BEFORE THE HONORABLE KERALA STATE ELECTRICITY REGULATORY COMMISSION AT THIRUVANANTHAPURAM

Review petition No. 2021

in

OP No.44 of 2020

IN THE MATTER OF:

Petition filed under Regulation 67 of the KSERC (Conduct of Business) Regulations 2003 for reviewing the Order dated 06.07.2021 of the Hon'ble Kerala State Electricity Regulatory Commission in OP No.44/2020 filed by M/s INDSIL Hydro Power and Manganese Ltd.

Petitioner/Respondent:

Kerala State Electricity Board Limited,
Vydyuthi Bhavanam, Pattom
Thiruvananthapuram,
Kerala - 695004

Vs.

Respondent/Petitioner:

M/s.INDSIL Hydro Power and Manganese Ltd.
Indsil House, T.V Swamy Road (West),
R.S Puram, Coimbatore.

STATEMENT OF FACTS & GROUNDS

1. The Review Petitioner is the respondent in the above Original Petition filed by the respondent herein.

2. The respondent is an EHT consumer having its factory at Palakkad district and also a captive generator of electricity.

3. It had entered into an agreement with KSEB on 30.12.1994 whereby the respondent was allowed to set up Kuthunkal Phase I and Phase II Hydro Electric Project at their own cost, the construction, operation and maintenance being managed by them

subject to stipulations contained in the said agreement and also the policy guidelines stipulated in GO(MS)No.28/90/PD dated 07.12.1990 and GO(MS)No.5/92/PD dated 12.03.1992 under CPP mode. The agreement was executed while Electricity Act 1910 and Electricity Supply Act 1948 were holding the field. Consequent on coming into force of the Electricity Act 2003, generation, transmission and distribution are governed by the provisions of the said act. The respondent filed the above Original Petition before the Honourable KSERC in connection with the denial of payment in respect of invoice raised by the respondent on 13.07.2020 together with interest. The respondent contended that the Review Petitioner had violated clause 11 of the agreement in as much as an amount of Rs 6,39,63,157/- towards the price of the energy generated and banked by the respondent from the plant at Kuthunkal during the water year 2019-20 was not paid.

4. The denial of the bill was communicated by KSEB as per letter dated 16.09.2020. In the said letter KSEB had pointed out that no intimation whatsoever was passed on to KSEBL about the lack of demand at the Respondent's factory so as to request the respondent to restrict generation from Kuthungal SHEP and that KSEB had excess energy during the above period due to various reasons. Admittedly the respondent had contacted them regarding the excess generation only on 16.05.2020 and that too in regard to energy generated previously. As per the agreement, banking of excess energy is only an option given to the respondent and is not mandatory and that such option shall be exercised before generation.
5. It is significant to note that the respondent never intimated its intention to bank energy except by the letter dated 16.05.2020.

6. Another important fact is that the supplementary agreement dated 27.12.2012 is not meant to evacuate power from Kuthunkal Power House. The sub-station was constructed to meet the increasing local demand as part of regular network expansion plan to adequately meet growing demand and location near Kuthunkal Power House was found optimum. Since INDSIL offered land free of cost, the sub-station was established there.

7. The matter was considered by the Honourable KSERC and disposed off by order dated 06.07.2021. It is respectfully submitted that the Honourable KSERC committed a mistake while understanding the scope and ambit of the various clauses in the agreement.

8. At paragraph 40 of the order the Honourable KSERC observed "admittedly if there is generation from the station and no factory consumption, banking of energy is bound to take place". Clause 9 of the agreement shows that the energy generated in Kuthungal project is measured before it is fed into the grid of KSEB. Clause 10 is the other relevant clause in the agreement. It specifically states that the energy from Kuthungal Phase I and Phase II project fed into the KSEB grid will be metered at a location as detailed above and this quantum of energy less 12% towards wheeling charges and T & D losses will be delivered free of cost to the company and their associates M/s. SUN Metals & Alloys Pvt Ltd, Kanjikode at the EHT Terminal at the point of supply in their instillation, if any or it will be banked by KSEB if the company **so desires**. KSEB will collect 1% of the energy so banked as its commission. It is reiterated that the collection of the commission is in addition to wheeling charges and loss towards T & D charges.

The above clause shall be read along with GO (MS)No.28/90/PD dated 07.12.1990 and GO (MS)No.5/92/PD dated 12.03.1992. The scheme of the government was for setting up of Small/Mini/Hydel Schemes by Private agencies both CPP Mode and IPP Mode as part of promotion of private participation in setting up Small/Mini/Micro Hydel Schemes. M/s. INDISIL opted for CPP Mode indicating that the main purpose is for utilizing the power generated for the purpose of their factory at Kanjikode.

9. However, if excess energy is generated the company has the option to bank the energy with KSEB, if the company so desires. This would show that an occasion for banking energy would arise only when energy becomes excess after consumption in their factory. Banking must therefore be a voluntary action on the part of the company. In other words, it is not automatic. Also, it is to be noted that there is no separate power purchase agreement other than what is emanating from clauses 10 & 11 enabling the company to re-coup the price of energy generated in excess. Another important aspect is that at the time of entering into the agreement, the Electricity Act 1910 and Electricity (Supply) Act 1948 were holding the field wherein, there was no scope for Electricity Trading and open access. Therefore the contemplation can only be that the company would utilize the energy produced for their purpose and only in case there is excess energy after their use that the same can be banked or sold to KSEB.

10. Therefore, the observation in paragraph 40 that the energy generated if not consumed in the factory, banking will take place automatically is a conclusion which cannot be legitimately drawn from the clauses relied on by the Honourable Commission. It is

also to be noted that the scope and ambit of a clause in the agreement shall be decided by considering the whole agreement. In this context, the law declared by the Honourable Supreme Court in the decision South East Asia Marine Engineering and Constructions Ltd (SEAMEC) Vs Oil India reported in (2020) 5 SCC 164 at paragraphs 25 and 28 is apposite. The Honourable Apex Court held that a contract needs to be interpreted taking into consideration all the clauses in the contract and that the thumb rule of interpretation is that the document framing a written contract should be read as a whole and so far as possible as mutually explanatory. It is a well-established proposition.

11. The observations and findings in paragraphs 41 to 45 are not consistent with clause 12 of the agreement. Clause 12 shall be read in the context of clauses 10 & 11 of the agreement. As per clause 12 as already submitted the generator can bank the energy if they so desire. As per clause 11, the company can sell the banked energy to KSEB. It may be noted that the sale of energy is also on voluntary action on the part of the company.

12. It is further stated in clause 11 that the accounting and billing of the energy fed into the grid by the company and/or supply by KSEB to the companies for operating its factories if any will be settled on a monthly basis. It is further stated in the said clause that if the energy banked is not utilized by the company and their associates during one accounting year, it shall not be carried forward to the next accounting year and shall be treated as lost. However, there is an option for the company to sell the excess energy to KSEB on the terms specified in the agreement. When clause 12 is read along with clauses 10 and 11 the picture will become clear. Clause 12 does not allow the company to keep the

energy banked until the last day of the water year and then on the last day sell the same to KSEB. If such is the intention, clause 12 cannot operate because on the last day of the water year there cannot be any occasion for KSEB to restrict the generation to the extent of captive consumption of the company. Therefore, the cumulative effect of clauses 10 to 12 is that the company can bank the energy in case there is excess and the company can also sell the energy before the end of the water year, but settlement shall be made on monthly basis. A reasonable meaning to the above provisions is that if there is excess banked energy during monthly settlement the company can sell that excess energy and if the company anticipates that their consumption will be lower, it can bank and sell the energy, but the KSEB can say that they do not require the energy and therefore restrict generation. The approach of the Honourable Commission is therefore not consistent with the scope and ambit of clauses 10 to 12.

13. The finding in regard to issue number 3 also requires reconsideration for the reasons stated above. It is to be noted that letter dated 16.05.2020 from the company to the Special Officer Revenue is the trump card of the company. The letter only says that from 24th march onwards they had to shut down the company and the power generated from 24th March to 16th May 2020 is 57,01,301 units and the request is to adjust the said amount of energy in their consumption in the factory. It is to be noted that unless there is a prior intimation, the Board cannot instruct the generator to restrict generation. Intimation on 16.05.2020 regarding the generation of electricity during prior period will not entail the company to adjust the said power in their future consumption. The matter would have been different had

they informed the Board on 24th march itself regarding their intention to bank the energy or to sell the energy in which event the Board would have the opportunity to keep the energy in bank or to purchase the energy or to restrict generation.

14. The Honourable Commission has considered as to whether INDSIL has the obligation to sell the banked energy and the KSEB has any obligation to purchase the excess banked energy as issue number 4. There also the Honourable Commission committed a very serious error. The Honourable Commission relied on clauses 10 & 11 of the agreement and came to the finding that there was deemed sale. Now coming to clause 11 of the agreement it can be seen that the said clause deals with energy generated in excess of the requirement of the company. It is stated in the said clause that if the energy in excess of the requirement of the company is generated from the project during one accounting year, the company may sell the excess banked energy to KSEB. Pausing here for a moment, it can be seen that the energy should be banked before selling it and it is from such banked energy that the company can sell to KSEB. Therefore, selling of energy should be a conscious act and no sale can be effected without the knowledge of the purchaser. Transaction of sale involves an offer to sell for a price and the acceptance of such offer. Any sale should conform to the provisions in the Sale of Goods Act. Therefore, the option in clause 11 of the agreement to sell banked energy should be exercised by the company by offering to KSEB.

15. In the instant case as can be seen from the records and especially from the observation of the Honourable Commission is that on 16.05.2020 the company informed KSEB regarding excess

generation during the previous period. Before that date, KSEB was unaware of the excess generation. The SLDC is only monitoring the availability of the energy in the grid and scheduling it and it has no facility to understand the specific source from which the energy is flowing into the grid. Its duty is to control and distribute the power in the grid. So, if excess energy from an unknown source comes to the grid it will go unnoticed and it may go to places outside Kerala where energy is required and consumed by different users. This was stated so only to highlight the aspect that assuming that excess energy had come to the grid; the same could not be utilized by the Board economically.

16. The other aspect dealt with by the Honourable Commission on the basis of clause 11based on the sentence; "The sale shall be deemed to be effected at the EHT Terminal of KSEB where the power generated by the company is fed into the KSEB grid". This sentence was understood by the Honourable Commission as a deemed sale as if energy fed into the grid will automatically become a sale of energy. The said understanding is a fundamental mistake. In every sale, one of the important aspects is the situs of goods at the time of sale. Electricity being a commodity that cannot be stored, always there will emerge a doubt regarding the situs of electricity at the time of sale. The situs of electricity at the time of sale assumes importance because the wheeling charges and T & D charges are to be collected on the basis of utilization of the KSEB grid. Suppose the situs of sale is at Palakkad, the company shall have to pay the wheeling and T & D charges from Kuthungal to Palakkad. It is only to avoid such confusion that situs of sale is clearly mentioned in the agreement that the same is at the EHT Terminal of KSEB where the power generated by the

company is fed into the KSEB grid. The further sentences in the said clause make the position clearer. It is stated that the energy fed into the KSEB grid, less banking Commission, royalty, and/or levies shall be deemed to be the energy sold to the KSEB. It is specifically stated that wheeling charges and loss towards T&D shall not be taken into account to determine the energy sold. The reason is obvious, once the energy is sold at the entry point of the grid, the energy has become the property of KSEB, and thereafter the seller, namely the company, cannot be obligated to pay wheeling charges and T&D charges.

17. Therefore, the edifice of the reasoning of the Honourable Commission is on a shaky foundation, thereby the conclusion reached became faulty. The order passed by the Honourable Commission in OP No 44/2020 dated 06.07.2021 requires review and reconsideration on the following among other:

18. In view of the order dated 23.09.2021 of the Honourable Supreme Court of India in Miscellaneous Application No.665 of 2021 In SMW(C) No.3 of 2020 read with Regulation 67(1) of the KSERC (Conduct of Business) Regulations,2003, the present petition is in time. The relevant portion of the order dated 23.09.2021 of the Supreme Court is quoted below;

I. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.

II. In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.202. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.

GROUNDS

A. The Honourable Commission has formulated a question as issue number 2 as to whether generation from Kuthunkal SHEP is to be based on petitioner's power consumption at their Palakkad units and whether such consumption is the prime factor taken by SLDC while deciding the scheduling and generation from Kuthunkal SHEP and came to the conclusion at paragraph 45 of the order that the power consumption at the petitioner's Palakkad unit and the scheduling of power by SLDC and its generation from petitioner's Kuthunkal SHEP are not co-related. Even though the generation at Kuthunkal and consumption of INDISIL are not co-related in the normal course, the reasoning of the Honourable Commission in that aspect is not fully correct. The Honourable Commission had observed in paragraph 40 as follows "admittedly if there is generation from the station and no factory consumption, banking of energy is bound to take place." The above statement is not correct for the reasons stated in paragraphs 7,8 and 9 above. Moreover, the Honourable Commission had relied on the additional clarification dated 09.03.2021 which led to the observations at paragraph 44 of the order. While doing so the Honourable Commission had omitted to consider the additional submissions made on behalf of KSEB in compliance with daily order dated 08.03.2021. In the said additional submission the KSEB had

clearly explained the reason for establishing the substation in the land owned by INDISIL and that the power generated at Kuthunkal SHEP is not specifically utilised for distributing in nearby area. Kuthunkal Sub-Station is a part of state grid. Rajakkad, Senapathi, etc function essentially as an extension of the grid of KSEBL. It is to be noted that when energy is fed into the grid from any source it will lose its identity and it flows as per laws of physics meaning thereby it will flow from high voltage to low voltage just like water. Therefore, the INDISIL's additional clarification taken note of in paragraph 43 is not correct. Hence, the observations in paragraphs 40 to 45 require review and reconsideration, being an error apparent on the face of the record.

B. The Honourable Commission had considered the issue as to whether the respondent herein is required to issue advance notice to KSEB Ltd for restriction of generation from Kuthunkal SHEP by KSEB as issue number 3 and came to the conclusion that no obligation as per the agreement is cast on the respondent to inform KSEB to enable restriction of the generation from the plant. It is respectfully submitted the above finding happened to be arrived at on the basis of a wrong understanding of the clauses in the agreement and by restricting the consideration to clause 12 above. In paragraphs 10 and 11 the Review Petitioner has explained in detail the scope of the agreement. Therefore, the observations and findings in paragraphs 46 to 55 require review and reconsideration being an error apparent on the face of the record.

C. The Honourable Commission has considered the issue as to whether the respondent herein has the obligation to sell the excesses banked energy and whether KSEB Ltd has the obligation

to purchase the excess banked energy at the end of accounting year. The Review Petitioner has explained in paragraphs 12 and 13 above the nature of the transaction between the parties. No doubt the company can sell the excess banked energy and the KSEB has the obligation to purchase the same as per the terms of the agreement. But this Honourable Commission proceeded on the assumption that there is a deemed sale between the company and KSEBL at the moment the power generated by the company is fed into the KSEBL grid. As explained in paragraphs 12 and 13 above there cannot be any deemed sale. As already submitted, the transaction of sale is governed by the Sale of Goods Act except what is stated in Article 366 (29A) of the Constitution of India. Those transactions are known as deemed sale. Therefore, the phraseology used in Clause 11 of the agreement that "the same shall be deemed to be effected at the EHT terminals of the KSEB where the power generated by the company is fed into the KSEB grid." indicates only the situs of sale. Therefore, the observations and findings contained in paragraphs 56-61 require review and reconsideration being an error apparent on the face of the record.

D. The Honourable Commission had formulated a subsidiary question as to whether the company had offered to sell excess banked energy. After considering the issue primarily on the basis of a letter issued by the company dated 16.05.2020 came to the conclusion that the said letter is an offer to sell excess energy. Here also the Honourable Commission proceeded on the assumption that the energy was earlier banked with KSEB and it was such energy that was sought to sell. It is to be noted that the company has not produced any document to show that at any point of time prior to generation of electricity the company informed its desire to bank

energy. In none of the previous monthly settlements the company did express any desire to bank the energy. The interpretation of this Honourable Commission will make clause 12 of the agreement inoperative. While interpreting an agreement the thumb rule of interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory. Therefore, the observations and finding in paragraphs 62-67 require review and reconsideration being an error apparent on the face of record.

E. While dealing with issue number 6 also the commission proceeded on the assumption that the whole energy generated was banked. No doubt banked energy can be sold to KSEB before the close of the water year. It is because when energy is banked it will be utilised by KSEB. If it is not banked the same will not be scheduled and made use of. The finding of the Honourable Commission in this regard therefore requires review and reconsideration being an error apparent on the face of the record.

F. The Honourable Commission had considered the issue regarding the rate at which the banked energy should be purchased. In the light of the earlier submissions there is no banked energy and therefore there is no occasion to consider such an issue. Having considered such an issue the Honourable Commission ought to have found that after the coming into force of the 2003 Act all existing agreements should be construed in the light of the provisions of the said Act and regulations made there `under. Thus, tariff being the prerogative of the Honourable Commission, the Honourable Commission ought to have determined tariff in accordance with the norms, rules and regulations prevailing.

G. The Honourable Commission as per paragraph 94(1), ordered that, KSEBL is obliged to purchase the excess banked energy as **on 30.6.2020** as per the agreement dated 30.12.1994. But, as per paragraphs 94(2) & (3), ordered that, the rate applicable to the sale of energy banked till 4.06.2020 shall be as per clause 11 of the agreement and from 05.06.2020 to 30.06.2020 the rate applicable shall be as per the provisions of KSERC (Renewable Energy and Net Metering)Regulations,2020. Without prejudice to the earlier contentions, it is submitted that, the Honourable Commission ought to have found that, the actual quantum of energy banked can only be assessed at the end of the accounting year as the generator has every right to use the banked energy at any time before 30.06.2020 and thus, sale if any, can be effected only on 30.6.2020. Thus, assessing the quantum of energy for sale at any time prior to 30.6.2020 is meaningless. Nevertheless, the rate applicable is also as on 30.06.2020, as per the existing regulations for the entire quantity. Therefore, the order and findings in paragraphs 94(2) require review and reconsideration being an error apparent on the face of record.

PRAYER

For these and other reasons that may be submitted at the time of hearing it is respectfully prayed that this Honourable KSERC may be pleased to review and reconsider the order in 44/2020 dated 06.07.2021 by allowing this Review Petition.

Dated this 26th day of October 2021.

Petitioner:

Chief Engineer (Commercial and Tariff), KSEBL.

Presented on:26.10.2021

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Petitioner/Respondent:

Kerala State Electricity Board Limited,

Vs.

Respondent/Petitioner:

M/s.INDSIL Hydro Power and Manganese Ltd.

MEMORANDUM OF REVIEW PETITION FILED UNDER REGULATION 67 OF KSERC (CONDUCT OF BUSINESS) REGULATIONS 2003

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&
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