interim arrangement shall continue up to the date of the disposal of O.A. No. 5 of 2021 and for a further period of two weeks thereafter.

We direct the parties to appear before the Commission on 20.02.2023 at 10.30 a.m.

The present appeal stands disposed of in the above terms.

We have not expressed any opinion on merits of the case and the Commission may decide the pending O.A. on its own merits in accordance with law.”

19. In compliance of the directions of the Hon'ble Supreme Court, the Commission vide its Order dated 10.05.2023 had disposed the petition OP No. 05/2021 after hearing the parties. Since the KSEBL could not submit the approval of the Central Government on the deviations pointed out by this Commission in its Order dated 30.08.2016 in petition OP No. 13/2015, and also the views of the State Government regarding the deviations made in the bidding documents for procuring power through DBFOO basis, the Commission was constrained to reject the adoption of tariff approval of PSAs of these stations on procedure violation and technical reasons of the bidding process. Accordingly, the Commission had rejected the adoption of tariff and PSAs of the four unapproved DBFOO contracts, namely,

- (1) 115MW of power from Jhabua Power Limited (L2 of Bid-1)
- (2) 150 MW of power from Jindal Power Limited (Bid-2)
- (3) 100MW of power from Jindal Power Limited (Bid-2)
- (4) 100MW of power from Jhabua Power Limited (Bid-2).

Subsequent approval granted by the Commission to schedule power from these unapproved contracts (after the Order dated 10.05.2023)

20. Subsequently, this Commission vide its Order dated 07.06.2023 OP No. 24/2023, had granted permission to draw power from these four unapproved DBFOO contracts for a further period of 75 days from 07.06.2023. The relevant portion of the Order is extracted below.

“The Commission, after examining the petition filed by KSEB Ltd dated 02.06.2023, the deliberations of the subject matter during the hearing scheduled on 06.06.2023, the provisions of the Electricity Act, 2003, KSERC (Terms and Conditions of Determination of Tariff) Regulations, 2021, Tariff Policy 2016, and other documents and records, hereby Orders the following.

- (1) *KSEB Ltd is permitted to make arrangements for power procurement by continuing the interim arrangement of scheduling power from the four unapproved DBFOO which was in force for a period of two weeks from 10.05.2023 as per the direction of the Hon'ble Supreme Court, for a further period of 75 days from the date of this Order, or till the alternate arrangements of procuring 500MW RTC power on medium term basis, which ever earlier.*
- (2) *The payment for the power supply during the interim arrangement shall be as per the interim Orders of the Hon'ble APTEL dated 21.10.2022, 16.12.2022, 10.02.2023 and 17.04.2023, subject to the final disposals of the pending appeal petitions before the Hon'ble APTEL.*
- (3) *The interim arrangement as above, shall be subject to the final decision of the Hon'ble APTEL in IA 1183/2023 filed by KSEB Ltd in DFR No. 325/2023, against the Order of the Commission dated 10.05.2023 in petition OP No. 05/2021."*

21. Further, the Commission vide the Order dated 21.08.2023 in petition OP No. 50/2023 had permitted KSEBL to draw power from the four unapproved DBFOO contracts for the periods upto 31.12.2023. The relevant portion of the Order is extracted below.

"18. The Commission, after examining the petition filed by KSEB Ltd dated 17.08.2023 with the prayer to allow power drawal from the unapproved DBFOO contracts at PPA rate till the finalisation of the medium term power procurement due to the severe financial crisis faced by KSEBL due to the critical power shortage in the State caused by failure of monsoon, the provisions of the Electricity Act, 2003, KSERC (Terms and Conditions of Determination of Tariff) Regulations, 2021, hereby Orders the following;

(1) The Commission hereby orders to extend the interim arrangement for procurement of power from the unapproved DBFOO contracts as per the Order dated 07.06.2023 in petition OP No. 24/2023 for the period upto 31.12.2023 or till KSEB Ltd make alternate arrangements of procuring 500MW RTC power on medium term basis, which ever earlier.

(2) KSEB Ltd shall take appropriate decision on the outcome of the bid and submit the petition before the Commission accordingly, latest by 11.09.2023 through an affidavit with all supporting documents.

(3) The interim arrangement as above, shall be subject to the final decision of the Hon'ble APTEL in DFR No. 325/2023, against the Order of the Commission dated 10.05.2023 in petition OP No. 05/2021.

(4) All other terms and conditions as per the Order of the Commission dated 07.06.2023 in petition OP No. 24/2023 is applicable for the extended period also. The petition disposed off. Ordered accordingly."

22. As detailed in paragraph 20 and 21 above, even after rejecting the four PSAs entered into KSEBL on DBFOO basis vide the Order dated 10.05.2023, this Commission has permitted KSEBL to draw power from these contracts for avoiding critical power situation of the State, if any arises due to the denial of approval of PSAs of these contracts.

23. As explained in the preceding paragraphs, on the close examination of the entire facts of the subject matter in detail, the following are the facts and circumstances of the case before this Commission.

- (1) The Commission noted that, KSEBL has made certain deviations in the bidding guidelines dated 08.11.2013 and 09.11.2013 notified by the Central Government. As per the said bidding guidelines, prior approval of the Central Government has to be obtained for making any deviation therein. However, KSEBL could not get such approval before floating the tenders. In these circumstances, the Commission vide its Order dated 30.08.2016 in petition OP No. 13/2015 has ordered that, the adoption of tariff and approval of the PSA of the bids other than L1 in Bid-1 and L1 in Bid-2 may be considered after getting the approval of the Central Government on the deviations and views of the State Government on such deviations in the bidding documents of DBFOO contracts.
- (2) The Central Government vide its communications dated 18th November 2016 and 11th December 2019 had clarified that, the deviations pointed out by KSERC would have been got vetted and approved by the Central Government before the issuance of the RFQ, RFP and PSA and not at this stage. The Central Government further clarified that, Government of Kerala/ KSEBL may take appropriate action on the subject issue in consultation with this Commission.
- (3) KSEBL could not pursue the State Government and get its views as part of the proceedings of the subject petition OP 13/2015 before the Commission. Hence, the Commission could not take a final decision on the subject matter during the proceedings of the OP No. 13/2015.
- (4) However, in order to meet the power requirement of the State, the Commission had allowed KSEBL to draw power from these four unapproved contracts from the date of commencement of supply specified in the PSA, i.e., allowed to draw power from L2 in Bid-1 from October 2016 onwards and L2,L3 and L4 in Bid-2 from December 2017 onwards, and clarified that the final approval of the adoption of tariff shall be granted after getting the approval of the Central Government on the deviations and views of the State Government on the DBFOO contracts.

The Commission vide the Order dated 08.07.2019 has adopted the L1 rate of Bid-2 for approving the cost of power purchase from these DBFOO contracts, as part of approval of ARR and tariff determination during the MYT period from 2018-19 to 2021-22. However, the Commission has denied the claim of fuel surcharge of these contracts during the said MYT period on the reason of pending approval of these contracts due to the reasons specified earlier.

- (5) In the meanwhile, instead of getting the considered views of the State Government and submit the same before the Commission for approval of the pending contracts, KSEBL again filed a petition OP No. 05/2021 before this Commission on 12.11.2020 for the approval of the unapproved contracts. However, the Commission could not grant approval of the pending contracts, without getting the views and decisions of the State Government on the subject matter.
- (6) During the course of the proceedings, an appeal petition was filed by one of the generator M/s JITPL before the Hon'ble APTEL against the denial of fuel surcharge by the Commission. Hon'ble APTEL vide the Order 20.11.2020 had directed the Commission to decide on the petition OP No.05/2021 filed by KSEBL on 12.11.2020 and also granted 'status quo ante' till the final disposal of the subject matter.
- (7) An appeal was filed by this Commission before the Hon'ble Supreme Court against the Order of the Hon'ble APTEL. The Apex Court vide the Order dated 10.02.2023, has directed this Commission to take appropriate decision on the petition OP No. 05 of 2021 within three months from the date of this Order.
- (8) Since the licensee KSEBL could not submit the approval of the Central Government on the deviations made in the bidding documents and also could not get the views of the State Government on the subject matter, the Commission vide its Order dated 10.05.2023 has denied the approval of the four PSAs entered into by KSEBL on DBFOO basis, citing the procedural deviations and technical reasons of the bidding process done by KSEBL.
- (9) However, even after the denial of the adoption of tariff and approval of the PSAs, the Commission vide its Order dated 07.06.2023 in petition OP No. 24/2023 and Order dated 21.08.2023 in petition OP No. 50/2023 had allowed KSEBL to draw power from these contracts till 31.12.2023.
- (10) The fact being so, it is a concluded fact that, the denial of the said PSAs was mainly due to the lapses from the part of the KSEBL to get the considered views and decisions of the State Government on the deviations in the bidding documents and other procedural lapses pointed by the Commission in its original Order dated 30.08.2016 in petition OP No. 13/2015. It is also a fact that, even though the adoption of tariff and approval of PSAs was denied due to procedural lapses, this Commission never stand against KSEBL in scheduling power from these contracts. The approval was granted to draw power from these contracts till 31.12.2023.

If KSEBL could get and communicate the views of the State Government on the issues pointed by the Commission in its Order dated 30.08.2016 in time, the present issues and crisis, if any, due to the denial of the power purchases of the four unapproved DBFOO contracts in question could have been avoided.

24. In the meanwhile, the State Government vide its policy direction dated 10.05.2023 in file No. 125/B1/2021-Power, issued under Section 108 of the Electricity Act, 2003, has directed the Commission to reconsider/ review its Order dated 10.05.2023 in petition OP No. 05/2021. The relevant portion of the policy directives of the State Government is extracted below.

“...Chairman & Managing Director KSEBL requested intervention of the Government of Kerala in the matter highlighting the impact of the KSERC orders on the power position of the State detailing the technical and financial implications as follows:

Technical implications without DBFOO Contracts

1) For meeting the evening peak demand, KSEBL is procuring power from the market to the order of 400 MW to 600 MW, even after scheduling of power from generators of four unapproved contracts, depending upon the impact of summer rains.

2) Non scheduling from four unapproved contracts will reduce the availability from 1033.22 MW to 652.73 MW at Kerala periphery.

3) If the demand soars high, the deficit in the peak will be of the order of 1100 MW. Currently the market prices are of the order of Rs.10/- from 19:00 hrs till 24:00 hrs.

■ *4) There is a chance of scarcity in availability of power as the demands picks up in the country, which is now slightly declined due to the impact of summer rains.*

■ *5) Even after availing power from DBFOO stations, hydel storage position is sufficient to meet the State demand up to 1st week of June 2023 due to the impact of heat wave, with summer rains, this can extend a little further.*

6) For meeting the swap commitments starting from 16th June 2023, the reservoir levels were managed so as to have around 750 MU at the beginning of this water year 2023-24. The situation will be aggravated further with the non-availability of 380.49 MW from these stations.

7) Load restrictions needs to invoke throughout the day to balance the increasing demand with depletion of hydel reserves and delayed monsoon.

■ *8) 465 MW is inevitable to manage the LGB of the state. If 465 MW of power needs to be curtailed, the same may be done after contracting from equivalent alternate source. Tender procedure for re-tendering of 500 MW RTC power on Medium Term basis is undergoing, which may take around 3-4 months for finalization including time period for seeking KSERC approval. Alternatively, a fresh tender for the long term period for the balance period of DBFOO contracts (around 18 years) will take minimum six months to finalise.*

■ *Also, due to fluctuating rate in power market it is not able to ensure purchase of power at affordable rate. Hence the tariff may go up exorbitantly.*

- 10) In the worst scenario, KSEBL may be forced to impose power restrictions in the State of Kerala including to those on Industrial Consumers.

Financial Implications

1. In case of termination of Agreement by Utility, as per Clause 31.3.2 of DBFOO PPA, KSEBL will be liable to pay damages. The termination payment of the four unapproved DBFOO Contracts amount to approximately Rs.500 crores.
2. In addition to the above, KSEBL have to make immediate disbursal of the pending amount to be disbursed to the generator on account of restrictions as per KSERC Order and APTEL Orders is around Rs.270 Crore which includes Rs. 171.46 crores disputed in PRAAPTI portal.
3. As per the current market trend, the per unit energy charge to replace the above shortfall comes around Rs. 5 - 6/unit which in turn leads to tariff hike.
4. It is pertinent to note that the Ministry of Power, vide communication dated 23.05.2023 has sought the willingness of other beneficiaries of North/West/ South region for availing the power from Jhabua Power Ltd. to the extent of 215 MW on account of the orders dated 10.05.2023 of Hon'ble KSERC.

WHEREAS the Government, as per letter cited 16th above, directed KSEBL to approach KSERC to make an interim arrangement and to get necessary time to overcome the electricity crisis in the State.

WHEREAS the KSEBL approached the Kerala State Electricity Regulatory Commission by filing IA No. 1383/2023 and thereby sought permission to make interim arrangement to overcome the power crisis in the State. The Commission by its order dated 07.06.2023 read as 17th above granted extension of time up to 75 days from 07.06.2023.

WHEREAS the Chairman & Managing Director, KSEBL as per the letter cited 18th again requested Government to intervene in the matter and to allow KSEBL to procure power at PPA rates and approve DBFOO contracts from unapproved GENCOS. It is further informed that, in order to limit the financial implications due to purchase of additional power from the market within manageable levels so as to avoid tariff shocks to the consumers and to ensure sustainability of the utility, demand side management by way of power cut or load restriction or both is the only way out and also requested to consider the gravity of the matter and issue directions on imposing load shedding/power cut if the monthly power purchase cost crosses Rs.900 crores.

- WHEREAS KSERC, as per the order cited 19th in OP No. 50/2023 further ordered to extend the interim arrangement for procurement of power from the unapproved DBFOO contracts for the period up to 31.12.2023 or till alternate arrangements are made by KSEBL for procuring 500 MW RTC power on medium term basis or whichever is earlier subject to final decision of the Hon'ble APTEL in DFR No.325/2023, filed against the order of Commission dated 10.05.2023 in OP No.05/2021.

WHEREAS the Government have examined the request of Chairman & Managing Director, KSEBL with connected records in detail and observed as follows:-

A. Consequent to non-approval of power purchase agreements by the Commission, substantial amounts are due to the generation companies, in pursuant

to the agreements executed with the KSEBL. Further, the said companies are no longer supplying power to KSEBL. In order to solve the said issue KSEBL is now purchasing power from the market at very higher rates. The cost of power purchase required for the remaining period of the DBFOO contract from July 2023, by adopting an alternative system, will cause huge financial constraints and a situation may arise where power will not be available even at the existing contract rates. **In the event of non-approval of power purchase agreements, State will be put to power crisis and consequential power restrictions, which will not be in the best interest of the State.**

B. A comparison of the power purchase rate on cancellation of contract is also verified and is found to be comparatively much higher than that of the contract rates that would have been had the contract not been cancelled. There had been an increase in the market price from every point of time. **Therefore, entering into new contracts in the current situation will also lead to a huge increase in the electricity charges which ultimately turn out to be the liability of the consumers and they will be put in trouble.**

C. It appears that since 2010, the State of Kerala has been witnessing recurring rampant power restrictions. Consequent to the said power restrictions, the cost of power procurement was increased from year to year. **During the summer of 2010 to 2012 and from 09/2012 to 05/2013, the State of Kerala was facing severe power deficit and was constrained to impose load shedding and power restrictions throughout the State.**

D. It was in the said compelling circumstances that steps were initiated by the KSEBL to procure adequate quantity of power through open access mechanisms, on a long term basis. **The demand of power in the State was projected an increase at the rate of 7% to 8 %, on an annual basis.** Accordingly, the Board had invited tenders for procurement of power, which had culminated in execution of seven power purchase agreements, as stated herein afore. **So much so, as is seen therefrom, the public purpose and public good involved therein is apparent and evident.**

E. Owing to the deviations committed by the Board in the bidding process, the Commission its order dated 10.05.2023 denied approval for the power supply agreements executed by the KSEBL for the purchase of 465 MW of power. **Insofar as the deviations committed by the KSEBL are concerned, there cannot be any squabble as things stands now, more particularly on the face of order dated 30.08.2016 and order dated 22.12.2016 respectively passed by the Commission. However, the matter is now pending before the learned Appellate Tribunal.**

F. The Electricity Act of 2003 contemplates for the most efficient and economical development and operations of electricity industry, so as to benefit the consumer, predominantly, the public at large.

G. Section 108 of the Electricity Act of 2003 reads as thus; Section 108 (Directions by State Government) :-

(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.

H. Section 108 of the Act gives power to the State Government to issue directions in writing to the Commission in the matters of policy, involving public interest. Furthermore, **Section 108 (2) of the Act of 2003 recognizes the**

dominant position of the State Government in deciding as to whether any direction issued by the State Government relates to a matter of policy involving public interest, then the decision of the State Government thereon shall be final.

I. Accordingly, when a matter is placed before the Government which involves public interest and public good, then the Government is empowered to issue necessary directions in writing to the Commission in that regard, in the matter of discharge of its functions, as contemplated under the Electricity Act of 2003.

J. As observed above, there had been an increase in the market price from time to time. Therefore, entering into new contracts in the current situation will lead to a huge increase in the electricity charges to be paid by the consumers and the public/consumers will be put in trouble to meet the liability arising therefrom. Any cancellation of unapproved power purchase agreements at this length of time will not be in the best interest of the State. Moreover, the public should not be put in peril for the irregularities/mistakes/deficiencies happened due to any procedural and technical reasons. It appears that KSEBL, despite earnest efforts, is not in a position to come up with an alternate arrangement to overcome the impending power crisis in the State.

K. KSEBL was bound to follow the instructions laid down by KSERC regulations. If any mistake had occurred, alternative means should have been sought earlier so as to avoid the losses. Now the public should not be held liable for the shortcomings due to procedural flaws.

L. The State Government is of the opinion that for the benefit of the society especially the public at large, it should formulate a policy purely based on public interest and it is necessary to intervene in the matter and to issue directions in writing to the Commission, in the matter of granting approval to the power purchase agreements.

M. For the reasons stated in the preceding paragraphs, in the best interest of the consumers of power in the State and to avoid the impending power crisis, it is only apposite for the State Government to take a policy decision, in public interest, enabling to issue necessary directions, as contemplated under Section 108 of the Electricity Act of 2003.

NOW THEREFORE, after detailed examination of the matter, considering all facts and observations, without prejudice to any enquiry ongoing in the matter and without ratifying the procedural irregularities pointed out by KSERC, keeping in view the larger interest of the public, the Government deems it appropriate to invoke the power under section 108 of Electricity Act 2003 and accordingly, in exercise of the said power, Government hereby direct Kerala State Electricity Regulatory Commission to reconsider/review their orders in O.P No.5/2021 filed by Kerala State Electricity Board Limited, in accordance with the policy of the Government for the best interest of the State and public at large.”

- 25.** The Commission has carefully examined the policy directions dated 10.10.2023 issued under Section 108 of the Electricity Act, 2003, regarding the approval of the power purchase of 465 MW under DBFOO basis and noted the following.

- (1) The policy directives issued by the State Government dated 10.10.2023 are the views and directions of the State Government regarding the power purchase of the 465MW power from the unapproved DBFOO contracts entered into by the KSEBL in the financial year 2014-15, which was sought by the Commission vide the Order dated 30.08.2016 in petition OP No. 13/2015 and subsequent letter of this Commission dated 08.09.2016 addressed to the State Government. However, KSEBL could pursue and get the views and directions of the State Government subsequent to the Order of this Commission dated 10.05.2023 in petition OP No. 05/2021.
- (2) The policy directions were issued duly considering the Technical implications and financial implications subsequent to the denial of the adoption of tariff and approval of the PSAs of the four DBFOO contracts under question.
- (3) The policy directions were issued by invoking the powers conferred on the State Government under Section 108 of the Electricity Act, 2003, which is extracted hereunder for ready reference.

“108. Directions by State Government

(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.”

- (4) In the said Policy Directions, the State Government has highlighted the following, before the Commission;
 - (i) ***In the event of non-approval of power purchase agreements, State will be put to power crisis and consequential power restrictions, which will not be in the best interest of the State.***
 - (ii) ***Entering into new contracts in the current situation will also lead to a huge increase in the electricity charges which ultimately turn out to be the liability of the consumers and they will be put in trouble.***
 - (iii) ***During the summer of 2010 to 2012 and from 09/2012 to 05/2013, the State of Kerala was facing severe power deficit and was constrained to impose load shedding and power restrictions throughout the State. The demand of power in the State was projected an increase at the rate of 7% to 8 %, on an annual basis. Accordingly, the Board had invited tenders for procurement of power, which had culminated in execution of seven power purchase agreements, as stated herein afore. So much so, as is seen therefrom, the public purpose and public good involved therein is apparent and evident.***
 - (iv) ***Insofar as the deviations committed by the KSEBL are concerned, there cannot be any squabble as things stand now, more***

particularly on the face of order dated 30.08.2016 and order dated 22.12.2016 respectively passed by the Commission. However, the matter is now pending before the learned Appellate Tribunal.

(v) **Section 108 of the Act gives power to the State Government to issue directions in writing to the Commission in the matters of policy, involving public interest. Furthermore, Section 108 (2) of the Act of 2003 recognizes the dominant position of the State Government in deciding as to whether any direction issued by the State Government relates to a matter of policy involving public interest, then the decision of the State Government thereon shall be final.**

(vi) **There had been an increase in the market price from time to time. Therefore, entering into new contracts in the current situation will lead to a huge increase in the electricity charges to be paid by the consumers and the public/consumers will be put in trouble to meet the liability arising therefrom.**

Any cancellation of unapproved power purchase agreements at this length of time will not be in the best interest of the State.

Moreover, the public should not be put in peril for the irregularities/mistakes/deficiencies happened due to any procedural and technical reasons. It appears that KSEBL, despite earnest efforts, is not in a position to come up with an alternate arrangement to overcome the impending power crisis in the State. KSEBL was bound to follow the instructions laid down by KSERC regulations. If any mistake had occurred, alternative means should have been sought earlier so as to avoid the losses. Now the public should not be held liable for the shortcomings due to procedural flaws.

(vii) **The State Government is of the opinion that for the benefit of the society . especially the public at large, it should formulate a policy purely based on public interest and it is necessary to intervene in the matter and to issue directions in writing to the Commission, in the matter of granting approval to the power purchase agreements.**

(viii) **The State Government further clarified that, for the reasons stated in the preceding paragraphs, in the best interest of the consumers of power in the State and to avoid the impending power crisis, it is only apposite for the State Government to take a policy decision, in public interest, enabling to issue necessary directions, as contemplated under Section 108 of the Electricity Act of 2003 apposite for the State Government to take a policy decision, in public interest, enabling to issue necessary directions, as contemplated under Section 108 of the Electricity Act of 2003.**

(ix) **The State Government, further directed that, considering all facts and observations, without prejudice to any enquiry ongoing in the matter and without ratifying the procedural irregularities pointed out by KSERC, keeping in view the larger interest of the public, the Government deems it appropriate to invoke the power under section 108 of Electricity Act 2003 and accordingly, in exercise of the said power, Government hereby direct Kerala State Electricity Regulatory Commission to reconsider/review their orders in O.P No.5/2021 filed by Kerala**

State Electricity Board Limited, in accordance with the policy of the Government for the best interest of the State and public at large.”

26. As discussed above, the State Government has not ratified the procedure irregularities pointed out by the Commission in the bidding documents by KSEBL in the process of entering into DBFOO contracts in question and also clarified that the ongoing enquires on the procedural irregularities shall continue. However keeping in view of the larger public interest, the State Government, by invoking the Section 108 of the Electricity Act, 2003, directed this Commission to reconsider/review its Order dated 10.05.2023 in petition OP No. 05/2023.

27. The Commission has carefully examined the issues raised by the State Government in its policy directives dated 10.10.2023, and examined the following issues in detail.

(1) Issue No.1.

(a) Whether the policy directives of the State Government under Section 108 of the State Government is binding on the Commission?

(b) Whether there will be technical and financial implications in the State due to the non approval of the four DBFOO contracts?

(2) Issue No.2.

Whether the respondent generators are bound to give power supply as per the PSA signed under DBFOO contracts, if the Commission approves the PSA in view of the policy direction of the State Government?

The Commission has examined each issue in detail and discussed the same in the subsequent paragraphs.

Issue No.1. (a) Whether the policy directives of the State Government under Section 108 of the State Government is binding on the Commission? (b) Whether there will be technical and financial implications in the State?

28. The petitioner KSEBL during the deliberations of the subject matter submitted that the policy directives issued by the State Government by invoking the powers conferred on it under Section 108 of the EA-2003 in the matters of policy involving public interest is binding on the Commission, especially due to the saving provisions under Section-108 (2) of the EA-2003. Hence, the petitioner KSEBL prayed before the Commission to review its Order dated 10.05.2023 in view of the binding policy directives issued by the State Government dated 10.05.2023. The respondent M/s Jindal Power Limited (M/s JPL) also endorsed the views of the petitioner KSEBL.

However, the respondent M/s Jindal Thermal Power Limited and M/s Jhabua Power Limited submitted that, the policy directives of the State Government is not binding on the Commission and it can be taken as guidance only in the process of tariff determination. Hence the Commission has no authority to review its earlier decision based on the policy directives of the State Government dated 10.05.2023. Further, the review petition cannot be entertained based on a subsequent event, and occurrence of some subsequent event or development cannot be taken note of declaring the initial order as vitiated by error apparent.

29. The Commission has examined the Section 108 of the Electricity Act, 2003, which is extracted below for ready reference.

“108. Directions by State Government

(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.”

Section 108 of the Electricity Act 2003 empower the State Government to issue policy directions to the State Commissions in writing, in the matters involving public interest. Further as per the Section 108(2) of the EA-2003, such directions of the State Government relates to the matter of policy involving public interest, such directions are binding on the Commission.

30. In the instant case, the State Government has observed the following issues involving public interest in the event of denial of drawal of power from the four DBFOO contracts in question.
- (i) ***In the event of non-approval of power purchase agreements, State will be put to power crisis and consequential power restrictions, which will not be in the best interest of the State.***
 - (ii) ***Entering into new contracts in the current situation will also lead to a huge increase in the electricity charges which ultimately turn out to be the liability of the consumers and they will be put in trouble.***
 - (iii) ***There had been an increase in the market price from time to time. Therefore, entering into new contracts in the current situation will lead to a huge increase in the electricity charges to be paid by the consumers and the public/consumers will be put in trouble to meet the liability arising therefrom.***
 - (iv) ***Any cancellation of unapproved power purchase agreements at this length of time will not be in the best interest of the State.***
 - (v) ***Moreover, the public should not be put in peril for the irregularities/mistakes/deficiencies happened due to any procedural and technical reasons. It appears that KSEBL, despite earnest efforts, is not in a position to come up with an alternate arrangement to overcome the impending power crisis in the State.***

- (vi) *The State Government is of the opinion that for the benefit of the society especially the public at large, it should formulate a policy purely based on public interest and it is necessary to intervene in the matter and to issue directions in writing to the Commission, in the matter of granting approval to the power purchase agreements.*
- (vii) *The State Government further clarified that, in the best interest of the consumers of power in the State and to avoid the impending power crisis, it is only apposite for the State Government to take a policy decision, in public interest, enabling to issue necessary directions, as contemplated under Section 108 of the Electricity Act of 2003 apposite for the State Government to take a policy decision, in public interest, enabling to issue necessary directions, as contemplated under Section 108 of the Electricity Act of 2003.*

31. The Commission has also examined the entire issues raised by the State Government in the policy direction dated 10.10.2023 in detail, and noted the following;

- (1) The electricity demand in the Country and in our State has been increasing year after year, especially after the Covid-19 pandemic. The summary of the anticipated electricity demand as per the 20th Electric Power Survey published by the Central Electricity Authority on November, 2022 under Section 73(a) of the EA-2003 is given below.

Anticipated electricity demand as per the 20th Electric Power Survey of CEA

Year	Kerala		All India	
	Peak Demand	Annual Energy requirement at ex bus	Peak Demand	Annual Energy requirement at ex bus
	(MW)	(MU)	(GW)	(BU)
2021-22	4390	26626	203	1382
2026-17	5549	33963	277	1908
2031-32	6967	42285	366	2474
2036-37	8483	52596	466	3095
2041-42	10055	62791	575	3776
CAGR	4.2%	4.4%	5.3%	5.2%
CAGR upto 2031-32	4.7%	4.7%	6.1%	6.0%

Source- Report on 20th Electric Power Survey of India- published by CEA as per Section 73(a) of the EA-2003

As detailed above, the State is expected to have an annual average increase in peak demand of 250MW to 350MW in the coming years, where as the same in the Country is in the range of 12400MW to 21000 MW per annum. The annual increase in energy demand in the State is in the range of 1250 MU to 2000MU in the coming years, where as the anticipated increase in energy demand in the State is 82000MU to 1,45,000MU.

- (2) The Commission has also noted the Generation Plan published by the CEA in the official Gazette on March 2023. The portfolio of the generation plan of the Country in the year 2031-32 is given below.

Generation plan for the Year 2031-32

Source	Installed Capacity		Annual Energy	
	(GW)	(%) of total	(in Billion Units)	(%) of total
Hydro	62.2	6.9%	246.2	9.2%
Solar PV	364.6	40.5%	665.6	25.0%
Wind	121.9	13.5%	258.1	9.7%
Nuclear	19.7	2.2%	117.6	4.4%
Coal & Lignite	259.6	28.8%	1334.8	50.1%
Gas	24.8	2.8%	33.4	1.3%
Other RE	47.6	5.3%	10.0	0.4%
Total	900.4	100.0%	2665.7	100.0%

Source: CEA- National Electricity Plan- Generation (Vol-1) Published in March 2023 as per Section-3 of EA-2003

As detailed above, though more thrust is given for RE sources, the dependence on coal based generation may continue for more years. Even by the year 2031-32, the coal based generation may contribute more than 50% of the energy requirement though its share in installed capacity may reduce to 28.80% of the total installed capacity in the Country. Also, the installed capacity of coal/lignite based plants are likely to increase to 2,59,600 MW from the present level of 2,13,000MW.

- (3) Last few years, the electricity prices in the energy exchanges also comparatively high. The details are given below.

Time slot	Year		
	2021	2022	2023
	(Rs/ kWh)	(Rs/ kWh)	(Rs/ kWh)
RTC	3.96	5.77	5.56
Evening	5.19	7.47	7.22
Day	3.31	4.64	4.27
Night	3.53	5.37	5.42
Morning	4.02	5.91	5.54

- (4) Due to the dependence on imported coal due to coal shortages, the average power purchase rate of all coal based stations except Talcher-II pit head stations are in the range of Rs 4.60/unit to Rs 5.50 /unit in the year 2022-23.

The Commission is also aware of that, the rate of short term power purchase arranged by KSEBL during the year 2023-24 is in the range of Rs 5.12/unit (in October 2023) to Rs 6.34/unit (in March 2024).

- (5) In the recent bid invited by KSEBL for procuring 500MW RTC power on FOO basis, two bidders only participated in the Bid, and the total offered quantum was 403MW as against the bid quantum of 500MW. The L1 rate arrived through reverse auction was Rs 6.88/unit.
- (6) As discussed above, with the available details at present, the electricity demand in the country is much higher than the availability, may be due

to the shortage in the availability of the domestic coal. This has resulted in the higher electricity rates in the short-term and medium term market.

- (7) Further, without adequate cost effective storage facility, it is difficult to store and use the solar energy in non solar hours for meeting the electricity demand. However, the situation may change once the storage technologies improve and can deliver cost effective storage of RE especially solar energy at affordable cost.
- (8) However, as discussed earlier, the electricity demand is increasing and the Country may depend on the coal based stations for meeting the electricity demand for more years to come. Hence, Kerala also has to rely on coal based stations until storage technologies may mature to meet the RTC power requirement through renewable energy sources.
- (9) Duly considering the emerging power shortages in the State, the Commission vide its Order dated 07.06.2023 and 21.08.2023 had permitted KSEBL to continue to draw power from the four unapproved DBFOO contracts till 31.12.2023.

There is no doubt that, there is growing demand for electricity and the State may face power shortages for few more years to come. Hence the Commission is of the considered view that, there is merit in the public interest pointed out by the State Government in its policy directives dated 10.10.2023. The policy directives is only to review/ reconsider the Order of the Commission dated 10.05.2023, wherein the four DBFOO contracts with total capacity of 465MW was denied citing the procedure violations and technical issues on tendering process done by the KSEBL for procuring power through DBFOO basis.

32. The Commission has also examined the issue where the policy directives issued by the State Government dated 10.10.2023 is binding on the Commission or not. The Commission has examined the various judgments of the Hon'ble Supreme Court, placed before the Commission by the petitioner KSEBL and the respondents M/s Jhabua Power Limited and M/s JTPL. In this matter, reliance was placed on the following judgment of the Hon'ble Supreme Court.

- (1) Hon'ble Supreme Court in "***Paschimanchal Vidyut Vitran Nigam Ltd. & Ors. Vs. Adarsh Textiles & Anr., (2014) 16 SCC 212***, is observed as follow:-
"..... 21. *The Electricity Act, 2003 was enacted by Parliament. Section 62 whereof confers the power upon the Commission to determine the tariff. Section 65 of the Electricity Act, 2003 enables the State Government to grant subsidy to any consumer or class of consumers in the tariff determined by the State Commission under Section 62. Section 108 of the 2003 Act deals with the power to issue directions by the State Government. **The Commission shall be guided by such directions in the matter of policy involving public interest as the State Government may give to it in writing**.....*

..... 23. *It is apparent from a bare reading of the aforesaid provisions of the Electricity Act, 2003 and the Reforms Act, 1999 that **in discharge of its***

functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing. Such decision/direction of the State Government in the matter of policy, subsidy and public interest shall be final.....”

- (2) **Hon’ble Supreme Court in “Dwaraka Resorts Pvt. Ltd. Vs. State of Orissa & Ors., 2014 SCC Online Ori 498**, is also observed as under:-
“..... 24. Section 108 of the Electricity Act, 2003 not only mandates that in the discharge of its functions, the State Electricity Commission is to be guided by directions issued by the State in matters of policy involving public interest, but also recognizes the dominant position of the State Government in deciding as to whether any direction issued by the State Government relates to a matter of policy involving public interest. **In other words, in the matter of policy involving public interest, decision of the State Government is final.** All the instrumentalities of the State are required to speak with one voice.....”

In view of the principles of law laid down in the above-mentioned judgments, this Commission has to be necessarily be guided by the policy directive dated 10.10.2023 issued by the Government of Kerala, which clearly recording the reasons and grounds, basis in public interest, requiring to reconsider / review its orders in OP No. 05 / 2021, in the matter for granting approval to the four (4) Power Supply Agreements(PSAs) in question.

33. The Commission has also noted the few judgements of the Hon’ble APTEL in Appeal No. 352 / 2022 “**Fatehgarh Bhadla Transmission Company Ltd. Vs. CERC & Ors., Judgment dt. 02.05.2023**”, Appeal No. 189 / 2022, 369 / 2022 and 4 / 2021 “**Steel City Furnace Association Vs. PSERC & Ors., Judgment dt. 31.10.2022**”, Appeal No. 92 / 2013 in **Tamil Nadu Electricity Consumers’ Association Vs. Tamil Nadu Electricity Regulatory Commission & Ors., Judgment dt. 21.01.2014** and Appeal No. 05/2009 “**Kerala State Electricity Board Ltd. Vs. KSERC & Ors., Judgment dt. 18.08.2010**”.

The matters involved in the above judgments are related to specific issues raised by the State Government in determination of tariff by the SERCs under Section 62 of the EA-2003. As per the provisions of the EA-2003, the tariff determination is a statutory function of the State Commissions, and the Government cannot interfere in such matters.

34. However, in the present case, the policy directive issued by the State Government is not against the statutory functions of the Commission for the determination of tariff. Here the only issue raised by the State Government is to review/ reconsider the denial of four purchases entered into by KSEBL on DBFOO basis citing the procedural violation and technical issues. The State Commission vide its original Order dated 30.08.2016 in Petition OP No. 13/2015 itself clarified that, the Commission may approve these power purchases after getting the views of the State Government on the deviations pointed out by the Commission.

The State Government in the policy direction clarified that, separate enquires are going on the deviation pointed out by the Commission. The Government

further clarified that, the public should not be put in peril for the irregularities/ mistakes / deficiencies happens due to procedural and technical reasons.

35. As per the Order 47 of the Code of Civil Procedure 1908 read along with Section 94 of the Electricity Act, 2003 permits the Commission to review its order for any “sufficient reasons” also among other reasons specified therein. In the instant case, the views of the State Government on the deviations on the bidding procedure pointed out by the Commission in its Order dated 30.08.2016 and also the views on the DBFOO purchase, and also the policy directives dated 10.10.2023 under 108 of the EA-2003 are the sufficient reasons for review/ reconsider the Order of the Commission dated 10.05.2023.
36. The Commission, after careful examination of the policy directives of the State Government dated 10.10.2023, the petition of KSEBL dated 10.11.2023, the comments of the respondent generators, various judgments of the Hon’ble Supreme Court and Hon’ble APTEL, other documents and matters placed before the Commission during the proceedings of the subject petition, hereby decided to adopt the tariff and grant approval for the following four purchases entered into by KSEBL on DBFOO basis, without prejudice to any enquiries by the State Government on the procedure irregularities/ mistakes/ deficiencies happened due to the procedural and technical reasons pointed out by this Commission in its Order dated 10.05.2023.
- (1) PSA for 115 MW capacity (under Bid-1) with Jhabua Power Ltd. dated 31.12.2014;
 - (2) PSA for 100 MW capacity (under Bid-2) with Jhabua Power Ltd. dated 26.12.2014;
 - (3) PSA for 150 MW capacity (under Bid-2) with Jindal Power Ltd. dated 29.12.2014;
 - (4) PSA for 100 MW capacity (under Bid-2) with Jindal India Thermal Power Ltd. dated 29.12.2014;

Issue No.2.

Whether the respondent generators are bound to give power supply as per the PSA signed under DBFOO contracts, once the Commission approves the PSA in view of the policy direction of the State Government?

37. The following three generators are involved in the four DBFOO contracts under consideration of the Commission in the present review petition filed by KSEBL based on the policy direction dated 10.10.2023 of the State Government.

Sl. No.	Name of the Generator	Bid	Quantum of power in MW	Tariff as on Bid Date (Rs./kWh)	Date of execution of PSA	Commencement of power supply
1	Jindal Power Limited	Bid-2	100	4.29	29-12-2014	Oct-17
2	Jhabua Power Limited	Bid-1	115	4.15	31-12-2014	Dec-16
		Bid-2	100	4.29	26-12-2014	Oct-17
3	Jindal India Thermal Power Limited	Bid-2	150	4.29	29-12-2014	Oct-17

38. Out of the above three generators, M/s Jindal Power Limited has consented to supply 150MW as per the terms of the signed PSA dated 29.12.2014. However,

the other two generators strongly opposed the review petition filed by KSEBL based on the policy direction of the State Government dated 10.10.2023.

39. Among other objections, M/s Jhabua Power Limited (JPL) and M/s Jindal India Thermal Power Limited (JTPL) submitted that, they had made alternate arrangements to sell the power contracted with KSEBL under DBFOO basis, citing the denial of approval of power supply agreement by the Commission vide the Order dated 10.05.2023. The details are given below.

- (1) M/s Jhabua Power Limited had tied up its un-tied power by entering into Long Term PPA dated 27.09.2023 with NTPC Vidyut Nigam Limited for selling its power to DISCOMS/ States/ Industrial customers/ etc through bi-lateral arrangements. Hence Jhabua Power does not have any free power to supply to KSEBL.
- (2) M/s JTPL submitted that, they had participated in the tender floated by M/s Noida Power Company Ltd, and become a successful bidder. JTPL has signed a medium power purchase agreement dated 15.11.2023 with M/s Noida Power Company Limited for supply of 95MW power for a period of five years. Hence JTPL is no longer capable of supplying power to KSEBL.

40. The Commission has examined the submission of the respondents M/s Jhabua Power Limited (JV of NTPC Ltd) and M/s JTPL, regarding their incapability to supply power under concluded PSAs on DBFOO basis due to the alternate tie-ups made as thereafter. In this matter, the Commission has noted the following regarding the DBFOO contracts.

- (1) Procurement of electricity from Thermal Power Stations set up on Design, Build, Finance, Own and Operate (DBFOO) basis under Section-63 of the EA-2003, is separate scheme envisaged by the Central Government vide the guidelines dated 9th November 2023. The Central Government has also published the model bidding documents including model Power Supply Agreement (PSA) along with the guidelines.
- (2) Unlike other Power Supply Agreements signed between the supplier/generator and the utility/DISCOMs, the Part-III of the signed PSAs containing the details of the Power Station from which the power is offered to supply to the utility, including, the details of the site of the project (Article-10), construction of the power station (Article-11), Monitoring Power Station (Article-12), completion certificate (Article-13), Entry into commercial service (Article-14), Operation and Maintenance (Article-15), Monitoring of operation and maintenance (Article-16), Allocated capacity (Article-18) etc.

Further, the Article-31 of the PSA deals with the termination of the agreement and the circumstances and the procedures of termination.

As discussed above, the DBFOO contracts envisaged to allocate a specified capacity of the plant to the utility during its useful life/terms of the agreement. The supplier cannot unilaterally terminate the contract and allocate the capacity on commercial reasons, without complying with the procedures and practices.

- (3) It is an undisputed fact that, though the final approval of the signed PSA was not approved by the Commission, the generator M/s Jhabua Power Limited and M/s Jindal Thermal Power Limited has been supplying power to the KSEBL as per the terms of the PSA. Thus the PSA was in operational since the date of signing the agreement, i.e, from December 2014 to the year 2023. After operation of the PSA for more than 9 years continuously, and while the matter of final approval was under the due consideration of the Hon'ble APTEL and thereafter of this Commission, how the supplier can unilaterally terminate and reallocate the contracted capacity under DBFOO to others. The suppliers are the established generators of the Country is aware of all these facts.
- (4) Even after the denial of final approval of the PSAs under question vide its order dated 10.05.2023, this Commission has permitted KSEBL to draw power from these contracts till 31.12.2023. The Commission has also written to the coal companies to ensure the availability of coal to the generators for supplying power under these contracts.

Hence, there is no idling of the plants or not affected its interests till date, however due to their own reasons, the generators are not supplying power to KSEBL.

- (5) Even after the denial of the approval of the PSAs, KSEBL with the concurrence of the State Government and with the permission of the Commission has been requesting the generators to continue to supply power to it till 31.12.2023 as permitted by the Commission. But without supplying power to the utility as per the terms of the signed PSA, the suppliers cannot claim that their commercial interests were affected.
41. The PSA signed by the generators and KSEBL is being governed by the provisions of the Electricity Act, 2003. Section-111 of the EA-2003 provides for filing appeal provisions by the affected parties against the orders of the SERCs before the Hon'ble APTEL. Further, the Section 125 of the EA-2003 provides for filing second appeal before the Hon'ble Supreme Court if the decision in the first appeal also not satisfied.

KSEBL has already filed appeal petition (518 of 2023) before the Hon'ble APTEL against the Order of the Commission dated 10.05.2023 within the time limit specified for filing Appeal provisions. The suppliers are bound to comply with the orders and judgements of the Hon'ble APTEL and Hon'ble Supreme Court. Till the Hon'ble Higher Courts finally decide on the appeal petition filed by the affected parties, the generators cannot divert the contracted power under DBFOO basis and they cannot enter into long term/ medium PPAs during the

terms of the present PSAs , unless both the parties consented to terminate the PSA as per Article 31 of the Agreement. Ignoring these facts, if the generators proceeds with signing long term/ medium terms PPA for selling the power allocated to KSEBL through DBFOO contracts may ultimately lead to breach of contracts at multiple levels. The generators shall avoid this type of unethical practices.

42. It is a known fact that, due to various reasons, the electricity prices in the market at present is much higher than the rates of the DBFOO contracts under question. Hence, the suppliers may be commercially benefitted by unilaterally stopping the power supply to KSEBL and entering into new contract at present at the prevailing trend of electricity prices. This is against the business ethics, contract law and provisions of the EA-2003.
43. Due to the reasons discussed under paragraphs 39, 40, 41 and 42 above, there is no merit in the argument of the respondents that, due to commercial reasons they had made alternate arrangements with other DISCOMs/ traders to sell the power allocated to KSEBL through DBFOO basis.
44. The Commission also noted that, JPL is the joint venture of the NTPC Ltd, which is a Navaratna Company owned by the Central Government. Over the years, NTPC Ltd has very good relation with the State of Kerala and always supporting to provide helping hand when need arises during power crisis in the State. NTPC Ltd had already established a Naptha based power plant in the State for the exclusive use of the State. Further, NTPC Ltd has established 92 MW floating solar power plant in the State and the entire power is contracted with KSEBL.

Moreover, NTPC Vidut Vyapar Nigam Ltd (NVVN) is a fully owned subsidiary of NTPC Ltd for facilitating the trading of electricity among various DISCOMS and other interested parties. The present agreement signed on 27th September 2023 between Jhabua Power Ltd and NVVN is a commercial arrangement, entrusting the trader NVVN to arrange the trading the surplus power with the M/s JPL, the JV of NTPC Ltd with other DISCOMS. The Article 9.0 of the PPA deals with the tariff of the transaction, which is extracted below.

“9.0 Tariff

The applicable tariff for the energy supplied to NVVN from JPL against the contracted capacity shall be per mutual agreement between the parties in accordance with the sale agreement between NVVN and buyer.

The tariff payable to JPL for sale of power in power exchange by NVVN shall be in accordance with power trading agreement as per annexure-1 and as amended from time to through subsequent supplementary agreement”

As discussed above, there is no firm tariff for the sale of surplus power available with M/s JPL, the JV of NTPC Ltd with the trader NVVN, the wholly owned subsidiary of NTPC Ltd. In the absence of a firm tariff, the supply of power cannot be considered as a concluded contract and firm in nature. Hence, there is no issue or no breach of said contract involved in supply of power to KSEBL as per the PSAs dated 26.12.2014 and 29.12.2014 signed between KSEBL and Jhabua Power Ltd (JPL) on DBFOO basis.

It is well settled position that only in case the parties to a contract has the legal authority to enter into the said contract, then only it became legally enforceable. While the PSA in question was in the active consideration of the Hon'ble APTEL and thereafter of this Commission, JPL has no legal authority to enter into contract for sale of the same quantity of power committed under the said PSA.

The Commission is of the considered view that, M/s Jhabua Power Ltd , the JV of NTPC Ltd shall fully honour the policy directives of the Government of Kerala dated 10.10.2023 and shall supply power to KSEBL as per the terms of the PSAs dated 26.12.2014 and 29.12.2014 signed between KSEBL and M/s Jhabua Power Ltd.

45. Regarding the difficulty raised by the respondent generator M/s JTPL, the Commission has also noted the following, in addition to the common issues addressed in paragraphs 39 to 43 above.

(1) The other disputing generator M/s Jindal India Thermal Power Ltd had signed the PSA with KSEBL for supply of 100MW power on DBFOO basis on 29.12.2014. As per the provisions of the PSA, the respondent generator has been supplying power to KSEBL since October, 2017. During the course of the implementation of the PSA, there was no major disputes between the licensee KSEBL and the generator M/s JTPL.

(2) As per the records placed before the Commission, the Government of Kerala has issued the policy directives on 10.10.2023 and respondent generator M/s JTPL has signed the PPA for supplying 95MW power with Noida Power Company Ltd on 15.11.2023, on Finance, Own and Operate (FOO) basis. The PPA with Noida Power Company Limited was signed subsequently after (37 days) issuing the policy direction of the Kerala Government.

(3) It is not clear from the documents submitted before the Commission that, the power allocated to Noida Power Ltd was the 100MW power allocated to KSEBL on DBFOO basis as per the PSA dated 29.12.2014. Hence the Commission is not inclined to go into the legality of the respondent JTPL signing PPA with Noida Power Company Limited for supplying 95 MW power.

(4) As per the records available in the public domain, the JTPL has established 1200 MW (2x 600 MW) coal based power plant in Angul District, Orissa State. The generator had signed PSA with KSEBL for supplying power on DBFOO basis from one of the 600MW unit of the power plant.

(5) As pointed out by this Commission earlier, it is well settled position that only in case the parties to a contract has the legal authority to enter into the said contract, then only it became legally enforceable. While the PSA of JTPL with KSEBL in question was in the active consideration of the

Hon'ble APTEL and thereafter of this Commission, JTPL has no legal authority to enter into contract for sale of the same quantity of power committed under the said PSA with any other party.

- (6) JTPL had an another power supply contract with KSEBL through aggregator M/s PTC for supplying 270MW RTC power on medium term basis @ Rs 3.26/unit at CTU interconnection point for the months of January to June in a year for three years from 01.01.2022. The validity of the said agreement will terminate by 30th June 2024.
- (7) As discussed above, the respondent generator M/s JTPL has fruitful relationship with the State of Kerala over the years in meeting the power demand of the State. The Commission expect that, this will continue in future by fulfilling the contractual obligations as per the PSA signed with KSEBL for supplying 100MW power on DBFOO basis.

Orders of the Commission

46. The Commission, after careful examination of the petition filed by KSEBL dated 10.11.2023 in compliance of the policy directives of the State Government dated 10.10.2023, the comments of the respondent generators, various judgment of the Hon'ble APTEL and Hon'ble Supreme Court and other documents and matters placed before the Commission during the proceedings of the subject petition, hereby Orders the following.
 - (i) Allowed the Revision Petition of KSEBL based on the directive of the State Government under Section 108(2) of the Electricity Act, 2003 and the legal positions and other reasons explained in this Order.
 - (ii) The respondent generators shall supply power to the KSEBL in terms of the PSA signed between the generators as above with immediate effect.
 - (iii) KSEBL shall submit a status report of the compliance of this Order within one month from the date of this Order with all necessary details including the compliance of the Order by the respondents.

The petition disposed of. Ordered accordingly.

Sd/-
Adv. A J Wilson
Member

Sd/-
T K Jose
Chairman

By the Order of the Commission

Sd/-
Secretary