

**ERALA STATE ELECTRICITY REGULATORY COMMISSION**  
**THIRUVANANTHAPURAM**

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

**Petition No. OA 30/2019**

In the matter of : Petition filed by M/s Viyyat Power Pvt Ltd, in the matter of determination of Compensatory Tariff for rehabilitation of Iruttukanam Small Hydro Power Project Stage I (2 X 1.5) MW and Stage II (1 X 1.5) MW destroyed in the MahaPralayam on the 9<sup>th</sup> August and 14<sup>th</sup> August 2018.

Petitioner : M/s. Viyyat Power Pvt Limited.

Petitioner represented by : 1. Sri. Adv. C. K. Vidyasagar  
2. Smt. S. Syamala Nair, Chairperson, Viyyat Power Pvt Ltd  
3. Sri. P.D. Nair, Managing Director, Viyyat Power Pvt Ltd

Respondent : 1. Kerala State Electricity Board Limited  
2. Government of Kerala  
3. The Director, Energy Management Centre

Respondents represented by : 1. Sri. K.G.P. Nampoothiri, EE, KSEB Ltd  
2. Smt. Latha S.V, AEE, KSEB Ltd

**Order dated 24.04.2020**

1. M/s. Viyyat Power Pvt Limited ( hereinafter referred to as the petitioner or M/s Viyyat), on 17.09.2019, filed a petition before the Commission with the following prayers.

*“ Considering the fact that the Petitioner has rehabilitated the power project Stage I & II against heavy odds in a record time of 322 days after the disaster with almost all new equipments including new generators by spending an additional investment of Rs. 9,69,34,511.80 over and above the insurance cover benefit of Rs. 8.00 Crore, the petitioner humbly prays for the following.*

- (i) *The Hon’ble Commission may be pleased to pass on order granting an additional “Compensatory Tariff” for Stage I and Stage II, commensurate with the new investment made by the petitioner as*

*done by the Hon'ble CERC in Order dated 21.02.2014 in the case of Petition No. 155/MP/2012 of Adani Power Limited Vs. Uttar Haryana Bijli Vidyut Nigam Limited and Others.*

- (ii) *Any other Order the Hon'ble Commission may be pleased to deem fit considering the fact that the tariff of Iruttukanam Stage I and Stage II of the Petitioner as existing before the disaster, are much below the APPC of KSEBL and if the Petitioner had abandoned the project after the disaster, KSEBL has to purchase the same measure of power from elsewhere at the rate above APPC'.*

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

- (1) M/s. Viyyat Power Pvt Limited established two Small Hydro Project (2 X 1.5) MW, Iruttukanam Stage I and (1 X 1.5) MW Iruttukanam Stage II at Iruttukanam, Idukki District. These two projects are at the same location using the same weir and water conductor system but having separate power houses. The 3 MW stage I project was commissioned on 04.11.2010 and Stage II was commissioned on 10.04.2012.
- (2) For implementing the Stage-1- 3 MW SHP, the State Government selected the developer through competitive bids at the lowest tariffs quoted by developer for supplying power to KSEBL for the entire BOOT period. Tariff quoted by the petitioner is as follows.

For 6<sup>th</sup> year of BOOT Period is Rs. 1.08/Unit  
7<sup>th</sup> to 18<sup>th</sup> year of BOOT period- Rs 2.70/unit  
19<sup>th</sup> to 30<sup>th</sup> year of BOOT period- Rs 2.07/unit.

The petitioner has also signed an implementation agreement (IA) with the State Government in the month of December 2004.

- (3) With the approval of the Commission, KSEB Ltd and Petitioner signed Power Purchase Agreement (PPA) for supplying the energy generated to KSEB and tariff quoted by builder during the year 2007.
- (4) The Iruttukkanam Stage II - 1.5 MW project, was proposed by utilizing the unutilized water after generating electricity from the Stage I project. An implementation agreement was also signed with State Government as an extension of Stage I project

The Stage-II project achieved commercial operation in 10.04.2012, the Commission approved generic tariff prevailed at that time i.e @ 2.94/unit for supplying electricity to KSEB from the Stage-II project.

Subsequently, the Commission revised the generic tariff applicable for SHPs commissioned on or after 01.01.2013 at Rs. 4.88/unit in line with CERC norms for RE project. The petitioner demanded the revised generic tariff @ Rs 4.88/unit applicable for the projects commissioned on or after 01.01.2013, though the Stage-II 1.5 MW SHP of the

petitioner was achieved CoD on 10.04.2012. Commission declined the request of the petitioner. The petitioner filed an appeal against the order of the Commission before the Hon'ble APTEL, but the Hon'ble APTEL also declined the request of the petitioner. The petitioner filed appeal against the decision of the Hon'ble APTEL before the Hon'ble Supreme Court and the matter is now pending before the APEX court. **So, the petitioner is yet to sign Power Purchase Agreement with KSEBL for supplying power from Stage-II 1.5 MW project.** However as per the provisions of the implementation agreement, the petitioner has been supplying energy to KSEBL from the Stage II project at the approved tariff of Rs. 2.94/unit from the date of commercial operation.

- (5) The petitioner submitted that he had supplied a total 169.54 million units of energy to KSEBL till 14.8.2018.
- (6) The Petitioner further submitted that during the land slide disaster (Urulpottal) happened in the MahaPralayam occurred in August 2018 the projects of the petitioner i.e, Stage-I and Stage-II of Iruttukkanam project was totally damaged, including the office room, control room, switch gear room and battery room, generating units etc and were completely destroyed and the equipment were thrown over the turbine and generator. The generator hall was covered with mud, rock and debris, at 28 to 30 feet height. It is reported that petitioner replaced all the three generators with new generators.
- (7) According to the petitioner, the following additional expenses incurred due to the disaster happened in August 2018.

SI No	Particulars	Amount (Rs. Cr)
1	Making good the damage to the power house building and other civil works	2.55
2	Cost of dismantling / repair / replacement of mechanical equipment	0.22
3	Cost of replacement of electro mechanical equipment including erection and commissioning	9.15
4	Total	<b>11.91</b>

- (8) In addition to the above the petitioner has claimed the following additional expenses on account of the damage occurred during the flood in August 2018.

SI No	Particulars	Amount (Rs. Cr)
1	Cost of Civil Structure & protection work of power house against future	0.56
2	Loss of generation revenue during rehabilitation period from 09.8.2018 to 01.07.2019	4.94
3	Additional cost incurred for SCADA equipment in power house	0.28
	Total	5.78

Thus, according to the petitioner, total additional liability incurred on account of the disaster happened in August 2019 is Rs 17.69 crore, as detailed below.

Sl No	Particulars	Amount (Rs. Cr)
1	Expenditure incurred for replacing generators repairing power house mechanical equipment	11.91
2	Additional expenses claimed (Additional protection works, loss in revenue etc)	5.78
	Total	17.69

(9) The petitioner submitted that they had the following insurance policies in the position at the time of disaster.

- (i) SBI General's "Standard Fire & Special Perils Insurance" Policy.
- (ii) SBI General's Burglary Insurance" Policy
- (iii) SBI General's "Machinery Breakdown Insurance" Policy
- (iv) SBI General's "Public Liability Insurance" Policy
- (v) SBI General's "Employee Compensation Insurance" Policy

Petitioner further submitted that out of five policies, only "the Standard Fire and Special Insurance Policy" (policy (i)) only triggered at this point of time. The total amount insured under this policy were as under:

Sl No	Particulars	Amount (Rs.Cr)
1	Building (civil work)	8.50
2	Equipment	14.62
3	Total	23.12

(10) The petitioner further submitted that as against insured value of Rs. 23.12 Cr, the payable amount by Insurance Company was worked out by the Insurance Surveyor is about Rs. 8 Cr. The exact amount will be worked out by Insurance Company subsequently and the same will be submitted before the Commission during the currency of the petition before hearing. Accordingly after accounting the expected share of the Insurance Company the loss to the petitioner including loss in revenue generation additional protective works etc is  $(17.69-8.00) = \text{Rs. } 9.69$  Cr.

(11) The petitioner completed the rehabilitation work and synchronized the units with the grid at the dates given below.

Stage I	Unit 1	27.06.2019
Stage I	Unit 2	28.06.2019
Stage II	Unit 3	08.07.2019

- (12) The petitioner further submitted that, the clauses in the PPA related to Force Majeure events provide as under.

*Clause 13.5 of PPA provides that if the Company is the aggrieved party in case of Force Majeure event, Article 6.5 of IA shall apply which states that “if a Force Majeure event which is a Non-political event continues or is in the reasonable judgment of the parties likely to continue beyond a period of 120 days, the parties may mutually decide to terminate this agreement or continue this agreement on mutually agreed terms. If the parties are unable to reach an agreement in this regard, the affected party shall after the expiry of the said period of 120 days, be entitled to approach the government to terminate this agreement”*

Pursuant to the above, the petitioner decided not to abandon the project in spite of the Force Majeure conditions extending beyond 120 days.

- (13) The petitioner further submitted that, they had taken up the loss sustained to the project on account of the disaster before the State Government and also to the KSEBL. The Petitioner requested the Government to extend the BOOT period further, considering the new generating units installed instead of the old one and additional investment made by the petitioner on account of damages occurred during the flood happened in August 2018.
- (14) The petitioner further requested that the Commission may grant an additional compensatory tariff for Stage I & Stage II, considering the additional investment (including loss in revenue) of Rs. 9.69 Cr and also considering Force Majeure events. The petitioner has also produced the copies of the order of CERC dated 21.02.2014 in Petition No. 155/MP/2012 and also a copy of the order of this Commission dated 12.01.2015 in the case of Meenvallom Small Hydro Project.

3. The petitioner vide the affidavit dated 6.1.2020 submitted the supplementary statements on additional facts as follows:

- (1) The total catchment area of the Iruttukkanam Project is 75 sq.km. The ongoing Sengulam Augmentation Scheme of KSEB Ltd, with a catchment area of 53.5 sq. km is just upstream of the Iruttukkanam project. Once the Sengulam project is commissioned, the catchment area of Iruttukkanam project will get reduce to 21.45 sq.km and consequently power generation will be get reduced to 28.6 % of the present generation.

The expected annual generation of Iruttukkanam Project is 10.50MU as against the present average annual generation of 22.50 MU.

- (i) As per PPA, the tariff applicable for the electricity generated from the project from 03.09.2022 is Rs 2.07/unit only. Without compensatory

tariff the petitioner will not be able to fulfill its obligation in loan, RoE Income Tax etc.

- (ii) The petitioner is supplying power to KSEBL at a tariff much below APPC and hence KSEBL have immense gain.

4. The respondent KSEB Ltd, on 13.02.2020 submitted written comments on the petition filed by M/s Viyyat Power Ltd for the determination of compensatory tariff. The summary of the comments raised by KSEB Ltd is given below.

- (1) The petitioner M/s Viyyat Power Private Ltd, filed a Civil Appeal before the Hon'ble Supreme Court against the tariff fixed by the Commission for Iruttukkanam Stage-II (1 x 1.5 MW) project. The petitioner not yet signed PPA with KSEB Ltd for Iruttukkanam Stage-II project.

Hence the petition filed by M/s Viyyat Power (Pvt) Ltd is not maintainable, in view of the fact that the tariff of Iruttukkanam Stage-II is subjudice before Hon'ble Supreme Court.

- (2) Without prejudice to the maintainability of the petition, the respondent KSEB Ltd submitted the following.

- (i) Though the petitioner has five insurance polices, they claimed insurance only from the SBI General's "Standard Fire & Special Perils Insurance " Policy. Further, even though the amount insured under the above policy is Rs.23.12 Cr, the petitioner proposes to share only Rs.8 Cr with the insurance company. The petitioner proposes to recover the balance amount as compensatory tariff from KSEB Ltd through PPA.

- (ii) The clause 6.6 of the Implementation agreement signed by the petitioner with State Government provide as under.

*"6.6 Liability for other losses, damages etc.*

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

- (iii) The Clause 13.6 of the PPA signed between the petitioner and KSEB Ltd provide as under.

*"13.6 Liability for other losses, damages etc.*

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

- (iv) As per clause 5.6 of the IA signed by the petitioner with GoK, the Petitioner shall at its cost and expense, purchase and maintain by re-instatement or otherwise, during the operation period insurance against:
- a. Loss, damage or destruction of the project facilities, at replacement value
  - b. The Company's general liability arising out of the project.
  - c. Liability to third parties
  - d. Fire Protection Coverage insurance
  - e. Any other insurance that may be necessary as per prudent utility practices to protect the Company, its employees and its assets against loss, damage, destruction, business interruption or loss of profit including insurance against all Force Majeure events that are insurable.

- (v) Clause-10.1 of the PPA provide as under.

*"10.1 Insurance:*

*The Company shall at its cost and expense, purchase and maintain by re-instatement or otherwise, during the Operations period insurance against:*

- (i) Loss, damage or destruction of the project facilities, at replacement value*
- (ii) The Company's general liability arising out of the project.*
- (iii) Liability to third parties*
- (iv) Fire Protection Coverage insurance;*
- (v) Any other insurance that may be necessary as per prudent utility practices to protect the Company, its employees and its assets against loss, damage, destruction, business interruption or loss of profit including insurance against all Force Majeure events that are insurable."*

- (vi) KSEB Ltd submitted that, as per the provisions of the IA and PPA, the petitioner is not entitled to claim any loss, damage, cost, expense, claim, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure event. Further as per the above provisions of the IA and PPA, the petitioner shall, at its cost and expense, purchase and maintain by re-instatement or otherwise, during the Operations period insurance against Loss, damage or destruction of the project facilities, at replacement value. Therefore, the petitioner was entitled to take Insurance coverage at replacement value and replacing the plant and machinery and other facilities destroyed by flood has to be through insurance.

- (vii) KSEB Ltd further submitted that the investment made by the petitioner was unilateral without consulting the beneficiary respondent, and also without getting the approval of the Commission. The original capital cost of the project was Rs.24.88 crore only, where as the capital investment now claimed by the Petitioner as rehabilitation expense is Rs.17.69 Cr which is almost 71% of the original capital cost of the power plant.
- (viii) As per the provisions of the IA & PPA, the cost due to Force Majeure cannot be passed on to KSEB Ltd. The petitioner may claim the amount over and above the insurance amount from the GoK under the head 'Dhurithaswasam'.
- (ix) In response the petitioner's reference to tariff of Meenvallom SHEP, KSEBL submitted as follows:

*The Petitioner has cited the order dated 12-1-2015 in OP 5 of 2014 issued by Hon'ble Commission in the case of Meenvallom SHP as an example for modification of tariff in an executed PPA. In this matter, it is submitted that the matter involved in the case of Meenvallom is different from the case of Petitioner in the following aspects:*

- a. The initial tariff for Meenvallom was fixed by GoK before Commissioning of the project. Due to reasons beyond the control of the project developer, the commissioning of Meenvallom got delayed and got commissioned in August 2014.*
- b. Meanwhile Hon'ble Commission had issued Regulations determining tariff of RE projects in the State and fixed generic tariff applicable for Renewable Energy projects commissioning in 2014.*
- c. As per the EA, 2003, the tariff of RE projects in the State have to be determined by State Commission. State Commission vide KSERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2013 had notified generic tariff for the RE projects commissioned in the State during that period. This tariff was applicable for all the projects developed during the period of commissioning of Meenvallom project. Therefore, the project developer of Meenvallom filed petition before Hon'ble Commission seeking the generic tariff.*
- d. Eventhough, there existed enabling provision in the Regulation to fix higher preferential tariff for Meenvallom project, Hon'ble Commission had ordered for getting concurrence for the rate before modification of the PPA.*
- e. It is further submitted that while fixing the tariff by the State Commission, the project had not started operation, even though PPA was executed.*



*f. However, in the case of the Iruttukanam project, the case is different. The project was in operation for the last 17 years and payment was being made for the energy injected at a tariff approved by Hon'ble Commission as per the provisions of the EA, 2003. Around 80% of the cost recovery of the project is completed at the tariff in the PPA. Reviewing the tariff at this stage is not in accordance with any financial, legal and Regulatory principles.*

- (x) In the matter of the Adani referred to in the Petition, KSEBL submitted that the compensatory tariff fixed by Hon'ble CERC was for a short period of 3 years or less and that the facts related to that matter is also entirely different and thus the ratio cannot be imported in this matter.
- (xi) KSEBL further submitted that the petitioner has stated in the petition that the project has received Clean Development Mechanism funds. As per the Regulations in force, the petitioner was bound to share the benefits with the beneficiary, KSEBL. However, no such sharing has been done so far and the petitioner has been retaining the same. KSEBL therefore requested the Commission to direct the petitioner to share the same as per the extant regulations.
- (xii) Based on the above, KSEB submitted before the Commission that,
  - (a) As per the provisions of the IA and PPA, the petitioner is not entitled to claim the loss due to force majeure event from the respondent, KSEBL.
  - (b) The petitioner is bound to meet the expense from the Insurance policy for the project, which the petitioner was bound to take for replacement value.
  - (c) Balance portion of the expense, if any may be met from the 'Dhurithaswasam' fund of GoK.
  - (d) Extension of 'BOOT' period of the project may be decided by the GoK as the Implementation Agreement has been executed by the Petitioner with the GoK.

5. The State Government vide the letter dated 20.02.2020 forwarded the remarks of the Government on the petition filed by M/s Viyyat Power Private Ltd, and its summary is given below.

- (i) According to the developer, during the floods and associated landslides during August 2018, both the Stage-I & II of Iruttukkanam SHP were subjected to extensive damages and destructions.
- (ii) The petitioner completed the maintenance, replacement of damages systems and re-commissioned the plant on 08.07.2019, with a total cost of Rs 17.69 crore towards the rehabilitation of the project. Out of

which Rs 7.09 crore was received from insurance company and remaining Rs 10.59 crore was the company's share towards rehabilitation. The petitioner requested compensatory tariff for the additional expenditure incurred by the company.

- (iii) KSEB Ltd stated that, as per the provisions of the existing PPA for Iruttukkanam stage-I, KSEB Ltd is not liable to bear the cost of additional expenditure incurred by M/s Viyyat Power Private Ltd, toward flood, and the plant and machinery and other facilities destroyed by flood had to be recovered through insurance. Hence according to KSEB Ltd, the request regarding additional compensatory tariff for the rehabilitation of the Iruttukkanam SHP stage -I & II is not sustainable. Moreover the tariff of the Stage-II project has been challenged before the Hon'ble Supreme Court and the matter is sub judice and the PPA for stage-II is yet to be executed.
- (iv) Based on the submission of the petitioner M/s Viyyat Power Private Ltd and the respondent KSEB Ltd, the State Government submitted as follows.

“ Tariff determination in the State is vested with the Hon'ble State Electricity Regulatory Commission under Section 62 & 86 of the Electricity Act, 2003. The State Government has no legitimate role in the tariff reform process. In the circumstances, Hon'ble Commission may take an appropriate decision on the request of the petitioner regarding compensatory tariff., considering the fact and circumstances of the case in view of the report furnished by KSEB Ltd and also taking into account the argument raised by the petitioner regarding the rehabilitation cost after the flood, suffered by the petitioner over and above the amount obtained from insurance company, which was not received or disallowed/ compulsorily deducted by the insurance company as per the terms and conditions of the insurance”.

6. The Commission admitted the petition as OA No. 30/2019 and conducted hearing on 20.02.2020 at the court hall of the Commission at Thiruvananthapuram. Adv. C.K. Vidyasagar, Senior Advocate, presented the matter on behalf of the petitioner and submitted the following.

- (i) Viyyat is the only project established in the State, out of the 13 SHPs allotted by the State Government based on public tender under IPP category.
- (ii) The electricity generated from the project has been supplying to KSEBL since its CoD in the year 2010. However, the project was totally destroyed in the Mahapralayam during August 2018. With the blessings of on all concerned, the petitioner M/s Viyyat Power Ltd could re-commission the project within one year. Unless a helping hand is extended by way of compensatory tariff, the petitioner could not operate at least with minimum profit. The petitioner further submitted

that, the Central Commission in the order dated 21.02.2014 in Petition No.155/MP/2012 introduced the concept of Compensatory tariff, in the matter of the Adani Power Ltd vs Uttar Haryana Bijli Vidyut Nigam Limited and Others.

Sri P D Nair and Adv Vidyasagar responded to the queries of the Commission.

7. Sri K.G.P Nampoothiri, Executive Engineer, presented the counter arguments on behalf of the respondent KSEB Ltd. The summary of the counter argument of KSEB Ltd is given below.

(1) The petitioner signed an implementation agreement with the State Government on 10.12.2004. Further, the petitioner signed Power Purchase Agreement (PPA) with KSEB Ltd on 7<sup>th</sup> June 2007. But there is no provision in the implementation agreement and PPA to determine the compensatory tariff on account of additional liability incurred due to a force majeure event.

(2) The order of the CERC referred by the petitioner is entirely different and the ratio therein cannot be applied to this matter.

(3) The Meenvallom project was not selected through bid route. Initially, the tariff of the Meenvallom project was determined by the State Government in the year 2002, before the constitution of the Commission @ 2.50/unit for the five years from date of CoD and for the balance 20 years @ Rs.2.12 per unit. But due to many reasons the project could commissioned only in the financial year 2014. As per the KSERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2013, the preferential tariff for the small hydro project commissioned in the FY 2014 is Rs 4.88/unit. Hence the Commission directed the developer of the Meenvallom project to approach the State Government and KSEB Ltd for their concurrence to apply the above rates to the energy supplied from Meenvallom Small Hydro Project and to modify the terms and conditions of PPA executed on 23.01.2007.

8. During the hearing, the Commission directed the petitioner to clarify that, as per the provisions of the Implementation Agreement dated 10.12.2004 signed between the State Government and the petitioner, and also as per the PPA dated 7<sup>th</sup> June 2007 signed between the petitioner and KSEB Ltd, whether there is any provision to determine the compensatory tariff for loss sustained due to Force Majeure events. The Commission further directed the petitioner to clarify, whether the losses if any due to the Force Majeure events can be passed on to the respondent KSEB Ltd and to the electricity consumers of the State.

The petitioner clarified that, they communicated the extent of damages to all concerned including the State Government and the KSEB Ltd. The

rehabilitation and replacement works was done as recommended by a committee constituted by the State Government, and the committee include the officials of KSEB Ltd and Energy Management Centre also.

The Commission directed the petitioner to submit a copy of all correspondence with the State Government and KSEB Ltd including the orders and/or directions issued the State Government and communications from KSEB Ltd in this regard.

9. Based on the deliberations on the subject petition, the Commission directed the petitioner and respondent the following.
  - (i) The petitioner shall submit copies of all correspondence with the State Government and KSEB Ltd including the orders and/or directions issued the State Government and communications from KSEB Ltd in this regard.
  - (ii) The petitioner shall also submit the details of book value of assets of the Iruttukkanm Project (Stage-I & II) as on 01.04.2018, i.e, at the beginning of the year in which the disaster happened, attested by its statutory auditors.
  - (iii) The respondent KSEB Ltd shall submit its views on extending the BOOT period of the project.
  
10. In compliance of the direction issued by the Commission during the deliberations of the subject matter, the petitioner vide the letter dated 24.02.2020 submitted the following documents before the Commission.
  - (1) Letter of the State Government dated 05.10.2018 from the Secretary, Power Department to the Chairman & Managing Director, KSEB Ltd, asking remarks on the letters dated 11.08.2018 and 23.08.2018 of M/s Viyyat Power Private Ltd.
  - (2) Letter of Energy Management Centre dated 13.02.2019 to the State Government, giving details and status of the rehabilitation work.
  - (3) Letter of the State Government dated 02.03.2019, forming a committee of representatives from KSEB Ltd, EMC and State Government to conduct a site inspection to assess the damages.
  - (4) Letter of the Energy Management Centre dated 22.05.2019, addressed to the State Government assessing the damages and progress of the rehabilitation work.
  - (5) Joint inspection report dated 21.06.2019 of the officials of KSEB Ltd.
  
11. KSEB Ltd vide the letter dated 08.04.2020 submitted the following;
  - (1) The BOOT period of the project is as specified under Article 2.1 of the Implementation Agreement signed between the Government of Kerala

(GoK) and the petitioner. KSEB Ltd is not a party to the said agreement.

- (2) When the flood affected the project, the petitioner vide the letter dated 15.11.2018 had approached KSEB Ltd for compensatory tariff along with the BOOT period.
- (3) KSEB Ltd had intimated the petitioner that extension of BOOT period is a matter to be decided between GoK and the petitioner. Any decision of the GoK in this matter will be followed by KSEB Ltd.

KSEB Ltd vide the letter dated 15.11.2018 had intimated the matter before the GoK.

### **Analysis and Decision**

12. The Commission examined in detail, the petition filed by M/s Viyyat Power Private Ltd for granting 'compensatory tariff' as per the provisions of the Electricity Act, 2003, and other relevant documents submitted along with the petition.
13. Based on the deliberations on the subject petition and other documents, the Commission examined in detail, the following issues, from the petition and further clarification given by the petitioner.
  - (1) Whether the Commission can grant, compensatory tariff to compensate the loss sustained by the petitioner due to the Force Majeure event, i.e., the Mahapralayam which occurred in August 2018?
  - (2) Whether, the BOOT period can be extended to recover a part of the additional investment made by petitioner to rehabilitate the project after the Mahapralayam?
14. In this context, the Commission examined in detail the background of the construction of Iruttukkanam Stage-I (2 x 1.5 MW) and Iruttukkanam Stage-II (1x 1.5MW) small hydro project by the M/s Viyyat Power Private Ltd, and its summary is given below.
  - (1) The State Government vide the order No. GO (Ms) No.16/04/PD dated 21.06.2004, allotted the Iruttukkanam (3 MW) SHP at Idukki to M/s Viyyat Power Private Ltd, among the 22 projects listed under IPP category. The allotment criteria was the lowest tariff rate per unit of electricity offered by the petitioner for sale to KSEB Ltd.

The tariff quoted by M/s Viyyat Power Private Limited for the electricity generated from Iruttukkanam SHP (3 MW) to KSEB was;

- (a) @Rs 1.08/unit for the 6<sup>th</sup> year of the BOOT period.
- (b) @Rs 2.70/unit from 7<sup>th</sup> to 18<sup>th</sup> year of the BOOT period.
- (c) @Rs 2.07/unit from 19<sup>th</sup> to 30<sup>th</sup> year of the BOOT period.

Where, the BOOT period is 30 years from the date of allotment by the State Government.

- (2) The petitioner signed an 'Implementation Agreement' with the State Government on 10<sup>th</sup> December 2004. The Article 6 of the Implementation Agreement deals with 'Force Majeure' events, which is extracted under paragraph 20 (1) below.
- (3) The petitioner signed Power Purchase Agreement (PPA) with KSEB on 7<sup>th</sup> June 2007. Article 8 of the PPA specify the tariff payable by KSEB Ltd for the electricity generated and supplied to the State grid. The Article 13 of the PPA deals with 'Force Majeure' events, which is extracted under paragraph 20(2) below.
- (4) The Iruttukkanam SHP (3 MW) declared COD on 04.11.2010.
- (5) The petitioner vide their letter dated 29.11.2010, requested the State Government permission for setting up an additional generating unit of 1.5 MW, to act as a standby to the existing units, and since it will not require any additional civil structure except the power house. The Company also informed the Government that, they are willing to take up the risk in case of water shortage once the water is diverted to KSEB's Sengulam Augmentation scheme. The Evaluation Committee constituted by the State Government recommended to grant sanction for setting up an additional unit of 1.5 MW on the condition that, any loss on account of this investment may not be factored into the pricing of power from the main unit. Based on the recommendation of the Evaluation Committee, the State Government vide the G.O (Rt) No.117/2011/PD dated 25.05.2011, allotted 1.5 MW additional generation unit to the existing machine, augmenting the existing capacity of 3 MW (2 x 1.5 MW) to 4.5 MW.
- (6) The petitioner signed a Supplementary Implementation Agreement with the State Government on 22.09.2011, wherein the petitioner agreed that, the terms and conditions of the PPA to be signed with KSEB will be the same as that of the original PPA dated 07.06.2007, except for the tariff which shall be decided by the KSERC. It is further agreed in the Supplementary Implementation Agreement that, *the Company will not have any claim over the water from the catchment stream of the proposed diversion weir of the Sengulam Augmentation scheme and will not make any claim on account of that in future.*
- (7) The Commission vide the Order dated 30.09.2011 in petition No. OP 20/2011, determined the tariff for the electricity generated from the Iruttukkanam stage-II at Rs 2.94/unit, at the preferential tariff approved

by the Commission vide the KSERC (Power Procurement from Renewable Sources by Distribution Licensee) (Second Amendment) Regulations, 2010 dated 22.11.2010.

- (8) The Iruttukkanam Stage-II was commissioned on 10.04.2012.

Subsequently, the Commission revised the generic tariff applicable for SHPs commissioned on or after 01.01.2013 at Rs. 4.88/unit in line with CERC norms for RE project. The petitioner demanded the revised generic tariff @ Rs 4.88/unit applicable for the projects commissioned on or after 01.01.2013, though the Stage-II 1.5 MW SHP of the petitioner had achieved CoD on 10.04.2012. The Commission declined the request of the petitioner. The petitioner filed an appeal against the Order of the Commission before the Hon'ble APTEL, but the Hon'ble APTEL also declined the request of the petitioner. The petitioner then filed an appeal against the decision of the Hon'ble APTEL before the Hon'ble Supreme Court and the matter is now pending before the APEX Court. The petitioner is yet to sign Power Purchase Agreement with KSEBL for supplying power from Stage-II 1.5 MW project. However, as per the provision of Implementation Agreement, the petitioner has been supplying energy to KSEBL from the Stage II project at the approved tariff of Rs. 2.94/unit from the date of commercial operation.

In the above background, the Commission examined in detail the issues addressed under paragraph-12 above.

**Issue No.1 : Whether the Commission can grant, compensatory tariff to compensate the loss sustained by the petitioner due to the Force Majeure events, i.e., the Mahapralayam of August 2018.**

15. The petitioner submitted that, during the Mahapralayam of August 2018, the Iruttukkanam Stage-I & Stage-II was totally damaged/ destroyed, including the control room, switch gear room, generating units etc. The petitioner rehabilitated the project and again synchronized with the grid on the dates given below.

Stage I	Unit 1	27.06.2019
Stage I	Unit 2	28.06.2019
Stage II	Unit 3	08.07.2019

16. According to the petitioner, the total additional liability incurred by the company due to the rehabilitation including the presumptive loss in generation revenue during the rehabilitation period is estimated below.

Sl No	Particulars	Amount
		(Rs. Cr)
1	Repairing the damages in the powerhouse building	2.55
2	Cost for dismantling mechanical equipments	0.22
3	Cost of replacement of electro mechanical equipments	9.15
4	Cost of protection works against future floods etc	0.56
5	Cost for installing SCADA etc	0.28
	Sub total	12.75
6	Loss of revenue from sale of power during the rehabilitation period	4.94
	Grand Total	17.69

The petitioner submitted that, out of the above, the items 1, 2, and 3, amounting to Rs 11.93 crore, only have insurance coverage.

17. According to the petitioner, they had the following insurance policies on the project at the time of disaster.

- (i) SBI General's "Standard Fire & Special Perils Insurance" Policy;
- (ii) SBI General's "Burglary Insurance" Policy;
- (iii) SBI General's "Machinery Breakdown Insurance" Policy;
- (iv) SBI General's "Public Liability Insurance" Policy;
- (v) SBI General's "Employee Compensation Insurance" Policy.

Petitioner further submitted that out of five policies, the loss claim was raised against "the Standard Fire and Special Insurance Policy" [policy (i)]. The total amount insured under this Policy were as under:

Sl No	Particulars	Amount (Rs.Cr)
1	Building (civil work)	8.50
2	Equipment	14.62
3	Total	23.12

However, the petitioner reported that, as against the insured value of Rs 23.12 crore, the insurance company sanctioned only Rs 7.09 crore as loss to the petitioner. The petitioner further submitted that, the Company did not file any litigation against the insurance company for this less payment, since the insurance company had released an advance payment of Rs 5.00 crore, and also helped in getting a term loan of Rs 7.00 crore from SBI, Commercial branch, so the company could complete the rehabilitation within 322 days from the date of disaster.

Hence, the petitioner requested the Commission to determine and grant the compensatory tariff for the additional investment (Rs 17.69 Cr- Rs 7.09 Cr)= Rs 10.60 crore incurred by the Company including the opportunity loss in energy sale during the rehabilitation period. The petitioner further pointed out



that, this Commission with the consent of the KSEB has re-opened the tariff of Meenvallom project, which was awarded in 1997, but could be commissioned only in the year 2014 after a delay of 17 years. In a similar case, CERC in the case of Adani power, has fixed a compensatory tariff for the hike in Indonesian coal price.

18. The Commission has noted the issue raised by the petitioner as above, the counter arguments of the KSEB Ltd detailed under paragraph-4 above, and also the observations of the State Government given under paragraph-5 above. The Commission notes that, **the petitioner has requested for a compensatory tariff for the additional investment of Rs 10.60 crore claimed by them as part of rehabilitation cost and loss in revenue to the Iruttukkanam project due to the Mahapralayam.** The petitioner proposed that, the compensatory tariff so determined by the Commission, be allowed to be recovered from the KSEB Ltd over and above the existing tariff.

The Commission has carefully considered the proposal. It is a fact that, the cost of power purchase of KSEB Ltd is a pass through in tariff after prudence check. Hence, the compensatory tariff if any approved by the Commission, has to be recovered from the consumers of the State through tariff. The petitioner in his petition has pleaded for recovery of the entire cost and opportunity loss to the Company due to the Mahapralayam from the electricity consumers of the State.

While considering this issue, the Commission examined the petitioner's claim for Rs. 4.94 crore presumptive loss of revenue due to non-generation during the rehabilitation period. The Commission has examined the Implementation Agreement signed by the petitioner with the State Government, the PPA signed with KSEB and other evidences and submissions placed before the Commission by the petitioner and KSEB Ltd.

The relevant clauses in the Implementation Agreement and Power Purchase Agreement is quoted below:

#### Article 6.2 Implementation Agreement

“

##### **6.2 Non- Political Events**

*Any of the following events which prevents the Affected Party from performing any of its obligations for a continuous period of not less than 7 days from the date of its occurrence, shall constitute a Non-Political Event.*

- a) **Earthquake, flood, inundation, landslide;**
- b) *Storm, tempest, hurricane, cyclone, lighting, thunder or other extreme atmospheric disturbance;*
- c) *Fire caused by reasons not attributable to the Company or the Contractor or any of the employees or agents of the Company or the Contractor;*
- d) *Acts of terrorism;*
- e) *Strikes, boycotts, labour disruptions or any other industrial disturbances not arising on account of the acts or omissions of the Company or the Contractor.*
- f) *War, hostilities (whether war be declared or not);*
- g) *Invasion, act of foreign enemy, rebellion, riots, weapon conflict or military actions, civil war;*

- h) *ionizing radiation, contamination by radio activity from nuclear fuel, any nuclear waste, radioactive toxic explosion;*
- i) *volcanic eruptions;*
- j) *a Non Political Force Majeure Event causing a Material Adverse Effect under the Power Purchase Agreement*
- k) *Any other event of like nature;*
- l) *Any failure or delay of a contractor caused by any of the aforementioned Non-Political Events, for which no offsetting compensation is payable to the Company by or on behalf of the contractor.*

As extracted above, as per the Implementation Agreement, flood is a Non-Political Force Majeure Event. But there is no provision in the Implementation Agreement to compensate the loss sustained by the petitioner due to Non-political Force Majeure Events, though there is a provision for compensate the loss due to Political Force Majeure Events. The relevant Article of the PPA is extracted below.

**Article 6.4 (c) Compensation (Implementation Agreement)**

*In the event of any loss sustained, which is quantified by the Company and accepted by the Government, due to a political force majeure event as aforesaid for a period which may extend from 120 to 365 days at a stretch during a current year / two consecutive years, it shall be compensated upto 25% of the same by the Government.*

Similar provisions are there in Article 13.2 and 13.4(c) of the PPA signed by the petitioner with KSEB Ltd.

From the above, it is clear that the petitioner has no right whatsoever for this claim. The Commission is of the considered view that this presumptive generation loss in revenue during the rehabilitation period from August 2018 to the date of re-commissioning in June and July 2019 cannot be approved and passed on to the electricity consumers of the State. The Commission notes that the Mahapralayam was a natural disaster and fell within the definition of Non Political Force Majeure as defined in Article 6.2 of the Implementation Agreement and Article 13.2 of the PPA. **Hence, the Commission rejects this claim of Rs. 4.94 crores on account of loss of generation during the rehabilitation period.**

19. Thereafter, the Commission carefully examined the provisions in the Implementation Agreement dated 10.12.2004 signed by the petitioner with State Government. In addition, the provisions in the Power Purchase Agreement dated 7<sup>th</sup> June 2007 between the petitioner and the respondent KSEB, regarding whether any compensatory tariff can be allowed by the Commission as proposed by the petitioner was examined. The details are given below.

- (1) Implementation Agreement: Article 5.6 of the Implementation Agreement deals with 'Insurance'.

**5.6 Insurance**

**(a) Construction Period**

*The company shall at its cost and expense purchase and maintain by due re-instatement or otherwise during the Construction Period such insurance as are necessary by statute including but not limited to the following:*

- (i) builders' all risk insurance;*
- (ii) comprehensive third party liability insurance including injury or death to personnel / representatives of persons who may enter the Project Site;*
- (iii) workmen's compensation insurance*
- (iv) Fire protection coverage insurance*
- (v) any other insurance that may be necessary as per prudent Utility Practices to protect the Company, its employees and its assets against loss, damage, destruction, business interruption or loss of profit including insurance against all Force Majeure Events that are insurable*

***(b) Operation Period***

*The company shall at its cost and expense purchase and maintain by due re-instatement or otherwise during the Operation Period insurance against:*

- (i) loss, damage or destruction of the Project Facilities, at Replacement value;*
- (ii) the Company's general liability arising out of the Project;*
- (iii) liability to third parties;*
- (iv) Fire protection coverage insurance*
- (v) any other insurance that may be necessary as per prudent Utility Practices to protect the Company, its employees and its assets against loss, damage, destruction, business interruption or loss of profit including insurance against all Force Majeure Events that are insurable*

***(c) Evidence of Insurance***

*The Company shall, provide to the Government/Board annually, copies of all insurance policies (or appropriate endorsements, certifications or other satisfactory evidence of insurance) obtained by the Company in accordance with this Agreement.*

***(d) Validity of Insurance***

*(i) The Company shall from time to time promptly pay insurance premium, keep the insurance policies in force and valid throughout the BOOT Period and furnish copies thereof to the Government/Board. The insurance policy shall not be cancelled or terminated unless 10 days' clear notice of cancellation is provided to the Government/ Board in writing. Authentic Copy of insurance policies taken by the Company shall be Submitted to Government annually as a proof of compliance.*

*(ii) If at any time the Company fails to obtain or maintain in full force and effect any or all of the insurance required under this Agreement the Government/Board may at its option( but not Being obliged to do so ) obtain and maintain such insurance and all sums incurred by the Government/ Board therefor shall be reimbursed by the Company to the Government/ Board together with interest thereon at 5 % p .a over SBI- PLR from the date the respective sums were incurred by the Government/ Board within 7 days from the receipt of claim in respect thereof made by the Government/ Board*

***(e) Application of Insurance Proceeds***

*Subject to the provisions of the Financing Documents and unless Otherwise provided herein, the proceeds of all insurance policies received shall be promptly applied by the Company towards repair, renovation, restoration or re-instatement of the Project Facilities or any part thereof which may have*

been damaged or destroyed. The Company may designate the Lenders as the loss payees under the Insurance policies or assign the insurance policies in their favour as Security for the financial assistance provided by them to the Project. The Company shall carry out such repair, renovation, restoration or re-instatement to the extent possible in such manner that the Project Facilities after such repair, renovation, restoration or re-instatement be as far as possible in the same condition as it were prior to such damage or destruction normal wear and tear excepted

**(f) Un-insurable Risks**

If during the BOOT Period, any risk which has been previously insured becomes un-insurable due to the fact that the insurer have ceased to insure such a risk and therefore insurance cannot be maintained/re-instated in respect of such risk, the Company shall not be deemed to be in breach of its obligations regarding insurance under this Agreement.

- (2) PPA with KSEB Ltd.: Article-10 deals of the PPA deals with 'Insurance'. This clause is extracted below for ready reference.

**"10.1 Insurance:**

The Company shall at its cost and expense, purchase and maintain by re-instatement or otherwise, during the Operations period insurance against:

- (i) Loss, damage or destruction of the project facilities, at replacement value
- (ii) The Company's general liability arising out of the project.
- (iii) Liability to third parties
- (iv) Fire Protection Coverage insurance; and
- (v) Any other insurance that may be necessary to protect the Company, its employees and its assets against loss, damage, destruction, business interruption or loss of profit including insurance against all Force Majeure events that are insurable."

**10.2 Evidence of Insurance**

The Company shall provide a annually to the Government /Board copies of all insurance policies (or appropriate endorsements, certifications or other satisfactory evidence of insurance) obtained by the Company in accordance with this Agreement and as per the Implementation Agreement signed by the company and the Government.

**10.3 Validity of Insurance**

The company shall from time to time promptly pay insurance premium, keep the insurance policies in force and valid throughout the agreement period and furnish copies thereof to the Government/Board. The Insurance policy shall not be cancelled or terminated unless 10 days, clear notice of cancellation is provided to the Board in writing.

Provided that if at any time the Company fails to obtain or maintain in full force and effect any or all of the insurance required under this Agreement, the Government/Board may at its option (but not being obliged to do so) obtain and maintain such insurance and all sums incurred by the Government/Board therefore shall be reimbursed by the Company to the Government/Board together with interest thereon at 5 % p.a. over SBI PLR from the date the

respective sums were incurred by the Government/Board, within 7 days from the receipt of claim in respect thereof made by the Board.

#### **10.4 Application of Insurance proceeds**

*Subject to the provisions of the Financing Documents and unless otherwise provided herein, the proceeds of all insurance policies received shall be promptly applied by the Company towards repair, renovation, restoration or re-instatement of the Project Facilities or any part thereof which may have been damaged or destroyed. The company may designate the Lenders as the loss payees under the insurance policies or assign the insurance policies in their favour as security for the financial assistance provided by them to the Project. The Company shall carry out such repair, renovation, restoration or re-instatement to the extent possible in such manner that the project Facilities after such repair, renovation, restoration or re-instatement be as far as possible in the same condition as it were prior to such damage or destruction, except for normal wear and tear.*

As seen from Clause (e) "Application of Insurance Proceeds" of the Implementing Agreement and Article 10.1 of the PPA, the proceeds from the claim on the Insurance policy is expected to be utilised by the petitioner towards repair, renovation, restoration or re-instatement of the Project Facilities or any part thereof which may have been damaged or destroyed. Further, the petitioner shall carry out such repair, renovation, restoration or re-instatement to the extent possible in such a manner that the project facilities after such repair, renovation, restoration or re-instatement be as far as possible in the same condition as it were prior to such damage or destruction, except for normal wear and tear. To this end, the petitioner shall at his cost and expense, purchase and maintain appropriate insurance by re-instatement or otherwise, during the operation period against;

- (i) Loss, damage or destruction of the project facilities, at replacement value,
- (ii) the Company's general liability arising out of the Project;
- (iii) liability to third parties;
- (iv) Fire protection coverage insurance
- (v) Any other insurance that may be necessary to protect the Company, its employees and its assets against loss, damage, destruction, business interruption or loss of profit including insurance against all Force Majeure Events that are insurable.

Thus as per the Article 10.4 of the PPA as extracted under paragraph-18 above, and Article 5.6(e) of the Implementation Agreement, the petitioner has to use the proceeds of the insurance towards repair, renovation, restoration or re-instatement of the project facilities which may have been destroyed or damaged. ***There is no provision in the PPA or in the Implementation Agreement to claim compensatory tariff for any additional amount incurred over and above the insurance proceeds from KSEB Ltd and its consumers.***

20. The Commission has also examined Article 6 of the Implementation Agreement and Article 13 of the PPA regarding the 'FORCE MAJEURE' events and its treatment. The details are given below.

(1) The Article-6 of the Implementation Agreement dated 10.12.2004 between the petitioner and the State Government deals with 'FORCE MAJEURE' is extracted below.

**“6.1 Force Majeure Events**

*As used in this Agreement, Force Majeure Event means any of the Non – Political Events or the Political Events as set out in sub-articles 6.2 and 6.3 respectively including the impact / consequence thereof which:*

- (a) Is beyond the control of the Party claiming to be affected thereby (the “Affected Party”).*
- (b) Causes Material Adverse Effect and prevents the Affected Party from performing or discharging its obligations under this Agreement; and*
- (c) The Affected Party has been unable to overcome or prevent despite exercise of due care and diligence.*

**6.2 Non- Political Events**

*Any of the following events which prevents the Affected Party from performing any of its obligations for a continuous period of not less than 7 days from the date of its occurrence, shall constitute a Non-Political Event.*

- m) Earthquake, flood, inundation, landslide;*
- n) Storm, tempest, hurricane, cyclone, lighting, thunder or other extreme atmospheric disturbance;*
- o) Fire caused by reasons not attributable to the Company or the Contractor or any of the employees or agents of the Company or the Contractor;*
- p) Acts of terrorism;*
- q) Strikes, boycotts, labour disruptions or any other industrial disturbances not arising on account of the acts or omissions of the Company or the Contractor.*
- r) War, hostilities (whether war be declared or not);*
- s) Invasion, act of foreign enemy, rebellion, riots, weapon conflict or military actions, civil war;*
- t) ionizing radiation, contamination by radio activity from nuclear fuel, any nuclear waste, radioactive toxic explosion;*
- u) volcanic eruptions;*
- v) a Non Political Force Majeure Event causing a Material Adverse Effect under the Power Purchase Agreement*
- w) Any other event of like nature;*
- x) Any failure or delay of a contractor caused by any of the aforementioned Non-Political Events, for which no offsetting compensation is payable to the Company by or on behalf of the contractor.*

**6.3 Political Events**

*Any of the following events shall constitute Political Event*

- (a) Change in Law*
- (b) Action of Authorities having Material Adverse Effect including but not limited to acts of expropriation, compulsory acquisition or takeover by any Government Body of the Project/Project Facilities or any part*

thereof or of the Company's or the contractor's rights under any of the Project Agreement, or

- (c) Any failure or delay of a Contractor caused by any of the aforementioned Political Events, for which no offsetting compensation is payable to the Company by or on behalf of the contractor.

#### **6.4 Obligation of the Parties**

##### **(a) Obligation to Intimate**

(i) As soon as practicable and in any case within 7 days of the date of occurrence of a Force Majeure Event or the date of knowledge thereof, the Affected Party shall intimate the other Party of the Force Majeure Event setting out, inter alia, the following in reasonable detail.

a) the nature, extent of the Force Majeure Event and classification of the same as political/non-political

b) the estimated Force Majeure Period

c) the nature of and the extent to which performance of any of its obligations under this Agreement is affected by the Force Majeure Event.

d) the measures which the Affected Party has taken or proposes to take to alleviate/mitigate the impact of the Force Majeure Event and to resume performance of such of its obligations affected thereby, and

e) any other relevant information concerning the Force Majeure Event, and/or the rights and obligations of the parties under this Agreement

(ii) As soon as practicable and in any case within 5 days of intimation by the Affected Party in accordance with the preceding clause (i), the Parties shall meet, hold discussions in good faith and where necessary conduct physical inspection/survey of the Project/Project Facilities in order to:

- (a) Finalise the classification of the force majeure event mentioned in item (ia) of (i) above;

- (b) Assess the impact of the underlying Force Majeure Event.

- (c) To determine the likely duration of Force Majeure Period, and

- (d) To formulate damage mitigation measures and steps to be undertaken by the Parties for resumption of obligations the performance of which shall have been affected by the underlying Force Majeure Event

(iii) The Affected Party shall during the Force Majeure Period provide the other Party with regular (not less than weekly) reports concerning the matters set out in the preceding clause (ii) as also any information, details or document, which the other Party may reasonably require.

##### **(b) Performance of Obligations**

If the Affected Party is rendered wholly or partially unable to perform any of its obligations under this Agreement because of a Force Majeure Event (political/non-political), it shall be excused from performance of such obligations to the extent to which it is unable to perform the same on account of such Force Majeure Event provided that:

- (i) The excuse from performance shall be of no greater scope and of no longer duration than is necessitated by the Force Majeure Event.
- (ii) The Affected Party shall make all reasonable efforts to mitigate or limit damage, if any, caused or is likely to be caused to the Project Facilities as a result of the Force Majeure Event and to restore the Project Facilities, in accordance with the Good Industry Practice and its relative obligations under this Agreement.
- (iii) The Affected Party shall take all remedial measures including duly prosecuting and exhausting all such remedies available to the Affected Party under the Applicable Laws;

- (iv) *When the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other party and the Board written notice to that effect and shall promptly resume performance of its obligations hereunder, and*
- (v) *The Affected Party shall continue to perform such of its obligations which are not affected by the Force Majeure Event and which are capable of being performed in accordance with this Agreement.*

**(c) Compensation**

*In the event of any loss sustained, which is quantified by the Company and accepted by the Government, due to a political force majeure event as aforesaid for a period which may extend from 120 to 365 days at a stretch during a current year / two consecutive years, it shall be compensated upto 25% of the same by the Government.*

**6.5 Termination due to Force Majeure Event.**

**(a) Termination**

*If a Force Majeure Event which is a Non-Political Event continues or is in the reasonable judgement of the Parties likely to continue beyond a period of 120 days, the Parties may mutually decide to terminate this Agreement or continue this Agreement on mutually agreed terms. If the Parties are unable to reach an agreement in this regard, the Affected Party shall after the expiry of the said period of 120 days, be entitled to approach Government to terminate this Agreement.*

*If a Force Majeure Event is a Political Event and the same subsists for a period exceeding 365 days of the company shall be entitled to approach Government to terminate this Agreement.*

*Provided that the Government may at its sole discretion have the option to terminate this Agreement any time after the occurrence of the Political Event.*

**(b) Termination Notice**

*If a Party having become entitled to do so decides to terminate this Agreement pursuant to the preceding clause (a), it shall under intimation to the Board issue Termination Notice to the other Party setting out;*

- (i) *Details regarding the Force Majeure Event;*
- (ii) *The proposed Termination Date which shall be a date occurring not earlier than 60 days from the date of Termination Notice;*
- (iii) *Any other relevant facts pertaining to the force majeure Event.*

**(c) Obligation of Parties**

*Following issue to Termination Notice by a Party, the Parties shall promptly take all such steps as may be necessary or required to ensure that.-*

- (i) *The Termination Payment, if any, based on any appropriate procedure to be decided by the Government by the Government, taking into account the circumstances of such termination and the impact of the same on the affected party is paid to the Company; and*
- (ii) *The project Site/Project Facilities is transferred to the Government/any other agency on being authorized by Government by the Company on Termination Date free from all Encumbrance.*

**(d) Termination Payment**



Upon Termination of this Agreement due to a Force Majeure Event (political/ non political) Termination Payment shall be made to the Company by the Government in accordance with the following

- (i) Prior to COD
  - a) If Termination is due to a Force Majeure Event which is a Non Political Event, the Company shall be entitled to receive and appropriate the proceeds of any insurance obtained by it.
  - b) If Termination is due to a Force Majeure Event which is a Political Event, the Government shall pay Termination Payment based on any appropriate procedure to be decided by the Government taking into account the political event and the impact on the affected party. This payment shall be given after setting part compensation given as per clause 6.4(c).
- (ii) After COD
  - (a) If Termination is due to a Force Majeure Event which is a Non Political Event, the Company shall be entitled to receive and appropriate the proceeds of any insurance obtained by it.
  - (b) If termination is due to a Force Majeure Event which is a Political Event, the Government shall pay to the Company Termination payment based on any appropriate procedure to be decided by the Government taking into account the political event and the impact on the affected party. This payment shall be given after setting part compensation given as per clause 6.4(c).  
Provided that the Government/Board shall be entitled to deduct from the Termination Payment any amount due and recoverable from the Company as on the Termination Date.

**6.6 Liability for other losses, damages etc**

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

- (2) The Article 13 of the PPA dated 07.06.2007 between the petitioner and KSEB Ltd, deals with ‘FORCE MEJEURE’ events is extracted below.

**“13.1 Force Majeure Events**

As used in this Agreement, Force Majeure Event means any of the Non-Political Events or the Political Events as set out in sub-articles 13.2 and 13.3 respectively including the impact/consequence thereof which:

- (a) is beyond the control of the Party claiming to be affected thereby (the "Affected Party"),
- (b) causes a Material Adverse Effect and prevents the Affected Party from performing or discharging its obligations under this Agreement; and
- (c) the Affected Party has been unable to overcome or prevent despite exercise of due care and diligence.

**13.2 Non-Political Events**

*Any of the following events which prevents the Affected Party from performing any of its obligations for a continuous period of not less than 7 days from the date of its occurrence, shall constitute a Non-Political Event:*

- a) *earthquake, flood, inundation, landslide;*
- b) *storm, tempest, hurricane, cyclone, lightning, thunder or other extreme atmospheric disturbances;*
- c) *fire caused by reasons not attributable to the Company or the Contractor or any of the employees or agents of the Company or the Contractor;*
- d) *acts of terrorism;*
- e) *strikes, boycotts, labour disruptions or any other industrial disturbances not arising on account of the acts or omissions of the Company or the Contractor;*
- f) *war, hostilities (whether war be declared or not);*
- g) *invasion, act of foreign enemy, rebellion, riots, weapon conflict or military actions, civil war;*
- h) *ionising radiation, contamination by radio activity from nuclear fuel, any nuclear waste, radioactive toxic explosion;*
- i) *volcanic eruptions;*
- j) *any other events of like nature; and*
- k) *any failure or delay of a contractor caused by any of the aforementioned Non-Political Events, for which no offsetting compensation is payable to the Company by or on behalf of the contractor.*

### **13.3 Political Events**

*Following event shall constitute Political Event:*

- (a) *Change in Law*
- (b) *any failure or delay of a contractor caused by any of the aforementioned political event, no offsetting compensation is payable to the company by or on behalf of the contractor.*

### **13.4 Obligations of the Parties**

#### **(a) Obligation to Intimate**

- (i) *As soon as practicable and in any case within 7 days of the date of occurrence of a Force Majeure Event or the date of knowledge thereof, the Affected Party shall intimate the other Party of the Force Majeure Event setting out, inter alia, the following in reasonable detail:*

- (ia) the nature and extent of the Force Majeure Event and classification of the same as political/non political;*
- (ib) the estimated Force Majeure Period;*
- (ic) the nature of and the extent to which, performance of any of its obligations under this Agreement is affected by the Force Majeure Event;*
- (id) the measures which the Affected Party has taken or proposes to take to alleviate/mitigate the impact of the Force Majeure Event and to resume performance of such of its obligations affected thereby ; and*
- (ie) any other relevant information concerning the Force Majeure Event, and /or the rights and obligations of the Parties under this Agreement.*

*(ii) As soon as practicable and in any case within 5 days of intimation by the Affected Party in accordance with the preceding clause (i), the Parties shall meet, hold discussions in good faith and where necessary conduct physical inspection/survey of the Project / Project Facilities in order to:*

- (iia) finalise the classification of Force Majeure event mentioned in item (ia) of clause (i) above;*
- (iib) assess the impact of the underlying Force Majeure Event;*
- (iic) to determine the likely duration of Force Majeure Period; and*
- (iid) to formulate damage mitigation measures and steps to be undertaken by the Parties for resumption of obligations the performance of which shall have been affected by the underlying Force Majeure Event.*

*(iii) The Affected Party shall during the Force Majeure Period provide the other Party with regular (not less than weekly) reports concerning the matters set out in the preceding clause (ii) as also any information, details or document, which the other Party may reasonably require.*

**(b) Performance of Obligations**

*If the Affected Party is rendered wholly or partially unable to perform any of its obligations under this Agreement because of a Force Majeure Event (Political/Non Political), it shall be excused from performance of such obligations to the extent to which it is unable to perform the same on account of such Force Majeure Event provided that:*

- (i) the excuse from performance shall be of no greater scope and of no longer duration than is necessitated by the Force Majeure Event;*
- (ii) the Affected Party shall make all reasonable efforts to mitigate or limit damage, if any, caused or is likely to be caused to the Project Facilities as a result of the Force Majeure Event and to restore the Project Facilities, in accordance with the Good Industry Practice and its relative obligations under this Agreement;*

- (iii) *the Affected Party shall take all remedial measures including duly prosecuting and exhausting all such remedies available to the Affected Party under the Applicable Laws;*
- (iv) *when the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party written notice to that effect and shall promptly resume performance of its obligations hereunder:  
The Affected Party shall continue to perform such of its obligations which are not affected by the Force Majeure Event and which are capable of being performed in accordance with this Agreement.*

**(c) Compensation**

*In the event of any loss sustained which is quantified by the Company and accepted by Government due to a Political Force Majeure as aforesaid for a period which may extend from 120 days to 365 days at a stretch during a current year /two consecutive years, article 6.4 (c) of Implementation Agreement shall apply.*

- 13.5 *If a Force Majeure event which is a non political event continues or is in the reasonable judgement of the parties likely to continue beyond a period of 120 days or a political force majeure event subsist for a period exceeding 365 days, the following shall apply:*
- (a) *If the Board is the aggrieved party, it shall approach the Government*
  - (b) *If the Company is aggrieved party, article 6.5 of Implementation Agreement shall apply.*

**13.6 Liability for other losses, damages etc.**

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

21. As extracted above, the Article 13.6 of the PPA, and also as per Clause 6.6 of the Implementation Agreement, neither parties are liable to bear any loss, damage, cost, expense, claims, demand and proceedings arising out of occurrence or existence of any Force Majeure Events, unless explicitly provided in the IA and/or PPA.
22. The Commission examined this aspect in detail and noted the following:
- (1) As per the Article 13.2 of the PPA and Article 6.2 of the Implementation Agreement, ‘flood’ is categorised under ‘Non- Political Force Majeure Events’.
  - (2) Further, the Article 13.5 of the PPA provide as under;
    - 13.5 *If a Force Majeure event which is a non political event continues or is in the reasonable judgement of the parties likely to continue beyond a period of 120 days or a political force majeure event subsist for a period exceeding 365 days, the following shall apply:*

- (a) *If the Board is the aggrieved party, it shall approach the Government*
- (b) *If the Company is aggrieved party, article 6.5 of Implementation Agreement shall apply.*

(3) The Article 6.5 of the implementation agreement provide as under'

**6.5 Termination due to Force Majeure Event.**

**(a) Termination**

*If a Force Majeure Event which is a Non-Political Event continues or is in the reasonable judgement of the Parties likely to continue beyond a period of 120 days, the Parties may mutually decide to terminate this Agreement or continue this Agreement on mutually agreed terms. If the Parties are unable to reach an agreement in this regard, the Affected Party shall after the expiry of the said period of 120 days, be entitled to approach Government to terminate this Agreement.*

*If a Force Majeure Event is a Political Event and the same subsists for a period exceeding 365 days of the company shall be entitled to approach Government to terminate this Agreement.*

*Provided that the Government may at its sole discretion have the option to terminate this Agreement any time after the occurrence of the Political Event.*

- (4) In the subject petition, the Mahapralayam of August 2018 is a 'Non Political Force Majeure Event as per the terms of the Implementation Agreement and the Power Purchase Agreement.
- (5) Further, the petitioner company is the affected party due to the Mahapralayam and its impact affected the petitioner's project beyond a period of 120 days. The Commission also notes that the petitioner could commission the project after rehabilitation in June/July 2019, within a period of less than 365 days.
- (6) So, as per the Article 13.5 of the PPA read along with the Article 6.5(a) of the Implementation Agreement, the PPA can be continued on mutually agreed terms. However, if the parties are unable to reach an agreement, the affected party are entitled to approach the Government to terminate this Agreement.
- (7) However, instead of terminating the Agreement, the petitioner company rehabilitated the project by availing the insurance proceeds as per Article 10.4 of the PPA. In order to recover the additional liability including financial loss, after accounting the insurance proceeds, the company has done the following.
  - (i) Petitioned the Commission to grant additional compensatory tariff for the additional cost incurred for rehabilitation including the opportunity loss in revenue from sale of electricity generated from the project during rehabilitation period, after deducting the insurance proceeds.

- (ii) Requested the State Government to extend the BOOT period.
- (8) The respondent KSEB Ltd has vehemently opposed the proposal of the petitioner to claim compensatory tariff, and submitted the following vide its letter dated 13.02.2020.
- (i) As per the provisions of the IA and PPA, the petitioner is not entitled to claim the loss due to force majeure event from the respondent, KSEBL.
  - (ii) The petitioner is bound to meet the expense from the Insurance policy for the project, which the petitioner was bound to take for replacement value.
  - (iii) Balance portion of the expense, if any may be met from the 'Dhurithaswasam' fund of GoK.
  - (iv) Extension of 'BOOT' period of the project may be decided by the GoK as the Implementation Agreement has been executed by the Petitioner with the GoK.

During the hearing also, KSEB Ltd repeated the same and opposed the proposal of the petitioner to claim compensatory tariff.

23. As above, the Commission has examined in detail the provisions in the Implementation Agreement dated 10.12.2004 signed with the State Government, and PPA dated 7<sup>th</sup> June 2007 signed with KSEB, and other documents placed before it.

As per the Article 13.5 of the PPA read along with the Article 6.5(a) of the Implementation Agreement, if the Force Majeure Event is a Non-political event and it continues beyond 120 days, the parties can continue the Agreement on mutually agreed terms. In this case, though the KSEB Ltd is agreed to continue to purchase power from the project after the occurrence of the Force Majeure Events as per the terms and conditions of the original IA dated 10.12.2004, and PPA dated 7<sup>th</sup> June 2007. However, KSEB Ltd vehemently opposed the proposal of the petitioner to claim compensatory tariff to make good the excess amount incurred including the revenue loss during the rehabilitation period, after accounting the insurance proceeds.

But KSEB Ltd also not offered any objection on extending the BOOT period, but submitted that it may be decided by the State Government.

Considering all these aspects in detail, the Commission ordered that, there is no provision in the Implementation Agreement dated 10.12.2004 and Power Purchase Agreement dated 07.06.2007, to determine the compensatory tariff to make good the losses sustained due to Non-Political Force Majeure Events. The Commission has also seen from the insurance assessment statement, Rs. 3.39 crores has been rejected on account of under insurance. It is also a fact that though the petitioner had a valid Reinstatement Insurance policy, the insurance amount of Rs. 7.095 crore was accepted by the

petitioner against a damage claim of Rs. 12.23 crore without any protest or demur. Hence the request of the petitioner for any compensatory tariff is unsustainable and rejected.

24. The Commission has also examined the argument of the petitioner that, the petitioner had got the consent of the State Government and KSEB Ltd to proceed with the rehabilitation works. On examination of the various documents submitted by the petitioner, the Commission noted the following.

- (1) In August 2018, the petitioner informed the State Government and KSEB Ltd about the disaster vide its letters dated 11.08.2018 and 23.08.2018.
- (2) The petitioner in their letters dated 07.09.2018 addressed to the Chief Secretary, Power Secretary and CMD, KSEB Ltd, informed that, they already started the rehabilitation work with the advance installment of Rs 1.00 crore received from the insurance company M/s SBI General Insurance on 18<sup>th</sup> August 2018. The petitioner also informed that, SBI Commercial branch offered Rs 7.00 crore as loan for the rehabilitation work.
- (3) Regarding the request of the petitioner for extension of the BOOT period and Tariff Revision based on prevailing tariff fixed by KSEB Ltd in its letter dated 15.11.2018 informed the petitioner the following.

*“BOOT period of the project is defined in Article 2.1 of the Implementation Agreement executed between the GoK and the Company. Tariff of Phase-II of the project is a matter still to be decided by the Hon’ble Supreme Court. Hence KSEB Ltd requested the petitioner to take up the matter with the State Government since the Implementation Agreement is an integral part of the PPA.*

*As per the provisions of the PPA, flood and landslide are to be covered through insurance coverage under Article 10.1 of the PPA. Clause 10.1 & 10.2 of the PPA and Article 5.6(b)(v) of the IA specifies that ‘The Company shall at its cost and expense, purchase and maintain by reinstatement or otherwise, during the Operations period insurance against loss, damage or destruction of the Project facilities, at replacement value and provide Government/ Board copies of all insurance policies obtained by the Company. No such documents has been submitted by the Company till date. Hence KSEB Ltd requested the petitioner to provide the same’.*

- (4) The petitioner vide the letters dated addressed to the (1) Hon’ble Chief Minister. GoK, Hon’ble Minister for Electricity GoK, Hon’ble Chief Secretary GoK and Hon’ble Power Secretary, GoK submitted that, for the rehabilitation of the project, the total cost and loss including the generation loss for one year is estimated at Rs 20.55 crore. Out of it,

the insurance company may share Rs 8.04 crore and the balance Rs 12.51 crore has to be borne by the Company.

Hence in order to recover the additional investment of Rs 12.51 crore, the petitioner requested to extend the BOOT period by another 15 years. The Company further submitted that, as per the existing Implementation Agreement on 10.12.2004, the BOOT period ends on 09.12.2034. With the extension of the BOOT period by 15 years, the new BOOT period ends on 09.12.2049.

The petitioner further submitted to the Government in the said letters as follows.

*' We have not asked for any 'Durithaswasam' from the Government, although Rs 16.00 Crore losses were reported to the Government by the District Collectorate earlier. We hereby confirm that we will not ask for any 'Durithaswasam' from the Government, as we will consider this 15 years BOOT period extension itself as the equitable 'Durithaswasam' given to us.'*

- (5) Regarding the request of the petitioner for compensatory tariff, KSEB Ltd vide its letter dated 13.02.2019 informed the petitioner as follows.

*' Tariff of the Iruttukkanam Stage-I project was determined through tariff based bidding and that for Stage-II was fixed by KSEERC. However, tariff of Phase-II of the project has been challenged before the Hon'ble Supreme Court. After the enactment of Electricity Act, 2003, tariff fixation as well as re-fixation is within the purview of KSEERC and KSEB Ltd does not have authority to decided on it.*

*Since the request for re-fixation arises due to additional investment and losses incurred due to the flood, prior approval of the Hon'ble Commission would be required for the projected additional expenditure. It is understood that Insurance coverage was availed at replacement value for the project facilities as stipulated in the Implementation Agreement and PPA. Hence replacing the plant and machinery and other facilities would be covered under insurance. Please note that recovery of any investment made over and above the Insurance coverage will be subject to approval of the Hon'ble Commission'.*

- (6) The State Government vide the letter dated 02.03.2019, decided to conduct a site inspection to assess the damages at the project site of Iruttukkanam project, with following members.

- (i) Joint Secretary, Power Department, GoK,
- (ii) Chief Engineer (Civil- Construction South) KSEB Ltd,
- (iii) Chief Engineer (Generation), KSEB Ltd,
- (iv) Representative from Energy Management Center.

The representatives of KSEB Ltd, submitted its Joint Inspection report on 21.06.2019. The Chief Engineer (Civil) recommended that, Rs 2,71,32,000/-, reported by the petitioner for rehabilitation of the civil works may be accepted. The Chief Engineer



(Generation) recommended that, an amount Rs 9,30,00,425/- reported by the petitioner for rehabilitation of the electromechanical works may be accepted.

- (7) As per the details submitted before the Commission, the petitioner completed the rehabilitation work and the same synchronised with the grid at the dates given below.

Unit-1, Stage-1	27.06.2019
Unit-2, Stage-1	28.06.2019
Unit-3, Stage-2	08.07.2019

- (8) As discussed above, from the various communications, the State Government and KSEB Ltd has not given any consent or commitment that, the additional amount incurred by the petitioner over and above the insurance proceed shall be allowed to be recovered through compensatory tariff. **Hence there is no merit in the issue raised by the petitioner that, the rehabilitation works was done with the consents of all parties.**

25. The Commission has also examined in detail, the order of the Hon' CERC dated 21.02.2014 in Petition No. 155/MP/2012, filed by M/s Adani Power Ltd, referred by the petitioner. In the said order dated 21.02.2014, Hon'ble CERC has approved the compensatory tariff on account of the hike in Indonesian coal price, the relief claimed under 'Change in Law' under "force majeure" of the PPA signed by the petitioner with number of DISCOMs. However, Hon'ble Supreme Court in the Judgment dated 11.04.2017 in Civil Appeal No. 5399-5400 of 2016 set aside the order of the CERC. All the issues raised therein including the determination of the compensatory tariff was appraised in detail by the Hon'ble Apex Court and held that, the PPA, the bidding guidelines and subsequent directions issued by the Central Government permits for compensatory tariff only on account of price variation due to change in Indian law, however there is no provision to allow compensatory tariff on account of price variation due to change in Indonesian law.

The relevant portion of the judgment is extracted below.

*Change in Law*

46. It has been submitted on behalf of the counsel for the respondents, that the guidelines of 19th January, 2005, as amended by the 18th August, 2006 amendment, make it clear that any change in law, either abroad or in India, would result in the consequential rise in price of coal being given to the power generators. Since various provisions of the guidelines as well as the power purchase agreements are referred to, we set them out herein:

.....

.....

**Power purchase agreement**

.....

### 13. ARTICLE 13: CHANGE IN LAW

#### 13.1 Definitions

*In this Article 13, the following terms shall have the following meanings:*

*13.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:*

*(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement, or (iv) any change in the (a) Declared value of Land for the Project or (b) the cost of implementation of resettlement and rehabilitation package of the land for the Project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP, indicated under the RFP and the PPA;*

*but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.*

*Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law.*

*13.1.2 “Competent Court” means: The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.*

#### *13.2 Application and Principles for computing impact of Change in Law*

*While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.*

.....

#### *Operation Period*

*As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Central Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.*

*Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1% of Letter of Credit in aggregate for a Contract Year.*

#### *13.3 Notification of Change in Law*

13.3.1 If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurers of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to all the Procurers under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurers contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurers shall jointly have the right to issue such notice to the Seller.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

(a) the Change in Law; and

(b) the effects on the Seller of the matters referred to in Article 13.2.

#### **13.4 Tariff Adjustment Payment on account of Change in Law**

**13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:**

**(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or**

**(ii) the date of order/judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.**

13.4.2 The payment for Changes in Law shall be through Supplementary Bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff.

.....  
.....

53. However, in so far as the applicability of clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under clause 13.1.1. It is clear from a reading of the Resolution dated 21st June, 2013, which resulted in the letter of 31st July, 2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18th March, 2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. This being the case, on 31st July, 2013, the following letter, which is set out in extenso states as follows :

FU-12/2011-IPC (Vol-III)  
Government of India

Ministry of Power

Shram Shakti Bhawan, New Delhi

Dated 31st July, 2013

To,  
The Secretary,  
Central Electricity Regulatory Commission,  
Chanderlok Building, Janpath, New Delhi

*Subject: Impact on tariff in the concluded PPAs due to shortage in domestic coal availability and consequent changes in NCDP.*

*Ref. CERC's D.O. No.10/5/2013-Statutory Advice/CERC dated 20.05.13*

*Sir,*

*In view of the demand for coal of power plants that were provided coal linkage by Govt. of India and CIL not signing any Fuel Supply Agreement (FSA) after March, 2009, several meetings at different levels in the Government were held to review the situation. In February 2012, it was decided that FSAs will be signed for full quantity of coal mentioned in the Letter of Assurance (LOAs) for a period of 20 years with a trigger level of 80% for levy of disincentive and 90% for levy of incentive. Subsequently, MOC indicated that CIL will not be able to supply domestic coal at 80% level of ACQ and coal will have to be imported by CIL to bridge the gap. The issue of increased cost of power due to import of coal/e-auction and its impact on the tariff of concluded PPAs were also discussed and CERC's advice sought.*

*2. After considering all aspects and the advice of CERC in this regard, Government has decided the following in June 2013:*

*i) taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan.*

*ii) to meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPs may also import coal themselves if they so opt.*

*iii) higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.*

*3. Ministry of Coal vide letter dated 26th July 2013 has notified the changes in the New Coal Distribution Policy (NCDP) as approved by the CCEA in relation to be coal supply for the next four years of the 12th Plan (copy enclosed).*

*4. As per decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA for the remaining four years of the 12th Plan for the already concluded PPAs based on tariff based competitive bidding.*

*5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government.*

*This issues with the approval of MOS(P)/C.*

Encl: as above

Yours faithfully,  
Sd/-  
(V.Apparao) Director

*This is further reflected in the revised tariff policy dated 28th January, 2016, which in paragraph 1.1 states as under :*

*1.1 In compliance with Section 3 of the Electricity Act 2003, the Central Government notified the Tariff Policy on 6th January, 2006. Further amendments to the Tariff Policy were notified on 31st March, 2008, 20th January, 2011 and 8th July, 2011. In exercise of powers conferred under Section 3(3) of Electricity Act, 2003, the Central Government hereby notifies the revised Tariff Policy to be effective from the date of publication of the resolution in the Gazette of India.*

*Notwithstanding anything done or any action taken or purported to have been done or taken under the provisions of the Tariff Policy notified on 6th January, 2006 and amendments made thereunder, shall, in so far as it is not inconsistent with this Policy, be deemed to have been done or taken under provisions of this revised policy.*

*Clause 6.1 states:*

*6.1 Procurement of Power*

*As stipulated in para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements.*

*However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OM NO.FU-12/2011-IPC (Vol-III) dated 31.7.2013.*

*Both the letter dated 31st July, 2013 and the revised tariff policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective*

*from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would.*

*54. ....The Appellate Tribunal's judgment and the Commission's orders following the said judgment are set aside. The Central Electricity Regulatory Commission will, as a result of this judgment, go into the matter afresh and determine what relief should be granted to those power generators who fall within clause 13 of the PPA as has been held by us in this judgment.*

As extracted above, Hon'ble Supreme Court in the Judgment dated 11.04.2017 in Civil Appeal No. 5399-5400 of 2016 held that, the PPA signed by the generator M/s Adani Power Ltd with the DISCOMS, read along with the bidding guidelines, subsequent directions of the Central Government and Tariff Policy 2016 provides for compensatory tariff for the price variation on account of change in Indian law.

Also the issue here is totally different and there is no change in law issue. Argument and example quoted by the petitioner is irrelevant. In addition as mentioned in paragraphs above, there is no such provisions in the Implementation Agreement dated 10.12.2004, signed by the petitioner with the State Government and the PPA dated 7<sup>th</sup> June 2007 signed by the petitioner with the KSEB Ltd. Hence there is no relevance in the order of the CERC dated 21.02.2014 in Petition No. 155/MP/2012 referred by the petitioner.

26. The Commission has also examined in detail the order dated 12.01.2015 in OP No. 05 of 2014, 'in the matter of review and modifications in the PPA executed between Palakkad Small Hydro Co. Ltd and KSEB in respect of MEENVALLOM Small Hydro Project, referred by the Petitioner, in support of the claim of the petitioner for compensatory tariff. However the facts of the case of the Meenvallom project is entirely different and the rationale therein cannot be applied here, due to the reasons cited below.
- (1) The State Government in the year 1998 had allotted Meenvallom SHP to the Palakkad District Panchayat. The Palakkad District Panchayat formed a company namely M/s Palakkad Small Hydro Co. Ltd, for execution and management of the project with equity share capital from District Panchayat, 8 Block Panchayat and 13 Grama Panchayat in Palakkad District. The cost of the Meenvallom project estimated in the year 2002 was Rs 10.11 crore.
  - (2) National Bank for Agriculture and Rural Development (NABARD), offered to finance the project on the precondition of executing PPA with KSEB. Accordingly, the State Government approved the draft PPA in the year 2002, with tariff @ 2.50/unit for the five years from date of CoD and for the balance 20 years @ Rs.2.12 per unit. It may be noted that, the State Government approved the PPA and tariff before the constitution of this Commission. The PPA was finally entered into with KSEB in the year 2007 as approved by the Government with the

approval of the Commission, at the tariff and other terms and conditions originally approved by the State Government in the year 2002.

- (3) The project was executed through the PSU, M/s Steel Industrials Kerala Ltd (M/s SILK). But the execution of the project was delayed, and finally the project could commission only on 29.08.2014. Subsequently, after the commissioning of the project, the Palakkad Small Hydro Co. Ltd filed a petition before the Commission to modify the Article 8 of the PPA deals with tariff and to determine the tariff of the project. The petitioner submitted that, as against the estimated cost of Rs 10.11 crore, the actual cost of the project at the time of commissioning was around Rs 20.00 crore.
- (4) ***The Commission after examining the facts reached the conclusion that, the project was delayed mainly due to the delay in getting forest clearance for the project.*** The Commission also observed that, the PPA already entered into between the parties cannot be modified unless both the parties come to a consensus. However, as per the KSERC (Power procurement from Renewable Source by Distribution Licensee) Regulations, 2013, the generic levelized tariff for the ***Small Hydro Projects which has started commercial operation on or after 01.01.2013 is Rs 4.88 /unit. Since the project was commissioned only 29.08.2014, the Palakkad Small Hydro Co. Ltd is also eligible to get the tariff @ Rs 4.88/unit.*** The Commission also observed that, Meenvallom SHP is a unique venture by a local body and first of its kind in India. The Commission also expressed the view that, modifications of the commercial conditions of the PPA calls for a consensus of the parties to the agreement already executed. The disputes being among bodies under Power Department and Local Self Government Department, the Government may take steps to resolve the issue.
- (5) Considering all these facts, the Commission vide its Order dated 12.01.2015, ordered as follows.

**“Orders of the Commission:**

1. *The preferential tariff of Rs.4.88 / kWh is admissible for the energy, generated from Meenvallom Small Hydro Project of M/s Palakkad Small Hydro Company Limited in accordance with the provisions of KSERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2013.*
2. *The above rate is applicable to infirm power also.*
3. *M/s Palakkad Small Hydro Company Limited may approach M/s KSEB Limited and the State Government for their concurrence to apply the above rates to the energy supplied from Meenvallom Small Hydro Project and to modify the terms and conditions in the PPA executed on 23.01.2007.”*

As discussed above, the Commission vide the order dated 12.01.2015 expressed its view that, the preferential tariff of Rs 4.88/unit determined

by the Commission as per the provisions of KSERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2013 is admissible for the Meenvallom SHP, in view of the reasons specified in the order. The Commission also expressed its view that, modifications of the commercial conditions of the PPA calls for a consensus of the parties to the agreement already executed. Hence the Commission directed the petitioner therein M/s Palakkad Small Hydro Co. Ltd to approach KSEB Ltd and the State Government to apply the above rates to the energy supplied from M/s Meenvallom SHP and to modify the terms and conditions in the PPA executed on 23.01.2007.

As brought out in the above paras, the issues in the Meenvallom project is entirely different from the case of the petitioner. The petitioner was selected for the execution of the Iruttukkanam project through competitive bidding process, at the tariff quoted for sale of electricity from the project to KSEB. The petitioner was also signed an implementation agreement with the State Government, wherein the Force Majeure Events are clearly detailed. The Commission cannot take any decision inconsistent with the implementation agreement signed with the State Government. The petitioner had also signed power purchase agreement with KSEB Ltd for the sale of electricity from Iruttukkanam Stage-1 project. The Commission cannot approve any changes or modifications of the PPA without the consent of both the parties of the Agreement. The Commission also takes note of KSEB's submission that the project has received funds from the Clean Development Mechanism which the petitioner as per extant Regulations was expected to be shared with KSEB Ltd. KSEB Ltd also mentioned that unlike the case of Meenvallom project whose implementation was unduly delayed due to extraneous factors, the petitioner's units have been generating power for the last Nine (9) years and hence such a comparison was misplaced.

The respondent KSEB Ltd also vehemently opposed the proposal of the petitioner to recover the additional cost and loss sustained on account of the Mahapralayam of August 2018 through compensatory tariff. Considering all these facts, the Commission is of the firm opinion that it cannot allow the recovery of any compensatory tariff for the Iruttukkanam SHP over and above the insurance proceeds. The Commission also noted that the petitioner had underinsured the Iruttukkanam project to the extent of Rs. 3.39 crore and consequently this amount was denied to the petitioner. It is also not understood as to why instead of contesting the insurance payment, the petitioner without any protest and demur accepted payment of Rs. 7.095 Crore against a loss claim of Rs. 12.23 crore claim and that too in a situation when there was no such provision in the PPA or Implementation Agreement for entertaining any such claims.

27. The Commission has also examined the issue raised by the petitioner that, with the commissioning of the Sengulam Augmentation by KSEB Ltd, the



power generation from the Iruttukkanam project will get reduced from 22.5 MU per annum to 10.5 MU/annum. The petitioner submitted that, without compensatory tariff, it may be difficult for the petitioner to meet the loan repayment obligation etc. The Commission has examined all these aspects in detail, including the actual generation from the projects after COD, from the FY 2010-11 to 2017-18 and noted the following.

- (1) As per the Schedule-1, Project facilities attached to the PPA dated 7<sup>th</sup> June 2007 signed with KSEB Ltd, the important features of the project are:
  - Catchment area- 21.45 sq.km.  
This catchment is excluding the catchment area of the Sengulam Augmentation scheme of KSEB Ltd.
  - Installed capacity- 3 MW
  - Annual Designed Energy - 11.92 MU
- (2) Subsequently, as proposed by the petitioner, and at his own risk, the Government vide the orders dated 12.01.2011 and 25.05.2011, has granted permission to install an additional capacity of 1.5 MW as Iruttukkanam stage-II.

A supplementary implementation agreement was signed with the State Government on 22.09.2011, for the implementation of the Iruttukkanam Stage-II project, wherein it is specified as under; "**The Company will not have any claim over the water from the catchment stream of the proposed diversion weir of the Sengulam augmentation scheme and will not make any claim on account of that in future**".

However, the action of the petitioner of taking up an already known and agreed fact that once the Sengulam Augmentation scheme of the KSEB Ltd is commissioned, there will be reduction in generation from the Iruttukkanam Stage-I & Stage-II project is not correct. This is against the provisions in the sanction orders of the Government dated 25.05.2011 and Supplementary Implementation Agreement dated 22.09.2011.

- (3) The Commission also noted that, due to the delay in commissioning of the Sengulam Augmentation Scheme by KSEB Ltd, the petitioner is immensely benefited, the details are given below.
  - (i) As already mentioned, the designed energy of the Iruttukkanam Stage-1 is 11.92 MU and that of Iruttukkanam Stage-II is 3.87 MU.
  - (ii) As against the designed energy, the actual generation from Iruttukkanam- I & II, as per the invoice is detailed below.

Year	Designed Energy (MU)		Actual generation (MU)		Excess generation (MU)		Remarks
	Stg-1	Stg-2	Stg-1	Stg-2	Stg-1	Stg-2	

2011-12	11.92		17.62	0.00	5.70	0.00	Stage-II Commissioned in April-2012 only
2012-13	11.92	3.87	14.01	4.55	2.09	0.68	
2013-14	11.92	3.87	17.41	5.65	5.49	1.78	
2014-15	11.92	3.87	17.50	5.68	5.58	1.81	
2015-16	11.92	3.87	18.74	6.09	6.82	2.22	
2016-17	11.92	3.87	15.08	4.90	3.16	1.03	
2017-18	11.92	3.87	18.64	6.05	6.72	2.18	
Total	83.44	23.22	119.00	32.92	35.56	9.70	

- (iii) The tariff of the electricity generated and supplied to KSEB Ltd from Iruttukkanam Stage-I is billed @Rs 2.70/unit and the tariff of the electricity generated and supplied from Iruttukkanam Stage-II is billed @ Rs 2.94/unit. Accordingly, the additional revenue earned by the petitioner by excess generation, mainly on account of the delay in commissioning of the Sengulam Augmentation by KSEB Ltd is estimated as below.

Year	Excess generation (MU)		Additional revenue (Rs. Cr)		
	Stg-1	Stg-2	Stg-1 @Rs. 2.70/unit	Stg-2 @Rs 2.94/unit	Total
2011-12	5.70	0.00	1.54	0.00	1.54
2012-13	2.09	0.68	0.56	0.20	0.76
2013-14	5.49	1.78	1.48	0.52	2.01
2014-15	5.58	1.81	1.51	0.53	2.04
2015-16	6.82	2.22	1.84	0.65	2.49
2016-17	3.16	1.03	0.85	0.30	1.16
2017-18	6.72	2.18	1.81	0.64	2.46
Total	35.56	9.70	9.60	2.85	12.45

As detailed above, the petitioner had earned additional revenue of Rs 12.45 crore, by selling the excess energy over and above the designed energy at the tariff approved for the designed energy. It may be noted that, additional cost involved in hydel plant over designed energy is very meager. Hence, the additional revenue earned as above is the additional profit available to the petitioner, over and above the regulated Return on Equity (RoE) allowed to the petitioner.

Usually, the excess energy generated over the designed energy is billed at a rate much less than the designed energy. However, in the case of Iruttukkanam SHP, there is no such provisions in the PPA signed by the petitioner with KSEB Ltd, and hence the entire additional revenue of Rs 12.45 crore was allowed to be retained by the petitioner. This amount was also available to the petitioner to meet the additional cost, if any over and above the insurance proceeds, incurred for rehabilitation work.

- (iv) However, once the Sengulam Augmentation of the KSEB Ltd is commissioned, the excess energy available to the petitioner over and above the designed may not be available to the Company. The petitioner company was aware of these facts at the time of bidding for the project, and it was specified under Schedule-1 of the PPA that the catchment of the project of the petitioner as 21.45 sq.km, which is excluding the upper catchment area of 53.5 sq.km belongs to the Sengulam Augmentation project. In the Supplementary Implementation Agreement dated 22.09.2011 signed with the State Government, it is specified that "The Company will not have any claim over the water from the catchment stream of the proposed diversion weir of the Sengulam augmentation scheme and will not make any claim on account of that in future". Hence there is no rational in raising this issue at this stage. However, to the advantage of the petitioner, there is still uncertainty on the schedule of commissioning of the Sengulam Augmentation project of KSEB Ltd, and hence the excess surplus energy over designed energy is available to the petitioner for few more years.

28. Regarding the second prayer, the petitioner prayed before the Commission to issue 'Any other order' considering the fact that the tariff of the Iruttukkanam Stage-I and Stage-II was much below the APPC of KSEB Ltd. If the petitioner had abandoned the project after the disaster, KSEB Ltd has to purchase the same measure of power from elsewhere at the rate above APPC. The Commission noted the argument of the petitioner and rejected the prayer considering the following.

- (1) The Tariff for the Iruttukkanam stage-1 project of the petitioner is the same quoted by the company in the bid initiated by the State Government in the year 2004. The petitioner had quoted the year wise tariff from the 6<sup>th</sup> year to 30<sup>th</sup> year of the BOOT period.
- (2) Similarly, the tariff for the Iruttukkanam Stage-II is the generic tariff determined by the Commission vide the KSERC (Power Procurement from Renewable Sources by Distribution Licensee) (Second amendment) Regulations, 2010 dated 22.11.2010. The said tariff was applicable for all SHPs commissioned on or after 22.11.2010.
- (3) It is a fact that, the Capital cost is the basis for determining the tariff of a small hydro project. The per MW capital cost of a SHP established in 2010 is much less than the present day capital cost of a similar small hydel project. Hence the generic tariff approved by the Commission for SHP's commissioned in the year 2020 is much higher than that commissioned in the year 2010.

- (4) As mentioned in Para 26(3)(iii) above, due to the non-completion of Sengulam Augmentation Scheme, the petitioner has benefitted to the tune of Rs.12.45 crore over and above the realisation from the Stage 1 and II of this project. Normally such windfall revenue would be subject to reduced tariff. However, in this case, since the Implementation Agreement and the PPA did not specifically mention this aspect, additional revenue at the approved tariffs have been realised by the petitioner.
- (5) The Commission has also taken note of KSEBL's submission that the petitioner has received Clean Development Mechanism funds. As per the Regulations in force, the petitioner was bound to share the benefits with the beneficiary, KSEBL. However, no such sharing has been done so far and instead, the petitioner has retained the same.
- (6) Similarly, in the case of cost of generation and power purchase from conventional sources such as Hydro, Coal based power plants and Nuclear power plants also, the per unit cost of electricity generated from conventional sources is much higher than the cost of electricity generated from similar plants commissioned earlier.
- (7) The APPC of KSEB Ltd for the year 2020 is the Average Pooled Cost of Power Purchase from all sources in the year 2020. At present about 70% of the energy requirement of the State is being met by power purchase. Further, out of the power purchase, more than 60% of the purchase is from recent contracts. Hence the APPC of KSEB Ltd is comparatively higher than the cost of power purchase from the Iruttukkanam Stage-I & II of the petitioner.

The Commission has also noted that, the cost of power purchase from the Solar and Wind through competitive bidding route through the agencies like SECI are less than the tariff of the Iruttukkanam project.

- (8) Hence there is no rationale in comparing the average cost of power purchase of the utility with the tariff of an old project.

**Issue No.2: Whether, the BOOT period can be extended to recover the part of the additional investment made by the project?**

29. The Iruttukkanam project was awarded to the petitioner by the State Government. The petitioner had entered into Implementation Agreement with the State Government on 10.12.2004 and Supplementary Implementation Agreement on 22.09.2011. As per the Article 2.1 of the Implementation Agreement, the BOOT period is specified as 30 years from the date of allotment during which period the company is authorised to implement the Project and to operate and maintain project facilities in accordance with the provisions hereof.

30. It is true that, due to the Mahapralayam and consequent damages, and rehabilitation works, there was no electricity generation from the project from August 2018 to June 2019 (except few days). However, as mentioned in earlier paras, this was a Force Majeure situation and the petitioner's expectation of compensation for a presumptive loss and that too without any such provision either in the Implementing Agreement of PPA is not sustainable.
31. KSEB Ltd in their reply dated remarked that, 'Extension of BOOT period of the project may be decided by the Government of Kerala as the implementation agreement has been executed by the petitioner with the Government of Kerala.
32. The Commission notes that the Implementing Agreement was entered into between the State Government and the petitioner. As per this Agreement, the BOOT period is specified as 30 years from the date of allotment during which period the Company is authorised to implement the project and to operate and maintain Project Facilities in accordance with the provisions hereof. Such an Agreement is beyond the adjudication powers of this Commission as per the provisions of the Electricity Act, 2003. Hence the Commission declines from any interference in this issue and orders that if considered appropriate, the licensee may take up the issue with the State Government for any relief including extension of the BOOT period.

### **Order of the Commission**

33. The Commission examined in detail the petition filed by M/s Viyyat Power Private Ltd, the remarks of the State Government and KSEB Ltd, as per the provisions of the Electricity Act, 2003, and other relevant Regulations in force, hereby orders that,
- (1) The request of the petitioner to grant additional compensatory tariff for Iruttukkanam Stage-I and Stage-II is rejected, due to the reasons detailed in the preceding paragraphs.
  - (2) The petitioner may, approach the State Government, who allotted the project to the Company, to extend the BOOT period if the petitioner so desires.

The petition disposed as above.

**Sd/-**  
**S.Venugopal**  
**Member**

**Sd/-**  
**Preman Dinaraj**  
**Chairman**  
Approved for issue

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