

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

Present : Adv. A.J Wilson, Member (Law)

OP No 49/2022

In the matter of : Petition filed for extension of Tariff Period I of the Power Purchase Agreement of Iruttukanam Small Hydel Power Project Stage-I (2x1.5) MW destroyed in the Maha Pralayam on the 9th August and 14th August 2018

Petitioner : M/s Viyyat Power Private Limited

Petitioner represented by : Shri. P.D Nair, MD, Viyyat Power Private Limited

Respondents : 1. Kerala State Electricity Board Ltd
2. Principal Secretary,
Power Department,
Government of Kerala
3. The Director,
Energy Management Centre,

KSEB Ltd represented by : Shri. Ajithkumar, EE, TRAC, KSEB Ltd

Power Department Represented : Shri. G. Ramnath, Under Secretary, GoK

EMC represented by : Shri. Anoop Surendran, Energy Technologist,

Date of hearing : 11.10.2022

Venue : e-hearing through Video Conferencing

Daily Order dated 12.10.2022

1. M/s Viyyat Power Private Limited (herein referred as petitioner) on 17.08.2022, filed a petition before the Commission for extending the Tariff Period I of the PPA signed with KSEB Ltd by 333 days i.e., up to 01.08.2023.
2. The summary of the petition filed by the petitioner M/s Viyyat Power Private Ltd is given below.
 - (i) The Government of Kerala (GoK) has allotted 3MW Iruttukanam Small Hydel Power Project (SHP) to the petitioner in the year 2004. The petitioner had entered into an Implementation Agreement (IA) with State Government on 10.12. 2004.Subsequently, as per the provisions of the

Implementation Agreement and with the approval of the Commission, the Power Purchase Agreement (PPA) was signed with M/s KSEB Ltd on 07.06.2007.

- (ii) The petitioner was selected and awarded the project based on the tariff quoted in the tariff based competitive bidding initiated by the State Government. The tariff quoted by the petitioner from 7th year of CoD to 18th year of BOOT period was (Tariff Period I) ₹2.70 per unit, and 19th year to 30th year of BOOT period was Rs 2.07/unit. The Stage-I of the project has achieved CoD on 04.11.2010. Since then, the petitioner has been generating electricity from the project and supplying to KSEB Ltd as per the provisions of the PPA.
 - (iii) Subsequently, during the Maha Pralayam that occurred in August 2018, the powerhouse of the petitioner was destroyed fully except the civil works.
 - (iv) The petitioner rebuilt the powerhouse with an additional cost of about Rs 17.69 crore. Out of it, the insurance coverage was obtained only for about Rs 7.095 crores. The petitioner has availed a term loan of 7.0 Crores for completing the project.
 - (v) The rehabilitated project was recommissioned on 08.07.2019 and since then has been supplying electricity to M/s KSEB Ltd.
 - (vi) The petitioner further submitted that neither the State Government nor M/s KSEB Ltd has given any relief or compensation to the petitioner for the damages that occurred during the Maha Pralayam.
 - (vii) The petitioner further submitted that the full generation and supply of energy has been suspended from 9th August 2018 to 7th July 2019 (333 days, falling in the Tariff Period I of PPA). Hence, the petitioner requested before the Commission to extend the Tariff Period I of the PPA by 333 days.
3. KSEB Ltd vide the letter dated 06.10.2022 filed the counter affidavit. The summary of the issues raised by KSEB Ltd is given below.
- (1) The Commission vide the Order dated 24.04.2020 in Petition OA No. 30/2019 has rejected the claim of the petitioner for compensation on account of the financial loss sustained due to the Mahapralayam that happened in the year 2018. In the said petition, M/s Viyyat Power Pvt Ltd prayed before the Commission that, along with the other claims, the loss of generation during the rehabilitation period from 09.08.2018 to 07.07.019 is Rs 4.94 crore. However, the Commission rejected the claim citing that there is no provision in the Implementation Agreement and PPA for making compensation for such losses. The petitioner/s Viyyat Power Pvt Ltd filed an Appeal Petition against the Order before the Hon'ble APTEL. Hence the subject is sub-judice.

- (2) KSEB Ltd further submitted that, the petitioner's request to extend the BOOT period was pending before the State Government.
- (3) The petitioner has approached the State Government, APTEL and the KSERC on the same ground.
- (4) The tariff rate and tariff period are specified in the PPA dated 7th June 2007. The provisions of the PPA cannot be altered or modified without mutual consensus.
- (5) MoP vide the Order dated 11.05.2022 has made it clear that, in view of the settled position of law, once a binding contract has been entered, neither party can resile from the same nor the SERCs can alter any of the terms of the contract that has been mutually agreed upon by the parties.
- (6) The claim of the petitioner for compensation for loss of full generation for a period of 333 days during rehabilitation period is against the provisions in the Implementation Agreement signed by the Petitioner with GoK and the PPA signed by the Petitioner with KSEB Ltd.

Clause 6.6 of the Implementation Agreement is extracted below:

"6.6 Liability for other losses, damages etc.

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

Same provision exists under clause 13.6 of the PPA which states the following:

"13.6 Liability for other losses, damages etc.

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

4. The Commission admitted the petition as OP 49/2022. First hearing of the petition was conducted through video conference on 11.10.2022. The summary of the deliberations during the hearing is given below.

- (1) Shri. P.D Nair, Managing Director, M/s Viyyat Power Private Limited submitted the following.
 - (i) The 3 MW Iruttukanam SHP was one of the thirteen (13) small hydro projects (SHPs) allotted by the State Government in 2004 through tariff based competitive route. However, Iruttukkanam is the only project developed and commissioned out of the '13whole lot till date. The petitioner had entered into an Implementation Agreement (IA) with State Government on 10.12.2004 and a Power Purchase Agreement (PPA) with M/s KSEB Ltd on 07.06.2007. However, due to the unprecedented delay of 15 months caused by the Commission in giving tariff approval, the 6 months delay caused

by KSEB Ltd in insisting to get Government approval of an already approved draft PPA and the 12 months delay caused by Court interventions, totalling to 33 months delay for no fault of the developer, the project could be commissioned only on 04.11.2010. As a result, the cost of generation increased from Rs 2.22 /kWh to Rs 3.57/kWh making the project unviable and insolvent.

- (ii) The petitioner filed a Truing Up petition with the actual cost for re-determination of tariff, however the Commission by the Order dated 02.11.2010 rejected the petition. The petitioner developed an expansion project with an additional capacity of 1.5MW, which was commissioned on 10.04.2012.
- (iii) However, in the MahaPralayam that struck the state in August 2018, the power house was totally destroyed except the civil structure.

The petitioner decided to rebuild the power house rather than surrender it to the State Government. The Power Station was rebuilt completely with new equipment and new generators in less than a year and commissioned on 08.07.2019 at a total cost of Rs. 17.69 Cr. Out of it, Rs. 7.095 Cr was acquired from the insurance proceeds and balance Rs 7.00 Cr met from SBI loan.

The petitioner further submitted that, neither the Government, nor KSEB Ltd has given any relief or compensation for the disaster and for rebuilding the power house.

As the Petitioner has lost full generation and supply of energy to KSEB Ltd for the period from 9th August 2018 to 7th July 2019 (333 days) falling in Tariff Period I of the PPA, it was requested before the Commission to extend the Tariff Period I of the PPA by 333 days.

- (2) KSEB Ltd during the hearing submitted the following objections against the petition filed by M/s Viyyat Power Private Ltd for extending the Tariff Period-1 of the PPA by 333 days.
 - (i) The Commission vide the Order dated 20.04.2020 in petition OA No. 30/2019 had already examined the presumptive generation loss in revenue during the rehabilitation period. The petitioner has raised the settled issue again in some other form as “extension of Tariff Period-1.
 - (ii) The petitioner has filed appeal before the APTEL against the Order dated 20.04.2020 in petition OA No, 30/2019. Hence the matter is sub-judice.
 - (iii) The terms and conditions of a mutually agreed PPA cannot be amended or modified without the consent of the parties.

- (iv) MoP vide the Order dated 11.05.2022 has made it clear that, in view of a settled position of law, once a binding contract has been entered, neither party can resile from the same nor the Hon'ble Court can alter any of the terms of the contract that has been mutually agreed upon by the parties.
 - (v) The petitioner requested for extension of BOOT period. As the request of the petitioner for the extension of the BOOT period is still pending before the State Government, the prayer of the petitioner shall not be considered.
 - (vi) The rehabilitation was done without the approval of the State Government, KSERC and KSEB Ltd.
 - (vii) The petitioner has not claimed any compensation from "Dhurithaswasam", instead the petitioner opted for extension of the BOOT period.
 - (viii) The actual generation from the project was much higher than designed energy, mainly due to the additional water available from the catchment areas of Sengulam Augmentation Project of KSEB Ltd, which was badly delayed due to various reasons.
- (3) Shri. G. Ramnath, Under Secretary, Government of Kerala submitted that, the matter of extension of the BOOT period is pending before the State Government and shall take an appropriate decision after detailed examination.
- (4) Shri. Anoop Surendran, Energy Technologist, EMC submitted that, EMC has already given recommendations to the Government to extend the BOOT period by 8 years. The Tariff Extension period of 326 days requested by the petitioner is included in the BOOT period.
- (5) The Commission during the hearing directed the petitioner to clarify the following;
- (i) As directed by the Commission vide the Order dated 24.04.2020 in petition OA No. 30/2019, whether the petitioner had approached the State Government to extend the BOOT period.
 - (ii) Whether the Commission had the authority to extend the Tariff Period-1 by modifying the mutually agreed PPA.
- (6) Regarding the objections raised by KSEB Ltd and the clarifications sought by the Commission, the petitioner M/s Viyyat Power Private Limited clarified the following.
- (i) The petitioner in the petition has requested to extend the Tariff Period-1, whereas the matter is pending before the State Government for extension of the BOOT period. These are two different issues.

- (ii) As per the Section 64 of the Electricity Act, 2003, the Commission has the authority to extend or modify the Tariff period, even for the concluded PPAs without the consent of the parties.
 - (iii) The rehabilitation of the project was done based on the recommendations of the Chief Engineer Civil, Sri. Radhakrishnan, who is now the Director of KSEB Ltd.
5. The Commission noted that, the project developer M/s Viyyat Power Private Ltd (petitioner in this petition) was selected through tariff-based bidding by the State Government. Further, the State Government had signed an implementation agreement with the petitioner on 10.12.2004. The implementation agreement deals with the various aspects of the project during the construction and operation of the project including the BOOT period, obligations of the petitioner, force majeure events, termination of the agreement, transfer of the project after the BOOT period etc. Considering these aspects in details, the Commission desires to have the considered opinion of the State Government on the issue of extension of the Tariff Period-1 of the project as requested by the petitioner.
6. The Energy Management Centre has also not yet filed its written comments on the petition filed by M/s Viyyat Power Private Limited.
7. Based on the deliberations during the hearing, the Commission hereby issue the following directions to the petitioner and the respondents for immediate compliance, latest by 28.10.2022.
- (1) The State Government shall file its decision and order on the issue of the extension of Tariff Period-1 by 333 days , i.e., upto 01.08.2023, with a copy to the petitioner M/s Viyyat Power Private Limited and the respondent KSEB Ltd.
 - (2) Energy Management Centre (EMC) shall also file its detailed comments within the time stipulated with a copy to petitioner and the respondents.
 - (3) The petitioner M/s Viyyat Power Private Limited and the respondent KSEB Ltd shall file its additional comments, if any, before the Commission.

The next hearing on the petition is scheduled on 02.11.2022 at 11:00 AM.

Sd/-
Adv. A J Wilson
Member (Law)

Approved for issue

Sd/-
C R Satheeshchandran
Secretary