

ORDER

Before the Karnataka Electricity Regulatory Commission Bangalore

Dated 18th August, 2005

Present:

- 1. Sri. K.P. Pandey, Chairman**
- 2. Sri. H.S. Subramanya, Member**
- 3. Sri. S.D. Ukkali, Member**

In the matter of Standardization of formats for Power Purchase Agreements in respect of Non-Conventional Energy Projects

1. In the Commission's order dated 18.01.2005 on tariff determination for various categories of NCE projects, the Commission had directed KPTCL to file Draft Standard PPAs in respect of the various NCE categories duly considering various modifications suggested by IWPA in the course of the public hearing arranged in connection with the determination of tariff.
2. In response, KPTCL had filed Draft Standard PPAs with the Commission vide their letter No. KPTCL/B-36/912-13 dated 03.03.2005. Separate standard PPAs have been filed in respect of (i) Mini hydel projects (ii) Wind energy projects (iii) Biomass projects and (iv) Co-generation plants. The Commission, after review of these Draft PPAs, had communicated to KPTCL its preliminary observations on the drafts for compliance vide letter-dated 21.04.2005.
3. KPTCL had submitted the revised Draft Standard PPAs after attending to some of the observations made by the Commission along with its comments vide, their letter no. KPTCL/B-35/SEE (P&M)/1247/05-06 dated 09.06.2005.
4. In order to elicit the views of the stake holders, experts & public before finalizing the Standard PPAs, a Public Hearing was arranged by the Commission on 04.07.2005, after giving due notices in two English language and two Kannada language newspapers having wide circulation. All those who wished to furnish comments and views were required to make written submissions before 30.06.2005. The Commission had informed the ESCOMs

also to file their comments on the draft PPAs furnished by KPTCL since ESCOMs are required to enter into PPAs from 10.6.05 onwards.

5. A list of persons who have filed their written comments is enclosed. However, ESCOMs had not filed their comments in the matter. The hearing was held on 4.7.05. During the hearing, KPTCL/ESCOMs requested the Commission to adjourn the hearing allowing KPTCL and ESCOMs to file their responses on the comments received from the developers. Accordingly, the Commission had allowed KPTCL/ESCOMs to file their responses before 11.07.2005 and adjourned the hearing to 13.7.05. KPTCL/ESCOMs have filed their responses on 12.7.05 and presented their views in the hearing held on 13.07.2005.
6. The comments received on the various clauses of the draft standard PPAs from the various developers, response of KPTCL/ESCOMs and the Commission's decision thereon are as under:
 - a) Many developers have suggested certain drafting changes arising out of the fact that KPTCL is not permitted to carry out trading in electricity from 10.06.2005 and instead the ESCOMs will purchase power from the various generating companies directly. KPTCL/ESCOMs have also agreed that appropriate changes have to be made since KPTCL will not engage in trading from 10.6.05. KPTCL has further stated that since synchronization and transmission services have to be provided by KPTCL, perhaps a tripartite agreement between the generating company, ESCOM and KPTCL clearly defining obligations of each of the parties may have to be entered into.

The Commission had pointed out that since the PPA is only between the generating company and the ESCOM, KPTCL cannot be a party to the PPA. It is for the concerned ESCOM to enter into a separate agreement with KPTCL in the matter of transmission services if required in the event the generating company has to be connected to the

Grid at voltages 66 KV and above for which the generating company need not be a party. In the alternative, the Commission is also of the view that in the event the Generating Company has to be interconnected with the Grid at the sub-station of KPTCL depending on the transmission voltage, the matters of co-ordination with KPTCL regarding synchronization, COD etc., can be covered under clause 4.2 "Obligations of ESCOM" in the Article 4- Undertakings. Accordingly, the Commission approves to incorporate appropriate modification to clause 4.2 in Article 4 of the draft PPA.

- b) A few developers have suggested certain drafting corrections in the standard PPAs, which have been generally agreed to by KPTCL. The Commission approves to incorporate the drafting corrections in the draft PPAs wherever considered appropriate.

- c) In the definition of "financial Closure" under Article 1.1, many developers have requested to extend the period required for "financial closure" from the proposed 3 months from the date of signing of PPA to at least six to nine months from the date of signing of the PPA contending that banks/financial institutions take a long time to process the application for financial assistance. KPTCL has contended that the proposed 3 months period should not be extended so that only such of the developers who are serious in taking up the project should be encouraged and such developers can always take advance action for financial closure even before signing the PPA. The developers have disagreed with this view and stated that banks/institutions accept applications for financial assistance only after the PPAs are signed and approved by the Commission, since the viability of the project is evaluated by them based on the tariff and other commercial terms and conditions of the PPA.

The Commission, after examining the matter has decided to allow a period of six months for financial closure from the date of signing of the PPA in respect of all the categories of NCE projects.

- d) Similarly, on the definition of "scheduled date of completion", many developers have represented that the proposed 18 months from the date of achievement of financial closure for completion of the project is inadequate and that it should be extended at least to 24 months from the date of achieving financial closure. Developers of min-hydel projects have also represented that allowing a uniform period of 18/24 months for completing the project is not appropriate as the completion period varies from project to project depending upon specific conditions such as site conditions, number of units to be commissioned, technical specifications etc. A few developers have requested that an outer limit of 36 months be allowed for mini hydel projects. KPTCL has suggested that the period of completion to be allowed has to be mutually negotiated between the parties.

The Commission agrees that while the period of completion of each project will vary depending upon specific conditions of that project, allowing the parties to negotiate the period required for completion of each project may lead to disputes and delay and may not be prudent. Therefore, it is better to have an outer limit for completion of the projects and it is always in the interest of the developers to complete the project early. The Commission also finds merit in the statement of the developers that mini hydel projects require longer time for completion when compared to other NCE sources based projects. Considering these aspects, the Commission decides to allow a period of 18 months from the date of achieving the "financial closure" or 24 months from the date of signing the agreement, whichever is later, in respect of wind mill, co-generation and bio-mass projects. In respect of mini-hydel projects, the period shall be 24

months from the date of achieving the “financial closure” or 30 months from the date of signing of PPA, whichever is later.

- e) In Clause 1.1 in respect of the definition of the words “Emergency”, “System Constraints” and “Corporation's Electrical System” many of the developers have expressed the opinion that the definition of the words as existing could allow lee-way to the KPTCL/ESCOMs to direct the generators to back down their generation on the pretext that there existed emergency conditions in the Corporation's/ESCOM's electrical system on certain commercial considerations rather than emergencies arising out of any problems in the evacuation system of the project.

The Commission pointed out to the developers that this aspect has already been examined in detail in the Commission's order dated 18.1.05 and has ordered that merit order shall not be applicable to NCE sources. The Commission has decided that the definition of the words “Emergency”, “System Constraints” and “Corporation's /ESCOM's Electrical System” in the draft PPAs shall be reworded to remove any ambiguity considering the apprehension of the developers.

- f) Under Clause 2.1 pertaining to “Conditions Precedent”- in order to achieve the conditions precedent, one of the important requirements is that the Company shall have been granted and received all permits, clearances and approvals (whether statutory or otherwise) as are required to execute the project. The developers have suggested that the list of permits/approvals required should be specific.

The Commission agrees to this suggestion and directs that the specific list of permits, clearances and approvals required shall be listed out and appended to the PPA, which shall be an integral part of the PPA.

- g) Some of the developers have pointed out that, in Clause 3.4, it is mentioned that in case the company fails to achieve Financial Closure within the stipulated period or fails to commence the construction of the project before the Scheduled date of Commencement of the project or fails to complete the project within the Scheduled date of Completion of the project, the Agreement shall automatically become null and void. The Developers have contended that the portion relating to treating the agreement as null and void in case of failure of the company to complete the project within the Scheduled date of Completion needs to be deleted as this aspect has been separately dealt with in Clause 3.5 according to which the ESCOM is required to give 90 day's notice to the Company for "construction default" which in other words means failure to complete the project within the scheduled date of completion of the project.

The Commission after examining the issue in detail has concluded that there is merit in the representation made by the developers as it is illogical to automatically treat the agreement as null and void in case of such default as the Company would have invested large amounts and they have to be given adequate notice and given an opportunity to remedy the default before terminating the agreement. The Commission accordingly directs to delete the relevant portion in Clause 3.4

- h) Some of the developers and IWPA represented that Clause 4.1(vi) requires that the Company has to undertake at its own cost construction/up-gradation of interconnection facilities, transmission line and receiving stations for evacuating the power from the generating station of the company. As the ESCOM's/Corporation are likely to utilize the facility particularly the upgraded receiving station

etc for supplying power to other consumers also, there should be a provision for sharing of costs between the company and the ESCOMs/Corporation, which could be mutually agreed to. KPTCL argued that they cannot share the costs as the necessary infrastructure created is exclusively for the evacuation of power generated from the developers' generating plant.

The Commission after examining the arguments pointed out that according to Section 10 of Electricity Act 2003, the duties of the generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made there under. The generators are therefore required to maintain all the facilities required for interconnection with the Corporation/ESCOM, including the dedicated transmission lines. The Commission therefore concludes that clause (vii) in Article 4.1 shall be modified accordingly.

- i) Some of the developers have represented that a new Clause 5.1b under Article –5, "Rates and Charges" needs to be added as under- "the rates and charges are to be paid as per the norms of the Central Electricity Regulatory Commission by ESCOMs for the energy generated and pumped into the grid from the date of synchronization to the "Commercial Operation Date". KPTCL has stated that the power supply during such period is infirm and insignificant and therefore there is no need to pay any charges.

The Commission noted that the tariff determined is effective from the date of commercial operation of the plant and therefore in the case of biomass and co-generation plants, where fuel is consumed, they have to be compensated for the power supplied up to the date of commercial operation as in the case of conventional thermal power

plants. The Commission decides that a clause shall be added under Article-5 Rates and Charges in respect of biomass and co-generation projects to pay fuel charges for the power supplied up to the date of commercial operation and that the charges shall be the same as the cost of fuel considered by the Commission in the tariff determined for the first year of commercial operation of the plant, which is Rs. 1.16 per Kwh in respect of Bio-mass projects and Rs. 1.28 per Kwh in respect of Co-generation plant using Bagasse.

- j) In Clause 5.2, there is a provision for the ESCOMs and the Company to negotiate the tariff at which power is to be purchased by the ESCOMs from the generating company, from the eleventh year onwards, based on operating costs and incentives and further that in case the negotiations fail, the matter is to be referred to the Commission. Further, it provides that if the ESCOMs refuse to purchase the power, the Company shall be permitted to sell energy to third parties by payment of transmission, wheeling and banking charges to the ESCOMs. The developers have represented that the tariff is to be based on costs and incentives instead of the operating costs and incentives and further that generating company should also be allowed the right to refuse supply of power to the ESCOMs etc. In the rejoinder KPTCL have stated that since all the fixed costs including depreciation are covered during the first ten years' period, from 11th year onwards only the operating costs and incentives need to be covered. As such, the request of the company should not be considered and further the first right of refusal should rest with the ESCOMs only.

The Commission pointed out that according to section 62 of the Electricity Act 2003, the Commission is vested with the power to determine the tariff for power supply by a generating company to a distribution licensee. Therefore, with the enactment of the Electricity

Act 2003, the said provision in the PPA even in the case of concluded contracts are inconsistent with the provisions of the Electricity Act 2003 and as such the provisions of Electricity Act 2003 prevail. Therefore the tariff for power supply from 11th year onwards shall also be determined by the Commission only. Accordingly the Commission decides to modify the provision in the draft PPA appropriately.

- k) Many developers have represented that the Clause 5.4(in respect of Mini-Hydel & Wind-mill projects) and 5.3(in respect of Bio-mass & Co-generation projects) pertaining to payment of Rs. 37,000 per MW of installed capacity for providing required MVAR capacity at the sub-stations be deleted since KPTCL is not taking any action to install the capacitors even after payment of the amounts. KPTCL stated that it is taking action to install capacitors wherever necessary after conducting load-flow/system studies. They further contended that the location of the capacitors to be installed would not necessarily be at the sub-station at which the point of interconnection of the developers' transmission line is made, as the location is determined based on the load-flow/system studies.

The Commission examined the matter in detail. The Commission also noted that KPTCL even in the Draft Standard PPA submitted to the Commission has indicated in Clause 5.4(in respect of Mini-Hydel and Windmill) and 5.3 (in respect of Co-generation, Bio-mass) that the amount is being collected for the sole purpose of providing the required MVAR capacity at the sub-station of the Corporation to which the project is inter-connected to supply the required reactive power. Hence KPTCL's contention during the hearing that the location of capacitors to be installed would not necessarily be at the sub-station at which the point of interconnection of the developers' transmission line is made, as the location is determined based on the load-flow/system studies is not justified. The Commission therefore

concludes that there is need to ensure that the amount collected has been utilized for the specific purpose agreed to in the PPA. The Commission directs the ESCOMs to ensure that capacitors of required MVAR capacity are installed at the sub-station of the Corporation/ESCOM to which the project is interconnected before the Commercial Operation Date of the project. In case the Corporation/ESCOM fails to install the capacitors of requisite capacity before the Commercial Operation Date; the amount collected for this purpose shall be refunded by the ESCOM within thirty days from the date of Commercial Operation of the project.

- l) Developers of Co-generation projects also represented that in Clause 5.4, the amount payable to the ESCOM for the purposes of providing required MVAR capacity by the Corporation/ESCOM should be based on the "exportable capacity" of the project instead of the existing "installed capacity" of the project.

The Commission after examining the issue decides that there is no merit in the arguments put forth by the developers and hence no modification is considered necessary.

- m) In Clause 5.5, there is a provision permitting developers to use 10% of the installed capacity for start up for which 115% of such energy provided by the ESCOM for startup purposes will be deducted from the energy pumped in to the grid. If energy over and above the above entitlement is drawn then the same will be charged under the tariff applicable to HT industries. Developers of the Mini-Hydel projects have represented that the charges applicable to HT industries should be made without insisting on payment of demand charges.

The Commission after examining the matter concludes that there is no merit in the representation of the developers and hence no modification is considered to be necessary.

- n) Some of the Mini-Hydel project developers have represented that an additional Clause 5.6 is needed to be introduced to take care of their concerns regarding the possibility of reduced generation on account of non-availability of Corporation's/ESCOM's evacuation system from the project to the delivery point or due to ESCOM's/SLDC's back down instructions resulting in the spillage of water.

The Commission has elaborately discussed these points in the order dated 18.1.05 considering the views of the stakeholders and has come to the conclusion that single part tariff would be appropriate for NCE projects and further that merit order shall not be applicable to such sources. As discussed earlier, the Commission also decided to reword the definitions "emergency" and 'system constraints' in the PPA to remove the apprehensions of the developers. Therefore, no further modification is considered to be necessary.

- o) As per Clause 6.4, Corporation/ Company shall not have the right to challenge any Tariff Invoice, or to bring any court or administrative action of any kind questioning/modifying a Tariff Invoice after a period of one year from the date the Tariff Invoice is due and payable. IWPA have contended that the limitation period in respect of the unpaid debt as per law is three years and hence the developers have requested that the words "one-year" are to be replaced by "three years". KPTCL in their rejoinder have stated that the modification of Clause is not required, as the law of limitation will take care of this aspect.

The Commission agrees to the view of KPTCL that the law of limitation would be applicable and concludes that no modification to the said Clause is required.

- p) In Clause 6.5(iii), it is indicated that for payment by LC, the amount of Letter of Credit shall be equal to one month's projected payments payable by the ESCOM based on the average of annual generation. Some of the developers have represented that the words "average of annual generation" are to be replaced by the words "maximum projected monthly generation for the year".

The Commission after examining the request of the developer finds no merit in the representation and hence decides that the clause shall remain unaltered.

- q) IWPA have requested that in Clause 7.3, a provision should be made for specific rates for each meter reading and each calibration of meter in respect of additional energy meters installed by the companies other than the bulk supply meter to be carried out by the ESCOM/Corporation as otherwise the ESCOM/Corporation are likely to claim inflated costs towards the same. KPTCL in its rejoinder has claimed that only the cost incurred by the Corporation/ESCOMs is being claimed.

The Commission after considering the requests and the rejoinders concludes that there is no need to fix the rates for reading and calibration of meters in the PPA.

- r) In Clause 10- "Dispute Resolution" some of the developers have requested that a provision for arbitration should also be made for dispute resolution. KPTCL have stated that since provision already

exists in the Act itself, there is no need to include it separately in the PPA.

The Commission agrees with the view of KPTCL.

- s) Some developers have also contended that the mini-hydel and windmill projects should be given "must run status" in order that all the power generated by such projects is purchased/evacuated by the ESCOMs/Corporation without exception except under conditions of "emergency".

The Commission in its order-dated 18.1.05 has already ordered that merit order shall not be applicable for NCE projects and therefore this suggestion is already taken care of.

- t) Some developers/IWPA have represented that if the Commission decides to include the clause pertaining to "carbon credit", then the benefits accruing on account of the same shall be retained entirely by the generators since huge expenditure is involved while working for carbon credits and penalties if the carbon credits are not delivered as agreed to. The Developers have further contended that if the sharing of carbon credit is to be considered, then sharing of expenses and penalties are also to be considered. Further, United Nations Framework Convention on Climate Change (UNFCCC) is permitting to share the Carbon Credits among the Project Participants only.

In this regard the Commission in its Order dated 18.01.2005 has already taken a view that it does not consider it necessary to factor in carbon credit benefit in the tariff at this stage. The Commission directs that the same position shall be maintained in the PPA till any modification is made to the Commission's order.

- u) Some of the developers have represented that a provision has to be made for payments of royalty on water utilized and Electricity tax on generation as “ Pass Through costs” for tariff purposes. KPTCL expressed that KPTCL/ESCOs cannot absorb them and power will be costlier to handle.

The Commission is of the view that the parties are at liberty to approach the Commission for modification of tariff, if considered necessary, when new levies/ modification to levies take place having significant impact on their revenues.

- v) M/S Godavari Sugars have represented that since the Commission is approving the format of the PPA and as per their understanding, no further approval on the individual PPA by the Commission will be required, the words “subject to the approval of the Commission” in the preamble portion of the PPA can be deleted. KPTCL stated that approval of individual PPAs by the Commission would be required as per the present practice.

After examining the matter, the Commission considers that separate approval of the Commission for individual PPAs of NCE projects as per standard formats would be required as the Commission is bound by the Act to regulate the quantity of power purchased by the licensees. Accordingly the Commission agrees to the views of the KPTCL and decides that the ESCOs shall obtain approval of the Commission to the individual PPAs.

- w) During the hearing, MD GESCOM represented that the ESCOs should be allowed to purchase power from the NCE projects at their “door-steps” i.e. at the interface points.

The Commission after hearing the representation concludes that as the tariffs for the NCE projects have been determined at the generation point, the request of MD GESCOM cannot be considered.

7. The Commission hereby approves the draft Standard PPAs for each category of the NCE projects as annexed to this order duly incorporating the changes as approved in the preceding paragraphs of this order.

Sd/-
S.D. Ukkali
Member

Sd/-
H.S. Subramanya,
Member

Sd/-
K.P. Pandey,
Chairman