

No. N/49/2013

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.

Dated: 14.12.2021

Present

Shri Shambhu Dayal Meena : Chairman
Shri H.M. Manjunatha : Member
Shri M.D. Ravi : Member

OP No.15/2013

Between:

M/s SRM Power Private Ltd.,
Regd. Office: No.2, Kalpana Chawla Road,
5th Main, 4th Cross,
Sanjay Nagar, Bhoopasandra,
Bangalore – 560 094.
(Represented by its General Manager)

.... Petitioner

(Represented by Advocates Sri Abhilash Raju
and Sri. Srinivas and Badri)

And:

1. Bangalore Electricity Supply Company Limited,
Corporate Office, K.R.Circle,
Bangalore – 560 001.
[Represented by its Managing Director]

(Represented by Sri. Rithika Ravikumar, Advocate,
for M/s Indus Law)

2. Mangalore Electricity Supply Company Limited,
Corporate office, Paradigm Plaza
3rd Floor, A.B. Shetty Circle
Pandeshwara
Mangalore – 575 001.
(Represented by its Managing Director)

(Represented by Sri. Rithika Ravikumar, Advocate,
for M/s Indus Law)

3. Chamundeshwari Electricity Supply Company Limited,
Corporate Office,
927, L.J. Avenue
New Kantharaj Urs Road,
Saraswathipuram, Mysore – 575 005.

(Represented by its Managing Director)

(Represented by Sri. Rithika Ravikumar, Advocate,
for M/s Indus Law)

4. Hubli Electricity Supply Company Limited,
Corporate Office,
P.B.Road, Navanagar,
Hubli – 580 029.
(Represented by its Managing Director)

(Represented by Sri. Rithika Ravikumar, Advocate,
for M/s Indus Law)

5. Gulbarga Electricity Supply Company Limited,
Corporate Office,
Gulbarga Main Road,
Gulbarga.
(Represented by its Managing Director)

(Represented by Sri. Rithika Ravikumar, Advocate,
for M/s Indus Law)

... Respondents

FURTHER ORDER ON REMAND**1. Brief Facts of the Case:**

1. M/s SRM Power Private Ltd., has entered into a Power Purchase Agreement with the Mangalore Electricity Company Limited on 15th June 2006, which was approved by the Commission. The Power Purchase Agreement envisaged payment of Rs.2.80 as energy charges per KWHr of energy supplied without any escalation, as per the Generic Tariff Order dated 18th January 2005 for a period of 20 years.
2. The said tariff was determined taking into account the various parameters, fixed the tariff for the first 10 years, which was in force up to 2009. The said Tariff Order was revised by the Commission with a fresh Generic Tariff Order dated 11th December 2009. In the said order the tariff for the small hydro projects was fixed at Rs.3.40KWHr. This order was made applicable to all the Power Purchase Agreements executed during that period in which the tariff order was in force.
3. While implementing the project there was delay in achieving the CoD due to delay in getting approval from various government departments, getting land from the forest department etc. The delay was also due to technical snags like bursting of Head Race Conduit due to faulty technical design and construction faced during the commissioning of the project. These delays resulted both in cost and time over run.

4. Finally, the project was commissioned on 24.10.2011 at a total cost of Rs.46 Crores as against a capital cost of 3.75 Crore per MW considered in the generic tariff Order.
5. Consequently, the petitioner has filed a petition on 29.04.2013, OP No.15/2013, praying for re-fixation of the tariff at Rs.5.52 per unit for 10 years from the CoD, as against Rs.2.80 per unit, allowed as per the PPA which was in terms of the generic order of 2005 with the following relief:
 - a. Review of the Power Purchase Agreement entered into with the 2nd Respondent dated 14th June 2006 and determine a tariff of Rs.5.52/KWHr with effect from the date of the commercial operation of the Petitioner Company.
 - b. Grant such other and further reliefs as the Commission deems fit in the facts and circumstances of the case, in the interest of justice.
6. The petitioner in its petition filed before the Commission has requested to consider to extend at least the benefit of tariff of Rs.3.40 per unit determined in the Generic Tariff Order dated 11.12.2009. The Petitioner in its memo dated 12.08.2021 filed before the Commission has reiterated the same request for the consideration of the Commission
7. The above petition was disposed of by this Commission vide its Order dated 26.02.2015 with the following observations:

"We are of the considered opinion that there is every possibility of the Petitioner having shown an escalated amount pertaining to the Project Cost (or not being

prudent in incurring it) and that, in any case, the additional cost incurred for the repairs of the Head Race Conduit, damaged because of the faulty technical design and construction and the additional interest paid to the financiers due to delay in commencing the Project, is not relevant for re-determination of the tariff now sought by the petitioner. The petitioner has to proceed against its contractor for the faulty technical design and construction of the Head Race Conduit and other civil works of the Project, for claiming compensation for the losses incurred due to it. These additional expenditures cannot be reimbursed to the petitioner by way of a hike in tariff, because of the negligence by the Petitioner in ensuring proper technical design and construction of its project within the original cost. As already held earlier, the Petitioner cannot be allowed to benefit from its own fault. For all practical purposes, the project work was completed by the end of 2009. Therefore, the petitioner is entitled only to the generic tariff for Mini Hydel Project applicable during that time, as determined by this Commission in its generic tariff Order dated 18.01.2005 and is not entitled to any other higher tariff. Accordingly, issue No. (1) is held in the negative."

8. Aggrieved by the above order of the Commission, the Petitioner had challenged the Order of the Commission issued in OP No.15/2013 dated 26.02.2015 before the Hon'ble Tribunal in Appeal No.294 of 2015 and IA No's 142 of 2016 and 546 of 2018. The Hon'ble Tribunal had disposed of the Appeal on 29.03.2019 and passed the Order in para 37 and 38 as under:

Para 37: "Having regard to the facts and circumstances of the case stated supra, the instant Appeal filed by the Appellant is allowed, the order impugned passed by the sixth Respondent/KERC dated 26.02.2015 passed in OP 15/2013 on the file of the

sixth Respondent/KERC Bangalore is hereby set aside.

Para 38: The matter stands remitted back to the sixth Respondent/KERC for reconsideration afresh and pass appropriate order in accordance with law after affording reasonable opportunity of hearing to the Appellant and the respondent Nos. 2 & 4 and the other interested parties and dispose of the same as expeditiously as possible, at any rate, within a period of six months from the date of appearance of the parties.

The Appellant and the Respondent Nos. 2 & 4 and other interested parties are directed to appear personally or through their counsel without notice on April 30, 2019 before the KERC, Bengaluru.

All the contentions of the Appellant and the Respondents are left open”.

9. In response to the issuance of the Order dated 29.03.2019 in Appeal No.294 of 2015 and IA No's 142 of 2016 and 546 of 2018 by the Hon'ble Tribunal, the Petitioner has filed the Memo along with the additional documents which was filed before the Hon'ble Tribunal to the Commission on 06.08.2019.
10. The copy of the judgement of the Hon'ble ATE dated 29.03.2019 in the above appeal was received by the Commission on 02.05.2019. Thereafter, M/s SRM Power Private Limited had filed a Memo along with the copy of the additional documents filed before the Hon'ble ATE, on 06.08.2019. M/s SRM Power Private Limited has also submitted the

application filed to amend the Petition in respect of some of the paragraphs, under order 6 Rule 17 of the Code of Civil Procedure read with Section 62 of the Electricity Act,2003.

11. The Commission was unable to conduct the court proceedings in view of the total lock down declared in the State, due to the COVID-19 Pandemic. Thereafter, the Commission issued notices dated 27.10.2020 to the parties to the case, intimating that the case would be taken up through video conferencing on 19.11.2020 and the parties are required to appear before the Commission on the said date through video conferencing.
12. The Respondent, BESCO in its letter dated 18.11.2020 had informed that M/s SRM Power Private Ltd., is having valid Power Purchase Agreement with Mangalore Electricity Supply Company herein referred as 'MESCOM' for the supply of 6 MW mini hydel power and any variation in tariff is attributable to MESCOM and is representing the remand matter through Advocate M/s Indus Law, as such BESCO is not required to appear before the Commission in the matter.
13. BESCO has filed the Statement of Objections to the amended petition filed by the Petitioner. Further, the respondent BESCO, CESC, HESCO and GESCOM have filed the Interlocutory applications under Order I Rule 10(2) read with section 151 of the Code of Civil Procedure,1908 on 09.02.2021 to 09.03.2021 to delete Respondent No. 1, 3, 4 and 5 from the array of parties to the petition in the interest of justice and equity.

Respondent-2, MESCOM has filed the Statement of Objections to the amended petition filed by the Petitioner before the Commission on 06.01.2021.

14. The Petitioner has filed a memo dated 08.03.2021 before the Commission with Profit and Loss Statement from FY 2012-13 to FY2016-17. Further, the Petitioner has filed a Memo before the Commission on 02.07.2021 for physical hearing of the case due to voluminous nature of the documents involved in the case and prayed that the next date of hearing be given upon the commencement of physical hearings by the Commission. The Petitioner has filed the memo dated 11.08.2021 for submission of written arguments on behalf of the petitioner.

15. The Petitioner, M/s SRM Power Private Limited has reiterated the submissions made in its earlier petition No. OP. No.15/2013 dated 29.04.2013 filed under Section 62 of the Electricity Act,2003 before the Commission, also in the present memo's filed and submits that:

- a. It had filed the above Appeal No. 294/2015 before the Hon'ble ATE for redetermination of tariff of the Petitioner Mini Hydro project for supply of electricity to the distribution company, seeking the review of the tariff already fixed by this Commission vide Order dated 26.02.2015. The Hon'ble Tribunal after hearing passed the Order on 29.03.2019.
- b. They have established a small hydro power project of 6 MW capacity at Mudigere Taluk, Chickmagalore District across

Somavathi. A copy of the techno-economic viability study of the Somavathi mini-hydel project as produced as Annexure - A.

- c. Power Purchase Agreement has been entered into between the Petitioner Company and the Mangalore Electricity Company Limited on 15th June 2006, which was approved by the Commission. The Power Purchase Agreement envisages payment of Rs.2.80 as energy charges per KWHr of energy supplied without any escalation. The term of the Power Purchase Agreement is 20 years. and produced the copy of the PPA dated 15.06.2006 as Annexure - B.
- d. The tariff was determined based on the Generic Tariff fixed by the Commission by its Generic Tariff Order dated 18th January 2005, wherein the Commission, taking into account the various parameters, fixed the tariff for the first 10 years at Rs.2.80/KWHr. The tariff order itself has to be enforced up to 2009 and produced the copy of the said order as ANNEXURE - C. The said Tariff Order was revised by the Commission with a fresh Generic Tariff Order dated 11th December 2009. In the said order the tariff for the small hydro projects was fixed at Rs.3.40KWHr. The Petitioner submits that the earlier tariff order of the year 2005 were to be made applicable to all the Power Purchase Agreements executed during that period in which the tariff order was in force. Copy of the Generic Tariff Order dated 11th December 2009 is produced as Annexure - D.
- e. The second tariff order 2009 has to be made applicable to all the projects which have executed the Power Purchase Agreements on or after 01.01.2010. The Petitioner Company

as referred to above, executed the power purchase Agreement in June 2006 which made 2005 order applicable.

- f. The progress of the project before this Commission, which is one of the main reasons for seeking the redetermination of tariff.
- g. The project work was commenced in 2005-2006. The original cost then envisaged for the project was Rs.26 Crores with a debt-equity ratio of 1.55:1 and availed the term loan(s) sanctioned from a consortium of 3 banks viz. Andhra Bank, State Bank of Mysore and State Bank of Hyderabad for Rs.15.80 Crores and the remaining amount of Rs.10.20 Crores had to be infused as equity by the promoters.
- h. While under implementation, the project faced problems and consequently there was both a time and cost over-run. The cost over-run was to the tune of Rs.8.04 Crores. The Techno-Economic Validation (TEV) study was carried out by APITCO. An additional loan to the tune of Rs.4.18 Crores was sanctioned by the consortium of banks to meet the cost over-run. The remaining amount of Rs.3.86 Crores was infused as equity by the promoters.
- i. That during testing, its Head Race Conduit burst out due to faulty technical design and construction. The project ran into a turbulent phase and the cost including the interest cost ran out of control. Due to non-servicing of the loan, the accounts with all the three banks became NPA. At this juncture, the Gilada Group of Companies through one of its RE companies; namely Sahyadri Renewable Energy (P) Ltd., (SREPL) entered into a Memorandum of Understanding with the erstwhile promoters of M/s SRM Power (P) Ltd., to acquire

controlling stake in the latter for a consideration of Rs.36 Crores.

- j. Although, the power project was acquired for a consideration of Rs.36 Crores, the technical problems to be rectified, head race conduit to be re-constructed, unfinished tasks to be completed, technical personnel at the project site to be deployed along with rising interest cost over shooting deadlines, were to be resolved. At this juncture State Bank of Hyderabad Sanctioned a fresh Term Loan of Rs.24 Crores in July 2011 for the acquisition of the project for liquidating the earlier bank dues of Rs.19.80 Crores (Principal) and the interest accrued thereon and for meeting other outstanding liabilities of the project and finishing other unfinished works.
- k. The cost of the project at that time ran up to about Rs.45 Crores and finally, the commissioning of the project could be achieved in October 2011. Due to cyclicity of generation, commercial generation of power was yet to be achieved.
- l. Though the Power Purchase Agreement was executed in 2006, the project was able to commission for generation in October 2011, with a delay of more than 5 years. Therefore, 2005 generic order which was the basis for fixation of tariff in the Power Purchase Agreement had lost its relevance, particularly since the generic tariff order usually assume that the project would commission during the life of those order.
- m. The reasons for the delay in commissioning are bonafide and were beyond the control of the Petitioner due to various other circumstances the generation of electricity and supply at Rs.2.80/KWhr has become commercially unviable and

under these circumstances the Petitioner has filed the Original petition in seeking change of tariff.

- n. The 2009 order of the Commission itself has taken into account the following parameters for fixation of Rs.3.40/KW hr as the tariff.

Capital Cost: The Capital cost as per this Hon'ble Commission's order is considered at Rs.4.75 Crores / MW.

Plant load factor: The Plant load factor as per this Hon'ble Commission's Order is 30%.

Debt Equity ratio: The debt: equity ratio as per this Hon'ble Commission's Order is 70 : 30.

O & M Expenses: This Hon'ble Commission considered 1.50% of the capital cost and escalation of 5% pa.

Return on equity: The Return on equity considered this Hon'ble Commission is 16%.

Interest on term loan: This Hon'ble Commission has considered 11.75% as the interest on term loan.

Interest on working capital: 13.25% is considered as the interest on working capital by this Hon'ble Commission.

Depreciation: This Hon'ble Commission considered 7% as the depreciation in straight line method.

Auxiliary Consumption: 1% is the Auxiliary Consumption considered by this Hon'ble Commission.

The tariff approved by this Hon'ble Commission based on the above said parameters is Rs.3.40, for a period of 10 years without escalation.

- o. Further it is submitted that the Central Electricity Regulatory Commission has fixed the tariff at Rs.4.16 by its generic order dated 27.03.2012 for a period of 13 years by considering the following parameters:

Capital Cost: The capital cost as per the CERC order is considered at Rs.5.50 Crores / MW.

Plant load factor: The Plant load factor as per the CERC order is considered as 30%.

Saleable Energy: The saleable energy as per the CERC order is 2.60 MUs/MW which is assumed for 99% of the generation.

Debt: Equity ratio: The debt: equity ratio as per the CERC order is considered as 70: 30.

O & M Expenses: The CERC order considered Rs.14 lakhs/MW and escalation of 5% pa.

Return on equity: The Return on Equity considered according to the CERC order is 20% for the first 10 years and 24% from 11th year onwards.

Interest on term loan: As per the CERC order 12.30% is considered as the interest on term loan.

Interest on working capital: 12.80% is considered as the interest on working capital according to the CERC order.

Depreciation: The CERC order considered 5.83% as the depreciation for the first 12 years.

Income Tax: As per the CERC order the income tax is considered as 32.45% and 20% (MAT) for 10 years.

Auxiliary Consumption: 1% is the Auxiliary Consumption considered according to the CERC order.

- p. With the above submissions, the Petitioner has sought a tariff of Rs.5.52 for 10 years without escalation from the date of commissioning of the project by considering the following parameters.

Capital Cost: The capital cost considered by the Petitioner's Company is Rs.7 Crores / MW.

Plant load factor: The Plant load factor is considered as 30%.

Saleable Energy: The saleable energy is considered as 2.60 MUs/MW which is assumed for 99% of the generation.

Debt: Equity ratio: The debt: equity ratio as per the Petitioner Company is considered as 57: 43.

O & M Expenses: The Petitioner Company considered 1.50% of the capital cost and escalation of 5% pa.

Return on equity: The Return on Equity considered according to the Petitioner Company is 16%.

Interest on term loan: As per the Petitioner Company 13.75% is considered as the interest on term loan.

Depreciation: The Petitioner Company considered 7% as the depreciation in Straight line method.

Auxiliary Consumption: 1% is the Auxiliary Consumption considered according to the Petitioner Company.

- q. In support of the above parameters, claiming the tariff of Rs.5.52/KWhr, the petitioner has produced the sixth and the seventh Annual Report of the year 2009-2010 and 2010-2011 of the Company. Further it is submitted that, the Company is unable to fulfil its financial obligations, as a result of which proceedings have been initiated by the bank under the Securitization and Reconstruction of Financial Assets and Enforcement of security Interest Act, 2002 and has produced the copy of the notice issued by Andhra Bank under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of security Interest Act, 2002 at Annexure-F and sought for redetermination of tariff.
- r. It was submitted that they have addressed a letter to the Respondent No.2, on 25th January, 2013, requesting for a revision of tariff and informed about the declaration made by the consortium of bankers on the project as unviable and listed under Non-Performance Assets and the issue of notice

under Securitization and Reconstruction of Financial Assets and Enforcement of security Interest Act, 2002. Copy of the said letter is produced as ANNEXURE - G. The Respondent No.2, by the letter dated 15.03.2013, has rejected the request of the Petitioner to revise the tariff and produced copy of the letter as Annexure – H.

s. The petitioner has also submitted the documents relating the subject project on 18.07.2013.

16. After remand from the Hon'ble Tribunal, the petitioner has filed the IA under order 6 Rule 17 of the Civil Procedure Code read with Section 62 of the Electricity Act,2003 before the Commission for Amendment with additional para's. The gist of submissions made in the said IA are as follows:

i) That, they have earlier faced several hindrances in the course of commissioning the project that were well beyond the control of the Petitioner such as terrain, permissions and sanctions from competent authorities such as the Forest Department for the felling of trees, etc. In the Government of Karnataka proceedings dated 13.02.2004 approved establishment of Mini Hydro Electric Project on certain terms and conditions that the allottee was required to seek clearance from several departments such as Irrigation, Karnataka Power Transmission Company Limited, Karnataka State Pollution Control Board, Revenue Department and Karnataka Power Corporation Ltd., Non-compliance with the above said condition would lead to automatic cancellation of the allotment and as such Petitioner took steps to ensure compliance by the same, not being in the control of the Petitioner lead to some delay.

ii) That, the Forest, Ecology and Environment Department has granted sanction for diversion of 1.70 ha of Forest Land in favour of Petitioner for establishment of the Power Plant on 29.08.2007 and submitted the copy of the G.O as ANNEXURE L. The delay in according sanction is not attributable to the Petitioner. Pursuant to the sanction accorded on 29.08.2007, the Government of Karnataka represented by the Deputy Conservator of Forests entered into an Agreement with Petitioner on 05.11.2007 diverting 1.70 ha of Forest Land in Sy. No. 25/P1, 143 & 183 of Samse Village, Mudigere Taluk, Koppa Division and submitted the copy of the Agreement dated 05.11.2007 as ANNEXURE-M. There were more than 228 trees in the said 1.70 ha of Forest land and on 09.11.2007 the Forest Department has issued an Official Memorandum in according permission for felling of trees. There were 675 manna trees as well as wild trees identified for felling imposing certain conditions and a copy of the Official Memorandum dated 09.11.2007 is produced as ANNEXURE-N. Accordingly, the felling work was taken up by the Forest Department in late 2007 and completed only by the end of 2008. A confirmation issued by the Forest Department dated 24.09.2015 is produced herewith as Annexure-P.

iii) That, the terrain was very challenging and completed the construction of 4 KM long open canals by procuring TMT bars, cement and other necessary materials and submitted the invoices for the same and photographs showing the progress of work at Annexure-Q & R. The construction of the Open Canals could be undertaken only after receiving environmental clearance and the felling of trees undertaken by the Forest Department. The terrain and location posed unavoidable challenges as the weather was not conducive to

take up construction activities due to the torrential monsoon period and also due to the lack of proximity for men and material to undertake the said works which has resulted in some delay and also substantial increase in cost of establishment which is beyond the control of the Petitioner.

- iv) That they have filed OP No.06/2010 before the Commission, seeking a direction to sign the PPA in the format approved by the Commission or in the alternative for a direction to provide Wheeling and Banking facility and subsequent dismissal by the Commission on 03.03.2011 by producing the copy of petition, the Commission Order and the copy of the petition filed in OP 15/2013 are annexed as Annexure - T, U & V.
- v) The Due Diligence Report prepared by the Consultants during February 2010 about the progress of works and the status of the project and produced the copy of the Report at Annexure-W.
- vi) That they have entered into an Agreement with the GoK on 30.11.2004 for generation of power by setting up of a mini-hydel Project across Somavathi near Samse Village, Mudigere Taluk and submitted the copy of the Agreement dated 30.11.2004 as Annexure-X. KREDL has accorded technical clearance for establishment of 6.0 MW Capacity across Somavathi on 25.04.2005 and submitted the copy of the Official Memorandum dated 25.04.2005 as Annexure-Y. Civil work was awarded to M/s Swapna Constructions for the Contract Price of Rs.8,39,11,200/- and got sanctioned Term Loan with a limit of 790 lakhs from Andhra Bank on 31.08.2005 from State Bank of Mysore for Rs.790 lakhs on 19.11.2005.
- vii) That, they have filed the application dated 07.12.2005 submitted to the Forest Department, informing them the

requirement of 5 Acres of Forest Land and 7 Acres of private land already acquired and produced the copy of the same at Annexure-AC. KPTCL has communicated the revised evacuation approval on 16.12.2005 and submitted the same as Annexure-AD. The Petitioner also submitted the copy of the letter dated 07.12.2005 issued by the Principal Conservator of Forests to the Deputy Conservator of Forests for inspection of the area and submission of the report as Annexure - AE. The Petitioner has submitted the copy of the Work Order issued for supply of Electro Mechanical Equipment's as Annexure- AF in support of taking all permissible steps to ensure the timely commissioning of the project.

viii) That the KPTCL letter dated 09.01.2007, issued to the petitioner in communicating the 2nd revised evacuation approval placed as Annexure-AH and the letter addressed to Karnataka Renewable Energy Development Ltd., informing the progress achieved in the project and the reasons for the delay in the project and sought the extension of time till December 2008 and submitted the copy of the letter issued to KREDL as Annexure - AJ. The Petitioner by letter dated 07.03.2008 has requested MESCOM to amend the PPA as per the revised evacuation scheme i.e. providing metering cubicle at Kalasa Substation end and also to prepare estimate only for the terminal bay arrangement beyond metering cubicle and submitted the copy of the letter dated 07.03.2008 and 30.04.2008 as Annexure-AK.

ix) That the environmental clearance certificate dated 04.07.2008 issued by the State Environmental Committee annexed as Annexure - AM. The Petitioner has submitted the copy of the letter dated 18.06.2009 about the approval of the Government

of Karnataka for the drawings pertaining to electrical installations and to take up the work through Class - I Electrical Contractors as per the approved drawings as Annexure -AN. The Petitioner has produced the letter dated 06.02.2010 addressed to MESCOM informing about various correspondences exchanged about the cost overrun in implementation of the project due to delayed forest land acquisition, unexpected change in the evacuation scheme, non-availability of construction material in the vicinity, difficult terrain and Interest during construction and non-viability of the tariff of Rs.2.80 per unit contemplated in the PPA and requested for a fresh PPA with a new tariff or provision for wheeling and facility at an early date be consented for to make the project marginally viable and submitted the copy at Annexure - AP.

- x) That the MESCOM letter dated 11.03.2010 addressed to the Petitioner, informing about the Commission's approval to enter into a Supplemental PPA incorporating proposed modifications in so far as metering point and extension of the scheduled date of completion by one year from 01.07.2009 i.e. 30.06.2010 without considering the other request for revision of tariff or wheeling and banking on the ground that the PPA has come into force on the date of its execution and the same was binding for 20 years and produced the copy of the letter as Annexure - AQ. Thereafter, petitioner has entered into the draft Supplemental PPA incorporating proposed modifications in so far as metering point and scheduled date of completion was signed by Petitioner's authorised representatives on 28.06.2011 and the same was effective on 04.07.2011. The copy of the letter dated 28.06.2011 and the Supplemental PPA dated 04.07.2011 is produced as Annexure - AR & AS. Petitioner has

further requested for revisions of tariff on 25.01.2013 and the same was rejected by MESCOM on 15.03.2013 and submitted the copy as Annexure - AT.

- xi) That it is further submitted that the reason for delay in commissioning the project are well documented and not only due to the faulty functioning of the HRC but also due to delay by various Government departments in according approval / completion of felling of trees by the Forest Department and the problems in the site as the same were bonafide reasons and not within the control of the Petitioner and requested for revision of tariff on the ground that the PPA was already in force and that the same was binding for 20 years.

17. Upon notice the 2nd Respondent, MESCOM has filed the Statement of Objections, the gist is as under that:

- a) The Petitioner has filed the petition under Section 62 of the Electricity Act 2003 for the review of tariff fixed as per the order of the Commission dated 18.01.2005 which is not maintainable, untenable in law and is liable to be dismissed *in limine and* further submitted that except to the extent specifically admitted herein, all other contentions in the Petition are denied.
- b) That the petition filed under Section 62 of the Electricity Act, 2003 is not maintainable for re-determination of tariff. It is submitted that Petitioner cannot seek re-determination of tariff once the power purchase agreement is approved by the Commission. Once the tariff is determined by the Commission after inviting and considering the suggestions from all the stakeholders, the said tariff cannot be reviewed with respect to a single generating company and in respect of a particular power purchase agreement. Without prejudice to what is stated above, the Petitioner has not made out

any grounds for re-determination of tariff already fixed by the Commission.

- c) The Petitioner had initially applied for setting up of a 2 MW capacity Mini Hydro Electric Power Project across Somavathi Hole, in Mudigere Taluk of Chikkamgaluru District as per the approval granted by the Government of Karnataka vide order No. GO No. DE 52 NCE 2004 dated 13.2.2004, the copy enclosed as Annexure R1. The Petitioner, after a lapse of 8 ½ months of the approval, sought for enhancement of capacity from 2 MW to 6 MW from the GoK. The GoK approved the enhancement in capacity vide its GO No. DE 52 NCE 2004 dated 4.11.2004. Pursuant to the grant of approval to set up 6 MW Mini Hydel Project, the Petitioner entered into an agreement with the Government of Karnataka dated 30.11.2004. As per the agreement dated 30.11.2004, the Petitioner within a period of 18 months from the date of signing the agreement, that is on or before 31.5.2006, has to obtain all statutory approvals, acquire land, and arrange all finances required for the project and thereafter to complete and commission the project within 36 months from the date of the agreement. As per the PPA, the Petitioner had to commission the plant on or before 30.11.2007, after obtaining all the required approvals. The Respondent has submitted that the Petitioner had entered into the said agreement after evaluating and factoring all the commercial risks and the factors that could delay the commissioning of the plant.
- d) Pursuant to the approval of the GoK to set up to 6 MW capacity Mini Hydel Power Plant, the Petitioner entered into a Power Purchase Agreement (hereinafter referred to as "the PPA") dated 15.06.2006 with the 2nd Respondent for the supply of electricity at the rates specified in the generic tariff order dated 18.01.2005 passed by the Commission.

- e) Though the project work commenced in the year 2005-2006, the project has not been completed and commissioned within the agreed date due to the fault of the Petitioner. Since, the plant could not be commissioned within the timeframe agreed, the Petitioner met the 2nd Respondent in 2008 and informed that the plant would be commissioned by end of May 2008 and sought for amendment of certain clauses of the PPA which was agreed to by the 2nd Respondent and produced the copies of the letters dated 07.03.2008 and 30.04.2008 at Annexure-R2 and R3. Thereafter, on the application of the Petitioner, the GoK, vide its order dated 03.05.2008 has extended the commissioning time till 31.12.2008 which was further extended to 30.06.2009 vide its order dated 25.04.2009. Even after extending the commissioning time twice for the plant, the Petitioner could not commission the plant and sought further extension of time and the GoK, vide its order dated 23.09.2009, again extended the time till 30.06.2010 for implementation of the project by making it clear that there shall not be any change in the terms and conditions of the earlier allocation order dated 13.02.2004 and produced the copy of the order dated 23.09.2009 at Annexure- R4.
- f) The Petitioner could not commission the plant even within the extended time period and the plant was finally commissioned in October 2011, after the lapse of more than four years from the date agreed under the agreement with the Government of Karnataka. The Respondent -2 has further submitted that, the documents produced by the Petitioner clearly shows that there was delay in obtaining all the required approvals by the Petitioner. On the basis of the documents produced by the Petitioner, the diversion of 1.7 hectares of forest land has been obtained only in August 2007 and that the environmental clearance was taken only in July 2008. The CEIG's approval was obtained on 13.6.2009. Hence there was a

delay in obtaining all the aforesaid approvals for reason solely due to the fault of the Petitioner.

- g) The time and cost over-run, stated by the Petitioner as the reason for review and re-determination of tariff, is completely due to the fault of the Petitioner and is not due to any unforeseen factors. The Petitioner in Para 11 of its petition has categorically admitted that Head Race Conduit burst due to faulty technical design and construction and it is due to this faulty design and construction that the project was delayed and there was an increase in cost and the petitioner could not service the loan taken from the banks. It is completely due to the fault of the petitioner in commissioning the plant within the agreed timeframe, the cost had escalated.
- h) The original cost envisaged for the project was Rs.26 Crores with a Debt Equity ratio of 60: 40, as against the normal 70: 30. APITCO Limited, a joint venture company of IDBI, IFCI, ICICI, APIDC, APHFC and Banks had prepared a Techno Economic Viability Report in February 2008 and revised the project cost to Rs.3404.72 lakhs, due to the repair to Head Race Conduit of the Water Conductor System, which had failed during testing stage itself as admitted by the Petitioner. Further, submitted that the initial repair to Head Race Conduit by way of jacketing again failed as the Conduit has failed in neighbouring reaches during 2nd testing. On the suggestion of the consultant to the project, the additional work of Steel lining of the entire 430m length of Head Race Conduit with Steel pipe of 1.6m diameter and 8 mm to 12 mm thickness has taken up and which has resulted in the enhanced project cost of Rs.4522.22 lakhs, increase of 74% over the originally estimated cost. The delay is mainly on account of faulty design and construction of the project and delay in arranging the required funds.

- i) The Petitioner, could not meet the increased project cost and sold the stake of the project to M/s Sahyadri Renewable Energy Pvt. Ltd. Due to the failure of the Petitioner to design and construct the project as per good engineering practice and caused both time and cost overrun for which the Petitioner itself is to be blamed and held responsible. Getting fresh sanction of term loan by banks and selling of stake to the third party, etc., are all internal matters related with the functioning of the Petitioner and are not relevant for considering re-determination of tariff. The Respondent has submitted that even after the commissioning of the project in October 2011, it is not generating the expected energy as admitted by the Petitioner himself, due to inefficient functioning of TG Units / Electrical system etc., and the delay in commissioning the project by four years is entirely due to the fault of the Petitioner.
- j) The Petitioner has stated in Para 15 of the petition that "due to cyclicity of generation, commercial generation of power is yet to generalise", which means that the project is not generating the expected energy as projected in the DPR. Since the Petitioner is not earning the expected revenue due to poor generation, has come before the Commission by filing frivolous petition requesting for redetermination of the tariff. Non-production of full energy is on account of several inherent defects in fixing the installed capacity, design and construction of the project which is not a ground for redetermination of tariff.
- k) When the plant was not commissioned within the agreed timeframe, the Petitioner had requested, vide its letter dated 06.02.2010, for execution of new power purchase agreement at the tariff determined by the Commission, which was turned down, as the PPA dated 15.06.2006 is valid and binding for 20 years from the commercial operation date and produced the copies of the

Petitioner's letter dated 06.02.2010 and the 2nd Respondent's reply dated 11.03.2010 at Annexure R5 and R6.

- l) There was no change in tariff while executing the Supplemental PPA signed on 04.07.2011 for incorporating the change in the evacuation scheme and also to incorporate the Government Orders, according time extension for the implementation of the project, there was no change in tariff. On the other hand, the Petitioner in its letter dated 28.06.2011 committed to accept the PPA tariff. A copy of the letter dated 28.06.2011 and a copy of the supplemental PPA dated 04.07.2011 are produced as Annexure - R7 and R - 8. The respondent has also submitted the copy of the Commission's letter dated 20.09.2012 approving the supplemental PPA as Annexure-R9.
- m) The PPA as approved by the Commission has been signed by the Petitioner on 15.06.2006, when the tariff order dated 18.01.2005 was in force and was valid for the first 10 years from the date of commencement of the commercial operation, i.e. up to 23.10.2021 at the tariff of Rs.2.80/Kwh, without any escalation. The tariff determined under the said order was applicable to all the power purchase agreements filed before the Commission on or after 10.06.2004, for a period of 10 years from the date of commercial operation of the plants. Hence, the PPA tariff of Rs.2.80/Kwh without any escalation is applicable till 23.10.2021, the commencement of commercial operation being 24.10.2011. As per Clause 5.8 of the KERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations 2004, the tariff determined by the Commission is subject to review after 5 years. Accordingly, the Commission, vide its tariff order dated 11.12.2009 has determined the tariff. The said tariff order is applicable to only those agreements which are entered into on or after 01.01.2010, and are

not applicable to the agreements entered earlier, as per the said tariff order itself. The Commission's generic tariff order will be reviewed every five years, which is applicable to the generators who enter into the PPA within the specified period and the rate agreed under the PPA executed earlier would not be substituted by the rates in the new tariff order. The tariff order dated 18.01.2005 is applicable for 10 years from the date of commencement of commercial operation. In this case the commercial operation date was achieved on 24.10.2011, the tariff is applicable for 10 years from 24.10.2011 and shall be valid till 23.10.2021. Respondent-2 has further submitted that the term of the PPA is for 20 years from the commercial operation date as agreed under Article 9.1.1 of the PPA and hence, the terms and conditions of the PPA are to be honoured by the parties during the term of the PPA.

- n) The petitioner, during 2010, had filed the petition bearing O.P.No.6/2010 before the Commission praying for redetermination of tariff as per this Commission's order dated 11.12.2009 for the reason that the PPA has become null and void. The Commission dismissed the said petition, vide its order dated 03.03.2011, holding that the PPA has not become null and void at the instance of the generator for non-fulfilment of any condition precedent on its part. The Respondent has submitted the copy of the Petition bearing O.P.No.6/2010 and order dated 03.03.2011 as at Annexure-R10 and R11.
- o) The tariff order dated 11.12.2009 is not applicable to the Petitioner. The generic tariff determined by the Commission is applicable to all projects in different renewable energy streams and project specific tariff is not fixed for any individual project based on its own parameters. Hence, request for re-determination of tariff based on the parameters submitted by the Petitioner ought to be rejected by the Commission as it would create a precedent for all the other

generators to come up with similar pleas. For any delay due to the fault of the generating companies in commissioning the plant or cost over-run due to delay, the cost burden cannot be passed on to the distribution licensees.

p) Further, the 2nd Respondent has traversed the averments in the Petition as under:

- i. The Petitioner's contention about the higher parameters considered by the CERC are not relevant in the present case. The tariff of Rs.5.52 for 10 years without escalation as sought by the Petitioner is uneconomical for the 2nd Respondent and further the consumers would be put to undue hardship due to the fault of the Petitioner. The parameters considered by the Petitioner regarding capital cost, plant and factor, saleable energy, debt: equity ratio, operating and management expenses, return on equity, interest on term loan, depreciation and auxiliary consumption are not as per norms of KERC and all denied as false. The annual reports and the Balance Sheet are not relevant for re-determining the tariff in the present case.
- ii. The submission regarding availing the financial assistance from the consortium of banks and because of the unviability of the project, the Petitioner is unable to fulfil its financial obligations as a result of which proceedings have been initiated by the banks under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are denied.
- iii. There are no grounds for the Petitioner to seek re-determination of tariff based on the materials produced. It is submitted that it is the responsibility of the generating companies to commission the plant in time. For the delay

in commissioning the plant or cost over-run due to delay is solely due to the fault of the Petitioner and cannot seek re-determination of tariff. The cost burden cannot be passed on to the distribution licensees and prayed for the dismissal of the petition with costs, in the interest of justice and equity.

18. The Respondent No.2 has filed additional statement of objections to the amended petition filed under section 86(1) of the electricity act, 2003 by the Petitioner, by submitting that:

- a) The application for amendment filed by the Petitioner is bad in law, erroneous, highly belated, and liable to be set aside *in limine* and is another application to produce additional documents by the Petitioner. The Petitioner has in the original proceeding of this petition has produced multiple additional documents by way of Memo's at different stages of the proceedings. Despite multiple opportunities being granted to the Petitioner to diligently place all its documentation on record, the Petitioner has failed to do so and thereafter sought to file additional documents through two applications before the Hon'ble APTEL. The Petitioner has now approached and placed the additional documents in these remand proceedings before the Commission.
- b) The application filed by the Petitioner is premature by assuming that it would be permitted as a matter of right to produce these additional documents to the record of the Commission. The Petitioner initially tried to place the additional documents on record by way of Memo and thereafter as after-thought filed this present Application. The Petitioner has sought to amend the Petition instead of seeking permission to bring these additional documents on

record. The documents now produced before the Commission were not produced in the first instance during the original proceedings and was sought to be belatedly brought on record at the Appellant stage by way of two applications for additional documents. These two applications were disposed of as infructuous. Having failed to have successfully placed it on record before the Hon'ble Tribunal, the Petitioner is now seeking to place these documents on record in the remand proceedings before the Commission which is premature, bad in law, not maintainable and liable to be dismissed.

- c) The scope of dealing in a remand proceeding is limited with the matter remanded to it only within the framework of the remand, unless specifically permitted, the Court cannot go beyond the record of the original case file. The Hon'ble Tribunal has not directed/ permitted the Petitioner to place nor consider these additional documents before the Commission. Thus the Hon'ble Tribunal has clearly taken the view that the additional documents are not relevant to the dispute and not necessary for the Commission to pass a reasoned and cogent order at the stage of remand. Without express permission to bring these documents on record, the Commission cannot go beyond its power to now amend and change the original petition filed before it.
- d) The Petitioner has approached the Commission with unclean hands and has deliberately sought to mislead this Hon'ble Commission by deliberately stating that the Hon'ble Tribunal has considered the documents as relevant and therefore it is necessary to produce these documents before the Hon'ble Commission. The Hon'ble Tribunal has not made any

observation stating that the documents are relevant or necessary for the adjudication of the dispute and therefore the Commission cannot at this belated stage permit additional documents to be placed on record and ought not to be permitted to place any additional documents on record.

e) The Petitioner has stated in IA 546/2018 filed before the Hon'ble Tribunal and the subsequent order of the Hon'ble Tribunal dated 24.04.2018 permitted the Petitioner to produce these documents on record is entirely misplaced and misleading without producing the order dated 24.04.2018 as a proof to the claim. Further in para 2 of the IA filed before the Hon'ble Tribunal, the Petitioner himself has stated – *“This Hon'ble Tribunal vide order dated 24.04.2018 permitted the appellant to produce the Petition copy filed before the State Commission and the DDR Report by 7.5.2018. The Hon'ble Tribunal also permitted to Respondent No.2 and 4 to produce additional necessary documents to substantiate its submissions.”* Thus, the Hon'ble Tribunal has allowed the Petitioner to only produce a copy of the Petition filed before the KERC is submitted as Annexure- T and the Due Diligence Report as submitted as Annexure- W. The Hon'ble Tribunal has not granted approval for producing any other documents and hence the application to produce Annexures U, V and X to AT is misplaced, bad in law and ought not to be taken on record. The Petitioner has submitted 32 new documents by way of this amendment solely to overcome its own negligence and to add new grounds to their petition at this belated stage on the proceedings and liable to be dismissed.

- f) Without prejudice to the above, the application filed by the Petitioner to amend the petition and bring on record the additional documents pertaining to the period preceding the filing of the original petition in the year 2013 is without providing any cogent reasons for the non-production of these documents in the first instance which is bad in law, highly belated and without providing any reasons for the delay in placing these documents before the Commission. The reasons given by the Petitioner about the non-possession / inaccessible of the documents at the time of petition are vague and ambiguous and does not meet the burden of proof to show that the documents were indeed misplaced. The efforts made by the Petitioner to secure the documents or to obtain certified copies or additional copies from the competent authorities are not placed. Having failed to take any reasonable diligent measure to secure the documents, the Petitioner cannot now as a matter of right seek to place additional documents on record as and when it suits the Petitioner to do so. The application is unreasoned, unviable, and liable to be dismissed.
- g) The Petitioners argument that the delay in commencing commercial operation of the power plant was caused due to reasons beyond its control and hence by virtue of such unavoidable delay, the Petitioner is entitled to a revised tariff rate. The Petitioner in para 17 of its Petition dated 25.04.2013 has categorically stated – *The reason for the delay in commissioning are bona fide and were beyond the control of the Petitioner due to various circumstances.* The Respondent-2 has contended that the Petitioner cannot be allowed to reopen and reagitate the same issue at this

belated and subsequent stage in the same cause of action existing between the same parties.

h) The Petitioner through this amendment seeks to rely and produce various Government approvals received in relation to acquiring lands and obtaining forest clearances as to prove that the delay caused was not due to negligence or inadvertence on its part but rather due to circumstances beyond its control. The Respondent has contended that such an argument raised by the Petitioner is barred by the principle of constructive res-judicata and the Petitioner cannot be allowed to argue a contention that it ought to have raised at the initial stage of legal proceedings. Constructive res-judicata postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action. Hence, the Petitioner is barred from reagitating the same issue at this belated stage of the legal proceeding and has failed to exercise due diligence and cannot assert additional grounds beyond the scope of the remand.

i) The PPA as approved by the Commission has been signed by the Appellant on 15.06.2006, when the tariff order dated 18.01.2005 was in force and was valid for the first 10 years from the date of commencement of the commercial operation, i.e. upto 23.10.2021. It is submitted that the tariff of Rs.2.80/kwh, without any escalation fixed in the PPA, is in accordance with the tariff order dated 18.01.2005 issued by the Commission for Renewable Sources of Energy. The tariff determined under the said order was applicable to all the

power purchase agreements filed before the Commission on or after 10.06.2004, for period of 10 years from the date of commercial operation of the plants. Hence, the PPA tariff of Rs.2.80/kwh without any escalation is applicable till 23.10.2021 as the commencement of commercial operation being 24.10.2011. As per Clause 5.8 of the KERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations 2004, the Commission vide its tariff order dated 11.12.2009 has determined the tariff after the expiry of 5 years' period and is applicable to those agreements which are entered into on or after 01.01.2010, and are not applicable to the agreements entered earlier, as per the tariff order itself. The rate agreed under the power purchase agreements executed earlier would not be substituted by the rates in the new tariff order. As the tariff determined under tariff order dated 18.01.2005 is applicable for 10 years from the date of commercial operation and the Petitioners project for having achieved the commercial operation date on 24.10.2011, the tariff of 2005 shall be applicable till 23.10.2021. The term of the PPA is for 20 years from the commercial operation date as agreed under Article 9.1.1 of the PPA and hence, the terms and conditions of the PPA are to be honoured by the parties during the term of the PPA. Accordingly prayed for dismissal of the petition.

19. The Other Respondent -1,3, 4 and 5 to the petition have filed the Interlocutory applications under Order I Rule 10(2) read with Section 151 of the Code of Civil Procedure,1908 and submitted that they are not a party to the dispute nor a party to the PPA that has been brought before the Commission for adjudication. The Respondent No. 1,3,4 and 5 have been wrongly arrayed as part of the dispute and in the process has been forced to expend legal and financial

resources on this petition which is wholly and totally unrelated to the Respondent No.1,3,4 and 5 and requested the Commission to delete the Respondent No.1,3,4 and 5 from the array of parties.

20. The Petitioner has filed the rejoinder to the Statement of Objections filed by the Respondent-2 and substantiated the claims for redetermination of tariff with higher tariff as sought in its original petition. The Petitioner has submitted that they have no role in faulty design/ construction of materials and in such an event, the same cannot be termed as Petitioner's fault and submitted the worksheet with calculation considering both the tariff and disbursement of the term loan at Annexure-K.
21. While submitting additional documents, the Petitioner has also stated that during the original proceedings in OP no. 15/2013, he had already filed Memo on 01.01.2015 submitting the following documents:
- i) application letter to the principal chief Conservator of Forest dated 07.12.2005.
 - ii) letter addressed to the Deputy Conservator of Forest dated 09.01.2006.
 - iii) extracts of the ledger accounts reflecting the expenses towards the repair works of Head Race Conduit.
22. a) The Petitioner has again submitted the Memo dated 12.08.2021 reiterating the series of events that took place from getting sanction to the Power Project to the date of commissioning and the reasons for the cost overrun and delay in commissioning of the power project. The Petitioner has further submitted that the last extension was granted by the Government of Karnataka on 23.09.2009, which extended the date of completion until 30.06.210. If the plant was ready by the end of 2009, there would have been no occasion to extend the date until 30.06.2010. The

Petitioner has requested the Commission to consider at least the benefit of tariff determined in the Generic Tariff Order dated 11.12.2009 which is applicable from 11.12.2010 due to the delay on the part of the State in according approval and providing land to the project.

b) The Petitioner has quoted the Hon'ble Tribunal Order in GESCOM vs KERC- 2016 SCC online APTEL 40, in not suing the contractor for the faulty technical design. The Petitioner has also submitted the extension of date of completion by the GoK duly recognising the genuine difficulties of the project and hence the petitioner cannot leave to suffer with an unviable tariff. The petitioner has quoted the Hon'ble Tribunal Order dated 20.11.2018 in KPTCL and Others Vs M/s Soham Phalguni Renewable Energy Pvt. Ltd. And Others and requested the Commission to consider tariff approved by the Commission in its Generic Tariff Order dated 11.12.2009 by recognising the higher capital cost incurred on the project.

c) The Petitioner has quoted the Order of the Hon'ble Supreme Court of India in Gujarat Urja Vikas Nigam Limited Vs Tarini Infrastructure Ltd. & Others (2016) 8 SCC 743, in support of its claims for higher tariff than the agreed tariff under PPA.

23. The Respondents No. 1 to 5 to the petition have filed the written submission on 01.11.2021 by giving the chronological events that took place in respect of the said Power Plant and the factual history of the instant case.

24. a) The Respondents in their Memo have reiterated most of their stand taken earlier on the original petition and the statement of objection filed by the Respondent-2 to the Petitioner's Memo dated 06.08.2019 and submitted that the petition is barred by the

principle of constructive res-judicata. The Petitioner cannot be allowed to reopen and reagitate the same issue at this belated and subsequent stage in the same cause of action existing between the same parties as the same is barred by the principles of constructive res-judicata by referring the Orders of the Hon'ble Supreme Court of India in case of Devlal Modi Vs Sales Tax Officer, Ratlam and Others: AIR 1965 SC 1150.

- b) The Respondents have submitted that, the Petitioner is not entitled to produce the additional documents or amend the petition at this highly belated stage of delay of nearly 7 years. Allowing the Petitioner to do so would be an abuse of the process of law and hence the amended petition is liable to be dismissed.
- c) The Respondents in their written submission have quoted the Orders of the Hon'ble High Court of Delhi in Polyflor Limited Vs A. N.Geonka & Ors,2016 (159) DRJ664 reiterating the principle that the Plaintiff is required to produce all documents in his possession relevant to the dispute at the time of filing so as to afford the defendant a fair opportunity to peruse the same.
- d) The Respondents in their written submission have quoted the Orders of the Hon'ble High Court of Delhi in Gold Rock World Trade Ltd. Vs Veejay Lakshmi Engineering Works Ltd. (2008) 149 PLR 40 that the additional documents cannot be produced merely by way of a Memo as the same is required to be produced by filing an application under Order 7 Rule 14 of the Civil Procedure Code,1907.
- e) The Respondents in their written submission have submitted various factors for the delay in commissioning of the plant and contended that the delay in commissioning of the plant and increase in capital cost is attributable to the petitioner's action

and inaction. The imprudent business practice of the petitioner leading to cost over-run.

25. We have gone through the written submission of the Petitioner as well as the Respondent and have also considered the rival contentions of both the petitioner and the Respondent during the hearing process. The following issues would arise for our consideration and decision:

Issue No.1: Whether the request of the petitioner to review of the Power Purchase Agreement entered into with the 2nd Respondent dated 14th June 2006 can be considered and whether the request to re-determine the tariff of Rs.5.52/KWHr considering the increase in the cost of the project, with effect from the date of the commercial operation of the Petitioner Company is sustainable, if so;

Issue No. 2: Whether to consider the request of the petitioner to at least fix the tariff of Rs. 3.40 per unit as per the Generic Tariff Order 2009 dated 11.12.2009 can be considered with reference to date of commissioning of the project;

Issue No. 3: What orders?

26. After examining of records and material facts submitted by the parties to the petition, our findings on the Issue No.1,2 & 3 are discussed below:

Issue No.1: Whether the request of the petitioner to review of the Power Purchase Agreement entered into with the 2nd Respondent dated 14th June 2006 can be considered and whether the request to re-determine the tariff of Rs.5.52/KWHr considering the increase in the cost of the project, with effect from the date of the commercial

operation of the Petitioner Company is sustainable, if so;

27. After considering the submissions made by the petitioner and the Respondent-2, we note that the PPA approved by this Commission was signed by the Petitioner and MESCOM on 15.06.2006, that as per the Tariff Order dated 18.01.2005 the applicable tariff is Rs.2.80/kwh, without any escalation and that tariff is valid for the first 10 years from the date of the commercial operation, i.e. up to 23.10.2021, as the project started commercial operation on 24.10.2011. The term of the PPA is for 20 years from the commercial operation date as agreed to under Article 9.1.1 of the PPA and hence, the terms and conditions of the PPA have to be honoured by the parties during the term of the PPA.
28. As regards, revision of tariff for the petitioner's project, considering the increase in cost of the project, we note that the project is covered under the scheme of things as per generic tariff order date 18.01.2005 and accordingly the original PPA was signed allowing a generic tariff of Rs.2.80 per unit for the energy supplied to the Respondent. The Commission cannot determine a project specific tariff since the PPA was executed considering the Commission approved generic tariff. The increase in cost of the project is due to several reasons which also include technical problems in project implementation. It is the responsibility, of the petitioner to implement the project in a cost effective manner and complete the project within the time frame, though there are delays in getting the clearances. For these reasons, the total burden of increase in costs cannot be passed to the general consumers. Hence, we are unable to accept the request for increase in tariff to Rs.5.52/KWHr with reference to increase in capital cost of the project in view of

the fact that the petitioner is bound by the generic tariff clauses of the PPA. Thus the issue No.1 is answered in negative.

Issue No. 2: Whether to consider the request of the petitioner to at least fix the tariff of Rs. 3.40 per unit can be accepted with reference to date of commissioning of the project;

29. We have taken note of the submission of the Petitioner that, though the PPA was executed in 2006, the project was commissioned to generate energy in October 2011, with a delay of more than 5 years which was beyond the control of the Petitioner. The, Generic Tariff Order 2005 was the basis for fixation of tariff in the PPA, assuming that the project would get commissioned during the tenure of the said generic tariff order. But with the delayed commissioning of the project, the tariff with reference to 2005 generic tariff Order, has lost its relevance.
30. We also note that the Petitioner after executing the PPA, commenced the project work in the year 2005-2006 and has not completed and commissioned it within the agreed date. Thereafter, on the request of the Petitioner, the GoK, vide its order dated 03.05.2008 has extended the commissioning time till 31.12.2008 which was further extended to 30.06.2009, vide its order dated 25.04.2009 and further extended till 30.06.2010, vide its order dated 23.09.2009 without any change in the terms and conditions of the earlier allotment order dated 13.02.2004.
31. Considering the sequence of events in implementation of the power plant, the documents submitted by the Petitioner in requesting the Forest Department about the requirement of 5 Acres of Forest Land and (7 Acres of private land already possessed) sanction for diversion of 1.70 hectares of Forest Land in favour of Petitioner for establishment of the Power Plant the Forest, Ecology

and Environment Department had accorded approval on 29.08.2007 and the Agreement entered into with the Deputy Conservator of Forests on 05.11.2007 for diverting 1.70 ha of Forest Land in Sy. No. 25/P1, 143 & 183 of Samse Village, Mudigere Taluk, Koppa Division. The Forest Department had accorded permission on 09.11.2007 for felling of more than 228 trees in the said 1.70 ha of Forest land, imposing certain conditions for felling 675 manna trees as well as wild trees. The felling work was taken up by the Forest Department in late 2007 and completed only by the end of 2008 as confirmed by the Forest Department by its letter dated 24.09.2015.

32. The Petitioner, after receiving environmental clearance on 04.04.2008 and after the felling of trees by the Forest Department, has completed the construction of 4 KM long open canal on the challenging terrain having lack of proximity for men and material and adverse weather conditions, which has resulted in delay and increase in cost of construction establishment. The Commission has also taken note of the Due Diligence Report of the Consultants prepared during February 2010 about the progress of works and the status of the project.
33. The KPTCL vide letter dated 09.01.2007 communicated the 2nd revised evacuation approval and the Petitioner addressed letter to Karnataka Renewable Energy Development Ltd., informing the progress achieved in the project implementation and the reasons for the delay and sought extension of time till December 2008. We note that the Petitioner vide letter dated 07.03.2008 requested to MESCOM to amend the PPA as per the revised evacuation scheme for providing metering cubicle at Kalasa Substation end and also to prepare estimate for the terminal bay arrangement beyond metering cubicle and accordingly entered into the Supplemental PPA on 28.06.2011, to incorporate the same.

34. We also note that the petition filed by the Petitioner in O.P. No.06/2010 before this Commission, seeking a direction to sign the PPA in the format approved by the Commission or in the alternative for a direction to provide Wheeling and Banking facility and subsequent dismissal by the Commission on 03.03.2011.
35. We further note from the submission of the Petitioner that the reason for delay in commissioning the project are not only due to the faulty functioning of the Head Race Conduit but also due to delay by the various Government departments in according approval and also time taken for felling of trees by the Forest Department and the problems in the site as the same were bonafide reasons and not within the control of the Petitioner and requested for revision of tariff on the ground that the time overrun resulted in cost overrun and PPA tariff was economically not feasible for continuing with generation business.
36. We note that, the Commission had considered a capital cost of Rs. 3.90 Crores per MW in the generic tariff order of 2005 and Rs.4.75 Crores in generic tariff order of 2009. Thus, there is an increase in the capital cost by Rs.0.85 Crores in the generic tariff order of 2009.
37. The Commission noted that, the reasons for delay in implementation of the project were beyond the control of the petitioner as stated in the above paragraphs. The project was commissioned on 24.10.2011 by which time the Commission had issued the generic tariff order dated 11.12.2009 for next control period commencing from 1.01.2010. As per this Order, the generic tariff applicable to mini-hydel project is Rs.3.40 per unit for the projects commissioned on or after 1.01.2010. Since the original PPA signed with MESCOM was in force, the generator has been supplying energy to MESCOM and getting paid at Rs.2.80 per unit as per generic order of 2005.

38. The Commission takes note of the terms of the PPA wherein clause 8.1- Force Majeure Events, under sub-clause no.(iii) and (xii) read as under:

“8.1(iii) strikes, work stoppage, work slowdown or labour actions (other than such strikes, stoppage, slow down or actions involving employees of the company)

8.1(xii) Break-down of generating equipment of the Company;”

In terms of the above clauses, on the basis of documents produced during the proceedings, we notice that the petitioner, while implementing the project has faced work slowdown and break down of the equipment resulting in partially increasing the cost of the project besides delay in completion of the project.

39. It is worthwhile to note the submission made by the Petitioner in its Memo dated 12.08.2021, that as they have incurred the capital cost higher than Rs.4.75 Crores / MW approved by the Commission in Generic Tariff Order dated 11.12.2009 and also by considering the delay on the part of the State Government departments in according approval and providing land to the project, petitioner requested for extending at least the benefit of tariff determined in the Generic Tariff Order dated 11.12.2009 applicable from 01.01.2010.

40. The Commission, taking into account the investments already made by the petitioner in implementing an environmentally benign RE project, delay in implementing the project due to various reasons as described in the preceding paras, the provisions of the PPA clauses, the request of the petitioner to allow the tariff as per generic tariff order of 2009 and keeping in view the observations of the Hon'ble Tribunal as made out in para 35 and 36 of the Order dated 29.03.2019 and to relook into the subject petition,

Commission considered that it would be reasonable to consider the request of the petitioner to allow a tariff of Rs.3.40 per unit in terms of the generic tariff dated 11.12.2009. Thus, issue No. 2 is answered in affirmative.

Issue No.3: What Order?

For the foregoing reasons, we pass the following:

ORDER

- a) The Petitioner shall be entitled to the tariff of Rs.3.40 (Rupees Three and Paise forty only) per unit without any escalation for the energy delivered at the Metering Point, for the first ten years from the Commercial Operation Date.
- b) The Petitioner shall also be entitled to the tariff of Rs.3.40 (Three and paise Forty only) per unit without any escalation for the energy delivered at the Metering Point from for the next 10 year's period from 11th year onwards from the Commercial Operation Date i.e., 24.10.2011.
- c) The difference in tariff amount payable to the Petitioner, consequent on this Order, shall be paid in 6 (six) monthly instalments without out any interest/carrying cost.
- d) In case the Petitioner is not willing to supply energy, he may be allowed to sell the energy in the open market through open access, by issuing necessary NOC by the Respondent MESCOM.

- e) To implement this Order, the parties shall enter into a Supplemental PPA to regulate the supply of energy and to make payment thereof in terms of this Order.

sd/-

(SHAMBHU DAYAL MEENA)
Chairman

sd/-

(H.M. MANJUNATHA)
Member

sd/-

(M.D. RAVI)
Member