

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

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

Review Petition No. RP 1/2019

In the matter of : Review Petition filed by INOX on the tariff order issued by the Commission on 3.10.2018 in OP No. 8 of 2017.

Petitioner : INOX Renewables Limited
Plot No. 17 Sector 16A
Noida-201301

Respondent : Kerala State Electricity Board Limited

Petitioner represented by : Adv. Vishal Gupta

Respondent represented by : Smt. Meharunnisssa M, EE, KSEBL
Smt. Latha S V, AEE, KSEBL.
Smt. Anitha K, AEE, KSEBL.
Smt. Vijayalekshmy, AEE, KSEBL

Order dated 2.12.2019

1. M/s INOX Renewables Limited (hereinafter referred to as the petitioner or M/s INOX) filed a petition before the Commission on 15.11.2018 seeking review of the order dated 03.10.2018 in OP No. 08 of 2017 on approval of tariff for 16 MW wind power project at Kanjikode, Palakkad. The prayers of the petition are:
 - (i) Review of Order dated 03.10.2018 in OP No. 8 of 2017 insofar as it is inconsistent with the provisions of RE Tariff Regulations 2015 while determining the tariff computation methodology for wind power projects;
 - (ii) Declare date of commissioning of project as 28.03.2017 and that the project commissioned during Financial Year 16-17;
 - (iii) Declare that the generator has not availed the benefit of Accelerated Depreciation and correspondingly allow the generic tariff without considering the benefit of Accelerated Depreciation;
 - (iv) Approve the draft power purchase agreement and Direct the Respondent No. 1 herein to execute the same with the Petitioner herein at generic tariff as determined by the Commission for the

projects commissioned in FY 16-17 vide Renewable Energy Amendment Regulation dated 02.11.2017

2. The summary of the issues raised by the petitioner is given below.

- (i) The Commission in the past has been determining the generic tariff for the wind energy generators under Section 86 (1) (e) read with Section 61 (1) (a) of the Electricity Act, 2003. The Commission has notified KSERC (Renewable Energy) Regulations, 2015 on 11.11.2015. In the said Regulations the control period is specified as 5 years. Further the Regulations 20 & 21 of the said Regulation mandates the determination of generic tariff and procedure for determining the same. As per the provisions of the Regulations 18, 20 & 21 of the KSERC (Renewable Energy) Regulations, 2015, the Commission needs to determine the generic tariff on suo-motu basis, for each financial year of the control period and the generic tariff so determined will be applied to the project commissioned during that financial year. Further Regulation 22 of the said Regulations deals about project specific tariff for the electricity generated from renewable source of energy. The said regulations specifically provides for determination of project specific tariff on application from the project developer.

M/s INOX vide the original petition OP No. 08/2017 dated 12.07.2017 requested for approval of the PPA at the generic tariff determined under Regulations 20 & 21 of the Renewable Energy Tariff Regulations 2015. However the Commission vide the interim order dated 29.12.2017 has decided to determine the project specific tariff for the project under consideration. According to the petitioner, this decision of the Commission is 'erroneous' under prevalent regulatory framework, particularly in the light of Regulation 22 of the Renewable Energy Tariff Regulatory wherein it is explicitly mentioned that project specific tariff can be determined only on application from the project developer.

- (ii) The Commission vide the order dated 22.02.2017 in OP No. 10/2016 in a similar matter of approval of PPA including Tariff of 8.4MW wind farm of M/s Ahalia Alternate Energy (P) Limited allowed Generic Tariff from the date of commercial operation till the terms of the PPA.
- (iii) As per the Regulation 17 of the RE Regulation 2015, the Commission has to specify the principles, norms and parameters for the determination of Tariff for the electricity generated from the Renewable Energy sources for each year of control period. As per the Regulation 18 of the Renewable Energy Regulation 2015, the control period is 5 years starting from 2012-13 to 2016-17. Further as per Sub-Regulation 3 of the Regulation 18 of the Renewable Energy Regulation 2015, the norms prescribed shall continue in force till they are revised.

However vide the order dated 03.10.2018 in OP No. 08/2017, the Commission overlooked this part of the Regulation and adopted norms and parameters specified by the Central Commission for determining

Tariff of 16MW WEG from the plant installed by the Petitioner. Hence the petitioner requested to review the order of the Commission dated 03.10.2018 in OP No. 08/2017 to align the same with the Renewable Energy Regulations, 2015 and requested to adopt the tariff parameters applicable during financial year 2016-17 for determination of project specific tariff for the project.

- (iv) The Commission has not allowed the full lease rent paid under capital cost stating that the project has useful life of 25 years whereas the lease deed is for 90 years. The petition submitted that the lease rent should be allowed in full as it is an actual cost paid under prevalent laws and that the land is leased for the sole purpose of development of the project under consideration.
 - (v) The Commission has not included the Common Facility Charges (CFC) which the petitioner were required to pay at 1,07,246/month with an annual increment of 10% every year throughout the lease period. The petitioner requested that CFC charges may be allowed appropriately under capital cost itself or may be allowed under recurring expense over and above the O&M expense at given rates.
 - (vi) The petitioner request before the Commission to consider 28.03.2017 as the date of Commission instead of 14.08.2017 adopted by the Commission, since as per records the project was synchronised with the grid on 28.03.2017.
 - (vii) The petitioner also raised the issue that the scheme of availing the benefit of acceleration depreciation is as per the rules framed under Income Tax Act 1961. In the Income Tax Act, the generating company has an option or choice to avail the benefit of acceleration depreciation. However, the said option has to be exercised by the wind power generator before the filing of the return of the Assessment Year in which the generation of power commenced. The perusal of said rules clearly provides that the option to avail accelerated depreciation lies with the generating company. It is a settled position in law that power of choice provided in a statute cannot be taken away. As a matter of fact, in case of the project under consideration, the accelerated depreciation is not considered. Hence the petitioner request to consider generic tariff without considering the benefit of accelerated depreciation as same has not been availed by the petitioner.
3. KSEB Ltd submitted its comments vide letter dated 21.3.2019 and its summery is given below:
- (i) The petition filed by M/s INOX is for reviewing the order of the Commission dated 03.10.2018 in OP No. 08 of 2017. As per the Code of Civil Procedure, the review petition is permissible on the following grounds.

- (a) Discovery of new and important matter or evidence which after exercise of due diligence was not in the knowledge of the applicant and could not be produced by him at the time when decree or order was passed.
- (b) Some mistake or error apparent on the face of the record.

There has been no discovery of new and important matter since the issue of the order dated 3.10.2018. Further, the argument raised by the petitioner cannot be treated as an error in the order of the Commission. Hence KSEB Ltd submitted that the instant petition is not maintainable and hence requested to dismiss the petition.

- (ii) The argument of the petitioner that, as per the Regulations 22 of the RE Regulations, 2015, the project specific tariff can only be determined on application from the project developer. The argument of the petitioner is not correct. In the draft initialed PPA submitted by the petitioner before the Commission, it is specified that the 'tariff of the electricity generated from the project shall be the 'project specific tariff' or 'generic tariff' which ever is lower. Thus the petitioner himself is agree for determining project specific tariff.
 - (iii) The action of the Commission to determine the project specific tariff of the 16 MW WEG by adopting the norms and parameters specified by the CERC is in order as per the Regulation 17(4) of the RE Regulations, 2015.
 - (iv) The petitioner claimed the CoD as 28.3.2017. KSEB Ltd submits that the operation of the plant from 28.03.2017 to 15.6.2017 is for testing purpose. A firm agreement for availing supply was reached only on 14.08.2017 and energy was injected continuously form 16.8.2017 and hence 16.8.2017 can be considered as CoD.
 - (v) Regulation 23 of the CERC RE regulation, 2017 specified that the Commission while determining tariff has to take consider any subsidy or incentive offered by Central or State Govt. Hence accelerated depreciation has to be considered while determining tariff.
 - (vi) The prayer of the petitioner to approve the draft PPA and direct KSEB Ltd to execute the same with INOX at the generic tariff determined by the Commission for the projects commissioned in the FY 2016-17 may be rejected.
4. The Commission admitted the petition as RP No. 1/2019. In Meanwhile M/s INOX vide affidavit dated 20.03.2019 has submitted an Interlocutory Application with following prayer.

'Direct the respondent KSEB Ltd to enter into the PPA for 25 years in compliance to the order dated 03.10.2018 for the 16 MW wind power projects

commissioned by the petitioner at KINFRA park, Palakkad District, without prejudice to the rights and contentions under the review petition filed before the Commission’.

5. Commission conducted hearing on the petition on 24.05.2019. During the hearing, Adv. Vishal Gupta presented the petition on behalf of the petitioner M/s INOX and Smt. Latha S.V, AEE on behalf of the respondent KSEB Ltd. The summary of the deliberations during the hearing is as follows. During the hearing, the petitioner has stressed only on the following two issues, in the order of the Commission dated 03.10.2018 in OP No. 08 of 2017.

- (1) As per the proviso to Regulation 18(3) of the KSERC (Renewable Energy) Regulations, 2015, the Commission has to adopt the norms for determination of tariff for 2016-17 for determination of the tariff for the wind plant installed by the petitioner, till the norms are revised.

However, the Commission has relied on CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 as per the Regulation 17(4) of the KSERC (Renewable Energy) Regulations 2015. Accordingly, there is an error in the norms adopted by the Commission while determining the tariff of the wind power plant of the petitioner vide the order dated 03.10.2018 in OP No. 08 of 2017.

- (2) The Commission has determined the tariff for the 16 MW WEG at Kanjikode installed by the petitioner on the presumption that, the developer had availed the benefit of accelerated depreciation. However, in light of the judgement of the Hon. APTEL dated 28th September 2015 in Appeal No 198, 199, 200, 291 of 2014, the benefit of the accelerated depreciation can be considered only if the developer had availed such benefits. The developer may take appropriate decision on availing the benefit of accelerated depreciation, after one year from the date of commercial operation, after assessing that availing the same is beneficial for them or not.

Hence the petitioner requested to approve the tariff of the electricity generated from the 16 MW WEG at Kanjikode, Palakkad installed by the petitioner without accounting the benefit of accelerated depreciation.

The petitioner further submitted that, KSEB Ltd is not making payment for the energy from date of synchronization.

Regarding the IA filed, the petitioner submitted that it may be considered along with the approval of the PPA to be signed with KSEB Ltd for selling the energy injected from the project

6. Smt. Latha S.V, presented the comments on behalf of KSEB Ltd, and submitted that, the petition is not maintainable as per the Code of Civil Procedure, 1908. KSEB Ltd had already submitted detailed comments on the

issues raised by the appellant, and the same may be considered by the Commission while disposing the petition.

KSEB Ltd further submitted that, it had decided to purchase the power from the project only from the date of commercial operation and the draft PPA to be signed with KSEB Ltd as initialed accordingly. KSEB Ltd further submitted that, it had no obligation to purchase the energy injected during the testing period and accordingly KSEB Ltd is not liable to make payments for the energy injected during testing period at the tariff approved by the Commission.

7. Based on the deliberations during the hearing, the Commission issued the following directions/ orders to the petitioner M/s INOX and the respondent KSEB Ltd, for immediate compliance, within 15 days from the date of this order.

(1) KSEB Ltd shall submit detailed comments on the issues raised by the petitioner during the hearing above.

(2) KSEB Ltd shall submit the details of the energy injected into the State Grid from the date of synchronization till the date of commercial operation, including the UI/ deviation settlement paid.

(3) The petitioner shall file separate petition for approval of the PPA to be signed with KSEB Ltd, instead of filing petition through a third party. The Commission further clarified that, any person authorized by the petitioner INOX can sign PPA with KSEB Ltd for selling power from the 16 MW WEG installed at Kanjikode, Palakkad.

8. In compliance of the daily order, KSEB Ltd, vide the letter dated 03.07.2019 submitted the following.

(i) Applicability of the norms for the year 2016-17 for the 16 MW WEG installed by the petitioner at KINFRA park, Palakkad.

“

1. Section 181 of the EA, 2003 empowers the State Commissions to make regulations **consistent with the Act** and the rules to carry out the provisions of the Act. As per section 61 and 86 of Electricity Act,2003, State Commission is empowered to notify Regulations governing the tariff of Renewable Energy in the State. Further, Section 61 of the EA,2003 prescribes that Hon'ble Commission has to notify Regulations taking into consideration the following:

2. Section 61 (a) of the EA, 2003 prescribes that the Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by **the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;**

3. The expression “shall be guided” comprises of two elements: the ‘shall’ and, the ‘guidance’. The expression “shall” indicates that the factors which are specified in clauses (a) to (i) have to be necessarily borne in mind by the appropriate

commission. As guiding factors, they provide considerations which are material to the determination of tariffs by the appropriate commission.

4. Duly considering the above, Hon'ble Commission has also been issuing Regulations, especially Renewable Energy Regulations in the State in line with the norms, terms and conditions specified by the Hon'ble CERC. This is made explicitly clear by Hon'ble Commission while framing the KSERC(Renewable Energy)Regulations,2015, as detailed in the explanatory note attached along with the Regulation, which is extracted below:
"In order to consolidate the provisions of such Regulations and to provide more transparency and predictability, the Commission has decided that the terms and conditions and norms for fixation of renewable energy tariff in the State can be aligned in tune with the norms, terms and conditions specified by the Central Electricity Regulatory Commission. "
5. As already submitted, the Hon'ble Commission through KSERC(Renewable Energy)Regulations,2015 and its subsequent amendments has been adopting the norms of Hon'ble CERC and has never framed any separate and distinct norms applicable for determining RE tariff in the State. This is in exercise of the provision of Regulation 17(4) of the KSERC(Renewable Energy)Regulations,2015.
6. Regulation 18(3) of KSERC (Renewable Energy) Regulations, 2015 cannot be read in isolation and have to be read together with Regulation 17(4) of the same Regulation. Regulation 18(3) speaks of revising the norms on completion of every control period and continuation of the norms of the previous period if there are no new norms. Since CERC norms were being followed by Hon'ble Commission as per Regulation 17(4) and CERC norms for 2017-18 were notified vide the notification No.:1/21/2017-Reg.Aff./(RE-Tariff -2017-20)/CERC Dated: 17th April 2017 applicable for three years from 01.04.2017, the need for invoking Regulation 18(3) does not arise here . Regulation 18(3) can be called for applicability only when norms as per Regulation 17(4) is not available.
7. It is additionally submitted that the norms and parameters specified by Hon'ble Commission for the projects commissioned in a particular year can be made applicable only for the projects commissioned during that year. i.e. the norms and parameters specified for the year 2016-17 cannot be applied to projects commissioned in 2017-18. Application of the norms and parameters that existed in the year 2016-17 for projects commissioned in the year 2017-18 by mere extension lead to undue profiteering for the generator and injustice to consumers. This is against the intent and spirit of the EA,2003.
8. The wind tariffs need annual revision due to the dynamics of the power sector i.e. fast changing technology and economies of production. The tariff of wind power has fallen rapidly in the recent years. From a rate of Rs.6/unit in the year 2014 it has fallen to Rs.2.50/unit in 2019. To capture the rapid fall in wind tariff and to pass on the benefit to the consumers, annual revision of norms for determination of tariff is needed, so that the norms capture the market trends.
9. Duly considering this fact, Hon'ble Central Electricity Regulatory Commission and other State Regulatory Commissions issue Renewable Energy Regulations with shorter duration control period annual tariff orders .
10. Availability of electricity at reasonable and competitive rates to the consumers with reasonable cost recovery for the generators is the intent of the Electricity Act, 2003 and the Regulatory Commissions have to function on achieving this objective. A financially sustainable electricity sector is an important facet of the overall regulatory framework.

11. CERC vide the notification No.:1/21/2017-Reg.Aff./(RE-Tariff -2017-20)/CERC Dated: 17 th April 2017 has notified the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations,2017, applicable for three years from 01.04.2017 duly considering the market trends in wind energy tariff.
 12. The petitioner's project was commissioned in the year 2017-18 (16-8-2017). Since there were no norms issued by Hon'ble Commission for the year 2017-18 and considering the mandate of the EA,2003, Hon'ble Commission adopted the norms and parameters specified by the CERC for the financial year 2017-18 for determining the project specific tariff for the electricity generated from the project.
 13. Application of norms for the year 2016-17 for a project commissioned in 2017-18 is not correct. The action of Hon'ble Commission is in order and in line with the KSERC(RE)Regulations,2015.
- (ii) Accelerated depreciation benefit.
KSEB Ltd submitted that in the judgment of the Hon'ble APTEL dated 28.9.2015 produced by the petitioner not entered into the merit of the case on whether the Commission has to approve the tariff without the benefit of accelerated depreciation or not. The only issue considered by APTEL was on whether the petition filed by wind energy generators before GERC can be admitted for further proceedings or not
- (iii) As directed by the Commission, KSEB Ltd submitted that the total energy injected into the State Grid prior to CoD as 6.60 MU. KSEB Ltd also submitted the daily average UI rate for the period from 01.04.2017 to 16.08.2017. KSEB Ltd also submitted that since the intra-state ABT has not been introduced in the State, UI pool has not been created and thus no payment for the unscheduled interchange of power was provided.
9. M/s INOX, vide affidavit dated 5.10.2019 submitted rejoinder to the counter affidavit dated 21.03.2019 and 03.07.2019 filed by KSEB Ltd.
- (i) The Hon. APTEL in its various judgments dated have explicitly held that the Commission is bound by its own regulations. Once the State Commission notify its own Regulations under Section 61 of the Electricity Act, 2003, it cannot follow the Regulations framed by the Central Commission. Since the synchronisation of the project of the petitioner occurred in the financial year 2017-18, the tariff Regulations for determination of tariff of the project of the petitioner in the absence of new Regulations, the old Regulations will continue to apply virtue of Regulations 18.
- (ii) The judgment dated 28.09.2015 of the Hon'ble APTEL in Appeal No. 198,199, 200, 291of 2014 is a final order in an identical situation.
- (iii) The Commission, vide its order dated 3.10.2018 has directed KSEB Ltd to make payment to the petitioner from the date of synchronization of the project. The respondent in utter disregard of the directions of the

Commission has not paid the interim tariff from the date of synchronisation of the project of the petitioner. According to the respondent, UI charge only applicable for the energy injected to the State Grid prior to CoD. The daily average UI rate submitted by the KSEB Ltd is not correct. No power can be made available to the respondent from a generating company free of cost and the respondent is liable to make payment for the said power which it has supplied to the consumers as per the interim tariff fixed by the Commission vide its order dated 03.10.2018.

Analysis and Decision

10. The Commission has examined in detail the review petition filed by M/s INOX Renewables Limited (M/s Inox) the counter affidavit submitted by the respondent KSEB Ltd, the provisions of the Electricity Act-2003, KSERC (Renewable Energy) Regulations, 2005, and decided as follows. The petition filed by M/s INOX is for reviewing the order of the Commission dated 03.10.2018 in OP No. 8 of 2017. The relevant provisions in the Electricity Act-2003 for reviewing the decisions, directions and orders of the Commission is extracted below.

- “
- (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 provisions of the Electricity Act-2003 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. The Commission has examined the issues raised by the M/s INOX in the review petition and orders as follows:

11. During hearing the petitioner submitted that it is going to press only two issues raised in the original petition, viz,

Issue.1:

As per the proviso to Regulation 18(3) of the KSERC (Renewable Energy) Regulations, 2015, the Commission has to determine the tariff for the wind energy plant installed by the petitioner by adopting the norms for determination of tariff applicable for 2016-17, as the norms are not revised. However, the Commission adopted CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 as per the Regulation 17(4) of the KSERC (Renewable Energy) Regulations 2015.

Issue.2:

The Commission has determined the tariff for the 16 MW WEG at Kanjikode installed by the petitioner on the presumption that, the developer had availed the benefit of accelerated depreciation. However, in light of the judgment of the Hon. APTEL dated 28th September 2015 in Appeal No 198, 199, 200, 291 of 2014, the benefit of the accelerated depreciation can be considered only if the developer had availed such benefits.

Issue No.1

12. The Commission vide the notification dated 11.11.2015 has notified the KSERC (Renewable Energy) Regulations, 2015 (herein after referred as 'RE Regulations, 2015'). This Regulation 17 to 24 of the RE Regulations, 2015 deals with the 'determination of tariff for the Electricity Generated from renewable sources of energy.

More precisely, the Regulation 17 of the RE Regulations, 2015 deals with the 'Norms for Determination of Tariff' and Regulation 18 deals with the control period.

13. In order to get a clarity, the Regulations, 17 and 18 is extracted below.

17. Norms for determination of tariff.- (1) The Commission may, for each control period, notify the principles, norms and parameters for determination of tariff for the electricity generated from various categories of renewable sources of energy.

(2) While determining the principles, norms and parameters for determination of tariff, the Commission may consider appropriate operational and financial parameters of each category of renewable source of energy and may, to the extent possible, provide an allowance based on technology, fuel, market risk, social and environmental benefits and such other factors.

(3) The Commission may, while formulating and notifying the principles, norms and parameters for determination of tariff for the renewable energy from various categories of renewable source of energy, be guided by the National Electricity Policy and Tariff Policy published under Section 3 of the Act and the principles, norms and parameters specified by the Central Commission for this purpose.

(4) Until separate principles, norms and parameters are specified by the Commission as above, the principles, norms and parameters specified by the Central Commission for the purpose of determination of tariff for the electricity generated from various categories of renewable sources of energy, as specified in the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2012, as amended from time to time, may be adopted by the Commission for the purpose of determination of tariff under these regulations.

18. Control period.- (1) The control period under these regulation shall be five years.

(2) The norms for determination of tariff for the electricity generated from each category of renewable source of energy shall remain valid during the control period: Provided that the bench mark capital cost of the renewable energy projects and the rate of interest for loans may be reviewed annually by the Commission and the normative values of capital cost and rate of interest shall be modified accordingly by notification published in the official gazette.

(3) On completion of every control period, the Commission may by notification, revise the norms for determination of tariff: Provided that the norms for determination of tariff for electricity from renewable sources of energy, shall continue in force till they are revised.

(4) The financial year 2012-13 which is the first year of the control period as per regulation 6 of the Kerala State Electricity Regulatory Commission (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2013, shall be deemed to be the first year of the first control period as per these regulations.

14. As extracted above, the Regulations-17 of the RE Regulations, 2015, specified the principles to be adopted by the Commission while determining the norms and parameters for determination of tariff. Further, the Sub Regulation (4) of the said Regulations permits the Commission to adopt the principles, norms and parameters specified by the Central Electricity Regulatory Commission (CERC) for determination of tariff for the electricity generated from the renewable sources of energy, till the Commission specify separate principles, norms and parameters for determination of tariff for electricity generated from renewables.

However, in the RE Regulations, 2015, the Commission has not specified separate principles, norms and parameters for determination of tariff for the electricity generated from renewable sources of energy. The reason for not specifying the separate principles, norms and parameters for determination of tariff for the electricity generated from renewables is explained in detail in the 'explanatory note' given at the end of the RE Regulations, 2015, which is extracted below.

*' Section 86 (1) (e) of the Electricity Act, 2003 authorises the State Electricity Regulatory Commission to promote co generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person and specify for the purchase of electricity from such sources a percentage of the total consumption of electricity within the area of the distribution licensee. Accordingly the Kerala State Electricity Regulatory Commission had, for achieving the above purposes, issued various Regulations for fixing the renewable purchase obligation of the distribution licensees, for fixing the tariff applicable for the procurement of electricity from renewable sources and such other matters. **In order to consolidate the provisions of such regulations and to provide more transparency and predictability, the Commission has decided that the terms and conditions and norms for fixation of renewable energy tariff in the State can be aligned in tune with the norms, terms and conditions specified by the Central Electricity Regulatory Commission.** The Central Electricity Regulatory Commission vide its order in petition No SM/354/2013 (Suo Motu) dated 15.05.2014 approved generic levelised tariff for the electricity generated from various categories of renewable energy sources for financial year 2014-15. The Central Commission has also, vide its order in petition No SM/004/2015 (Suo Motu) dated 31.03.2015, approved generic levelised tariff for the electricity generated from various categories of renewable energy sources for financial year 2015-16. The Commission has decided to issue a comprehensive regulation on the subject in supersession of the existing Regulations on renewable energy and **adopting the generic levelised tariff for the financial years 2014-15 and 2015-16.** Accordingly the Commission has published a draft of the Kerala State Electricity Regulatory Commission (Renewable Energy) Regulations, 2015 dated 31.03.2015 incorporating the tariff approved by Central Electricity Regulatory Commission for the years 2014-15 and 2015-16 and the various measures for the promotion of renewable energy in the State for eliciting public opinion. A public hearing was conducted on 12.05.2015 at Municipal Town Hall, Kalamassery. Taking into consideration the written responses and also the suggestions in the public hearing from the stakeholders and the licensees, the Commission has finalized the Kerala State Electricity Regulatory Commission (Renewable Energy) Regulations, 2015. This notification is intended to achieve the above object.'*

As detailed above, in order to provide more transparency and predictability of tariff for the electricity generated from renewable sources of energy, the Commission has taken the considered decision to align the terms and conditions for determination of renewable energy tariff in the State with the norms, terms and conditions specified by CERC. Further, since this Commission has not specified any separate norms and parameters, the Commission has also adopted the generic tariff determined the CERC for the FY 2014-15 and 2015-16, i.e, the generic tariff notified by the CERC, which was determined by the CERC at the time of notifying the RE Regulations, 2015 on 11.11.2015. It may also be noted that, the Commission has taken this decision after stakeholders

consultations, including pre-publications for inviting comments of the stakeholders and public hearings.

Subsequently, the CERC vide the notification No. SM/03/2016 dated 29th April 2016 has determined the generic levelized tariff for the electricity generated from the renewable sources of energy commissioned during the FY 2016-17. This Commission, after prepublication and public hearings, vide the notification dated 02.11.2017 has adopted the generic tariff determined by CERC for the year 2016-17, for the renewable energy sources commissioned during the financial year 2016-17.

15. The Regulation 18 of the RE Regulations, 2015 specify the control period of the Regulations as 5 years from 2012-13. i.e., the control period of the RE Regulations 2015 is from 2012-13 to 2016-17. The sub Regulation (2) of the Regulation 18 of the RE Regulations, 2015 provides that the norms specified in the Regulation is valid for the entire control period. Further, the sub Regulations (3) of the Regulation 18 of the RE Regulations 2015 provides that, on completion of every control period, the Commission may by notifications revise the norms for determination of tariff. Also the proviso to sub Regulations (3) of the Regulation 18 of the RE Regulations, 2015 provides that, the norms for determination of tariff for electricity from renewable source of energy shall continue in force till they are revised.

But as explained under paragraph 14 above, the Commission has not specified the separate principles, norms and parameters for determination tariff for renewable sources of energy for the control period 2012-13 to 2016-17. Instead of the same, the Commission has adopted the principles, norms and parameters adopted by the CERC for determining the tariff for the electricity generated from the renewable source of energy in the State. The Central Commission has been specifying the principles, norms and parameters for tariff determination all years till date, hence in the absence of the separate principles, norms and parameters specified in the RE Regulations, 2015, the Commission has adopted the CERC norms as per the enabling provisions under Regulation 17(4).

16. In the case of the 16 MW WEG established by the petitioner M/s INOX at KINFRA park at Kanjikode, Palakkad, the year of commissioning of the plant is in the FY 2017-18. The reason for adopting the year of commissioning as FY 2017-18 is given under paragraph 27, 28, 29 and 30 of the original order dated 03.10.2018 in OP No.08/2017. The petitioner in the review petition has prayed before the Commission to declare the date of commissioning as 28.03.2017 and that the year of commissioning as 2016-17, but this issue is not pursued during the hearing. Further, in the counter affidavit dated 05.10.2019, the petitioner categorically admitted the year of commissioning as the FY 2017-18, and requested to adopt the norms and parameters for the FY 2016-17 since the Commission had not specified the norms and parameters for the FY 2017-18. So, there is no dispute on the year of commissioning of the project as 2017-18. Accordingly, the Commission has to adopt the principles, norms and parameters applicable for the year 2017-18 for the determination of tariff.

Since the Commission has not specified any principles, norms and parameters for determination of tariff for Renewables including the wind projects for the year 2017-18, the Commission has adopted principles, norms and parameters specified by the CERC, vide the notification No.:1/21/2017-Reg.Aff./(RE-Tariff -2017-20)/CERC Dated: 17thApril 2017 has notified the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017. This decision is the consistent position taken by the Commission as per the sub Regulation (4) of the Regulation 17 of the RE Regulations, 2015.

Since the CERC has notified the principles, norms and parameters for determination of tariff for electricity generated from RE sources for the financial year 2017-18 and also this Commission has not specified the principles, norms and parameters for determination of tariff of RE sources for the year 2017-18 separately, this Commission is bound to adopt the CERC norms for determining the tariff of RE sources for the year 2017-18.

Hence there is no merit in the arguments raised by the petitioner and hence the plea of the petitioner is rejected.

Issue No.2

17. The second issue raised by the petitioner is that, the Commission determined the tariff of the 16 MW WEG of the petitioner on the presumption that, the developer has availed the benefit of accelerated depreciation. In the light of the judgment of the Hon'ble APTEL dated 28th September 2015 in Appeal No. 198, 199, 200, 291 of 2014, the benefit of accelerated depreciation can be considered only if the developer availed such benefits. The petitioner submitted that, the developer may take appropriate decision on availing the benefit of accelerated depreciation after one year from the date of commercial operation, i.e., after assessing that availing the accelerated depreciation is beneficial or not. Hence the petitioner requested to approve the tariff of the 16MW WEG of the petitioner without accounting the benefit of the accelerated depreciation.

18. The Commission examine the argument of the petitioner. The Commission vide the order dated 03.10.2018 in OP No. 08/2017 has determined the tariff of the 16 MW WEG of the petitioner @ Rs 4.09 per unit after accounting the benefit of the accelerated depreciation. As already explained, since this Commission has not specified the principles, norms and parameters for determination of tariff of renewable source of energy for the financial year 2017-18, the Commission has adopted the principles, norms and parameters as per the CERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017 (hereinafter referred as CERC RE Regulations, 2017). The Regulation 23 of the CERC RE Regulations, 2017 provide as under.

“23. Subsidy or incentive by the Central / State Government The Commission shall take into consideration any incentive or subsidy offered by the Central or State Government, including accelerated depreciation benefit if availed by the

generating company, for the renewable energy power plants while determining the tariff under these Regulations.”

As above, the CERC RE Regulations 2017 provides that, the Commission shall consider the benefit of accelerated depreciation, if such benefit is availed by the developer. In the present case, the Commission determined the project specific tariff of the 16 MW WEG of the petitioner with the benefit of accelerated depreciation, since this is a benefit offered by the Central Government and available to the petitioner as a corporate entity. Normally, there is no reason for not availing such benefits by the developers.

19. The Commission noted the argument of the petitioner and also the provisions of Accelerated Depreciation available in the Income Tax Act 1961 and Rules framed there under. A person who qualifies under the above statutory provisions is entitled to get benefit of Accelerated Depreciation. Moreover, that Income Tax Act would not make any discrimination between the tax payers / investors, everyone is allowed to avail the benefit as per provisions under Income Tax Act.

Under Cost plus approach the tariff is determined upon normative cost and performance parameters. In view of the fact that the Commission has allowed all reasonable cost and returns to be recovered from the tariff, it is fair that any benefit occurring due to subsidy / accelerated depreciation would be factored in while determining the tariff.

As per the scheme of the Electricity Act, 2003, the Commission is duty bound to protect the interest of the consumers as well as the RE developers. If the developer not intended to avail a benefit offered by the Central Government, definitely the tariff of the electricity generated from the project will get increased. This higher tariff has to be pass on to the end consumers in the State, as higher tariff.

Hence the Commission in the order dated 03.10.2018 had approved the single levellized tariff taking into account the benefit of accelerated depreciation available under Income Tax Act 1961 and Rules framed under it.

20. The Commission has also examined the judgment of the Hon'ble APTEL dated 28.09.2015 in Appeal petition No, 198 of 2014 & ors produced before the Commission. It is noted that, the said judgment is on an appeal filed by Gujarat Urja Vikas Nigam Ltd (GUVNL) against the decision of the GERC to admit a petition filed by the RE generator Green Infra Corporate Wind Power Limited. The RE developer filed the said petition for varying the tariff as per the provisions in the original tariff order dated 30.01.2010, wherein it is specifically provides that, if a developer doesnot get the benefit of accelerated depreciation, the Commission would determine a separate tariff taking into account all the relevant facts. The GERC admitted the petition, but the State power utility M/s GUVNL filed appeal against the decision of the Commission to admit a petition, which results in re-opening of an already concluded PPA.

The paragraph 72 of the judgment of the Hon'ble APTEL dated 28.09.2015 clearly give the background and decision of the Hon'ble APTEL in this regard.

*72. In the ultimate analysis, therefore, we are of the view that the Appellant's contention that the wind energy generator's petitions praying for determination of project specific tariff on the ground that they are not availing of the accelerated depreciation benefit are not maintainable deserves to be rejected and is accordingly rejected. Execution of a PPA subsequent to the generic tariff order accepting the tariff fixed therein would not bar wind energy generator from filing a petition for modification of tariff on the ground that it is not availing of the accelerated depreciation benefit, **because the said order categorically gives such an option to the wind energy generator. Moreover, the said order is not challenged and has, therefore, become final. The wind energy generators' petitions are, therefore, maintainable.** Even otherwise, keeping the facts of this case aside, we find no fetters in law on the power of the Appropriate Commission to undertake such exercise. We have already referred to the provisions of the Electricity Act which permit the Appropriate Commission to amend the tariff order. These statutory provisions have a purpose. They are meant to give certain amount of flexibility to the Appropriate Commissions. They have been empowered to amend or revoke the tariff because exigencies of a situation may demand such an exercise. In the circumstances, we hold that there is no bar on the Appropriate Commission preventing it from entertaining a petition for modification of tariff after execution of a PPA. In other words, the Appropriate Commission has the power to reopen a PPA and modify the tariff by an order. We, therefore, find no substance in these appeals. The Appeals are dismissed. Needless to say that hearing of the petitions shall now proceed and the petitions shall be disposed of on merits in accordance with law"*

Accordingly, judgement of the Hon'ble APTEL dated 28.09.2015 is on an admissibility of a petition filed before the GERC, and the same is not applicable in the present issue raised by the petitioner.

21. Considering the reasons cited under paragraph 19 above, the Commission is of the considered view that, the project developer has to avail the benefit of accelerated depreciation available in the Income Tax Act, 1961 and pass on the benefit to the consumers of the State. However, in the review petition dated 15.11.2018, the petitioner submitted that, the developer may take appropriate decision on availing the benefit of accelerated depreciation, after one year from the date of commercial operation after assessing that the availing the same is beneficial or not. In view of the stand of the petitioner, the Commission hereby clarify that, as per the paragraph 48 of the order dated 03.10.2018, the levelized tariff of the project without the benefit of accelerated depreciation is Rs 4.54/unit. Further, as per the paragraph 50 of the order dated 03.10.2018, the net levelized tariff of the project after accounting the benefit of accelerated depreciation is Rs 4.09/unit.
22. The petitioner may sign the PPA with KSEB Ltd for supplying electricity @Rs 4.09/unit, the tariff approved after taking into account the benefit of

accelerated depreciation under Income Tax Act, 1961. However, if the petitioner is not intending to avail the benefit of accelerated depreciation, KSEB Ltd at its discretion can sign the PPA with the petitioner @Rs 4.54/unit, after taking an affidavit that the petitioner is not availing the accelerated depreciation and, as and when the petitioner avails the same, from that year onwards the applicable tariff is Rs 4.09/unit. In that case, the petitioner shall also submit the copies of the Income Tax Return statement every year to the respondent KSEB Ltd as documentary evidence for not claiming accelerated depreciation.

23. During the hearing, the petitioner has also raised certain other issues, especially regarding the payment to be made for the electricity injected in to the grid prior to the CoD of the project. Since the approval of the PPA to be entered into between the petitioner/ their authorized representative and KSEB Ltd is pending before the Commission, these issues may be raised during the hearing of the said petition with all supporting documents. The Commission may take an appropriate decision after hearing both the petitioner and the respondent KSEB Ltd.

Order of the Commission

24. Considering the facts and circumstances of the case as detailed above, the Commission hereby orders the following.

(1) In the order dated 03.10.2018 in OP No. 08/2018, at the end of the paragraph 53(1), the following words shall be added '*and the levelized tariff without the benefit of accelerated depreciation is approved @Rs 4.54/unit*'.

All other terms in the order dated 03.10.2018 remains unchanged.

(2) There is no merit in the issue No.1 raised by M/s INOX for reviewing the order of the Commission dated 03.10.2018 in Petition OP No. 08 of 2017 and hence rejected.

Petition disposed of accordingly.

Sd/-
K. Vikraman Nair
Member

Sd/-
S. Venugopal
Member

Sd/-
Preman Dinaraj
Chairman

Approved for issue

G Jyothichudan
Secretary