

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,**

**No.16, C-1, Millers Tank Bed Area, Vasanthnagar, Bengalure-560052**

**Dated: 02.09.2020**

Present

Sri Shambhu Dayal Meena	..	Chairman
Sri H.M. Manjunatha	..	Member
Sri M.D. Ravi	..	Member

**OP No.30/2020**

**BETWEEN:**

M/s SRS Energy Private Limited,  
Regd. Office: Kadrapur Village,  
Shahapur Taluk,  
Yadgir District-585 223  
(Represented by Sri Aditya Narayan,  
Saakshya Law, Advocates)

**....PETITIONER**

**AND**

Gulbarga Electricity Supply Company Limited,  
Corporate Offices, GESCOM,  
Station Road,  
Kalaburagi -585 102  
(Represented by Sri Shahbaaz Hussain, Advocates)

**... RESPONDENT**

**ORDERS**

1. This is a petition filed under Section 62 (1) (a) read with Section 64 and 86 (1) (e) of the Electricity Act, 2003 and Regulation-9 of the KERC (Power Procurement from Renewable sources by Distribution Licensee and Renewable Energy (Certificate Frame Work) Regulations, 2011, praying for the following reliefs:

The Commission be pleased to fix the tariff for the energy generated by the hydel plant to Rs.4.58 per unit and further to pass any other order in the interest of justice and equity.

2. The brief facts of the case are as hereunder;

- a) It is submitted that Petitioner is a private limited company registered under the provisions of the Companies Act,1956. The Petitioner is into the business of generating hydel power. A copy of the incorporation certificate of the Petitioner company is produced and marked as Annexure A to the petition. It is submitted that the Govt. of Karnataka by its order No.1 DE 13 NCE 2004, Bangalore dated 30.2.2004 and DE 190 NCE 2004, Bangalore dated 14.06.2004, has accorded its sanction to the proposal of M/s SRS Private Limited for installation of a mini Hydro Electric Power Generating Station of 10-MW capacity, across Krishna River near Kadhrapura village in Shahapur Taluk and permitted Respondent GESCOM to enter into an agreement with the petitioner for purchase of electricity. GESCOM has entered into PPA on 29.12.2005. The same is produced as Annexure-B to the petition.
- b) As per the parameters the tariff should have been at Rs.4.16 instead of Rs.2.80. The detailed calculation sheet is produced as Annexure C to the petition.
- c) The Respondent GESCOM has issued a letter No.CEE/CP/ EE/AEE (PTC)/ 2018-19/13706/09 dated 23.06.2018 (the same is produced as Annexure D to the petition) to continue the PPA for a remaining period of 10 years at the rate of Rs.2.80 per unit without any escalation, consequent to Petitioner letter dated 25.02.2018 and the same is produced and marked as Annexure E to

the petition. This action of Respondent GESCOM evoked the Petitioner to file the petition. GESCOM has also quoted KERC letter No.KERC/S/F54/ Vol.A/16-17/1922 dated 03.11.2016 and the same is produced as Annexure F to the petition. The respondent (GESCOM) has stated as per the Commission order dated 11.12.2009 and the letter dated 03.11.2016 of KERC, to allow the rate for the power purchase from the Petitioner's plant at the rate equal to the rate at the end of the 10<sup>th</sup> year without escalation for the remaining 10-years' period.

- d) It is submitted that the actual calculation of tariff to hydel power based on various parameters are as detailed below:

Capital Cost/MW-Rs.Lakh	525.26
Debt Equity ratio	70:30
Debt-Rs.Lakh	367.68
Equity-Rs. Lakh	157.58
Debt repayment tenure	12 years
Interest rate charged on debt	0.1250
Capacity Utilisation factor	25.12
Annual generation @ 26% CUF	22.78 lakh
Return on equity	16%
MAT/IT Rate to be reimbursable	18.50% + 10% surcharge +3% education cess = 20.9605%
IT/MAT reimbursement per unit (maximum)	-
Discount factor	13.55%
Auxiliary consumption	1.00%
O&M Expenses in Rs. Lakhs per MW	11.26
O&M Escalation p.a. in % & Rs.	5.72% Rs.54,397 compounded annually
Working capital	2 months receivable
Depreciation for first 12 years	5.83%
Depreciation for next 13 years	1.20% (applicable from 13 <sup>th</sup> years onwards)
Total price per unit	Upwards of Rs.4.16 per unit (excluding MAT/IT)

e) The principles and methodologies for determination of tariff for supply of electricity by a generating company to a distribution licensee is enumerated in Section 61 of the Electricity Act, 2003, and the guidelines stated in Clause-5.0 and Clause-6.0 of the Tariff Policy, 2006, would show that the generation tariff determined should relate to the project costs and other relevant facts. The determination of tariff is regulated by the Commission on the guidelines stated in the relevant provisions of the Electricity Act, 2003, and the Regulations framed thereunder. Considering the above facts and circumstances, it is respectfully submitted that the Commission can revise the tariff, taking in to account the material changes in the circumstances. As to when the term regarding 'tariff' or 'purchase price' agreed in the PPA could be revised is stated in the decision of the Hon'ble Supreme Court reported in (2011) 11 SCC 34, in the case of Transmission Corporation of Andhra Pradesh Limited and Another V/s Sai Renewable Power Private Limited & others. In paragraph-63 of the said judgment, it is held thus:

*"The term 'purchase price' indicated in the PPAs, as such, would be a matter within the realm of contract but this is subject to the changes which are contractually and/or even statutorily permissible...."*

In the facts and circumstances of the present case, the revision of tariff agreed in the PPA is statutorily permitted. Therefore, it is submitted that the cost of the project as certified by the Chartered Accountant in the relevant extract of Audited Accounts for 2008-09 is produced and marked as Annexure G to the petition.

f) It is submitted that the Petitioner has been supplying power from its plant as per the Power Purchase Agreement entered into with GESCO. The Petitioner

is getting Rs.2.80 per unit in the last ten years. Similarly placed Hydro power plant are getting Rs.2.90 per unit with 2% escalation in the prices every year and thus translate to Rs.3.42 per unit at the end of the 10<sup>th</sup> year. It is respectfully submitted that the Petitioner's power plant is losing about Rs.0.62 per unit. This translate to non-recovery of 14.12 Crores and comes to Rs.16.38 Crores including 16% ROE. Therefore, this Commission is requested to take into consideration this aspect also while revising the tariff to the plant.

- g) The Petitioner submitted before this Commission that the Petitioner is yet to receive a Rs.1.36 per unit (Generation cost per unit Rs.4.16 minus Rs.2.80) in the tariff for the first 10-years. This translates to Rs.35.96 crore on account of non-recovery of required tariff grossed up with ROE for the period from April 2008 to March 2018. Rs.35.96 crore which has been lost by the Petitioner in the last ten years' period ending March 2018 with approved parameter required in Generating Plant to get at least Rs.3.09 per unit. The detailed calculation sheet is made out and produced as Annexure L to the petition.
- h) It is submitted that the project has completed 10-years and not undergone any major overhaul of main machineries such as Turbine and Generator, it is also evident on the data ascertained that the renovation has to be carried out according to the report received from the expert engineer along with cost estimate by the Chartered Accountant. The cost of renovation is required to be considered while setting tariff of 11<sup>th</sup> year and onwards. As per the Tariff Policy issue by the Govt. of India on 28.01.2016, Renovation and Modernisation of Generation plant need to be encouraged for higher efficiency level even though they may have not completed their useful life. The impact of renovation comes to Rs.1.49 per unit of generation as detailed in the

calculation sheet which is produced and marked as Annexure I and the Renovation report is produced as Annexure J to the petition.

- i) KERC in its order 2015 have fixed the rate of Rs.4.16 for energy purchased from Hydel Plant, this may also be taken into consideration while fixing Tariff to this plant. The same is produced as Annexure K to the petition.

Apart from the above the grounds urged is as hereunder.

- j) It is submitted by the petitioner before the Commission that the price per unit for Hydel generation for the Petitioner's plant comes to Rs.4.58 per unit for the next 10 years as detailed at Annexure L & I. (Rs.3.09/unit Annexure L + Rs.1.49/unit Annexure I).
- k) Hon'ble Supreme Court in their order dated 5.7.2016, in Civil Appeal No.5875 in Gujarat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Ltd. have held that the State Regulatory Commission is empowered to revise the tariff during the term of PPA. A copy of the judgment is produced herewith and marked as Annexure N to the petition.
- l) KERC in their order dated 05.12.2014 have determined revised tariff of Rs.3.40 per KWH for the energy delivered during first 10-years even though a tariff of Rs.2.90 per KWH was originally fixed, in the case of Soham Phalguni Renewable Energy Private Limited Vs. MESCOM in OP No.48/2012. The order of Commission in OP No.48/2012, dt.5.12.2014 is produced as Annexure P to the petition.

m) It is evident from the foregoing paras that tariff fixed for the Petitioner plant that is much less than required tariff and this plant requires a tariff of Rs.4.58/unit for the next 10-years as detailed in Annexure L & M to the petition.

3. Upon notice, the Respondent entered appearance and filed the statement of objections as follows:

a) The petitioner has filed the present petition seeking revision of tariff to Rs.4.58 per unit from the currently entitled tariff rate of Rs.2.80 per unit.

b) The petitioner is seeking to justify the revision of tariff rate applicable to the energy supplied by its mini hydel power project to the respondent by showcasing the purported cost involved in renovation of the project along with relying on the tariff payable to other mini hydel power projects. It is hereby clarified and categorically stated that the applicable tariff is fixed with respect to any power project by taking into consideration the capital cost involved in setting up of such project along with associated costs involved in the up keeping and maintenance of the project.

c) The relevant portion of the PPA dated 29.12.2005 executed between the Petitioner and the Respondent is extracted hereunder for kind perusal of the Commission:

"Article 5

5.1 Monthly Energy charges:

*GESCOM shall for the Delivered Energy pay, for the 10 years from the Commercial Operation date, to the Company every month during the period commencing from the Commercial Operation Date at the rate of Rs.2.80 per KWh without any escalation for energy delivered to the GESCOM at the metering point.*

5.2 From the 11<sup>th</sup> year onwards, from the Commercial Operation Date GESCOM shall pay to the company for the energy delivered at the metering point at a rate determined by the Commission. In case, GESCOM is unwilling to purchase the power at the rates determined by the Commission, the Company shall be permitted to sell the energy to third parties and enter into a wheeling and banking Agreement with GESCOM/Corporation to sell power for which it shall pay transmission and other charges to GESCOM /Corporation at the rates applicable from time to time as approved by the Commission.

- d) Wherefore, it is explicitly clear after a bare reading of the above provisions that the Petitioner is only entitled for a tariff rates of Rs.2.80 per unit for a period of ten years from the date of commencement without any escalation. Furthermore, the PPA provides for the determination of tariff by this Commission after conclusion of first 10-years of operation of the project.
- e) In the light of the above submissions, it is pertinent to note that this Commission, in its Generic Tariff order dated 11.12.2009, has considered the issue of fixing tariff for plants subsequent to the completion of 10-years, and has held as follows –

*“In view of the fact that, after completion of 10 years, debt servicing will have been fully met and the only increase (marginal) would be in respect of O&M expenses, but at the same time the opportunity cost of the power has gone up, the Commission decides to allow the rate equal to the rate at the end of 10<sup>th</sup> year, without escalation for the next ten years for all renewable projects. This tariff is also applicable to such*



*PPAs in which ten years' period is already completed but no tariff has been determined."*

This Commission has noted that after the completion of 10-years, the debt servicing would have been completed and that the only increase would be in respect of O&M expenses. This Commission, by duly considering the applicable parameters and its impact on power generation, ordered that the tariff payable after the end of 10 years shall be the tariff that was payable at the 10<sup>th</sup> year.

- f) The said issue was further clarified by the Commission vide its letter KERC/S/F/54/Vol.A/16-17/1922 dated 03.11.2016. The relevant extract of the said letter is produced hereunder –

*"Inviting reference to your letter cited above, I am directed to clarify that, in case of the wind and mini hydel projects which have entered into PPA up to 31.12.2009 and that have completed 10 years' period from the date of commissioning, the tenth year tariff would be applicable for the next 10 years of the term of PPA without any escalation."*

- g) Article 5.1 of the PPA had cast upon a duty on the Commission to determine the tariff payable to the Petitioner, post the completion of 10 years of operation, and in exercise of such power granted under the PPA and the power granted to it under Section 86 (1) (b) of the Electricity Act, 2003, this Commission issued the above letter clarifying in unequivocal terms that all projects which have entered into PPA up to 31.12.2009 and which have completed 10 years, shall be eligible to supply energy at the tenth year tariff rate. In the instant case, the 10<sup>th</sup> year tariff rate is Rs.2.80 per unit and as such the petitioner shall be paid at the same rate for the energy supplied by it post the completion of 10 years from

the date of commencement. The Petitioner is estopped from seeking revision of tariff when it has already been determined and clarified by the Commission.

- h) The decision of this Commission vide its letter dated 03.11.2016 was duly communicated to the Petitioner by the Respondent vide its letter dated 23.06.2018 and the same has been produced by the Petitioner at Annexure-D to this petition. As the Commission has already determined the tariff, the same need not be revisited again.
- i) Without prejudice to the foregoing submissions, it is submitted that the Petitioner in the instant case is seeking for revision of tariff to account for the impending renovation and modernisation work of the plant. However, it is hereby brought to the notice of the Commission that all operation and maintenance related costs have already been accounted for while determining the original tariff rate of Rs.2.80 per unit. As per Article-4.1 the Petitioner is obligated to maintain as well as upgrade the project. The relevant portions of the PPA is extracted hereunder for the kind perusal of the Commission –

*“Article 4.1 Obligations of the Company:*

- (i) to (v) xxxxxxxxxxxxxxxx*
- (vi) The company shall undertake at its own cost construction/upgradation of (a) the Interconnection Facilities and (b) the transmission line as per the specifications and requirements of Corporation/ GESCO, as notified to the company.*
- (vii) The Company shall undertake at its own cost maintenance of the Interconnection Facilities, including the transmission line as per the specifications and requirements of the GESCO, as notified to the company, in accordance with Prudent Utility*

*Practices. The Transmission lines so constructed shall remain as dedicated transmission line without provisions for any tappings.*

*(viii) The Company shall operate and maintain the Project in accordance with Prudent Utility Practices....”*

- j) The petitioner has provided a renovation report entailing the detailed works that are required for the renovation of the project under Annexure-J of the Petition. A bare perusal of the said report points out that many entries relate to expenditure associated with upgradation and maintenance of transmission lines and interconnection facilities, which expenditure has to be exclusively borne by the petitioner as per Section 4.1 (vi) & (vii) of the PPA. Furthermore, costs related to upgradation of air conditioning system, upgradation of Guest House, staff quarters, transport vehicles, security surveillance has been attempted to pass off as renovation costs of the plant under the report.
- k) The PPA casts a specific duty upon the Petitioner to operate and maintain the Project in accordance with Prudent Utility Practices under the clause 4.1 (viii) of the PPA. The definition of Prudent Utility Practices as provided under the Section 1.1 of PPA is extracted hereunder –

*“Prudent Utility Practices” mean those practices, methods, techniques and standards, as changed from time to time, that are generally accepted for use in electric utility industries taking into account conditions in India, and commonly used in prudent electric utility engineering and operations and design, engineer, construct, test, operate and maintain equipment lawfully, safely, efficiently and economically as applicable to power stations of the size, service and type of the Project, and that generally conform to the manufacturers’ operation and maintenance guidelines.”*

- l) The petitioner has also sought to rely on the tariff rate payable to other mini hydel power projects, which averment is irrelevant as it has been clarified that the tariff payable at the commencement of the project is determined keeping in mind the capital and other associated costs involved in setting up and operationalisation of that specific power plant, which may vary from one project to another. In the instant case, the Petitioner was well aware at the time of executing the PPA that the applicable tariff is Rs.2.80 per unit without escalation for 10-years.
- m) The petitioner has further averred that it is yet to receive a balance of Rs.1.36 per unit of power supplied during the first ten years, which averment is false and imaginary and the Petitioner is put to a strict proof of the same. The Petitioner has been paid for the energy supplied by it at the rate of Rs.2.80 per unit. The petitioner in the instant case seeks to usurp the functions and duties of this Commission by unilaterally determining the tariff rate of Rs.4.16/unit and then asking the Respondent to pay the balance tariff rate of Rs.1.36 for the energy supplied by it for first ten years. Wherefore, all such fictitious and imaginary calculations of the Petitioner in determining the applicable tariff are liable to be dismissed.
- n) The petitioner has relied on the decision of the Hon'ble Supreme Court in their Order dated 05.07.2016 in Civil Appeal No.5875 of 2012 in Gujarat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Limited to state that this Commission is empowered to revise the Tariff during the term of PPA. In any case, the PPA itself provides for the determination of tariff by this Commission from 11<sup>th</sup> year onwards from the date of commencement of project. This Commission has already determined it to be Rs.2.80 per unit from 11<sup>th</sup> year onwards vide its letter

dated 03.11.2016 and as such the Petitioner is only entitled to a tariff of Rs.2.80 per unit.

- o) The Petitioner has sought to rely on orders passed by this Commission in OP No.48 of 2012. However, the facts of the said petition are different from that of the instant case. The relevant portion of the order in case of Soham Phalguni Renewable Energy Private Limited Vs. MESCOM, dated 05.12.2014 passed by this Commission in OP No. 48/2012 is extracted hereunder –

*"8(g) In the present case, admittedly, the Petitioner has incurred the Project cost during the five years' period, i.e., from 1.1.2010 to 31.12.2014, when the generic tariff order dated 11.12.2009 was in force and the tariff of Rs.3.40 per kWhr was applicable for the Projects commenced and completed during the said period."*

- p) In the instant case, the PPA was executed on 29.12.2005 and the project commenced shortly thereafter, and during such period of time, the applicable tariff was Rs.2.80 per kWhr as per the General Tariff Order of this Commission dated 18.01.2005. Applying the same reasoning provided under OP No.48/2012 to the present set of facts, it becomes clearer that the Petitioner is only entitled to the tariff rate of Rs.2.80 per kWhr.

- q) It is further submitted that interest on loan and depreciation will be further reduced after 12-years and interest on loan will be nil after 12<sup>th</sup> year onwards. Hence, instead of increase in the tariff, the rate should have come down by considering the reduction in interest on loan and depreciation.

- r) Regarding the interim tariff of Rs.3.95/unit for the energy supplied from 01.10.2018 to 31.10.2020 and Rs.4.58/unit from 01.06.2020, respondent stated

that it cannot be accepted, as the Commission has already determined the tariff of Rs.2.80 per unit.

s) Wherefore, in the light of the above grounds taken by the Respondent, it is prayed that this Commission be pleased to dismiss the above petition in the interest of justice and equity.

4. The Petitioner filed rejoinder on 16.03.2021 to the objection statement filed by the respondent. While reiterating the submissions made earlier, the petitioner has made the following additional submissions:

- i) The petitioner's application for the increase of tariff from 11<sup>th</sup> year onwards is based on cogent reasons. Holistic reading of PPA entered, along with the policy of the Government of India and Section 61 of the Act, empower the Commission to revise the tariff. In the present case, there is a need for revision of tariff on account of power plant Renovation & Modernisation undertaken by the Petitioner. In this regard reference to Clause 5.11 (g) of Tariff Policy 2016 is made, emphasising the need for Renovation & Modernisation of generation plants to improve efficiency of such plants resulting in benefits to the consumers.
- ii) The tariff for the Petitioner's project was not fixed considering the capital cost of the project. On the other hand, the generic tariff determined in the order dated 18.01.2005 was made applicable. Therefore, Petitioner is entitled for fair compensation of the cost incurred to execute the project, as stated in clause 8.2.7 National Tariff Policy. Referring to section 61 of the Act and Clauses 5 and 6 of Tariff Policy, it is submitted that the generation tariff has to be fixed on project cost and other relevant facts and therefore, the Commission is

empowered to revise tariff on the basis of material changes in circumstances after the tariff was last determined.

- iii) The Petitioner is entitled to capitalise the non-recovered portion of tariff of the first 10-years and seek tariff on that capitalised amount.
- iv) The generic tariff order dated 11.12.2009 stating that the tariff from 11<sup>th</sup> year onwards will be same as the 10<sup>th</sup> year tariff, is not applicable to the petitioner, as the order was specifically made applicable to RE projects entering into PPA on or after 01.01.2010 and projects for which the power purchase agreement had completed 10-years as on 11.12.2009, for which no tariff was determined for the period after the 10<sup>th</sup> year. Also the statement in the generic tariff order dated 11.12.2009, that debt servicing would have been completed after 10-years is an assumption and is not proved for all cases.
- v) The KERC letter dated 03.11.2016 could not have extended the 10<sup>th</sup> year tariff to the next 10-years or the projects that entered into PPA up to 31.12.2009 and that completed 10-years from the date of commissioning, without giving opportunities to the stakeholders. The letter of the Commission is neither an order issued under regulatory powers nor a tariff order and therefore, is not binding. It is denied that the Petitioner is estopped by the said letter from filing the above petition.
- vi) Article 4.1 of PPA pertains only to construction and maintenance of interconnection facilities, whereas the Renovation & Modernisation pertains to turbine and parts of power plant. Article 4.1 does not cover renovation of interconnection facilities.

- vii) The provisions relating to prudent utility practice is not relevant to the matter on hand, the provision relate only to normal wear and tear that has to be rectified by the Petitioner and does not obligate the Petitioner to absorb the Renovation & Modernisation cost.
- viii) The comparison of tariff of other plants was made to demonstrate that similarly placed power producers are receiving a higher tariff and similarly placed power plants must not be treated unequally. The tariff fixation should not be starkly different as to affix Rs.2.80 per unit for the petitioner's power plant and Rs.3.40 per unit for other mini-hydel plants. Considering the regulatory framework and the order of the Supreme Court in Civil Appeal No. 5875 of 2012 dated 05.07.2016, it is clear that capital cost and the costs of Renovation & Modernisation must be considered when revising the tariff.
- ix) The petitioner has only demonstrated that the tariff for their plant would be Rs.4.16 per unit based on actual cost and is not usurping the jurisdiction of the Commission.
- x) In view of the above the Petitioner has submitted that the tariff as prayed for is just and reasonable and has requested the Commission to grant the relief as claimed.

5. Further, the Petitioner has made the written submissions of the argument on 13.08.2021 reiterating the submissions made earlier and has made the following additional points:

From 11<sup>th</sup> year a tariff of Rs.4.58/unit has to be paid for the following reasons:



- a) As depicted in the audited accounts, the Petitioner has incurred capital cost of Rs.52,52,52,373/- for establishing generating station during 2008 & 2009. The above cost was not fully accounted when the PPA was executed. Due to lower tariff the petitioner incurred losses to the tune of Rs.3,59,64,000/-. Considering this amount, the petitioner should have recovered Rs.3.09 per unit.
  - b) The cost of Renovation & Modernisation is estimated at Rs.1,50,00,000/- for each megawatt which translates to a tariff of Rs.1.49/unit.
  - c) Thus, the combined tariff is Rs.4.58/unit, for which the petitioner is entitled.
  - d) The respondent has stopped making payments at PPA tariff of Rs.2.80 per unit from October, 2018 onwards. A memo dated 27.07.2021 is filed in this regard. Further, the Memo dated 02.08.2021, filed by respondent showing the energy supplied during April, 2018 to August, 2019 and stating that invoices have been not raised, is false, as Petitioner has submitted invoices from time to time. Further, respondent has also submitted that payment has not been made between November 2018 and August 2019, as PPA is not renewed, taking contradicting stand on the issue. As the PPA is for 20 years, the question of renewal does not arise and the Respondent shall be directed to fulfil its payment obligations.
6. The respondent has submitted written arguments on 26.07.2021 reiterating the submissions made earlier and has made the following additional points:
- a) The petitioner accepting the tariff of Rs.2.80 per unit, has not protested the tariff during the 10-year period and has not approached the Commission to alter the same. As such, the Petitioner is barred by limitation to claim for compensation for the imaginary tariff it did not revive in the last 10-years. By

accepting the tariff of Rs.2.80 per unit the petitioner has waived his rights for claiming any fictitious tariff for the next 10-years.

- b) As per law ESCOMs cannot procure power at a higher tariff from the petitioner than that determined by the Commission in its 2005 mini-hydel tariff order.
- c) The Chartered Accountant's [CA] report to justify the capital costs, is a self-serving statement and does not evidence higher capital cost and the Petitioner has not submitted either IT returns or the MCA annual returns. The CA report shows the expenditure of the Petitioner and not of the project. As such no record is placed to show that higher capital cost is incurred than that considered by the Commission in its 2005 generic tariff order.
- d) The petitioner has submitted a report on Renovation & Modernisation which is prepared by a private party engaged by the petitioner and is not by any authorised agency. Thus, the report is merely a self-serving statement. The petitioner's claim for revision of tariff on the ground of Renovation & Modernisation, is based on cost yet to be incurred and therefore, cannot seek revision without actually incurring such cost.
- e) Regarding the validity of the report, the Petitioner submitted that the verifying affidavit is the proof. If such stand is accepted, then the Commission has to accept prima facie as true all submissions made under affidavit and all contentions have to be accepted.
- f) Even if Renovation & Modernisation cost is to be considered, it has to be added to 30% of the capital cost and tariff has to be determined considering other parameters excluding interest on term loan.

g) In view of the above the Respondent has requested the Commission to dismiss the petition with costs. It is also submitted, in a separate affidavit dated 26.07.2020, that if the Commission decides to increase the tariff from 11<sup>th</sup> year onwards and if the Respondent is in disagreement with such tariff, the Respondent will issue NOC to the Petitioner to sell power to third parties as per Article 5.1 of PPA.

7. The Commission has examined the submissions made by the petitioner and the Respondent and the following issues would arise for our consideration:

Issue No.1. Whether the petitioner is entitled for a tariff of Rs.4.16 per unit for the first ten years from the date of CoD as claimed? If so, is the Petitioner entitled for payment of the difference amount of Rs.1.36 per unit [Rs.4.16–Rs.2.80] by capitalising the same, from 11<sup>th</sup> year onwards?

Issue No.2. Whether the petitioner is entitled for the proposed Renovation & Modernisation cost and if so, is he entitled for the consequent tariff of Rs.1.49 per unit as claimed, from 11<sup>th</sup> year onwards?

Issue No.3. What tariff is applicable for the petitioner's power plant after the Completion of 10<sup>th</sup> year from the date of CoD?

Issue No.4. What order?

8. After considering the material on record and the pleadings and submissions of the learned counsels for the rival parties, our findings on the above issues are as follows:

9. Issue No.1: Whether the Petitioner is entitled for a tariff of Rs.4.16/unit for the first ten years from the date of CoD as claimed? If so, is the Petitioner entitled for payment of the difference amount of Rs.1.36 per unit [Rs.4.16–Rs.2.80] by capitalising the same, from 11<sup>th</sup> year onwards?

a) The Petitioner has prayed for re-determination of the PPA tariff of Rs.2.80 per unit for the first ten years from the date of CoD, stating that the Generic Tariff Order 2005, had not considered the capital cost of the Petitioner's project. Relying on the Judgement of this Commission dated 05.12.2014 in OP No.48 of 2012 and the Hon'ble Supreme Court's judgement in C.A. No.5875/2012, the Petitioner has claimed that the Commission has power to re-fix the tariff after the PPA is executed. In this context the Commission notes the following:

(i) In OP No. 48/2012, after signing of the PPA, there was a delay in commissioning of the Project, as the Government of Karnataka based on the reports of KREDL had extended the time for completion of the project, which was recognised by the Commission. As such, keeping in view the commissioning date of the Project, the tariff as per the applicable Generic Tariff Order, 2009 was allowed by the Commission. As pointed out by the Respondent, the Commission has considered the time period during which the project was completed and the applicable tariff during such time period is allowed in the above OP No.48/2012.

In view of the above, by applying the same reasoning for the present case, the tariff as determined in the Generic Tariff Order, 2005 would be applicable for the Petitioner's power plant, as the Petitioner himself has stated that it was commissioned on 10.04.2008, i.e. after the issue of Tariff Order, 2005 on 18.01.2005. Hence, the Petitioner cannot rely on the decision of this Commission in O.P. No. 48/2012, as the facts of the present case are not similar to that in OP No. 48/2012.

(ii) Similarly, the facts of the case in C.A. No. 5875/2012 of Gujarat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Limited and Others are different from the present case for the following reasons:

- There was material change in the scope of the work mainly pertaining to the length of the transmission line. As per the concession agreement the power producer namely; Tarini Infrastructure had to lay transmission line for a distance of 4 kms. which was later on revised to 23 kms. that too after signing of the PPA.
- The power producer has applied within reasonable time to the State Regulatory Commission for redetermination of the tariff agreed in the PPA due to increased cost which was refused by this Commission on the ground that once the tariff is determined and incorporated in the PPA, there was no scope for redetermination.

- In view of the above, the Commission in the present case notes that, after entering into the PPA, which was approved by the Commission, incorporating the tariff as per the generic tariff order, 2005, the Petitioner has not placed any record to show that the Petitioner had brought to the notice of the Respondent that, after the plant was commissioned in 2008, there was a material change in the project cost in comparison to cost considered by the Commission in the 2005 order. The Petitioner neither filed a Petition before this Commission seeking revision of Tariff on account of increased cost during the 10-year period from the date of COD. As pointed out by the respondent, the Petitioner after accepting the tariff of Rs.2.80 per unit, has not protested the tariff during the 10-year period and as such, the Petitioner is barred by limitation to claim for compensation for the purported tariff it did not seek revision in the last 10-years.
- The Commission also notes that, tariff determined by GERC in its 2007 Order, which was issued after the Electricity Act,2003 was notified, is based on MNRE guidelines and not as per the provisions of Electricity Act,2003. However, when the KERC Tariff Order,2005 was issued on 18.01.2005, neither National Electricity Policy nor Tariff Policy was notified. Also, there was no guidelines of CERC to determine tariff at that point of time. Thus, the Commission in terms of KERC (Power procurement from

Renewable Sources by Distribution Licensee) Regulations, 2004, which was issued under the provisions of Electricity Act, 2003, invited petitions from stakeholders namely generators and licensees and after following the due process of inviting comments/views/suggestions from stakeholders and holding public hearing, issued the above Order. During the public consultation process, Renewable Energy Developers Association of Karnataka representing Mini-Hydel Projects, among other things had proposed a capital cost of Rs.3.90 Crores/MW for Mini-hydel projects, which was considered by the Commission while determining the tariff. Thus, the tariff determined considering the above capital cost proposed by one of the developers, cannot be challenged now after a lapse of about 12 –years. Thus, there is no scope for revisiting the capital cost or the generic tariff based on the purported actual costs of the project claimed by the petitioner, after lapse of 12-years.

- Hence, the petitioner cannot rely on the decision of the Hon'ble Supreme Court in C.A. No.5875/2012, as the facts of the present case are not similar.

iii) The petitioner at the time of entering into PPA had the choice of incorporating the Tariff as per the generic order, 2005 or if such tariff

was not viable could have approached the Commission for case specific determination of the tariff.

- iv) The petitioner after knowingly entering into the PPA at the tariff determined by the Commission in its Generic Tariff Order, 2005 and also not opposing the same even after the commissioning of the project and knowing the project cost in 2008-09 itself, now cannot raise the issue of increased capital cost, after elapse of almost Twelve Years, on the date of filing the current petition.
- v) The reliance of the Petitioner on the KERC Regulations, 2011, for re-determination of tariff does not hold water. In this regard, the decision of the Hon'ble Supreme Court in the case of BESCO Vs. Konark Power Projects Limited would be applicable, as the Hon'ble Supreme Court in CA No: 5875 of 2012 at Para 18 has observed as follows:

*“... In the case of Bangalore Electricity Supply Co. Vs. Konark Power Projects Ltd. (supra), this Court held that it was beyond the power of State Commission to vary the tariff fixed under the approved PPA in view of the specific provisions in Regulations 5.1 and 9 of the KERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2004 and KERC Regulations, 2011 respectively as the same specifically excluded a PPA concluded prior to the date of notification of the Regulations in question.”*



- vi) It is worthwhile to note that, the Proviso to Regulation 9 (i) of the KERC Regulations mentioned supra, specify that the tariff approved by the Commission prior to coming into force of the said Regulations, shall continue to apply for such period as mentioned in those PPAs. In the present case the Commission has approved the PPA including the tariff prior to coming into force of the said Regulations and therefore, is not open to re-determination.
- vii) Thus, we are of the considered opinion that, once the PPA is executed by the power generator with the ESCOMs at the generic tariff rates, as approved by this Commission and the power is supplied by the generator, the question of revision of tariff at a later date on the concluded contract, is neither permissible nor maintainable under the provisions of settled law and decision of the Hon'ble Supreme Court referred Supra. Therefore, the Petitioner before executing the PPA was required to examine the viability of his investments made on the power project. If the Petitioner was not satisfied with the rates as determined by the Commission as per the Generic Tariff, he should have not have executed the PPA (contract). In the present case, since the Petitioner has executed the PPA without raising any objections on the generic tariff for the first ten years, the question of allowing a request for revision of the tariff from the date of commissioning of the project, would not arise, since the same would amount to revisiting the concluded contract which is

against to the settled principles relating to concluded contract. In view of the facts mentioned supra, the Petitioner is not entitled for re-determination of tariff for the first ten years from the date of CoD and consequently is not entitled for the difference of tariff as claimed.

viii) Hence, our answer on the Issue No.1 is in the negative.

10. Issue No.2: Whether the petitioner is entitled for the proposed Renovation & Modernisation cost and if so, is he entitled for the consequent tariff of Rs.1.49/unit as claimed, from 11<sup>th</sup> year onwards?

- a) The petitioner has submitted report for Renovation & Modernisation prepared by individual expert engineer along with a cost estimate prepared by Chartered accountant, amounting to Rs.150 lakhs/MW, translating to a tariff of Rs.1.49 per unit.
- b) The respondent referring to the provisions of the PPA under Article 4.1 has submitted that the entire cost of Renovation & Modernisation has to be borne by the petitioner. The respondent has also raised doubts about the veracity of the report submitted by the Petitioner and has stated that several items included in the report, does not come under Renovation and Modernisation.
- c) The Commission notes that as per terms of the PPA, from the 11<sup>th</sup> year onwards the tariff has to be determined by the Commission and in case the respondent is unwilling to purchase the power at the rates determined by the Commission, the generator shall be permitted to sell the energy to the third parties by entering into a wheeling and banking

agreement. In this context, the GESCOM in the present proceedings has submitted that as per generic tariff order dated 11.12.2009, the 10<sup>th</sup> year tariff is payable for the next 10-years for all renewable projects and as per the clarification issued by the Commission on 03.11.2016, all wind and mini-hydel projects which have entered into PPA up to 31.12.2009 and that have completed 10-years period from the date of Commissioning, the 10<sup>th</sup> year tariff would be applicable for the next 10-years of the PPA, without escalation. Further vide affidavit dated 02.08.2021, the respondent has submitted that, if the Commission decides to increase the tariff from 11<sup>th</sup> year onwards and if the Respondent is in disagreement with such higher tariff, they would issue NoC to the petitioner to sell power to third parties as per Article 5.1 of the PPA.

- d) As per the submissions made by the Respondent, the Commission notes that the respondent is unwilling to bear the additional cost of Renovation & Modernisation. Thus, without the willingness of the respondent who is the procurer of power, the determination of additional tariff for the expenditure proposed to be incurred on Renovation & Modernisation would reduce to a mere academic exercise.
- e) As such the Commission is of the view that before taking up the tariff exercise on the additional cost of Renovation & Modernisation, both the petitioner and the respondent have to arrive at consensus regarding

the need for Renovation & Modernisation and the associated costs to be incurred thereof and thereafter, after execution of the Renovation & Modernisation work, the Petitioner can approach the Commission for determination of additional tariff, duly obtaining certificate from Indian Institute of Engineers and chartered accountant. The same has to be substantiated under the provisions of Law.

f) In the light of the above, at this stage, the approval of Renovation & Modernisation cost proposed by the petitioner does not arise.

g) Hence, our answer on the Issue No.2 is in the negative.

11. Issue No.3. What tariff is applicable for the Petitioner's power plant after the Completion of 10<sup>th</sup> year from the date of CoD?

In view of the above, for the existing plant without Renovation & Modernisation, whether the 10<sup>th</sup> year tariff of Rs.2.80/unit has to be continued is to be decided, which is discussed as hereunder. -

a) The respondent has submitted that the Commission has already determined the tariff applicable from 11<sup>th</sup> year onwards for those projects that have completed 10-years from the date of CoD. In this regard it is submitted that, as per generic tariff order dated 11.12.2009, the 10<sup>th</sup> year tariff is payable for the next 10-years for all renewable projects and as per the clarification issued by the Commission on 03.11.2016, all wind and mini-hydel projects which have entered into PPA up to 31.12.2009 and that have completed 10-years' period from

the date of commissioning, the 10<sup>th</sup> year tariff would be applicable for the next 10-years of the PPA, without escalation. Thus, the respondent has submitted that the 10<sup>th</sup> year tariff of Rs.2.80 per unit has to be continued for the petitioner's project from 11<sup>th</sup> year onwards, without escalation.

- b) On the other hand, the Petitioner has submitted that the tariff payable from 11<sup>th</sup> year onwards should be Rs.4.58 per unit. The generic tariff order dated 11.12.2009 stating that the tariff from 11<sup>th</sup> year onwards will be same as the 10<sup>th</sup> year tariff, is not applicable to the Petitioner, as the order was specifically made applicable to RE projects entering into PPA on or after 01.01.2010 and projects for which the power purchase agreement had completed 10-years as on 11.12.2009, for which no tariff was determined for the period after the 10<sup>th</sup> year. Also, the statement in the generic tariff order dated 11.12.2009, that debt servicing would have been completed after 10-years is an assumption and is not proved for all cases. Further, the KERC letter dated 03.11.2016 could not have extended the 10<sup>th</sup> year tariff to the next 10-years for the projects that entered into PPA up to 31.12.2009 and that completed 10-years from the date of commissioning, without giving opportunities to the stakeholders. The letter of the Commission is neither an order issued under regulatory powers nor a tariff order and therefore, is not binding. Hence, the respondent's contentions that the

tariff is fixed for the petitioner's plant by the letter dated 03.11.2016 are denied.

c) As per Article-5 of PPA, the Commission has to determine the tariff payable by the petitioner from 11<sup>th</sup> year onwards. The said Article is reproduced below:

"Article 5:-

5.1. Monthly Energy Charges

*GESCOM shall for the Delivered Energy pay, for the 10 years from the Commercial Operation date, to the Company every month during the period commencing from the Commercial Operation Date on the rate of Rs.2.80 (Rupees Two and Eighty Paise only) per Kilowatt-hour without any escalation for energy delivered to the GESCOM at the metering point.*

5.2 *From the 11<sup>th</sup> year onwards, from the Commercial Operation Date GESCOM shall pay to the Company for the energy delivered at the Metering Point at a rate determined by the Commission. In case, GESCOM is unwilling to purchase the power at the rates determined by the Commission, the Company shall be permitted to sell the energy to third parties and enter into Wheeling & Banking Agreement with GESCOM / Corporation to sell power for which it shall pay transmission and other charges to GESCOM's / Corporations at the rates applicable from time to time as approved by the Commission."*

d) The Commission in its Tariff Order, 2009 has already determined the tariff applicable for 11<sup>th</sup> year and onwards for the next ten years. The operative portion of the Tariff Order, 2009 regarding continuation of 10<sup>th</sup> year tariff is reproduced below:

*"In view of the fact that, after completion of 10-years debt servicing will have been fully met and the only increase (marginal) would be in respect of O & M expenses, but at the same time the opportunity cost of the power has gone up, the Commission decides to allow the rate equal to the rate at the end of the tenth year, without escalation for the next ten years for all renewable projects. This tariff is also applicable to such PPAs in which ten years' period is already completed but no tariff has been determined."*

- e) A plain reading of the above para excluding the last sentence, clearly specify that for all projects after completion of 10<sup>th</sup> year, the 10<sup>th</sup> year tariff without escalation is allowed for the next 10 years for all RE projects. However, the last sentence specifically states that, the 10<sup>th</sup> year tariff without escalation is applicable to PPA's completing 10-year period and for which no tariff is determined after 10-year period.
- f) This Commission, while issuing the Generic Tariff Order, 2009 dated 11.12.2009 has concluded that the debt portion of 70% of the project cost would have been serviced and an equal amount of depreciation, during the first 10 years' period has also been provided. The interest on capital loan will have been also completely paid for. Consequently, from

11<sup>th</sup> year onwards, the tariff payable will be only to meet the required O&M expenses, RoE, remaining depreciation amount and interest on working capital expenses. However, at the same time, considering the opportunity cost of power that the generator would have got by selling the power outside the PPA, the Commission has allowed the tariff equal to the rate at the end of 10<sup>th</sup> year without any escalation for the next ten years for all the renewable projects. Thus, the Commission has already determined the tariff applicable for 11<sup>th</sup> year onwards in the above order for all RE projects.

- g) The contention of the petitioner that, the KERC letter dated 03.11.2016 could not have extended the 10<sup>th</sup> year tariff to the next 10-years or the projects that entered into PPA up to 31.12.2009 and that completed 10-years from the date of commissioning, without giving opportunities to the stakeholders, is rejected, as the generic Tariff Order, 2009 has reached finality, wherein the Commission has already determined the tariff applicable for 11<sup>th</sup> year onwards and the clarification dated 03.11.2016 has only reiterated the decision of the Commission.
- h) The contention of the petitioner that debt servicing would have been completed after 10-years is an assumption and is not proved for all cases, is rejected, due to the fact that while determining generic tariff the Commission has considered normative loan tenure of 10-years, irrespective of the loan tenure of individual projects and has accordingly provided for servicing of debt.



- i) In the light of the above, the Commission decides to allow a tariff of Rs.2.80 per unit without escalation for the petitioner's existing plant bereft of Renovation & Modernisation, from the 11<sup>th</sup> year from the date of CoD, for the next 10-years.
- j) The Commission also notes that, the respondent has submitted that if the petitioner is not willing to sell energy at the Commission determined tariff, it is willing to issue 'No Objection Certificate' (NOC) to the petitioner to enable it to sell the energy in the open market through open access.
- k) In view of the above facts, if the petitioner is not willing to sell the energy at the Commission determined tariff of Rs.2.80 per unit, in terms of Clause 5.2 of the PPA, the petitioner is at liberty to sell the energy through open access, after obtaining a NOC from the respondent (GESCOM).
- l) The Commission is of the view that for the energy supplied from April, 2018 onwards till the date of this order, the petitioner is entitled for the payment. However, for the reasons stated above, the petitioner is entitled for a tariff of Rs.2.80 per unit and the respondent shall make payment for the energy supplied from April, 2018 onwards till the date of this order, if it is not paid already, duly verifying the data pertaining to energy supplied by the petitioner and following the payment procedure specified in the PPA.

m) Issue No.3 is answered accordingly.

12. Issue No.4: What Order?

For the foregoing reasons, we pass the following:

**ORDER**

- a) The petitioner is not entitled for re-determination of tariff for the first ten years from the date of CoD and consequently is not entitled for the difference of tariff as claimed.
- b) Before taking up the tariff exercise on the additional cost of Renovation & Modernisation, both the petitioner and the respondent have to arrive at consensus regarding the need for Renovation & Modernisation and the associated costs to be incurred thereof and thereafter, after execution of the Renovation & Modernisation work, the petitioner may approach the Commission for determination of additional tariff, duly obtaining certificate from Indian Institute of Engineers and Chartered Accountant. Therefore, at this stage, the approval of Renovation and Modernisation Cost proposed by the petitioner does not arise.
- c) From the 11<sup>th</sup> year from the date of CoD for the next 10-years, the Commission decides to allow to the Petitioner a tariff of Rs.2.80 per unit. The above tariff shall be paid by the respondent GESCO for the energy supplied after the completion of 10-years from the dated of CoD, till the date of this Order, if not paid already. Further, from the date of this order, in case the petitioner or the respondent is in disagreement with the above tariff of Rs.2.80/unit, the

respondent shall issue NoC to the petitioner to sell power to third parties, as per Article 5.1 of the PPA.

- d) The petitioner may raise their invoices for payment pending, if any, towards the supply of energy from April, 2018 onwards till the date of this order, as per existing provisions of PPA, at a tariff of Rs.2.80 per unit and the respondent is directed to settle such energy bills pending, within sixty-days from the date of this Order.
- e) Accordingly, the petition is disposed of and the pending IA does not survive for consideration, accordingly stands disposed of.

Sd/-  
(SHAMBHU DAYAL MEENA)  
Chairman

Sd/-  
(H.M. MANJUATHA)  
Member

Sd/-  
(M.D. RAVI)  
Member