KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

Present: **Shri. Preman Dinaraj, Chairman**
Shri. S. Venugopal, Member

Petition No. OP No. 08/2020

In the matter of	:	Petition filed by KSEB Ltd seeking Approval of Power Sale Agreement (PSA) for 100MW wind power with the Solar Energy Corporation of India Limited on long-term Basis
Petitioner	:	M/s Kerala State Electricity Board Limited
Respondent	:	M/s Solar Energy Corporation of India Limited (SECI)

Order dated 28.04.2020

1. Kerala State Electricity Board Limited (hereinafter referred to as the petitioner or KSEB Ltd) on 12.11.2019, filed a petition before the Commission for the approval of Power Sale Agreement (hereinafter referred to as PSA) for 100MW Wind Power with Solar Energy Corporation of India Limited (hereinafter referred to as the respondent or SECI) on long term basis of 25 years in accordance with Section 86(1)(b) of the Electricity Act, 2003 read along with Section 63 of the Electricity Act, 2003 and Regulation 76 of the KSERC (Terms and Conditions for determination of Tariff) Regulation, 2018 to meet the Renewable Purchase Obligation (RPO) of KSEB Ltd.

2. The summary of the issues raised in the petition is given below.

   (a) As per the estimated electricity demand and the RPO targets, KSEB Ltd has to meet 850 MW from Non-Solar Renewable Energy (RE) sources by the year 2021-2022. However, the existing non-Solar capacity achieved is only about 292 MW.

   (b) The Government of India identified M/s Solar Energy Corporation of India Ltd (M/s SECI Ltd) as the nodal agency for implementation of MNRE scheme for setting up 1200MW ISTS connected Wind Power Projects in the Country. As per the 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid

Connected Wind Power Projects' notified by the Ministry of Power, Government of India vide the notification dated 08.12.2017, M/s SECI shall act as the intermediary procurer.

(c) SECI concluded its Tranche VII E-RA bidding under ISTS connected 1200MW scheme on 14.05.2019 and 480 MW wind project got selected. SECI vide letter dated 24.06.2019 requested KSEB Ltd., to confirm its requirement at the applicable tariff of Rs.2.83/kWh plus trading margin of Rs.0.07/kWh till the commissioning of the cumulative awarded capacity by SECI under Request for Selection (RfS). Upon commissioning of the cumulative awarded capacity/ accepted cumulative capacity, the applicable tariff payable by the buying entity shall be Rs.2.8091/kWh plus trading margin of Rs.0.07/kWh.

(d) KSEB Ltd., vide its letter dated 06.07.2019 communicated its interest in procuring upto 100 MW wind power at the discovered rate of Rs.2.8091/kWh in SECI Tranche VII bidding plus trade margin of Rs 0.07/kwh, subject to the approval of the PSA between KSEB Ltd and SECI by the Commission.

SECI vide letter dated 19.07.2019 confirmed its offer of 100MW wind power to KSEB.

(e) M/s SECI and M/s KSEB Ltd., has initialed the PSA on 06.09.2019. KSEB Ltd on 06.07.2019 communicated to SECI that, this is subject to approval of the PSA signed among KSEB Ltd and SECI by KSERC.

(f) The article 2.1.2 of the signed PSA dated 06.09.2019 provide as follows;
"The parties agree that any modification in this Agreement as directed by SERC or DISCOMs, as applicable, as a result of adoption of tariff and approving the procurement of the contracted capacity, shall be binding on both parties to the Agreement"

(g) KSEB Ltd further submitted that, as per the Section 86(1)(b) of the Electricity Act, 2003, and Regulation 76 of the KSERC (Terms and conditions for the determination of Tariff) Regulation, 2018, every agreement for procurement of power by KSEB Ltd from generating station /companies entered into, after the date of commencement of KSERC(Terms and conditions for the determination of tariff) Regulations, 2018 will come into effect only with the approval of the Commission.

(h) Section 63 of the Electricity act 2003, prescribes that 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. SECI is approaching CERC for adoption of tariff in respect of bids invited by them.

(i) KSEB Ltd, therefore prayed before the Commission to approve the initialed PSA for procuring 100MW wind power through SECI on a long term basis.

3. Subsequently, KSEB Ltd vide the additional submission dated 18.12.2019, has submitted as follows.

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2. Hon'ble Commission vide the daily order dated 28-10-2019 in OP 53/19(for approval of 200MW wind PSA) directed the KSEB Ltd. and M/s. SECI to modify the Article 3.3 of the PSA, incorporating the provision in CERC (Sharing of interstate Transmission Charges and Losses) Regulations, 2010, issued on 27th March 2019, wherein transmission charges and losses for the use of ISTS are exempted for a period of 25 years from date of Commercial Operation of Wind and Solar Projects commissioned between 13.2.2018 till 31.3.2022. Hon'ble Commission has directed to incorporate the above provision in the PSE executed with SECI so that the buying entity K S E B Ltd. shall not be liable to pay interstate transmission charges and shall also not be liable to bear any transmission losses for entire term of the PSA. It was also directed that K S E B Ltd. may submit the modified PSA after incorporating the amended clause for final approval.

3. Since the above direction applies equally on the PSA executed for 100MW with SECI, whose approval is under the consideration of Hon'ble Commission, an amendment to the PSA of 100MW was also signed for incorporating the above clause. The amendment to the PSA is enclosed as Annexure.

It is humbly requested that Hon'ble Commission may kindly grant approval for the executed PSA for 100MW power with Solar Energy Corporation of India on long term basis."

Accordingly, KSEB Ltd submitted an amendment on the PSA dated 12.12.2019, amending the Article 3.3.1 of the PSA, as given below.

Article	Existing Article	Amended Article
3.3.1	Buying entity shall be liable to bear all the transmission losses as determined by Appropriate Commission from time to time in respect of the power evacuated from the delivery points to its receiving substation(s).	Buying entity shall be liable to bear all the transmission losses as determined by Appropriate Commission from time to time in respect of the power evacuated from the delivery points to its receiving substation(s). However, as per notification of Ministry of Power dated 13.02.2018 & Hon'ble CERC notification dated 27.03.2019 and/or any amendment thereof, no interstate transmission charges and losses will be levied on transmission of electricity through the interstate transmission system for sale of power by such projects commissioned till 31st March 2022 for the entire term of the PSA

Analysis and Decision

3. The Commission examined the petition dated 12.11.2019, filed by M/s. KSEB Ltd for the approval of the PSA dated 06.09.2019, for 100 MW wind power with M/s. SECI on long term basis, as per the provisions of the Electricity Act, 2003 and Regulations notified by the Commission.

4. The prayer of the petitioner KSEB Ltd in the subject petition is;

   "to approve the power sale agreement for procuring 100 MW wind power from SECI on long term basis".

5. The Commission has examined the PSA, in terms of the ''guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects' notified by the Ministry of Power, Government of India, vide the resolution No. 23/54/2017- R&R dated 8th December-2017, CERC order dated 28.02.2020, and other relevant rules and Regulations as detailed below.

6. The Central Government on 08.12.2017, in exercise of the powers conferred on it under Section 63 of the Electricity Act, 2003, notified the 'guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects' notified by the Ministry of Power, Government of India, vide the resolution No. 23/54/2017- R&R dated 8th December-2017. The clause (c) under paragraph 3 of the bidding guidelines permits the DISCOMS to procure the wind power through 'intermediary procurer'. The relevant portions of the guidelines are extracted below for ready reference.

   "c) Intermediary Procurer

   (i) In some cases, an intermediary, between the distribution licensee(s) and the Wind Power Generator(s) (WPG) may be required either to aggregate the wind power to be purchased from different generators and sell it to the distribution licensee(s) or to enhance the credit profile. In such cases, the 'Intermediary Procurer' is essentially a trader, buying power from the WPG(s) and selling the same to one or more distribution licensees and shall carry out the bidding as per the provisions of these guidelines.

   (ii) The Intermediary Procurer shall enter into a Power Purchase Agreement (PPA) with the WPGs and also enter into a Power Sale Agreement (PSA) with the distribution licensee(s). The PSA shall contain the relevant provisions of the PPA on a back to back basis. <u>The intermediary Procurer may charge trading margin as notified by the Appropriate Commission or in the absence of such notification as mutually agreed with distribution licensee(s).</u>

   (iii) As long as the Intermediary Procurer has followed these guidelines for procurement of wind power, the distribution licensee(s) shall be deemed to have followed these Guidelines for procurement of wind power."

As extracted above, as per the bidding guidelines notified by the Central Government dated 8th December 2017, 'as long as the Intermediary Procurer has followed the bidding guidelines for procuring wind power, the distribution licensee(s) shall be deemed to have followed the bidding guidelines' for procurement of wind power.

7. In the present case, the Solar Energy Corporation of India (SECI), a CPSU, is nodal agency for the implementation of the MNRE scheme for setting up of 1200 MW ISTS connected Wind Power Projects in the Country. As per the bidding guidelines dated 8th December 2017 for procuring wind power through bidding process, SECI is an intermediary procurer. The SECI, had concluded the Tranche VII E-RA on 14.05.2019 and selected 480 MW wind power. M/s SECI has allotted 100 MW out of it to KSEB Ltd.

8. The Commission examined the PSA submitted by KSEB Ltd as per the provisions of the Electricity Act, 2003, the bidding guidelines notified by the Central Government, and prudent practices followed across the country. The comments of the Commission on the PSA submitted by KSEB Ltd for approval is given in the subsequent paragraphs.

Power Purchase Agreement between SECI and WPD

9. The Commission noted that, as per the paragraph 3 of the bidding guidelines, the intermediary procurer SECI shall enter into PPA with the Wind Power Generators (WPGs). The PSA shall contain the relevant provisions of the PPA on back to back basis.

Further, as per the paragraph B to the preamble of the PSA dated 06.09.2019 provides that, SECI will sign PPA with the selected Wind Power Developers as indicated in the Schedule-1 and Schedule-2 of the PSA. Further, as per the paragraph-D to the preamble of the PSA dated 06.09.2019, copy of the PPA shall be submitted to the Buying Entity (here KSEB Ltd), within seven (7) days of signing of the PPAs and such PPAs shall become integral part of the 'Buyer- Buying Entity PSA'.

The Commission further noted that, almost all the important articles of the PSA signed with the SECI and KSEB Ltd dated 06.09.2019 has reference to the PPA to be signed with the SECI and WPDs. However, as seen from the CERC Order dated 28.02.2020, para 20, "SECI has submitted that the PPAs with the successful WPDs are yet to be executed". Hence the petitioner KSEB Ltd, has not submitted the PPA signed by the buyer SECI with the WPD. As stated in previous paragraph, without appraising the provisions in the PPA signed between the SECI and WPD, the Commission cannot approve the PSA initialed between SECI and KSEB Ltd.

10. The observation and comments of the Commission on the various Articles of the PSA is given below.

(1) The Clause H of the to the preamble of the PSA dated 06.09.2019 provided as follows.

"Discom(s) acknowledge(s) and accept(s) that SECI is only and Intermediary Company and is facilitating the purchase of sale of electricity generated from the WPD and, therefore, cannot assume independently, any obligation, financial or otherwise, either to the WPD or to Discom(s), (unless otherwise specifically provided otherwise in the PPA), except on a back to back basis, namely, that whatever obligation is enforced by the WPD under the PPA against SECI, Discom(s) shall be bound to fulfill, the obligation on a back to basis towards SECI and similarly, whatever rights that Discom(s) may claim under this Agreement against SECI, shall be subject to due enforcement of the corresponding rights on a back to back basis by SECI against WPD, without an independent obligation on the part of SECI"

The Commission has noted that the above Article appears to impose unequal rights and obligations in the PSA. While the Discom "shall be bound to fulfill the obligation on a back to back basis towards SECI", the rights of DISCOM to claim against SECI shall depend on SECI enforcing such rights against the WPD. The Commission is of the opinion that, all risks has to be apportioned and shared between the parties to the PSA. Since the PPA with WPD is yet to be signed by SECI the Commission in the present cannot agree to the inclusion of clause H of the PSA, without appraising the obligations to the licensee KSEB Ltd and its consumers, as per the provisions of the PPA to be signed between SECI and WPDs.

(2) Article 2.1.2 of the PSA.

The Article 2.1.2 of the initialed PSA provide as follows;

"The parties agree that any modification in this Agreement as directed by SERC or DISCOMs, as applicable, as a result of adoption of tariff and approving the procurement of the contracted capacity, shall be binding on both parties to the Agreement"

The Commission examined the Article 2.1.2. as per the provisions of the Electricity Act, 2003 and noted the following;

As per the Section 86(1)(b) of the Electricity Act, 2003, this Commission is vested with the powers to approve the power purchase agreements entered by the distribution licensees for purchase of power for distribution and supply within the State. Hence , once the Power Sale Agreement is approved by the State Commission, the DISCOMs cannot make any modifications in the PSA without the approval of the Commission.

Considering the statutory powers conferred on the Commission as per the provisions of the Electricity Act, 2003, under the Article 2.1.2 of the PSA, the words 'or DISCOMs, as applicable' shall be deleted.

(3) **Transmission charges and losses (Article 3.2 of the PSA)**

Article 3.2 of the PSA deals with transmission charges and Article 3.3 of the PSA deals with transmission losses, which are extracted below for ready reference.

"3.2 Charges
3.2.1 As per applicable regulation(s) of the Appropriate Commission(s), all charges as determined by the Appropriate Commission from time to time pertains to open access, CTU charges, scheduling charges (if any), and any other charges from injection/ delivery point to the receiving substation(s) of Buying Entity if any, shall be directly paid or reimbursed by the Buying Entity. Invoicing of all transmission related charges shall be done through supplementary bills.

3.2.2 Buyer shall neither be liable for obtaining the open access nor for any payments to be made for such open access to the concerned STU/CTU by Buying Entity.

3.3 Losses
3.3.1 Buying Entity shall be liable to bear all the transmission losses as determined by the Appropriate Commission from time to time in respect of the power evacuated from the Delivery Points to its receiving substation(s)."

As extracted above, as per the Article 3.2 and 3.3 of the PSA dated 6th September 2019, the Buying Entity (KSEB Ltd) shall reimburse the transmission charges/open access charges, scheduling charges etc and loss as determined by the CERC up to the Kerala periphery.

Exemption on inter-state transmission charges and losses ordered by the Central Government

Ministry of Power, Government of India, vide the order dated 13.02.2018, ordered as follows.

" For generation projects based on solar and wind resources, no interstate transmission charges and losses will be levied on transmission of electricity through the inter-state transmission system for sale of power by such projects commissioned till 31st March 2022.

Provided that the above waiver will be available for a period of 25 years from the date of commissioning of such projects.

Provided further that the above waiver will be available for solar and wind projects entering into PPAs with all entities including Distribution

Companies for sale of power from solar and wind power projects for compliance of their renewable purchase obligation.

Provided further that the above waiver will be allowed only to those solar and wind projects that are awarded through competitive bidding process in accordance with the guidelines issued by the Central Government."

Further, the Central Government vide the order dated 06.11.2019 extended the validity of the above order for such projects commissioned till 31st December 2022 instead of 31st March 2022.

Further, as per the bidding guidelines dated 08.12.2017 notified by the Central Government, as long as the intermediary procurer SECI followed the guidelines for procurement of wind power, the distribution licensee(s)/ procurer power from such intermediary procurer shall be deemed to have followed the guidelines for procurement of wind power. Accordingly, as per the order of the MoP, GoI dated 6th November 2019, the transmission charges and losses is completely waived for transmission of power from these wind plants KSEB Ltd proposed to procure power through SECI, for transmitting power through ISTS network upto Kerala periphery.

Considering the reasons as explained in the preceding paragraphs, the Commission hereby direct that the Article 3.2.1 of the PSA shall be modified as follows;

" As per the Order dated 06.11.2019 of the Ministry of Power, Government of India, no interstate transmission charges shall be levied for transmission of electricity under this PSA through inter-state transmission system upto the Kerala periphery for the entire term of the PSA, i.e., 25 years from the 'Scheduled Commissioning Date (SCD)".

Hence the first part of the proposed Amended Article "Buying entity shall be liable to bear all the transmission losses as determined by Appropriate Commission from time to time in respect of the power evacuated from the delivery points to its receiving substation(s)" shall be deleted.

The Commission also here by direct that the Article 3.3.1 of the PSA shall be modified as follows;

" As per the Order dated 06.11.2019 of the Ministry of Power, Government of India, no interstate transmission losses shall be levied for transmission of electricity under this PSA through inter-state transmission system upto the Kerala periphery for the entire term of the PSA, i.e., 25 years from the 'Scheduled Commissioning Date (SCD)".

(4) <u>Delivery point. (Article 4.1.1 of the PSA)</u>

Article 4.1.1 of the PSA states, 'Delivery point shall be as per the provisions identified in the **<u>Buyer-WPD PPA</u>**'.

The Commission cannot approve the Article 4.1.1 without appraising the Buyer-WPD PPA, which was required to be submitted along with the PSA before the Commission. The petitioner shall submit the PPA along with the modified PSA based on the directions given in this Order.

(5) <u>Scheduling and Energy Accounting (Article 4.2 of the PSA)</u>

Article 4.2.1 of the PSA states that 'the scheduling and energy accounting of wind power shall be as per the provisions of the **<u>Buyer-WPD PPA</u>** and Grid Code'.

The Article 4.2.2 of the PSA provides that, 'the WPD shall be responsible for the deviations made by it from the dispatch schedule and for any resultant liabilities on account of charges as per applicable regulations'.

The Commission can approve the Article 4.2.1 and 4.2.2 of the PSA only after appraising the Buyer-WPD PPA, which is yet to be submitted by the petitioner along with the modified PSA as per this order before the Commission.

(6) <u>Article 5.1.1 and 5.1.2 of the PSA: Applicable Tariff.</u>

The Article-5.1.1 and 5.1.2 of the signed PSA dated 6th September 2019 deals with the 'Applicable Tariff" which is extracted below for ready reference.

"5.1.1 From the Scheduled Commissioning Date (SCD) and subject to the provisions of the Article 6.7, the Buying Entity shall pay the fixed tariff of Rs 2.83/ kWh plus trading margin of Rs 0.07/kWh fixed up to commissioning of the cumulative awarded capacity/ accepted cumulative capacity by the SECI under the RfS.

5.1.2 Until the commissioning of the cumulative awarded capacity/ cumulative capacity commissioned as accepted by SECI under the RfS, the applicable tariff payable by Buying Entity shall be the Tariff as per Article 5.1.1. Plus the trading margin of Rs 0.07/ kWh.

Subsequently, the applicable tariff payable by Buying Entity shall be the pooled tariff arrived as per Schedule-1 of this Agreement of the commissioned Project Capacity of all the Projects accepted by SECI but not higher than Rs 2.8091/kWh, till the end of the Term of the Agreement. The Buying Entity shall make the Tariff Payments to Buyer as per the provisions of this Agreement. Trading Margin of Rs 0.07/kWh will be applicable over and above discovered tariff."

Further, as per the Schedule-1 of the signed PSA, the weighted average tariff (pooled tariff) is Rs 2.8091/kWh. Thus as per the PSA, till the commissioning of the cumulative awarded capacity of the

Trache-VII bid of 480 MW, the tariff payable by KSEB Ltd for the 100 MW wind power is Rs 2.83/unit plus the trading margin of Rs 0.07/kWh. Subsequently, after the commissioning of the cumulative awarded capacity, the tariff payable by KSEB Ltd is Rs 2.8091/kWh.

Regarding the applicable tariff, the Commission noted the following.

(i) As per the details submitted before the Commission, the SECI, a CPSU, the intermediary procurer designated by the Central Government is the procurer for power from the wind projects as per the bidding guidelines notified by the Central Government as per the Section 63 of the Electricity Act, 2003.

(ii) Since SECI being a CPSU, as per the Section 63 of the EA-2003, the CERC is vested with the powers to adopt the tariff of the wind projects selected by SECI through competitive bidding process.

(iii) The Central Commission vide the order dated 28th February 2020 in petition No. 382/AT/2019 has adopted the tariff for the 480 MW (Tranche-VII) wind power projects connected to the Inter-State Transmission System(ISTS) and selected through competitive bidding process as per the Standard Bidding Guidelines dated 08.12.2017. The relevant portion of the order of the CERC is extracted below.

21. In the light of above, it, thus, emerges that selection of the successful bidders and the tariff of the Projects has been carried out by SECI through a transparent process of competitive bidding in accordance with Guidelines. SECI, vide its letter dated 4.10.2019 has certified that the process is in conformity with the Guidelines and no deviation was taken from the Guidelines in the RfS documents. Relevant portion of the said letter dated 4.10.2019 is extracted as under:

"With respect to the RfS no. SECI/ C&P/ WPD/ 1200MW/ T7/ RfS/ 022019 dated 22.02.2019, it is hereby declared as follows:

1. After the conclusion of bid submission, the Evaluation Committee constituted for evaluation of bids has conducted the techno-commercial as well as financial bid evaluation in conformity to the provisions of the RfS.

2. Applicable Guidelines and amendments/clarifications thereof, if any, issued by Government of India for the bidding process were followed in the above tender and no deviation was taken from the Guidelines in the RfS documents for the above tender."

22. The Petitioner has prayed to adopt the tariff discovered in the competitive bid process for the individual power Projects. In *the light of the above discussion, in terms of Section 63 of the Act, the Commission adopts the following tariff for the Projects as agreed to by the successful bidders subject to signing of the PPAs with WPDs, which shall remain valid throughout the period covered in the PSAs and PPAs:-*

Sl No	Bidders	Tariff (Rs/kWh)	Projected Capacity (MW)
1	Betam Wind Energy Private Limited	2.79	200
2	Ostro Energy Private Limited	2.81	50
3	SprngVaayuUrja Private Limited	2.82	100
4	Adani Renewable Energy Park (Gujarat) Ltd	2.83	130
	Total		480

As above, the tariff derived through the bidding process ranges from Rs 2.79/unit to Rs 2.83/unit.

Further, as per the Article 5.1.1 of the PSA, KSEB Ltd has to pay the tariff @ Rs 2.83/unit, from the Scheduled Commissioning Date (SCD). Further, as per the definitions given under Article 1.1 of the PSA, Scheduled Commissioning Date (SCD) is defined as follows;
'Scheduled Commissioning Date (SCD) shall mean the Date that is eighteen (18) months from the Effective date of the SECI-WPD PPA'.

The Commission further noted that, since the petitioner KSEB Ltd not submitted the 'Buyer- WPD PPA', i.e., the PPA signed between the SECI and Wind Power Developer, the Commission is not aware of, from which WPD the power is being supplied to KSEB Ltd.

Commission is of the considered view that, KSEB Ltd is liable to pay the adopted tariff of the WPD, as per the 'Buyer-WPD PPA' assigned to this PSA, as per the Article 5.1.1 of the PSA. Hence the Commission is not in a position to approve the Article 5.1.1 of the PSA as extracted above.

Considering the reasons as detailed in the preceding paragraphs, the Commission hereby direct that, KSEB Ltd, shall modify the Article 5.1.1 of the PPA as follows;

"5.1.1 From the Scheduled Commissioning Date (SCD) and subject to the provisions of the Article 6.7, the Buying Entity shall pay the tariff adopted by CERC for the power supplied by the WPD selected by the SECI under the 'Buyer- WPD PPA' attached to this PSA plus trading margin as approved by KSERC up to commissioning of the cumulative awarded capacity/ accepted cumulative capacity by the SECI under the RfS.

(7) Trading Margin (under Article 5.1.1 and 5.1.2 of the PSA)

As per the initialed PSA dated 06.09.2019, the trading margin payable to the intermediary procurer SECI is Rs 0.07/unit.

The Commission examined the provisions of the trading margin as per the provisions of the bidding guidelines and also as per the Regulations notified by the CERC, and noted the following.

(i) The clause (c) (ii) under paragraph 3 of the bidding guidelines notified by the Central Government provide as under.

The intermediary Procurer may charge trading margin as notified by the Appropriate Commission or in the absence of such notification as mutually agreed with distribution licensee(s).

(ii) Regarding the trading margin, Hon'ble CERC vide the order dated 28.02.2020 in Petition No. 382/AT/2019 ordered as follows.

"27. SECI has prayed to adopt the trading margin of Rs. 0.07/kWh. Regulation 8(1)(d) of the Trading Licence Regulations provides as under:
"8(1)(d) For the transactions under long-term contracts, the trading margin shall be as mutually decided between the Trading licensee and the seller:"

28. The above provision gives choice to the contracting parties to mutually agree on Trading Margin for long-term transaction. Accordingly, the Commission cannot adopt Trading Margin. The Petitioner shall be governed by the above provisions of the Trading Licence Regulations. In view of the above, the prayer of SECI to adopt the Trading Margin is decided accordingly.

29. However, Proviso to Regulation 8(1)(d) of the Trading Licence Regulations provides as under:
*"8(1)(d) * * * * **
Provided that in contracts where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh."
In addition, Regulation 8(1)(f) of the Trading Licence Regulations provides as under:
"8(1)(f). For transactions under Back to Back contracts, where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh."
Thus, the Petitioner, SECI, shall also be governed by the above provisions of the Trading Licence Regulations.

The present transactions, i.e., procuring power 100MW power through SECI by KSEB Ltd is an inter-state trading transactions. As per the Section 79(j) of the Electricity Act, 2003, CERC is empowered '*to fix the trading margin in the inter-State trading of electricity, if considered necessary'.*However, CERC vide the order dated 28.02.2020 has observed that, ***'Trading Margin Regulations do not provide for any Trading Margin for long term transactions and, therefore, it is upto the contracting parties to mutually agree on Trading Margin'.***

Further, para 3.1- Explanation (c) (ii) of the bidding guidelines notified by the MoP, GoI dated 8th December 2017 also provides that, in the absence of the notification of the trading margin by the Appropriate Commission, the intermediary procurer can charge the trading margin mutually agreed with the distribution licensee(s).

The Commission has also examined the provisions in the CERC (Procedure, Terms and Conditions for grant of trading licensee and other related matters) Regulations, 2020. As per the Regulation 8(1)(c) of the said Regulations, the upper ceiling on the trading margin for short term contract is fixed at Rs 0.07/unit. The relevant Regulation is extracted below for ready reference.

"8(1)(c) For transactions under short term contracts and contracts through power exchanges upto one year, the Trading Licensee shall charge a trading margin of not less than zero (0.0) paise/kWh and not exceeding seven (7.0) paise/kWh:"

As above, Rs 0.07/kWht (ps 7/kWh) is the maximum ceiling on trading margin for short term transaction. However in the present case, the PSA between the KSEB Ltd and SECI is long term contract for 25 years. The risks of scheduling and payment of long term contracts are generally less when compared to short-term contracts. Further, as per the Article 6.4 of the PSA between the SECI and KSEB Ltd, there is enough payment security mechanism including 'Unconditional, revolving and irrevocable letter of credit, 'State Government Guarantee' etc. Accordingly, the payment risk of the present transaction is minimum. Considering these reasons, there is no rationale in claiming trading margin @Rs 0.07/kWh by the intermediary procurer M/s SECI, which is the upper ceiling on trading margin provided for short-term contracts.

Hence considering the best interest of KSEB Ltd and its consumers, the Commission is not is position to approve the trading margin @Rs 0.07/unit, which is the maximum ceiling on trading margin approved by CERC for short-term transactions.

Considering the reasons given in the preceding paragraphs, the Commission hereby direct KSEB Ltd to negotiate with SECI on trading margin as per the provisions in the CERC (Procedure,

Terms and Conditions for grant of trading licensee and other related matters) Regulations, 2020, and submit the same before the Commission for approval.

(8) Article 5.1.3. Damages/ dues recovered by the SECI by encashing the PBG maintained by the WPD with SECI.

The Article 5.1.3 of the PSA provide as under;

"5.1.3 Subject to Article 6.4 (C), any damage/ dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of the WPD under the Buyer-WPD PPA, shall be passed on by Buyer to the Payment Security Fund maintained by the Buying Entity."

Commission examined the above article in terms of the paragraph 7.4 of the bidding guidelines. As per the paragraph 7.4.2(b), when the DISCOM purchasing power through intermediary procurer, the DISCOM has to provide the following payment security to the intermediary procurer;

(i) Revolving letter of Credit (LC) of an amount not less than 1 (one) months average billing from the Project(s) under consideration.
(ii) State Government Guarantee.
(iii) In addition to (i) & (ii) above, the DISCOM ***may also*** choose to provide payment security fund, which shall be suitable to support payment of atleast 3 (three) months' billing of all the Projects tied up with such fund.

As extracted above, as per the bidding guidelines, the 'payment security fund' is optional and at the discretion of the DISCOM.

As per the Article 5.1.3 of the PSA, the damages/ dues caused to the DISCOMs due to the fault of the WPD shall be passed on by the buyer SECI to the Payment Security Fund, instead of passing it on to the DISCOMs. The Commission is of the considered view that, the damages/ dues caused to the DISCOM due to the fault of the WPD shall be passed on to the DISCOM instead of depositing it to the Payment Security Fund by the SECI.

Hence, the Commission hereby direct that, the Article 5.1.3 of the PSA shall be modified as follows.
"5.1.3 Any damage/ dues recovered by the Buyer by encashing the Performance Bank Guarantee, upon default of the WPD under the Buyer-WPD PPA, shall be passed on by the Buyer to Discom."

(9) Article 5.1.4. Obligation from the part of the Buying Entity (DISCOM) to purchase the energy generated by the WPD till the full commissioning or 'Scheduled Commissioning Date'.

The Commission hereby direct to modify the Article 5.1.4 duly considering the decision of the Commission on Article 5.1.1. and also the trading margin.

(10) Article 6.4 Payment Security Mechanism

The paragraph 7.4 of the bidding guidelines deals with payment security. As per the paragraph 7.4.2(b), when the DISCOM purchasing power through intermediary procurer, the DISCOM has to provide the following payment security to the intermediary procurer;

(i) Revolving letter of Credit (LC) of an amount not less than 1 (one) months average billing from the Project(s) under consideration.

(ii) State Government Guarantee.

(iii) In addition to (i) & (ii) above, the DISCOM may also choose to provide payment security fund, which shall be suitable to support payment of atleast 3 (three) months' billing of all the Projects tied up with such fund.

As extracted above, as per the bidding guidelines, the 'payment security fund' is optional at the discretion of the DISCOM.

However, as per the Article 6.4(C) of the PSA, in addition to the Revolving LC and State Government Guarantee, the DISCOM also has to provide Payment Security Fund, not later than the commencement of supply of power to the Buyer under this agreement, which shall be suitable to support payment of at least 3 (three) months' billing of all the projects tied up with such fund. The Commission notes that State Government Guarantee is a Sovereign Guarantee assigned against the revenues of the State. Being the highest guarantee, such guarantee, if given is completely secure and hence the Payment Security Fund for 3 months billing becomes redundant. The petitioner may make an informed choice to whether State Government Guarantee is required to be given if Payment Security Fund is provided. Also provision of 3 month's billing amount will cost the DISCOM extra and lead to avoidable expenditure.

Since Payment Security Fund is not obligatory as per the bidding guidelines, the Commission hereby direct that, KSEB Ltd shall take up with SECI to have only 2 securities for payment security instead of all three as proposed.

(11) Article 6.5.5 Diversion of Wind Power or part thereof to third party.

The Article 6.5.5 of the PSA provide as follows.

"6.5.5 Buyer/ WPD shall have the right to divert the Wind Power or part thereof and sell it to any third party namely;

i) Any consumer, subject to applicable Law; or
ii) Any licensee under the Act.

Buyer shall request the concerned SLDC/ RLDC to divert such power to third party as it may consider appropriate."

The Commission is of the considered view that, third party sale shall be allowed only if the Buying Entity make default in making payment beyond the 30th day of the due date by Buying entity. This aspect shall clearly provided as a precondition for third party sale. Hence the Commission hereby direct KSEB Ltd to suitably modify the Article 6.5.5. accordingly.

(12) <u>CUF and related issues.(Article 6.8.3 of the PSA).</u>

As per the Article 6.8.3a of the PSA, in any contract year, the Buying Entity (DISCOM) shall not be obliged to purchase an additional energy from the Buyer/ WPD beyond **413.21 MU.** Similarly, as per the Article 6.8.3b of the PSA, if the WPD not able to generate minimum energy of 275.47MU, the WPD shall be liable to pay compensation as determined by the Appropriate Commission or authority. Further, the minimum compensation payable to the Buyer by the WPD shall be 75% of the PPA tariff, which shall inturn be remitted to the Buying Entity.

Further, as per the Article 6.8.4 of the PSA provides that, the excess quantum of power shall be offered to the Buying Entity at 75% of the tariff under Article 5.1.1 and 5.1.2 of the PSA.

The Commission examined the above provisions of the PSA with the Paragraph 7.2 of the bidding guidelines, which is extracted below for ready reference.

7.2. Capacity Utilisation Factor (CUF):

7.2.1. The WPG will declare the annual CUF of its Project at the time of signing of PPA and will be allowed to revise the same once within first year of COD. Calculation of CUF will be on yearly basis from 1st April of the year to 31st March of next year. The declared annual CUF shall in no case be less than 22 percent. The variation permitted in wind power generation from the declared CUF value will be indicated in the RfS. The lower limit will, however, be relaxable to the extent of non-availability of grid for evacuation of wind power, which is beyond the control of the WPG. For the first year of operation of the project, the annual CUF shall be calculated for the complete year after COD of the Project. Subsequently, the annual CUF will be calculated every year from 1st April of the year to 31st March next year.

7.2.2. In case the project supplies energy less than the energy corresponding to the minimum CUF, the WPG will be liable to pay to the Procurer, penalty for the shortfall in availability of energy. This will, however be relaxable to the extent of grid non-availability for evacuation, which is beyond the control of the WPG. The amount of such penalty will be in accordance with the terms of the PPA, which shall ensure that the Procurer is offset for all potential costs associated with low generation and supply of power under the PPA, subject to a minimum of 75% (seventy-five percent) of the cost of this shortfall in energy terms, calculated at PPA tariff. Penalties may be prescribed on the amount of shortfall, higher shortfall may attract higher penalties and vice-versa.

7.2.3. In case of availability of power more than the maximum CUF specified, WPG will be free to sell it to any other entity provided first right of refusal will vest with the Procurer(s). In case the Procurer purchases the excess generation, the same may be done at 75% of the PPA tariff, and provision to this effect shall be clearly indicated in the RfS document.

As extracted above, as per the bidding guidelines WPG will have to declare the CUF at the time signing of the PPA. However, CUF declared by the WPG is not known to this Commission, since the petitioner has not submitted the PPA along with the PSA submitted for approval.

It is also specified in the bidding guidelines that, the minimum CUF in no case shall be less than 22% and incase the project supplies energy less than the energy corresponding to the minimum CUF, the WPG will be liable to pay to the procurer, penalty for the shortfall in availability of energy, to offset for all potential costs associated with low generation and supply of power under the PPA, subject to a minimum of 75% of the PPA tariff.

For the excess energy more than the maximum CUF specified, the first right of refusal vest with the Buying Entity (DISCOMS).

However, though the minimum CUF and maximum CUF was not specified in the PSA, the maximum energy purchase limit and the minimum limit of energy for avoiding penalty is mentioned in the PSA.

KSEB Ltd is also required to verify the CUF limit specified in the PSA with that provide in the PPA.

Further, as per the Article 6.8.3b of the PSA, the compensation for the short fall in generation, if any, beyond the minimum CUF shall be as determined by the Appropriate Commission/ Authority. ***As per the Section 86 of the EA-2003, the Commission is the authority to approve the PSA of a DISCOM. However KSEB Ltd has not prayed before the Commission to determine the compensation, if any, payable by the WPD for shortfall in generation beyond the minimum CUF limit specified.***

Considering above aspects in detail, the Commission hereby direct KSEB Ltd to modify the Article 6.8.3 of the PSA in conforming to the paragraph 7.2 of the bidding guidelines dated 08.12.2017.

(13) Article 6.9.1 (ii) of the PSA.

The Article 6.9.1(ii) of the PSA deals with raising supplementary bill 'pertaining to open access and scheduling related charges, if any, for transmission of the power, as determined by the CERC from time to time.

Since, as already clarified under paragraph 10(3) above, the intra-state transmission charges and loses upto the Kerala periphery is fully exempted as per the order of the Ministry of Power, GoI dated 06.11.2019.

Hence the Commission hereby direct KSEB Ltd to modify the Article 6.9.1(ii) of the PSA, duly incorporating the exemption of inter-state transmission charges and loss applicable upto Kerala periphery.

(14) Article 7.2 of the PSA (Affected party)

As per the Article 7.2 of the PSA, the Buyer-SECI and the Buying Entity KSEB Ltd only are included as affected party under the Force Majeure conditions. ***However, as per the bidding guidelines, the WPG is also an affected party. Hence the licensee shall consider including the WPD as per the Buyer-WPD PPA, which form part of the PSA as an affected party.***

(15) Article 7.3.1 (e) of the PSA.

The Article 7.3.1(e) of the PSA provides that, 'an event of force majeure identified under Buyer-WPD PPA there by affecting the supply of power by WPD' is a Force Majeure event.

Since the petitioner KSEB Ltd has not submitted the 'Buyer-WPD PPA' along with the PSA for approval, the Commission cannot approve the Article 7.3.1(e) without appraising the provisions the 'Buyer-WPD PPA'.

(16) **Article 9.2.1 of the PSA**

As per the Article 9.2.1(i) of the PSA, if the SECI fails to supply power to the Delivery points for a continuous period of one year, it shall be constitute as a SECI's event of default.

Hence to classify a default as due to SECI, there has to be a continuous period of one year of non-supply. Even if SECI supply power for few days in an year or intermittently, SECI cannot be held responsible for the event of default. This has to be adequately addressed to cover a situation if SECI provide intermittent supply for few days or few months in an year. KSEB Ltd shall include adequate provisions in the PSA to address such issues.

(17) Article 10.1.1 and 10.1.2 of the PSA.

As per Article 10.1.1 of the PSA, Buying Entity shall indemnify, defend and hold Buyer/WPD harmless for any loss of or damage to property of such third party, or death or injury to such third party, arising out of a breach by the Buyer/WPD of any of its obligations under the agreement and third party claims arising by reasons of breach by the Buyer/WPD of any of its obligations under the agreement.

The Commission notes that this PSA is executed between the SECI (Buyer) and KSEB Ltd (Buying Entity). As such WPD is an outsider to this PSA and has no privity as far as this Agreement is concerned. Hence 'Buying Entity' is not legally liable to indemnify any loss arising out of a breach by the WPD against such third party claims. This Article requires to be reconsidered by the petitioner.

Article 10.1.2 of the PSA also contain an indemnity provision. Since the WPD is not a party to this PSA, Buyer has to indemnify the Buying Entity for any loss or damage sustained by the Buying Entity due to breach of any of the obligations on the part of the 'Buyer'. This Article also required to be reconsidered.

(18) Article 13.9. Taxes and Duties

There is ambiguity in the Article 13.9.3 of the PSA regarding who is to pay taxes, duties etc for the trading margin received by the buyer from the buying entity for discharging their (buyer) obligation under the PSA. This Article says "*Buyer shall not be liable for any payment of, taxes,* *duties, levies, cess whatsoever for discharging any obligation of Buying Entity by Buyer on behalf of Buying Entity or its personnel*". The Buying Entity is paying the Buyer the trading margin, as per the PSA. However all taxes, duties, cess etc arising out of this trading margin shall have to be borne by the Buyer. This Article must be modified accordingly.

11. As detailed above and based on the documents submitted by the licensee, the Commission is unable to appraise the various Articles of the PPA to be signed between the Buyer SECI and WPD and its financial and other consequences on KSEB Ltd and its consumers. This is a prerequisite for the Commission before it can consider the approval of the initialed PSA.

Hence it is directed that, KSEB Ltd shall,

(1) If it considers expedient, sign a Letter of Indent (LOI) with SECI indicating the quantity, rate and the date of commencement of the supply along with the period of 25 years supply.
(2) File a proper petition for approval of the PSA after incorporating the remarks of the Commission on the PSA.
(3) Make available in the petition a copy of the PPA signed between SECI and WPD.

The petition is disposed off with the above observation and directions.

Sd/-	**Sd/-**
S. Venugopal	**Preman Dinaraj**
Member	**Chairman**

Approved for issue

C.R Satheesh Chandran
Administrative Officer
(In Charge of Secretary)