

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

Present: **Shri. Preman Dinaraj, Chairman**

RP 02/2020

In the matter of : Petition seeking review of the order dated 14-2-2020 in OA 29/2019 in the matter of recovering the additional cost incurred during the period April 2019 to June 2019 over approved level on Generation and Power Purchase due to variation in cost of fuel, from all consumers including Bulk Consumers and other Licensees.

Petitioner : Kerala State Electricity Board Limited

RP 04/2020

In the matter of : Petition seeking review of the order dated 27-4-2020 in OA 02/2020 in the matter of recovering the additional cost incurred during the period Jul-2019 to Sep-2019 over approved level on Generation and Power Purchase due to variation in cost of fuel, from all consumers including Bulk Consumers and other Licensees.

Petitioner : Kerala State Electricity Board Limited

Common Order dated 14.08.2020

RP No 02/2020

1. KSEB Ltd on 30.03.2020, filed a review petition against the Order dated 14.02.2020 in OA 29/2019, with following prayers.
 - (1) To review the Order dated 14-02-2020 in Petition No. OA 29/2019 and to allow passing on the additional fuel cost incurred against the Power Supply Agreements (PSAs) entered into with Jindal India Thermal Power Ltd, Jindal Power Ltd and Jhabua Power Ltd under Bid 2 of Design, Build, Finance, Own and Operate (DBFOO).

- (2) To issue appropriate directions on the drawal of power contracted against these PSAs, if Hon'ble Commission is not inclined to pass on the liabilities of 350MW PSAs executed on DBFOO basis under Bid 2.”

2. Summary of the issues raised in the petition by the petitioner KSEB Ltd in the review petition is given below:

- (1) To meet the energy demand of the State, KSEB Ltd entered into 865 MW long-term PSAs through two tariff based competitive bids invited under DBFOO guidelines issued by Ministry of Power (MoP), Govt. of India (GoI) during November 2013. The State Government vide Order dated 20.12.2014 accorded sanction for the long term procurement after obtaining the advice from the State Planning Board. Subsequently, KSEB Ltd entered into PSAs for the long term procurement for a period of 25 years from 1st December 2016 and 1st October 2017 with the L1 and L2 bidders of Bid-1 and L-1 to L-5 bidders of Bid-2, as given below.

Sl No.	Power Supplier	Region	Power (MW)	Tariff (Rs/kWh)	PSA Date	To be supplied from
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
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			

- (2) On 26.02.2015, the petitioner submitted copies of the signed PSAs before the Commission for adoption of tariff. Subsequently, as directed by the Commission, KSEB Ltd on 20.04.2015, the petitioner filed formal petition before the Commission for adoption of tariff as per Section 63 of the Electricity Act, 2003 (EA). The generators applied for Long Term Access (LTA) before the Central Transmission Utility (CTU) on 30.12.2014 and 31.12.2014. Based on the orders of Central Electricity Regulatory Commission (CERC) dated 16.02.2015 and 03.07.2015, and meetings held with POWERGRID and POSOCO, CTU granted LTA on 01.10.2015 with certain conditions, due to the transmission constraints which prevailed then.
- (3) The Commission vide Order dated 30.08.2016 in OP No.13/2015 approved and adopted the tariff of the L1 bidders under Bid-1 and Bid-2, namely 200 MW from Jindal Power Limited (Bid-1) and 100 MW from BALCO (Bid-2). The Commission further ordered that, the power purchase from 5 remaining bidders would be approved only after

getting the approval for the deviations in the bidding guidelines from the MoP, Gol and views of the State Government on the bidding process. Accordingly, KSEB Ltd, on 07.09.2016 approached the State Government and on 15.09.2016 approached the MoP, Gol through the State Government.

- (4) In view of the failure of the monsoon in 2016-17, KSEB Ltd sought the approval of the State Government and the Commission to schedule 115 MW power from M/s Jhabua Power Ltd from December 2016 onwards and the State Government vide Order dated 30.11.2016 granted approval for the same. The Commission vide Order dated 22.12.2016 granted provisional approval subject to certain conditions as requested by KSEB Ltd.
- (5) Out of the remaining PSAs which were not approved by the Commission, 100 MW PSA executed with M/s East Coast Energy Pvt. Ltd., could not fructify since the plant did not achieve commercial operations (COD). Therefore, the approval of the following PSAs under DBFOO contract remained not approved by the Commission.
- (i) Jindal India Thermal Power Ltd (100MW)
 - (ii) Jindal Power Ltd (150 MW)
 - (iii) Jhabua Power Ltd (100 MW)

The matter of approval of the remaining PSAs under Bid-2 was again taken up with the State Government (GoK) vide letters dated 10.05.2017, 03.07.2017 and 22.09.2017. Subsequently, GoK vide Order dated 21.10.2017 permitted KSEB Ltd to draw power from the entire DBFOO contracts, pending detailed consideration of the matter, and also stated that final orders in the matter shall be issued in due course. Thereafter, the Commission vide letter dated 22.10.2017 allowed KSEB Ltd to schedule the contracted power under DBFOO in view of the State Government Order dated 21.10.2017. The Commission further clarified that, they may approve the power purchase including the rate for the pending approvals under DBFOO only after the MoP, Gol and GoK give the final approval for the entire purchase under DBFOO. Based on the above, the petitioner has been scheduling power from these stations and making payments to them as per the terms and conditions of the unapproved PSAs.

- (6) KSEB Ltd further submitted that, the terms and conditions of all PSAs entered into with the bidders under DBFOO frame work is the same and is in compliance with the standard bidding documents notified by MoP, Gol under Section 63 of the EA. Since L1 matching is made on the bid date, as per the PSA, the rates applicable for each month may vary due to the difference in the availability, price and grade of coal delivered by coal supplier to each generator.

- (7) KSEB Ltd also submitted that, the Commission vide Order dated 08.07.2019 in OA No. 15/2018 in the matter of approval of the 'ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22' has approved the source wise details of the power purchase and the cost from various sources including 'Central Generating Stations (CGS)' and also the power purchase under long term contracts from private Independent Power Producers (IPPs). While doing so, the Commission has considered scheduling the entire power from PSAs of Bid-2. However, since the required approvals from Gol and GoK were awaited, the Commission provisionally considered the rate of power from Balco, which is the L1 of Bid 2 for estimating the ARR&ERC for the control period, in respect of the other generators in Bid 2 (350 MW). The relevant portion of the order is extracted below:

"Purchase of power from projects under DBFOO

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 emphasizes 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 31-8-2016. It is relevant here to note that the Commission in their Order on suo-motu determination of Tariff dated 17-4-2017 had approved Rs.4.00 per unit for the purchase of additional quantity of power for meeting the deficit from traders and exchanges. "

- (8) Meanwhile, KSEB Ltd requested the Gol to approve the deviations that they made to the standard bidding guidelines. In response, the MoP, Gol vide letter dated 11.12.2019 rejected KSEB Ltd's request stating that, *"deviations as pointed out by the KSERC would have been got vetted and approved by the Central Government before the issuance of RFQ, RFP and PSA and not at 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".*

KSEB Ltd thereafter took the view that there were no deviations in the Request for Quotations (RfQ), Request for Proposal (RfP) and Power Supply Agreement (PSA) issued by the petitioner while inviting bids

and the deviations pointed by the Commission was only in respect of their evaluation process.

- (9) KSEB Ltd further submitted that they filed the fuel surcharge petition before the Commission for the period from April 2019 to June 2019 on 27.09.2019. This was to claim a fuel surcharge of Rs 72.75 crore in accordance with Regulation 86 of the Tariff Regulations, 2018. In this petition, KSEB Ltd had also included Rs 6.28 crore towards fuel surcharge for the 350 MW DBFOO contracts under Bid-2, for which the scheduling of power was permitted by the Commission. However, it is a fact that these PSAs were not approved by the Commission for reasons mentioned in pre-paras.

For estimating the fuel surcharge for these 350 MW DBFOO contracts under Bid-2, KSEB Ltd had estimated the fuel surcharge as the difference between the actual Variable Cost and the Variable Cost adopted in the MYT petition dated 30.10.2018. If the approved Variable Cost of BALCO who was L1 in Bid-2 is adopted for estimating the additional liability, it would amount to Rs 20.67 crore.

- (10) The Commission vide Order dated 14.02.2020, while approving the fuel surcharge for the first quarter April-2019 to June 2019 did not approve the excess amount incurred for procuring power from the above sources. The relevant portion of the Order of the Commission is extracted below.

“The Commission, vide the letter dated 22.12.2017 allowed KSEB Ltd to schedule the above contracted power, in view of the order of the State Government GO (Ms) No. 22/2017/PD dated 21.10.2017. The Commission had in the said letter clearly mentioned that, the approval of the power purchase mentioned above including the rate of the DBFOO contracts shall be given, only after getting approvals from Government of India for the deviations from the standard bidding documents issued by Ministry of Power, Government of India and after getting the approval of the Government of Kerala on the entire power purchase under DBFOO.

While approving the ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22, the Commission stated as follows.

“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”.

The Commission noticed from the invoices and other documents submitted by KSEB Ltd that, the actual tariff paid by KSEB Ltd for procuring power from these three sources were much higher and amounted to Rs.22.38 crore more when compared to the L1 rate of Rs.4.15 per unit paid to BALCO which is the L1 of Bid-2. As mentioned above, the Commission vide its order dated 22.12.2017 had allowed KSEB Ltd, to schedule the contracted power from these three generators subject to conditions and while approving the ARR & ERC and tariff for the MYT period 2018-19 to 2021-22, the Commission had considered the rate equivalent to the cost of power from BALCO for estimating the cost of power provisionally from these three generators. The Commission reiterate that, during the truing up of accounts for the respective financial years, such excess amount incurred for procuring power from these three generators shall not be considered, unless KSEB Ltd gets the approval of power purchase from Government of India for the deviations from the guidelines and on getting the approval of the Government of Kerala on the entire power purchase under DBFOO.”

- (11) KSEB Ltd further submitted that, the Order equating the rates applicable in the PSA of M/s BALCO with that of other PSAs is an apparent error on the face of records. The L1 rate of BALCO as on the bid date was Rs 4.29/unit. However, the rate recorded by the Commission in the above Order was Rs 4.15/unit, which is not the L1 rate, but the rate in respect of BALCO for certain months and which was dependent upon a number of internal and external factors which changes from month to month. Power from these sources are being scheduled by the petitioner, based on the scheduling allowed by the Commission and payments are made strictly in accordance with the terms of the PSA notified by MoP, GoI. Denying the bonafide expense on the basis of it being disallowed by the Commission is an apparent error to be set right by the Commission.

Further, the Order of the Commission not to allow the additional amount incurred over and above the rates of L1 bidder in Bid-2 during the truing up stage as well; unless MoP, GoI and GoK approvals are obtained goes beyond the scope of the petition, putting the entire power procurement under question, continuation or otherwise to which a direction from the Commission is required.

- (12) KSEB Ltd further submitted the following in this review petition.
- (i) As per the provisions of the EA and the judgment of the Hon'ble Supreme Court dated 11.04.2017 in CA 5399-5400 of 2016 and also as per the various orders of the Commission, the State Commission do not have jurisdiction in respect of determination or re-determination of tariff of interstate generating stations. The

terms and conditions of the PSA has to be as per the standard bid documents notified by the Gol under Section 63 of the EA-2003. The tariff of the L1 under Bid-2 is adopted by the Commission. The Commission has also allowed to draw power from the L2, L3 and L4 generators under Bid-2. Hence, the rate of power in respect of these generators during the tenure of PSAs can be allowed by this Commission only in accordance with the standard PSA notified by MoP, Gol.

- (ii) The Commission in OP No. 12/2018 filed by M/s Jhabua has decided that the Commission does not hold jurisdiction to go into the provisions in the PSA for the interstate sale of power contracted therein. Accordingly, the Order of the Commission that any amount paid to other generators over and above the rate at which payment is made to M/s BALCO will not allowed at the time of truing up is an apparent error on face of records.
- (iii) In case the Commission is not inclined to pass over the liabilities under the PSAs, it amounts to rejection of the respective PSAs. In such a case, it would be inappropriate to contract power against these PSAs. Therefore, there is ambiguity in administering these PSAs and the same needs to be rectified through appropriate directions.

KSEB Ltd further submitted that, if the Commission is not inclined to pass on the entire liabilities of the 350MW PSAs executed on DBFOO basis under Bid-2, then the Commission may issue appropriate orders on continuation or otherwise of the drawal of power against these PSAs.

The Commission admitted the petition as RP No. 02/2020.

RP No. 04/2020

- 3. KSEB Ltd on 04.06.2020, filed a review petition against the Order of the Commission dated 27.04.2020 in OA No. 02/2020, with the following prayers:
 - (1) To review the Order dated 27-4-2020 in Petition No. OA 2/2020 and allow passing on the additional fuel cost incurred against the PSAs with Jindal India Thermal Power Ltd, Jindal Power Ltd and Jhabua Power Ltd under Bid 2 of DBFOO.
 - (2) To issue appropriate directions on the drawal of power contracted against these PSAs, if the Commission is not inclined to pass on the liabilities of 350MW PSAs executed on DBOO basis under Bid 2.

4. The summary of the issues raised by the petitioner KSEB Ltd in this petition is extracted below.

- (1) KSEB Ltd on 19.11.2019 filed a petition before the Commission for the approval of fuel surcharge amounting to Rs 57.98 crore, for the second quarter of the financial year 2019-20 from July 2019 to September 2019.
- (2) The Commission in its Order dated 27-04-2020, while approving the fuel surcharge petition has not approved the amount additionally incurred due to change in cost of fuel in respect of the 350MW power contracted under bid-2 of DBFOO based contracts. The relevant portion of the order is extracted below:

“18.” KSEB Ltd has claimed fuel surcharge for the following DBFOO contracts of Bid-2 invited by KSEB Ltd, for which the Commission neither granted approval of the PPA nor adopted the tariff as per Section 63 of the Electricity Act, 2003.

- (i) 100 MW power from M/s Jindal India Thermal Power Ltd, New Delhi.*
- (ii) 100 MW from M/s Jhabua Power Limited.*
- (iii) 150 MW from M/s Jindal Power Limited.*

The Commission, vide the letter dated 22.12.2017 allowed KSEB Ltd to schedule the above contracted power, in view of the order of the State Government GO (Ms) No. 22/2017/PD dated 21.10.2017. The Commission had in the said letter clearly mentioned that, the approval of the power purchase mentioned above including the rate of the DBFOO contracts shall be given, only after getting approvals from Government of India for the deviations from the standard bidding documents issued by Ministry of Power, Government of India and after getting the approval of the Government of Kerala on the entire power purchase under DBFOO.

While approving the ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22, the Commission stated as follows.

“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 31-8-2016”.

The Commission noticed from the invoices and other documents submitted by KSEB Ltd that, the actual tariff paid by KSEB Ltd for procuring power from these three sources were much higher and amounted to Rs.22.75 crore more when compared to the L1 rate of Rs.4.31 per unit paid to BALCO which is the L1 of Bid-2. The Commission further notes that the additional payment under the three DBFOO

contracts amounts to Rs 45.13 crore for the first six months of the FY 2019-20. As mentioned above, the Commission vide its order dated 22.12.2017 had allowed KSEB Ltd, to schedule the contracted power from these three generators subject to conditions and while approving the ARR & ERC and tariff for the MYT period 2018-19 to 2021-22, the Commission had considered the rate equivalent to the cost of power from BALCO for estimating the cost of power provisionally from these three generators. The Commission reiterate that, during the truing up of accounts for the respective financial years, excess amount, if any, incurred for procuring power from these three generators shall not be considered, unless KSEB Ltd gets the approval of power purchase from Government of India for the deviations from the guidelines and on getting the approval of the Government of Kerala on the entire power purchase under DBFOO.”

- (3) The Commission had taken a similar stand while allowing fuel surcharge for the power purchase contracts under Bid-2 of DBFOO for the first quarter of the FY 2019-20 from April 2019 to June 2019 vide the Order dated 14.02.2020 in OA 29/2019. KSEB Ltd filed a review petition on 30.03.2020 before the Commission against the said Order dated 14.02.2020. The Commission admitted the petition as RP 02/2020,
- (4) In this Review Petition, KSEB Ltd raised the same grounds raised in the earlier Review Petition RP No. 02/2020, which was extracted under paragraphs 2(1) to 2(9) and 2(12) above.
- (5) KSEB Ltd further submitted the following in this review petition dated 04.06.2020.
 - (i) The petition dated 19.11.2019 for approving the fuel surcharge amounting to Rs 57.99 crore for the second quarter of the FY 2019-20 from July-2019 to September-2020, include the fuel surcharge of Rs 5.18 crore in respect of 350 MW DBFOO contracts of Bid-2 for which approval of the Commission is awaited, but drawal was allowed. The additional liability as fuel surcharge is arrived as the difference between the actual variable cost and the estimate of variable cost used in the MYT petition dated 31.10.2018.
 - (ii) If the approved variable cost of BALCO is to be used for the estimation of additional liability, the liability towards fuel surcharge should be Rs 19.63 crore.
 - (iii) The Order of the Commission dated 27.04.2020, equating rates applicable in the PSA of M/s BALCO with that of other PSAs is an apparent error on the face of records. L1 rate of BALCO as on the bid date was Rs 4.29/unit and the rate recorded by the Commission in the above Order was Rs 4.31/unit, which is not the L1 rate, but is the variable cost in respect of BALCO for certain months, which is dependent on number of internal and external factors and bound to change from month to month. The rate of BALCO for the first quarter of the FY 2019-20 was Rs

4.15/unit. The charges payable are dynamic in nature based on pre-determined internal and external factors.

- (iv) Power from these sources are being drawn by the petitioner based on the orders of the Commission and the payments are strictly in accordance with the terms of the PSA notified by MoP, Gol. Denying the bonafide expense met, based on authentication from the Commission is an apparent error to be set right by the Commission. Further, the Order of the Commission not to allow the additional amount incurred over and above the rates of L1 bidder in Bid-2 during the truing up stage as well unless Government approvals are in place, has gone beyond the scope of the petition, and has put the entire power procurement under question, continuation or otherwise of which requires direction from the Commission.

The Commission admitted the petition as RP No. 04/2020.

5. The Commission conducted public hearing on both the petitions RP 02/2020 and RP 04/2020 through video conference on 15.07.2020. List of participants who participated in the hearing is given in Annexure-1.
6. During the hearing, Sri. K.G.P Nampoothiri, Executive Engineer, KSEB Ltd presented the petition on behalf of the petitioner. Summary of the issues raised during the hearing is given below:
- (1) There is apparent error in the Orders dated 14.02.2020 and 27.04.2020 in approving fuel surcharge for the third and fourth quarter of the FY 2019-20 in the following-
 - (i) Equating rates assumed in the ARR for BALCO with that of other PSAs while calculating fuel surcharge.
 - (ii) Tariff of different PSAs cannot be equated as per DBFOO guidelines.
 - (2) The Order of the Commission that the additional amount incurred over and above the rates of L1 bidder in Bid 2 will not be allowed during the truing up stage unless approvals are in place is beyond the scope of the petition filed for approval of fuel surcharge.
 - (3) KSEB Ltd does not intend to challenge the Order, but is constrained to come out of the PSA, if the Commission is not allowing the tariff. Hence, the Commission may issue suitable direction for continuation of the PSA.
 - (4) Bid-2 tariff of the L1 (Rs 4.29/unit) is adopted by the Commission. All the PSAs under Bid-2 are signed as per this adopted tariff. Separate adoption of fixed cost and variable cost is not envisaged in EA-2003 and MoP guidelines.

- (5) L1 rate of BALCO as on bid date was Rs 4.29/unit and the rate recorded by the Commission in the fuel surcharge order for 1st quarter is Rs 4.15/unit and second quarter is Rs 4.31/unit, which are not the L1 rate. The actual rates depend on number of internal and external factors and is bound to change from month to month.
 - (6) KSEB Ltd further submitted that, the long-term PSAs are executed as per the Order approving the ARR&ERC for the FY2014-15. Further, short term market rates are highly fluctuating and widely depending on the market conditions. Further, short term market is highly risky and not reliable. In addition, optimum power procurement includes a basket of long term, medium term and short-term markets.
 - (7) KSEB Ltd also submitted that, the DBFOO contracts are economically viable than recently commissioned Central Generating Stations (CGS). Hence the observation of the Commission that the tariff under DBFOO contracts are higher is not correct.
 - (8) Considering the above, KSEB Ltd requested to review the Order dated 14.02.2020 in petition OA No. 29/2019 and Order dated 27.04.2020 in petition OA No. 02/2020.
7. Sri Ratheesh Kumar, English India Clay Limited requested the Commission to direct KSEB Ltd to make available the details of the fuel surcharge collected from the consumers on monthly basis. KSEB Ltd clarified that the said details are available at their website.
 8. Sri Prabhakaran representing HT & EHT Association requested the Commission that, the date of implementation of the orders on fuel surcharge may be made only from 1st of the month so as to avoid confusion on taking meter readings when such orders are implemented from a particular date. KSEB Ltd clarified that, they had no objections to such a proposal.
 9. Sri Satheesh A R submitted that the decision of the Commission cannot be questioned in a review petition. A review petition can be entertained only on the following three grounds:
 - (i) discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the decree was passed or order made,
 - (ii) on account of some mistake or error apparent on the face of the record,
 - (iii) for any other sufficient reason.

If KSEB has any objection on the decision of the Commission, it may prefer an appeal before Hon. APTEL under Section 111 of the Act.

Mr. Satheesh further pointed out that, the submission of KSEB Ltd that the price has been matched for all the PSAs is not correct. Further, the contention

of KSEB Ltd that the Commission has allowed to draw power without specifying the rate is not correct, since the Commission has clearly explained in the letter permitting drawal of power that, approval will be considered only after getting approval of Government of Kerala and Government of India. Any Power Purchase Agreement without the approval of the Commission cannot be termed as an agreement.

Mr. Satheesh also remarked that, long-term agreements are not required at this point of time when there is surplus power in the country. Hence, he suggested that the Agreements must be terminated. He also submitted that the practice followed by KSEB Ltd is to seek approval of the Commission after entering into agreements cannot be allowed.

10. Smt Prini, representing Carborandum Universal submitted that, PSAs signed by KSEB Ltd with various generators may be made available at their website. KSEB Ltd clarified that it is already available in their website.
11. In compliance of the direction issued by the Commission based on the deliberations during the hearing held on 15.07.2020, KSEB Ltd vide the submission dated 17.07.2020 submitted the following regarding.
 - (i) As per the Section 63 of the EA-2003, in case of power procurement through bidding in accordance with the guidelines issued by the Central Government, there will be only adoption of tariff and no separate approval of the terms and conditions of the PSA is envisaged.
 - (ii) In the instant case, the tariff determined through the bid process for L1 in Bid-2 was adopted by the Commission vide the Order dated 30.08.2016. Further, the Commission vide letter dated 22.12.2017 has allowed drawal of entire quantity contracted under Bid-2.
 - (iii) Scheme of the EA does not envisage the separate approval of the terms and conditions in the PSAs of Jindal India Thermal Power Limited, Jindal Power Limited and Jhabua Power Limited under Bid 2 of DBFOO totalling to 350 MW.

Regarding the second prayers in both the petitions, KSEB Ltd submitted as follows.

“On the second prayer in the review petition regarding issue of appropriate directions on the drawal of power contracted against these PSAs, if Hon’ble Commission is not inclined to pass over the liabilities of 350MW PSAs executed on DBOO basis under Bid 2, Hon’ble Commission stated that the issue is purely an administrative decision of KSEBL to decide on whether to avail power from these PSAs. In this matter, following are submitted:

- a) As per Section 86(b) of the EA,2003, Hon’ble Commission is the authority to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the

generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

Quote:

“Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: - (b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;.”

Unquote:

- b) “Invoking the above powers envisaged under the EA,2003, Hon’ble Commission vide letter dated 22.12.2017 has allowed the petitioner to schedule the entire contracted power under DBFOO. The word ‘contract’ mentioned therein has to be necessarily the PSAs executed with these generators under DBFOO as there are no other contracts between KSEBL and these generators. Therefore, the observation of the Commission that the word ‘contract’ refers to only quantum of power and not the PSA is not correctly aligned to the decisions already communicated to KSEBL by Hon’ble Commission.
- c) In view of the powers conferred on this Hon’ble Commission under Section 86 of the Act, read along with the decision conveyed through the letter dated 22.12.2017 and the power sources approved by the Hon’ble Commission for the current control period any decision to stop or otherwise restrict drawal from these generating stations can be taken by the petitioner only based on appropriate directions of Hon’ble Commission and therefore the matter cannot be limited only to an administrative decision of KSEBL.
- d) Moreover, in the MYT order dated 8-7-2019, Hon’ble Commission has considered schedule from all these contracts for assessing the power purchase expenses of KSEBL for the entire control period. This has been made as per the petition of KSEBL. By stopping the schedule from these contracts, the power purchase approved by Hon’ble Commission in the MYT order also gets changed, which cannot be made by KSEBL without the explicit approval of Hon’ble Commission, in view of the mandate of Section 86 of the Act.
- e) Therefore, it is submitted that any decision of stopping the drawal of power from these stations has to be only with the approval of Hon’ble Commission and not entirely based on an administrative decision of KSEBL alone.
- f) It is further submitted that as presented before Hon’ble Commission during the public hearing, the rate of power from all the DBFOO contracts are lower than most of the PPAs with stations whose tariff is determined by CERC. Stopping the schedule from these stations and thereby scheduling costlier stations which in turn will adversely impact the merit order scheduling mandated under the Act and tariff Policy and thus cannot be carried out without the approval of Hon’ble Commission.”

Analysis and Decision of the Commission

12. The Commission has carefully examined KSEB Ltd.'s submissions in the following review petitions as per the provisions of the EA and Regulations notified by the Commission.
- (1) Review petition RP No. 02/2020, dated 30.03.2020, filed against the Order dated 14-2-2020 in OA 29/2019 in the matter of approval of 'Fuel surcharge for the first quarter of the year 2019-20' from April-2019 to June 2019.
 - (2) Review petition RP No. 04/2020, dated 04.06.2020, filed against the Order dated 27.04.2020 in OA 02/2020 in the matter of approval of 'Fuel surcharge for the second quarter of the year 2019-20' from July - 2019 to Sep 2019.
13. Section 94 of the Electricity Act, 2003 deals with the jurisdiction of the Commission regarding reviewing its decisions orders and directions, which is extracted below for ready reference.
- (i) Section 94 of the Electricity Act-2003, provide as follows:

*“ (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** 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.:*
 - (ii) Order 47 rule 1 of the Code of Civil Procedure dealing with review of the orders and decisions of a Civil court is quoted below:

“

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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation : The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment."

As extracted above, as per the Section 94 of the EA and Order 47 Rule 1 of the Code of Civil Procedure, the review jurisdiction of the Commission is very limited. For reviewing its decisions, the discovery of new and important matter or evidence, which was not within the knowledge of the petitioner 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 face of record, or for any other sufficient reason is required.

14. Commission has examined in detail the review petitions filed by KSEB Ltd as per the provisions of the EA and the Regulations notified by the Commission. The only issue raised in these Review Petitions is regarding the non-consideration of the additional liability claimed by the petitioner as fuel surcharge in respect of three DBFOO contracts under Bid 2, namely Jindal India Thermal Power Ltd (100MW), Jhabua Power Ltd (100 MW) and Jindal Power Limited (150MW), for which adoption of tariff and approval of PSA has not been accorded by the Commission due to want of approvals from the Central Government and State Governments for the deviations from the bidding guidelines notified by the Central Government as directed vide the Commission's Order dated 30.08.2016.
15. In order to understand the sequence of events and the background of the issue and the reasons for the refusal to provide ex-post facto approval to the deviations from the approved bidding guidelines to these DBFOO contracts by the Central Government, the Commission examined the factual positions of the subject matter and noted the following:
 - (1) The Central Government, vide Resolution dated 9th November 2013 notified the Guidelines for Procurement of Electricity from Thermal Power Stations set up on Design, Build, Finance, Own and Operate (DBFOO) basis. The Central Government also issued model bidding

documents to be adopted by the distribution licensees for procurement of power through open and transparent process of competitive bidding from the thermal power generating stations constructed and operated on DBFOO basis.

Paragraph 4 of the said Guidelines notified by the Central Government prescribed as follows.

“Any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government. Provided, however, that any project specific modifications expressly permitted in the Standard Bidding documents shall not be construed as deviations from the Standard Bidding Documents”

From the above, it is clear that the distribution licensees are permitted to make any deviations from the Standard Bidding Documents only with the prior approval of the Central Government.

- (2) KSEB Ltd on 21.04.2015, filed a petition before the Commission for the adoption of tariff determined under Section 63 of the Electricity Act, 2003 for the following 865 MW of power procured by it on ‘Design, Build, Finance, Own and Operate (DBFOO)’ basis in the open bid process. KSEB Ltd had claimed that the bidding process had complied with the requirements of Section 63 of the Electricity Act, 2003 and adhered to the Standard Bidding Documents notified by the Government of India.

Details of PSAs executed by KSEB Ltd - 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 - 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

- (3) The Commission had examined the submission of KSEB Ltd in this petition and noted that there were significant deviations to the Standard Bidding Documents notified by the Central Government. Though KSEB Ltd had submitted during the hearing that there were no deviations, this statement of KSEB Ltd is factually incorrect and included the following unauthorised deviations:
- (a) KSEB Ltd has not followed the provisions in the Guidelines issued by the Central Government for processing the offers other than the L1 offers received in both Bid-1 and Bid-2, but had adopted the provisions of the repealed RFP guidelines issued by MoP on 22.07.2010 without the approval of the Central Government.
 - (b) Without complying with the Gol guidelines, KSEB Ltd selected the L2 bidder in Bid-1 at a rate higher than the L1 rate in Bid-1.
 - (c) In Bid-2, KSEB Ltd accepted offers for a total of 550 MW as against the bid quantum of 400 MW. This excess procurement by KSEB Ltd is not in accordance with the guidelines issued by the Government of India.
- (4) Since these deviations were significant, did not have the prior approval of the Central Government and had vitiated the bidding process, the Commission vide detailed Order dated 30.08.2016 in OP No. 13 of 2015, disposed the petition with the following orders.

Analysis and Order of the Commission

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)	<i>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.</i>
(b)	<i>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.</i>
(c)	<i>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.</i>
(d)	<i>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.</i>
(e)	<i>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.</i>

- (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.*

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 extracted above, the Commission vide the Order dated 30.08.2016 adopted the tariff of L1 bids only, under Bid-1 and Bid-2 of DBFOO contracts entered by KSEB Ltd. Regarding the bidding process, though KSEB Ltd submitted that they had adhered to the Central Government Guidelines, this statement is factually incorrect. The Commission had noted that KSEB Ltd had adopted certain deviations from the notified bidding documents, especially for the evaluation and selection of bidders without the prior approval of the Central Government as required under Para 4 of the Guidelines as mentioned in pre-paras.

Hence, the Commission vide Order dated 30.08.2016 in OP No. 13 of 2015, ordered that the power purchase from the bidders other than L1 bidder in Bid-1 and Bid-2 will be considered on getting approval from Government of India for the deviations from the guidelines and on

getting the views from the Government of Kerala on the DBFOO contracts. ***This Order of the Commission is binding on KSEB Ltd since the same has not been challenged.***

Regulation 67 of the KSERC (Conduct of Business) Regulations, 2003 permits KSEB Ltd to file review petition before the Commission with in the time stipulated therein, if there is any error in the order of the Commission. The relevant Regulations is extracted below.

“67. Powers of review, - (1) Any person or party affected by a decision, direction or order of the Commission may, within forty-five days from the date of making such decision, direction or order apply for the review of the same.

(2) An application for such review shall be filed in the same manner as a petition under Chapter III of these regulations.

(3) The Commission may after scrutiny of the application, review such decisions, directions or orders and pass such appropriate orders as the Commission deems fit within forty-five days from the date of filing of such application:

Provided that the Commission may, at its discretion, afford the person or party who filed the application for review, an opportunity of being heard and in such cases the Commission may pass appropriate orders as the Commission deems fit within thirty days from the date of final hearing:

Provided further that where the application for review cannot be disposed of within the periods as stipulated, the Commission shall record the reasons for the additional time taken for disposal of the same”.

As seen from the above Regulation, KSEB Ltd had the right to file a review petition in case they felt aggrieved by any infringement or deviation from the prescribed Regulation in the Commission's Order dated 30.08.2016. However, KSEB Ltd had to file the review petition before the Commission against the Order within 45 days from the date of the Order. Alternatively, KSEB Ltd if it felt aggrieved by the above Order of the Commission, also had the option to seek legal remedies by filing an Appeal Petition before the Hon'ble APTEL as per Section 111 of the EA-2003. However, KSEB Ltd neither filed any review petition before the Commission nor did it prefer any Appeal Petition before Hon'ble APTEL against the said Order. Hence the Order of the Commission has become binding on KSEB Ltd.

Subsequently, as requested by KSEB Ltd and also in view of the decision of the Government of Kerala dated 31.11.2016, the Commission vide Order dated 22.12.2016 provisionally approved the purchase of 115 MW power from M/s Jhabua Power Ltd. The relevant portion of the order is extracted below:

“ 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.”

In the meanwhile, the PSA executed with M/s East Coast Energy Pvt. Ltd. did not materialise since the plant did not achieve the CoD as per schedule. Accordingly, the adoption of tariff and approval of PSAs of the following three power purchase contracts on DBFOO basis with a total capacity of 350 MW was not approved by the Commission for want of approval of the Central Government for the deviations in the bidding documents incorporated by KSEB Ltd, and also the views of the State Government on this power purchase.

Sl. No.	Power Supplier	Region	Power (MW)	Tariff (Rs/kWh)	PSA Date	To be supplied from
1	Jindal India Thermal Power Ltd	ER	100	4.29	29-12-2014	Oct-17
2	Jhabua Power Limited	WR	100	4.29	26-12-2014	Oct-17
3	Jindal Power Limited	WR	150	4.29	29-12-2014	Oct-17
	Total		350			

In the meanwhile, as requested by KSEB Ltd and duly considering the order of the State Government GO (Ms) No. 22/2017/ PD dated 21.10.2017, the Commission vide the letter dated 22.12.2017, allowed KSEB Ltd to schedule 350 MW of contracted power from the above suppliers. Relevant paragraph of the letter of the Commission dated 22.12.2017 is extracted below.

“ In view of the State Government order dated 21.10.2017, KSEB 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”

The Commission also made it clear to KSEB Ltd that the GO dated 21.10.2017 is only an interim measure and final orders were required from the State Government to fulfil one of the conditions laid down in the Order of the Commission dated 30.08.2016.

- (5) KSEB Ltd on 31.10.2018, filed the petition for the approval of the Aggregate Revenue Requirement and Expected Revenue from Charges (ARR&ERC) for the MYT period from 2018-19 to 2021-22. In the said petition, KSEB Ltd included the scheduling of 350 MW of power from the above three DBFOO contracts. In the Order dated 08.07.2019 in OA No. 15/2018, in the matter of approval of ARR, ERC and Tariff Order for the MYT period from 2018-19 to 2021-22, the Commission considered the schedule of power from these stations as proposed by KSEB Ltd. However, the Commission did not approve the power purchase cost as proposed by the licensee. The relevant portion of the Order of the Commission 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 extracted above, in the Order dated 08.07.2019, the Commission had considered the scheduling of power from the above DBFOO contracts. Further, the Commission’s intent on the price to be paid is very clearly brought out in the above Order and was meant only to estimate the power purchase cost and not for any approval or payment purpose. The rate of power purchase used for the above purpose was the **RATE** of power from BALCO, which is the L1 in Bid-2. In the said Order, the Commission made it clear that the above consideration was only for estimating the cost of power purchase provisionally for estimating the ARR of KSEB Ltd for the MYT period. It is also made clear that, the above consideration shall not construe as an approval of the power purchase, rate or of the PPA itself as per the Section 63 of the EA-03. The approval for the power purchase can be considered

only after fulfilment of the conditions specified in the Order dated 30.08.2016.

As discussed above, the Commission neither adopted the tariff nor approved the PSAs of the three DBFOO contracts. Hence, the Commission cannot consider the terms and conditions of the PSAs signed by KSEB Ltd under these contracts. KSEB Ltd, while irregularly awarding the contract to L2, L3 and L4 bidders in Bid-2 had mentioned that these contracts were awarded at the same **RATE** as Balco, who was the L1 bidder of Bid-2. The Commission further noted that in KSEB Ltd's bid notice, the rate for power was to be quoted for delivery at Kerala periphery. Since the bidders other than L1 were irregularly asked to match the **L1 rate and not rates**, the question of any differential payment other than the **rate** paid to L1 for supply at Kerala periphery does not arise. Further, asking bidders to match **the L1 rate**, and then paying them a higher rate is highly objectionable and in violation of tender finalisation procedure notified in the Central Government Bidding Guidelines which is reproduced below:

“3.3 Selection of Bidder

3.3.1 Subject to the provisions of Clause 2.16.1, the Bidder whose Bid is adjudged as responsive in terms of Clause 3.2.1 and who quotes the lowest Tariff offered to the Utility in conformity with the provisions of Clause 3.5 shall be declared as the selected Bidder (the “Selected Bidder”). In the event the Utility rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

3.3.2 In the event that two or more Bidders quote the same amount of Tariff (the “Tie Bidders”), the Utility shall identify the Selected Bidder by draw of lots, which shall be conducted, with prior notice, in the presence of the Tie Bidders who choose to attend.

3.3.3 In the event that the Lowest Bidder withdraws or is not selected for any reason in the first instance (the “first round of bidding”), the Utility may invite all the remaining Bidders to revalidate or extend their respective Bid Security, as necessary, and match the Bid of the aforesaid Lowest Bidder (the “second round of bidding”). If in the second round of bidding, only one Bidder matches the Lowest Bidder, it shall be the Selected Bidder. If two or more Bidders match the said Lowest Bidder in the second round of bidding, then the Bidder whose Bid was lower as compared to other Bidder(s) in the first round of bidding shall be the Selected Bidder. For example, if the third and fifth lowest Bidders in the first round of bidding offer to match the said Lowest Bidder in the second round of bidding, the said third lowest Bidder shall be the Selected Bidder.

3.3.4 In the event that no Bidder offers to match the Lowest Bidder in the second round of bidding as specified in Clause 3.3.3, the Utility may, in its discretion, invite

fresh Bids (the “third round of bidding”) from all Bidders except the Lowest Bidder of the first round of bidding, or annul the Bidding Process, as the case may be. In case the Bidders are invited in the third round of bidding to revalidate or extend their Bid Security, as necessary, and offer fresh Bids, they shall be eligible for submission of fresh Bids provided, however, that in such third round of bidding only such Bids shall be eligible for consideration which are lower than the Bid of the second lowest Bidder in the first round of bidding.”

From the above procedure notified in the Bidding Guidelines, it is clear as to under what circumstances the utility could consider the offers of any bidder other than L1. However, KSEB Ltd unauthorizedly deviated from these guidelines and entered into PSAs with L2 bidder of Bid-1 and L2, L3, L4 and L5 bidders of Bid-2. As per Guidelines, prior approval to these deviations were to be obtained from the Central Government before entering into these PSAs. However, KSEB Ltd did not seek the same but instead entered into PSAs with these bidders. It is also a fact that KSEB Ltd.’s request for post facto approval of these deviations from the Bidding Guidelines were declined by the Central Government. Hence the Commission Orders dated 30.08.2016 and 08.07.2019 has to be viewed in this context.

If KSEB Ltd did find any error in the above decision of the Commission in the Orders dated 30.08.2016 or 08.07.2019 in OA 15/2018, KSEB Ltd should have filed a review petition before the Commission against the Orders, within 45 days from the date of the Orders. However, KSEB Ltd did not file any review petition against these Orders within the specified time limit.

Further, KSEB Ltd did also not file any appeal against the said Orders before the Hon’ble APTEL as per the Section 111 of the Electricity Act, 2003. Hence the decision of the Commission to adopt the rate of BALCO, i.e., L1 bid in Bid-2, for the limited purpose of estimating the cost of power purchase provisionally in the Order of the Commission dated 08.07.2019 has reached its finality and cannot be litigated at this stage.

16. Regulation 86 of the Tariff Regulations 2018 permits KSEB Ltd to claim fuel surcharge on quarterly basis. The fuel surcharge is the difference on account of the change in cost of fuel, between the actual cost of power purchase and the cost of power purchase as approved by the Commission in the Aggregate Revenue Requirement. As per the Tariff Regulations 2018, ‘fuel surcharge is allowed only for the variation of the fuel cost and not for fixed cost’. Variations, if any, on the fixed cost can be claimed at the time of truing up only.

Based on the Order of the Commission dated 08.07.2019 in OA No.15/2028, KSEB Ltd on 27.09.2019 filed the petition for approval of fuel surcharge for the first quarter of the FY 2019-20 from April-2019 to June 2019 before the Commission. The total fuel surcharge claimed by KSEB Ltd is Rs 72.75 crore which included the fuel surcharge of the three unapproved DBFOO contracts with total capacity of 350MW.

Since the Commission has neither adopted the tariff nor approved the PSAs of these DBFOO contracts, the Commission cannot approve the fuel surcharge of these sources as per the provisions of the Tariff Regulations 2018. Hence, the Commission vide Order dated 14.02.2020, approved the fuel surcharge for the first quarter of the year 2019-20, and ordered as follows:

25.KSEB Ltd has claimed fuel surcharge for the following DBFOO contracts of Bid-2 invited by KSEB Ltd, for which the Commission neither granted approval of the PPA nor adopted the tariff as per Section 63 of the Electricity Act, 2003.

- (i) 100 MW power from M/s Jindal India Thermal Power Ltd, New Delhi.*
- (ii) 100 MW from M/s Jhabua Power Limited.*
- (iii) 150 MW from M/s Jindal Power Limited.*

The Commission, vide the letter dated 22.12.2017 allowed KSEB Ltd to schedule the above contracted power, in view of the order of the State Government GO (Ms) No. 22/2017/PD dated 21.10.2017. The Commission had in the said letter clearly mentioned that, the approval of the power purchase mentioned above including the rate of the DBFOO contracts shall be given, only after getting approvals from Government of India for the deviations from the standard bidding documents issued by Ministry of Power, Government of India and after getting the approval of the Government of Kerala on the entire power purchase under DBFOO.

While approving the ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22, the Commission stated as follows.

“Hence the Commission has considered scheduling power from the three projects of Bid-2, i.e., 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 31-8-2016”.

The Commission noticed from the invoices and other documents submitted by KSEB Ltd that, the actual tariff paid by KSEB Ltd for procuring power from these three sources were much higher and amounted to Rs.22.38 crore more when compared to the L1 rate of Rs.4.15 per unit paid to BALCO which is the L1 of Bid-2. As mentioned

above, the Commission vide its order dated 22.12.2017 had allowed KSEB Ltd, to schedule the contracted power from these three generators subject to conditions and while approving the ARR & ERC and tariff for the MYT period 2018-19 to 2021-22, the Commission had considered the rate equivalent to the cost of power from BALCO for estimating the cost of power provisionally from these three generators. The Commission reiterate that, during the truing up of accounts for the respective financial years, such excess amount incurred for procuring power from these three generators shall not be considered, unless KSEB Ltd gets the approval of power purchase from Government of India for the deviations from the guidelines and on getting the approval of the Government of Kerala on the entire power purchase under DBFOO.”

17. Similarly, KSEB Ltd vide the petition dated 19.11.2019 for the approval of fuel surcharge for the second quarter of the FY 2019-20 from July 2019 to September 2019, had included the fuel surcharge claim of the three unapproved DBFOO contracts. Since the Commission had neither adopted the tariff nor approved the PSAs of these DBFOO contracts, the Commission reiterated its earlier decision taken, while approving the fuel surcharge of the first quarter vide Order dated 14.02.2020 that, the Commission cannot approve the fuel surcharge of these sources as per the provisions of the Tariff Regulations, 2018. Hence, the Commission vide Order dated 27.04.2020, while approving the fuel surcharge for the second quarter of the year 2019-20, ordered as follows.

“KSEB Ltd has claimed fuel surcharge for the following DBFOO contracts of Bid-2 invited by KSEB Ltd, for which the Commission neither granted approval of the PPA nor adopted the tariff as per Section 63 of the Electricity Act, 2003.

- (iv) 100 MW power from M/s Jindal India Thermal Power Ltd, New Delhi.*
- (v) 100 MW from M/s Jhabua Power Limited.*
- (vi) 150 MW from M/s Jindal Power Limited.*

The Commission, vide the letter dated 22.12.2017 allowed KSEB Ltd to schedule the above contracted power, in view of the order of the State Government GO (Ms) No. 22/2017/PD dated 21.10.2017. The Commission had in the said letter clearly mentioned that, the approval of the power purchase mentioned above including the rate of the DBFOO contracts shall be given, only after getting approvals from Government of India for the deviations from the standard bidding documents issued by Ministry of Power, Government of India and after getting the approval of the Government of Kerala on the entire power purchase under DBFOO.

While approving the ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22, the Commission stated as follows.

“Hence the Commission has considered scheduling power from the three projects of Bid-2, i.e. 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”.

The Commission noticed from the invoices and other documents submitted by KSEB Ltd that, the actual tariff paid by KSEB Ltd for procuring power from these three sources were much higher and amounted to Rs.22.75 crore more when compared to the L1 rate of Rs.4.31 per unit paid to BALCO which is the L1 of Bid-2. The Commission further notes that the additional payment under the three DBFOO contracts amounts to Rs 45.13 crore for the first six months of the FY 2019-20. As mentioned above, the Commission vide its order dated 22.12.2017 had allowed KSEB Ltd, to schedule the contracted power from these three generators subject to conditions and while approving the ARR & ERC and tariff for the MYT period 2018-19 to 2021-22, the Commission had considered the rate equivalent to the cost of power from BALCO for estimating the cost of power provisionally from these three generators. The Commission reiterate that, during the truing up of accounts for the respective financial years, excess amount, if any, incurred for procuring power from these three generators shall not be considered, unless KSEB Ltd gets the approval of power purchase from Government of India for the deviations from the guidelines and on getting the approval of the Government of Kerala on the entire power purchase under DBFOO.”

18. As extracted under paragraphs 16 and 17 above, the Commission vide Orders dated 14.02.2020 and 27.04.2020, while approving the fuel surcharge for the first and second quarter of the financial year 2019-20, had reiterated its earlier decisions on the three unapproved DBFOO contracts for which neither the tariff was adopted nor the PSA approved due to the denial of approval by the Central Government for the irregular deviations from the Standard Bidding Documents and due to non-receipt of the views of the State Government till date. As mentioned earlier, the Commission cannot approve the fuel surcharge as per the provisions of Tariff Regulations, 2018 from these sources whose tariff is neither adopted nor their PSAs approved by the Commission.
19. The Commission also noted from the documents presented by KSEB Ltd in support of their fuel surcharge petitions that, though the Commission is yet to adopt the tariff and approve the PSAs of these sources, KSEB Ltd has been effecting payments to these generators at rates much higher than the L1 rate of Bid-2 i.e. BALCO. In fact, the Commission in its Orders dated 14.02.2020 and 27.04.2020 have estimated this excess payment to be Rs. 45.13 crore for the six months between April to September 2019. Considering these serious anomalies, the Commission hereby reiterates its stand that any excess payment on account of these unapproved PSAs shall not be allowed, unless all conditions specified in the Commission's Order dated 30.08.2016 are fully complied with.

20. KSEB Ltd has filed the review petition RP No. 2/2020 against the Commission's Order dated 14.02.2020 in petition OA No. 29/2019 and against the decision of the Commission extracted under paragraph 16 above. Similarly, the review petition RP No. 04/2020 is filed by KSEB Ltd against the Order of the Commission dated 27.04.2020 in petition OA No. 02/2020 against the decision of the Commission extracted under paragraph 17 above.

In both these petitions, KSEB Ltd has raised the same grounds as discussed in the preceding paragraphs. As already discussed, the decision of the Commission not to allow a rate higher than the L1 Balco rate as paid from time to time to these three generators was strictly based on the earlier Order of the Commission dated 30.08.2016 in OP No. 13/2015 and Order of the Commission dated 08.07.2019 in OA No. 15/2018. The crux of these orders is that, the adoption of tariff and approval of the PSAs of the three DBFOO PSAs with a total capacity of 350 MW shall be considered only after getting the approval from the Central Government for the deviations made by KSEB Ltd in the bidding guidelines notified by the Central Government and also after getting the views of the State Government on the entire DBFOO contracts.

As mentioned earlier, the Central Government vide letter dated 18.11.2016 informed and on 11.12.2019 reiterated that *'The deviations as pointed out by KSERC would have been got vetted and approved by the Central Government before issuance of RFQ, RFO and PSA and not at 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'*.

Further, the views of the State Government are also awaited in line with the Commission's Orders dated 30.08.2016 and 22.12.2016. Obtaining these approvals is a prerequisite for the Commission to consider both, the tariff and the PSA signed by KSEB Ltd with these generators for supply of 350 MW power under DBFOO.

KSEB Ltd. in their submission dated 17.07.2020 had mentioned that Section 63 of the Electricity Act, 2003, envisages "only the adoption of tariff and no separate approval of the terms and conditions of the PSA". Further, SERC do not have jurisdiction 'in respect of determination or re-determination of tariff of interstate generating stations. The Commission notes that Section 63 of the EA deals with 'determination of tariff by bidding process' and adoption of such tariff by the Appropriate Commission subject to certain conditions. The relevant Section of the EA is extracted below.

"63. Determination of tariff by bidding process:- Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such

tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

From the above Section, it is clear that in the case of ‘bidding process’, the distribution licensee shall go in for procurement process strictly as per the bidding guidelines notified by the Central Government, and in such cases the SERC has to adopt the tariff derived through bidding process, subject to the conditions specified therein. In this matter, the following facts are also relevant.

- (i) The distribution licensee was required to obtain the prior approval of the State Commission before commencing the bidding process. However, KSEB Ltd did not seek any such approval from the State Commission.
- (ii) The bidding process shall strictly conform to the guidelines notified by the Central Government. The Central Government in this bidding guidelines had clearly mentioned that, if the distribution licensee desired any change in the bidding guidelines to suit their state specific requirements, the licensee has to get the prior approval of the Central Government for the deviations from the bidding guidelines. However, KSEB Ltd did not seek any such prior approval from the Central Government.

The Commission has also examined KSEB Ltd.’s contention as per Section 63 of the EA, that the Commission’s power is limited only to adoption of tariff and there is no requirement for the approval of the terms and conditions of the PSA by the Commission. The Commission notes that Section 63 of the Electricity Act, 2003 is applicable only if “the tariff has been determined through transparent process and bidding in accordance with the guidelines issued by the Central Government”.

Further, Section 86 of the Electricity Act, 2003 defines the functions of the State Commission. Section 86 (1) (b) states as follows, -

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

It is a settled position that, as per the Section 86(1)(b) of the EA-2003, the adoption of tariff of the purchase of power from the generators, irrespective of whether such purchase is from CGS or composite generators is vested with the appropriate State Commission.

To get more clarity on these issue, the following facts may kindly be noted.

- (i) A 'composite generator', can participate in the bidding initiated by distribution licensees in different States. The present law permits that, the generator can quote different tariff in each bidding according to their own reasons. In each such cases, the adoption of tariff for purchase of power from such generators is vested with the appropriate State Commission. But in the case of selection of UMPP initiated by the Central Government based on bidding or in the case of selection of generators by intermediary procurers like Central Government agencies like SECI etc, the adoption of tariff is vested with CERC.

It may be noted that, in such cases, the UMPP or the generators selected by SECI or such other intermediary procurers, shall supply electricity to different States and to the distribution licensees at the same tariff determined through the bidding process and adopted by CERC. In such cases also, the ultimate decision on purchase of power from such UMPP or SECI at the tariff adopted by CERC by the State distribution licensees is vested only with the concerned State Commission.

Vide the above section, it is clear that the Commission has been conferred full powers for examination and approval of Power Purchase Agreements/Power Supply Agreements (PPA/PSA) entered into by the distribution licensees for supply within the State. The Commission notes that Section 63 and Section 86 of the EA are separate provisions, dealing with entirely different matters. While Section 63 deals with the determination of tariff by bidding process, Section 86 defines the functions of the State Commission.

This legal position is clarified by the Hon'ble APTEL in the following decisions extracted hereunder:

The present case involves a dispute between the Distribution Licensee of Karnataka, the Respondent and the Appellant which is an inter-State licensee.... Since the procurement of power by the Distribution Licensee from the Trading Licensee is being done in the State of Karnataka, the Appellant falls within the jurisdiction of the State Commission under **Section 86(1)(b) of the Act.....** The supply of electricity, namely, the Appellant being at a different place does not oust the jurisdiction of the State Commission under Section 86(1)(f) to adjudicate upon the dispute between the licensees.

(Pune Power Development Private Ltd. (Formerly known as Kalyani Power Development Private Ltd) vs. Karnataka Electricity Regulatory Commission, (23.02.2011 - APTEL) : MANU/ET/0025/2011)

The supply of electricity namely, the Appellant being at a different place does not oust the jurisdiction of the State Commission under Section 86 (1) (f) to adjudicate the dispute between the licensees. Therefore, so long as the distribution licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86 (1) (f) to adjudicate the dispute.

(Lanco Power Limited, Lanco House, Plot No. 397, Phase III, Udyog Vihar, Gurgaon-122 016 vs. Haryana Electricity Regulatory Commission, Bays 33-36, Sector-4, Panchkula-134 112, Haryana and Ors. (04.11.2011 - APTEL) : MANU/ET/0164/2011)

The basic and overriding purpose of 2003 Act being ensuring generation of electricity and efficient equitable distribution thereof with the interest of the consumers in mind the generating companies cannot be permitted to act outside the purview of Regulations of a Regulatory Commission and consequently it must be held that the Commission has full jurisdiction not only to regulate tariff and price issues but also distribution of quantum of electricity and other necessary concomitance thereto.

(Tata Power Company Ltd. and Ors. vs. Maharashtra Electricity Regulatory Commission and Ors. (06.05.2009 - SC) : MANU/SC/0932/2009)

Hence KSEB Ltd's contention that the Commission's power is limited only to adoption of tariff under Section 63 and does not have any power to examine and approve Power Purchase Agreements (PSAs) entered into by their distribution licensee is factually incorrect as clearly enunciated by the decision of the Hon'ble mentioned above.

21. The Commission's examination of the bidding documents, revealed significant deviations from the conditions mentioned in the SBD issued by MoP, GOI. For instance, Clause 4 of the SBD requires that any deviations from the SBD guidelines shall only be done with the prior approval of the MoP, GOI. The Commission while examining the documents had noticed significant deviations, especially at the stage of bid evaluation and award of contract (PSAs) as mentioned earlier. Since these deviations did not have the prior approval of the MoP, GOI, the Commission in its Order dated 30.08.2016 had directed KSEB Ltd to obtain the approval of the MoP, GOI and the views of the State Government for these deviations. However, KSEB Ltd's request through the

State Government for ex post-facto approval of these deviations was rejected by the MoP, GOI as stated above.

KSEB Ltd in their review petition has also mentioned that the Commission in OP No. 12/2018 filed by M/s Jhabua has decided that the Commission does not hold jurisdiction to go into the provisions in the PSA for the interstate sale of power contracted therein. In this regard, the Commission would like to point out that the issues discussed in the OP No. 12/2018 and in the current OP are entirely different. In the Jhabua OP, the issue under consideration was the question of jurisdiction to resolve a dispute in the approved PPA. The Commission respectfully notes the clarification issued by the Hon'ble Supreme Court vide the judgement dated 11.04.2017 in CA 5399-5400 of 2016 that, in the matter of common disputes applicable to generators supplying electricity to more than one States, such disputes has to be adjudicated by the CERC to avoid multiple decision on common disputes referred to different SERCs by them.

22. However in the instant review petitions filed by KSEB Ltd, the issue pertains to unauthorised deviations from the MoP, GoI guidelines, adoption of the tariff so obtained and the approval of PSAs entered into by KSEB Ltd without the prior approval of this Commission. The Commission has examined its powers conferred vide Section 64(5) of the EA-2003. The same is reproduced below:

“64(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor:”

A simple reading of Section 64(5) of the EA makes it amply clear that for every power purchase, irrespective of whether it is from a CGS or from a generating companies supplying electricity to more than one State or composite schemes, the concerned distribution licensee has to get the prior approval of the State Commission. ***If the State Commission is of the opinion that the price of the power purchase from CGS or composite schemes etc. at the tariff determined by the CERC is not competitive or power is available from alternate sources at cheaper rates, the distribution licensee cannot proceed with entering into the PPA/PSA or make any payments thereof with such generator citing the reason that the tariff is being determined by CERC.***

Considering all these, there is no merit in the legal issues raised by KSEB Ltd in this regard and has to be rejected in total.

23. Regarding the second prayer in both review petitions RP No. 02/2020 and RP No.04/2020, KSEB Ltd prayed as follows.

“(2) To issue appropriate directions on the drawal of power contracted against these PSAs if Hon’ble Commission is not inclined to pass on the liabilities of 350 MW PSAs executed on DBOO basis under Bid 2.”

In addition, KSEB Ltd in the additional submission dated 17.07.2020 had contended that, the Commission vide the letter dated 22.12.2017 allowed the petitioner to schedule the entire contracted power under DBFOO contract. KSEB Ltd further submitted that, the word ‘contract’ mentioned therein has to be necessarily the PSAs executed with these generators under DBFOO as there are no other contracts between KSEBL and these generators. Therefore, the observation of the Commission that the word ‘contract’ refers to only quantum of power and not the PSA is not correctly aligned to the decisions already communicated to KSEBL by Hon’ble Commission.

In this context, the Commission’s letter dated 22.12.2017 reads as follows, -

“ In view of the State Government Order dated 21.10.2017, KSEB 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”

The above letter makes it amply clear that Commission had only allowed KSEB Ltd. to schedule the contracted power, i.e. 350 MW of contracted power. This decision was taken in view of the compelling circumstances as brought out by KSEB Ltd in its letter dated 25.10.2017 in view of the State Government’s order dated 21.10.2017. The Commission’s letter has clearly mentioned that it could approve the power purchase 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.

Further the Commission in OA 15/2018 dated 08.07.2019 while approving the ARR & ERC for the Multi Year Tariff, 2018-2022 had in Para 5.104 ordered as follows.

“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 31-8-2016”.

All the above statements make the decision of the Commission very clear. In view of the serious and significant unapproved deviations by KSEB Ltd in the bid evaluation and contract awarding stage noticed by the Commission, the Commission was constrained not to adopt the tariff or approve the PSAs signed with the L2 bidder of Bid 1 and L2, L3 and L4 bidders of Bid 2. Hence this submission of KSEB Ltd is factually incorrect, totally misleading and therefore rejected.

Regarding the prayer of KSEB Ltd to issue appropriate directions on the drawal of power contracted against these PSAs, if Commission is not inclined to pass on the liabilities of 350 MW PSAs executed on DBOO basis under Bid 2, the Commission notes that this prayer is a new issue raised by KSEB Ltd, which was neither included nor deliberated in the original petitions OA 29/209 and OA No. 02/2020.

It is a settled legal position that a new prayer in a Review petition is not admissible. This legal position has been clarified by the Hon'ble APTEL in the following decisions:

**(Neyveli Lignite Corporation Ltd. vs. Central Electricity Regulatory Commission and Ors. (15.05.2017 - APTEL) : MANU/ET/0038/2017).
(Jindal Steel and Power Limited vs. Raigarh Ispat Udyog Sangh and Ors. (28.04.2016 - APTEL) : MANU/ET/0043/2016)**

Hence this prayer cannot be decided through Review Petitions filed by KSEB Ltd against the original petitions OA 29/2019 and OA No.02/2020, and the prayer is rejected.

The Commission's Order dated 30.08.2016, had only approved the tariff for the L1 in Bid-1 and L1 in Bid-2. Neither the tariff nor the PSAs entered into by KSEB Ltd were approved by the Commission. Instead the Commission in its Order dated 30.08.2016 had specifically mentioned that the power purchase from the remaining bidders would be approved after getting approval for the deviations to the bidding guidelines from the MoP, GOI and the views of the State Government on the bidding

process. Hence, the Commission till date has neither adopted the tariff nor approved their PSAs.

As mentioned in the preceding paragraphs, the petitioner, KSEB Ltd has failed to pointed out any error on the face of record, not raised any new facts as per the Code of Civil Procedure, 1908. Hence the review petition does not fulfil the essential criteria to be considered further and therefore, the Commission cannot review its following orders,

- (1) the Order dated 14.02.2020 in Petition OA No. 29/2019 admitted as RP No. 02/2020 and
- (2) the Order dated 27.04.2020 in Petition OA No.02/2020.

Hence the review petitions RP No. 02/2020 and RP No. 04/2020 filed by KSEB Ltd to review the decisions extracted under paragraph 16 and 17 above is liable to be rejected and hence rejected.

Orders of the Commission

24. Commission, after detailed examination of the Review Petitions RP No.02/2020 and RP No.04/2020 as per the provisions of the Electricity Act, 2003 and Regulations in force as detailed in the preceding paragraphs, here by orders the following.

- (1) The first prayer of the petition RP No. 02/2020 'to review the order dated 14.02.2020 in Petition OA No. 29/2019 and allow passing on the additional fuel cost incurred against PSAs with Jindal India Thermal Power Ltd, Jindal Power Ltd and Jhabua Power Ltd under Bid 2 of DBFOO' is hereby rejected.
- (2) The first prayer of the petition RP No. 04/2020 'to review the order dated 27.04.2020 in Petition OA No. 02/2020 and allow passing on the additional fuel cost incurred against PSAs with Jindal India Thermal Power Ltd, Jindal Power Ltd and Jhabua Power Ltd under Bid 2 of DBFOO' is hereby rejected.
- (3) Second prayer of both the Review Petitions RP No. 02/2020 and RP No. 04/2020 is 'to "(2) To issue appropriate directions on the drawal of power contracted against these PSAs if Hon'ble Commission is not inclined to pass on the liabilities of 350MW PSAs executed on DBFOO basis under Bid 2.'" This is a new issue raised by KSEB Ltd, which was neither included nor deliberated in the original petitions OA 29/209 and

OA No. 02/2020. Hence this prayer cannot be decided through Review Petitions filed by KSEB Ltd and the prayer is rejected.

The petitions RP 02/2020 and RP 04/2020 hereby disposed off.

**Sd/-
Preman Dinaraj
Chairman**

Approved for Issue,

Satheeshchandran.C.R
Secretary (i/c)