

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

PRESENT

**Shri T. M. Manoharan, Chairman
Shri P. Parameswaran, Member
Shri Mathew George, Member**

ORDER NO. 734/CT/2013 DATED 30/07/2013

PETITION IN THE MATTER OF

Determination of Tariff - Petition under Sec 62 of Electricity Act, 2003.

**Ref: Petition filed by EDCL Power Projects Ltd dated 08-04-13 for re determination
of Tariff**

Admissibility hearing was held on 12-06-13 as per Clause 26(1) of Kerala 2003

Petition	Dy.No.734	EDCL Power Projects Ltd, Ullunkal SHP, Chittar P.O Pathanamthitta Dist	Petitioner
		Kerala State Electricity Board Vaidyuthi Bhavanam, Trivandrum	Respondent

ORDER

Background

EDCL Power Projects Ltd is a special purpose vehicle (SPV) set up pursuant to Condition (G) of the Implementation Agreement dated 19-06-2008 between Government of Kerala and parent company Energy Development Company Ltd. (EDCL) for the implementation of Ullunkal Small Hydrel Project (2 x 3.5 MW). The project was

originally allotted to M/s. Travancore Electrochemical Industries Ltd (TECIL) as a captive power project (CPP). Later Government of Kerala as per orders No G.O.(MS)14/2006/PD dated 22-05-2006 transferred the project to M/s. Energy Development Corporation Ltd (EDCL) as an independent power producer (IPP). M/s. EDCL completed the works of the Ullunkal SHP and commissioned it on 13.11.2008.

2. EDCL filed an application for tariff fixation on 29-12-2008 for Ullunkal Small Hydro Project (2 x 3.5 MW) which is utilizing the tail water from Kakkad Hydro electric project of KSEB which in turn receives water for generation of electricity from upstream project namely Sabarigiri Hydro Electric Project. The Sabarigiri Hydro Electric Project utilizes water from Kakky, Anathodu and Pampa reservoirs as well as from small dams such as Kullar, Meenar and Gavi which are augmenting the Sabarigiri Hydro Electric Project. In between the Ullungal SHP and Kakkad Hydro electric project there is a dam namely Veluthodu dam which augments supply of water to Kakkad Hydro Electric Project. In view of the high storage potential of the upstream Hydro Electric Projects, Ullunkal Hydro Electric Project receives copious supply of water thereby escalating its PLF to more than 30%.

3. National Tariff Policy (NTP) vide clause 6.4 specifies that the Appropriate Commission shall determine the preferential tariff for power procurement by the Distribution Licensee from renewable energy sources. It is evident from the provisions of NTP that preferential tariff for renewable energy is to be determined by the Appropriate Commission. Under Section 86 of the Electricity Act, 2003 read with sections 62 & 64, the Commission has the power to determine the tariff of the generating companies including Non-Conventional Energy (NCE) projects which supply electricity to the distribution licensees. In exercise of its powers under these provisions, the Commission had issued KSERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2006 dated 24th June, 2006, KSERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2010 dated 22nd November 2010 and KSERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2013 dated 01-01-2013. In view of the provisions in above regulations and the policy of Government to promote harnessing of power from renewable energy sources, the Commission determined a preferential tariff of Rs 2.44 per unit as per Regulation dt 24.6.2006,

Rs.2.94 per unit as per Regulation dt 22.11.2010 and Rs.4.16 per unit as per Regulation dt 1.1.2013 for the SHP of the category.

M/s. EDCL had filed an application on 29.12.2008 for determination of tariff for energy generated from Ullunkal SHP. As per amended Clause 5(6) of KSERC(Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2006 dated 26th June, 2006, the procedure for approving the tariff of individual Wind and SHP projects is as follows:

“(6) The Commission shall follow the following procedure in approving tariff of individual Wind and SHP Projects

- (1) Applicant for setting up individual renewable energy projects shall file tariff petition before the Commission along with prescribed fee.
- (2) The Commission shall approve the same if the proposed rate is equal to or less than the levelised tariff approved as per Annex I and Annex II of the principal regulation”.

As per the above Regulation, the Commission allowed the preferential tariff of Rs 2.44/Unit for a period of 25 years vide Order No KSERC/III/TP-61/2009/201dated 28-02-2009 for Ullunkal Project which had been commissioned on 13.11.2008.

EDCL requested to review the Order dated 28-02-2009 vide petition dated 26-03-2009, pointing out the differences in the parameters applicable to their project from those adopted by the Commission for fixing of preferential tariff. Since the Commission had fixed a preferential tariff for all SHPs as per regulation there was no need for fixing a special tariff for each SHP separately. Even if such special tariff is fixed, it is subject to the ceiling as stipulated in sub regulation (2) of regulation (6) quoted above. So the special tariff for individual SHP can only be either equal to or less than the preferential tariff of Rs.2.44 per unit for the projects commissioned between 24.6.2006 and 22.11.2010. Hence the request of the review of tariff for Ullungal SHP could not be allowed and hence the petition was not admitted.

Subsequently the petitioner company EDCL Power Projects Ltd was incorporated and the project was transferred to it along with assets and liabilities including tariff applicable to the project. EDCL Power Projects Ltd filed a review petition on 20-09-2011 requesting to review the Order dated 28-02-2009. It was pointed out in the petition that the capital cost of similar projects implemented was in the range of Rs 9 Cr/MW to Rs 10 Cr/MW. As per Order dated 21-08-2012 Commission decided not to admit the review petition since it was not filed within 90 days of the date of the Order and also since it did not satisfy XXXXVII, Rule 1 of Civil Procedure Code. The petitioner is now seeking a fresh determination of tariff for the project under Sec 62 of the Electricity Act, 2003

2.Prayer

The prayers of the petitioner are the following.

- 1) Hon Commission may exercise the powers conferred on it by Section 61 and 62 of the Electricity Act, 2003 by taking into consideration the existing facts, scenario and the factors set out in Section 61 and accordingly determine the tariff in relation to Ullungal Small Hydro Electric Project on the basis of applicant's calculations attached in the Annexure 15. The applicant prays that the tariff shall be fixed at Rs 4.87/Unit.
- 2) The tariff may be fixed for a period of 15 years with liberty being given to the applicant to apply for a revision on a yearly basis inter alia on account of variation in various factors and opportunity cost of power going up regularly. While so fixing the tariff the actual cost of project and other parameters set in the regulation may be taken into account.
- 3) Commission may re-examine the entire issue in the light of the submissions made above and re-fix the tariff on the basis of the actual facts relating to the project as the applicant has still not signed the Power Purchase Agreement for the project.
- 4) The applicant may be permitted to sign the PPA at Rs 2.44/Unit subject to the outcome of this petition.

3.0 Admissibility hearing of petition

3.1 In the admissibility hearing of the petition held at 11.00 am on 12-06-13 at the Commissions Office at Vellayambalam, and in the petition dated 08-04-2013 the petitioner has stated that despite Regulations issued by the Commission with regard to power procurement from renewable sources by distribution licensees (i.e. KSERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2006 dated 26th June, 2006, KSERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2010 dated 22nd November 2010 and KSERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2013 dated 01-01-2013) the petitioner, as a developer, has got a right to get tariff determined exclusively for this project, in view of the provision of Section 61 and 62 of the Electricity Act, 2003. It was also argued that the regulations issued by the Commission on procurement of power from renewable sources by distribution licensees in 2006, 2010 and 2013 are likely to be hit by Article 14 of the Constitution. The following case laws were also presented in support of the arguments of the petitioner.

(1) AIR 2010 SC 1338 PTC India Ltd Vs Central Electricity Regulatory Commission.

(2) (2009) 5 SCC 625 M. Rathinaswamy and Ors Vs State of Tamil Nadu and Ors

(3) (1988) 2 Supreme Court Cases 351 General Officer Commanding – in-Chief Vs Dr. Subhash Chandra Yadav.

3.2 On behalf of KSEB it was submitted that the tariff in respect of project has already been fixed by the Commission in the petition filed by the same petitioner. In spite of instructions issued by the Commission to sign the PPA, the petitioner has not executed the PPA. The review petitions filed by the petitioner were also dismissed. Therefore it was contended by KSEB that this petition is not maintainable and that should not be admitted.

4. Analysis

As per the Tariff petition dt 29/12/2008, M/s EDCL had commenced works of the project in October 2006 and completed in September 2008. In the above petition, the

company had sought a Tariff of Rs.2.95 per unit, based on the costs claimed as incurred by them. The petitioner is now praying for a tariff of Rs. 4.87 per unit again based upon their new calculations.

In a review petition dt 20.9.2011, M/s EDCL Power Projects Ltd. claimed that the capital cost of the project was Rs.7.5 crores per MW. Later in the present petition the project cost is shown as Rs.9.10 crores per MW. The present petition also seeks for revision of tariff on a yearly basis taking into consideration, the factors such as opportunity cost of power going up regularly. From the above it is clear that the petitioner is trying to misrepresent the facts to achieve the aim of higher levelised tariff for the project commissioned in 2008 by boosting the costs of the project at its will. Also Commission cannot consider the factors like opportunity costs of power in the open market, while deciding the applicable tariff in a cost plus regime.

4.1 The tariff for a project is determined after taking into consideration the project cost, debt equity ratio, cost of finance, return on equity, repairs and maintenance charges, depreciation etc. The cost of energy per unit is worked out taking into consideration the PLF and the total annual energy output from the project. In this case, as already pointed out the PLF is more than 30% in view of the fact that it receives copious supply of water as explained in para 2. In spite of this fact the Commission had allowed the preferential tariff applicable to the project at the time of establishment of the project without considering the higher PLF and consequent additional return the project proponent is likely to receive. It has to be understood that as and when project cost, financing cost, repairs and maintenance cost, rate of depreciation etc increase, the cost of energy would also increase. The tariff for energy generated from generating stations established in recent years would be higher than the tariff applicable to the project established years back. This is quite natural. The proponents of the project commissioned many years ago cannot claim increased tariff as and when the rates are revised for recent projects, based on the current cost and other relevant factors.

4.2 There is absolutely no violation of any of the article of the Constitution of India in this regard as contended by petitioner. It is well established in law that equality can be claimed only by persons or entities placed on an equal footing. A project which was

constructed and commissioned years back cannot claim equality with a project constructed and commissioned at present, since cost of construction, cost of material, cost of labour etc. are totally different. The provisions of article 14 of the Constitution of India can be invoked only if discrimination is shown against petitioner when compared to a project commissioned during the same period. The CERC is also determining the tariff for energy for renewable sources and such tariff is determined for a time block of four years and after every time block the tariff is revised based on the change in parameters. The projects which are commissioned during a time block can only claim tariff applicable to that time block. As and when revised tariff published by CERC, the older projects cannot claim the revised tariff applicable to new projects.

4.3 In this case it has to be specifically noted that the petition filed by EDCL Power Projects Ltd is to protect the interests of the previous company M/s. EDCL. The tariff is fixed for a project taking into consideration the project cost, debt equity ratio, cost of finance, return on equity, repairs and maintenance charges, depreciation etc. The cost of energy per unit is worked out taking into consideration the PLF and the total annual energy output from the project. It cannot be revised and increased as and when project is transferred to new proponents.

As per Clause 5(2) of KSERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2013

“Provided that the tariff given above shall be applicable for the projects commissioned / synchronized on or after 01.01.2013 only. Provided also that this Tariff shall be in force for the Financial Year 2013-14 also. The generic tariff shall be applicable for all the projects developed during the Control Period and the Developers need not obtain approval from the Commission for the tariff applicable for their individual projects.”

The power to fix the tariff is vested with the State Commission. But this can be exercised only in the manner contemplated in the regulations. The regulations do not contemplate on any escalation of price above the preferential tariff for an individual renewable energy generating company. Hence even if tariff for individual project is

determined, as requested by the petitioner under Sec 62 (1) (a) of Electricity Act, 2003 the norms for individual projects have to be limited to the norms adopted for different time periods in the regulations as these norms are valid during the control period as per the regulations for preferential tariff valid for that time period.

Under the above circumstances, the Commission concludes that the petition for revising the levellised tariff of Ullunkal SHP cannot be admitted.

5. Decision of the Commission

The petition dt 8.4.2013 containing an application under section 62 of the Electricity Act 2003 filed by M/s EDCL Power Projects Ltd for review of Tariff of Ullunkal SHP cannot be admitted and hence rejected.

Sd/-
Member (E)

Sd/-
Member (F)

Sd/-
Chairman

Approved for issue

Sd/-
Secretary