

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

Present : Shri T K Jose, Chairman
Adv. A.J Wilson, Member
Shri B Pradeep, Member

OP No 60/2023

In the matter of : Petition filed under Section 86 of the EA-2003, for Approval of the PPA for the 8 MW Small Hydro Project (SHP) developed by M/s Anakampoil Power Private Limited at Chaliar basin at Kozhikode District

Petitioner : M/s Anakampoil Power Private Ltd

Petitioner represented by : Adv. Shikha Ohri, Counsel for the petitioner
Shri. Tanmay Das, Director

Respondent : M/s Kerala State Electricity Board Ltd (KSEB Ltd)

KSEB Ltd represented by : Shri. M.P. Rajan, Dy. Chief Engineer
Shri Ajithkumar K.N, Executive Engineer
Shri. Shine Raj Asst: Executive Engineer

Date of hearing : 28.12.2023, 04:00 PM

Venue : Court hall of the commission

Order dated 06.08.2024

1. M/s Anakampoil Power Private Ltd (hereinafter referred as M/s APPL petitioner), filed a petition dated 31.01.2022 before the Commission with the following prayers;

“In light of the above-mentioned facts and circumstances, this Hon'ble Commission may most graciously be pleased to:

- a. approve the purchase agreement dated 12.08.2021 initialled by the Petitioner and KSEBL, with the modifications proposed in Para 27 hereinabove;;*
- b. pass any other order/orders as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the instant case.”*

2. Summary of the petition filed by the petitioner is given below;

- (1) The petitioner is a generating company, who constructed an 8 MW Anakampoil SHP at the Chaliyar basin, Kozhikode district.
- (2) The project was awarded to the developer by the State Government vide Order dated 21.07.2014 under the IPP category on BOOT basis

for a period of 30 years. Initially the capacity of the project was 6.75MW.

As per the conditions of allotment, the petitioner had executed an Implementation Agreement (IA) dated 16.01.2015 with Government of Kerala.

Subsequently, the State Government vide the Order dated 25.03.2015, approved Techno Economic Feasibility Report (TEFR) and also enhanced the capacity from 6.75 MW to 8 MW, based on the request of the Petitioner.

- (3) The project was synchronised and commissioned on 17.12.2020 with the Grid. The Project was achieved its CoD on 14.07.2021.
- (4) The Commission vide Order dated 20.07.2018 in petition OP No.02/2018 had ordered that KSEB Ltd has affirmed the assurance to purchase power from the project at the tariff and other terms and conditions approved by the Commission. The relevant portion of the Order is extracted as follows;

“Order of the Commission

19. The Commission after duly examining the petition filed by M/s Anakampoil Power Private Ltd, the counter argument of the respondent KSEB Ltd, and other documents placed before it, hereby orders that,

- (i) *The respondent KSEB Ltd has confirmed their willingness to purchase power from the 8 MW SHP developed by the petitioner at the tariff and terms and conditions as decided by this Commission, the first prayer of the petitioner is answered in the affirmative.*

.....”

- (5) Subsequently the petitioner vide letter dated 16.03.2019, requested KSEB Ltd for initiating the process of execution of PPA. The respondent KSEB Ltd vide e-mail dated 23.03.2019 had shared the draft PPA with Anakampoil Power Private Ltd.

According to the petitioner, the draft PPA finalised by the KSEBL was in variance with the tender documents floated by the State Government for selecting the bidders for allotment of SHPs. According to KSEBL, the draft model PPA which was part of tender document was only a reference document and the terms and conditions of the draft PPA format shared with the petitioner is similar to the PPAs being approved by the Commission.

KSEBL, further also informed that only project specific deviations can be made in the PPA format already furnished by KSEBL, and that apart, the other changes/ modifications suggested by the Petitioner cannot be accepted in the draft PPA

- (6) Petitioner submitted that upon further deliberations the parties arrived at the mutual understanding that the unresolved issues would be taken up with the Commission at the time of approval of PPA.
 - (7) The petitioner further submitted that they had initialled the PPA for interim payment, since they are generating and supplying power to KSEB Ltd w.e.f 17.12.2020 without any payments.
3. The following are the unresolved issues between the petitioner M/s Anakampoil Power Pvt Ltd and the respondent KSEBL.
 - (1) Must run status of the project,
 - (2) Article 5.4 of the PPA regarding tariff,
 - (3) Payment security mechanism,
 - (4) Billing and payment,
 - (5) Incorporation of relevant provisions in the Implementation Agreement,
 - (6) Inclusion of 'retention money' clause.
 4. The Commission has conducted hearing on the petition on 28.12.2023. Adv. Shika Ohiri presented the matter on behalf of the petitioner, and Sri. M.P. Rajan, Deputy Chief Engineer and Sri. Shine Raj, AEE appeared before the Commission on behalf of the respondent.
 5. Subsequently, KSEBL vide the affidavit dated 29.12.2023 has submitted its written comments on the petition filed by M/s Anakampoil Power Private Limited.
 6. The petitioner vide its affidavit dated 18.01.2024 has submitted the rejoinder to the reply filed by KSEBL on the subject matter.

Summary of the project

7. The petitioner M/s Anankampoil Power Projects Limited is a generating company under Section 2(28) of the EA-2003. The State Government vide the Order dated 21.07.2014 had allotted the project to the petitioner. Originally the capacity of the plant proposed was 6.75MW, however later it was enhanced to 8MW.

The petitioner has signed an implementation agreement with the State Government on 16.01.2015.

The project was synchronised with the grid on 17.12.2020. The project achieved CoD on 14.07.2021.

The Commission vide the Order dated 23.11.2023 in petition OP No. 01/2021 had determined the levelised tariff of the project at Rs 4.15/unit with the benefit of accelerated depreciation.

However the Commission vide the Order dated 13.06.2024 in Review Petition 01/2024 had given the option to the parties to sign the PPA at the tariff of Rs 4.15/unit with the benefit of accelerated depreciation or @Rs 4.43/unit without availing the benefit of accelerated depreciation. The relevant paragraph of the Order dated 13.06.2024 is extracted below.

"The Commission further clarify that, KSEBL has the freedom to decide on the purchase of power from the Anakampoil Power Project (8MW), in case the petitioner does not intend to

avail the accelerated depreciation benefit. The Commission expects the petitioner and KSEB Ltd to arrive at rational decisions through discussions on the matter of availing benefit of accelerated depreciation and consequently on the matter of entering into the PPA, within two months from the date of this Order.”

The present petition is filed by the petitioner on 31.01.2022 is for the approval of the Power Purchase Agreement to be signed between the petitioner M/s Anakampoil Power Private Ltd and the respondent KSEBL.

8. As discussed under paragraph-3 above, there are disputes between the parties in few clauses of the draft initialled PPA . The deliberations on these disputes and the considered decisions of this Commission on these issues are given in the subsequent paragraphs.

Issue No.1. Must run status of the project.

9. Suggestions of the petitioner

The petitioner submitted that the project of the petitioner being a hydroelectric power plant falls under the category of a renewable energy source and as such ought to be promoted in terms of the provisions of the Electricity Act, 2003. As part of promoting RE, the project of the petitioner may be exempted from merit order despatch and allow must run status to the project.

The petitioner further submitted that, KSEBL vide the letters dated 30.10.2020 and 20.03.2021, had in agreed that, being an RE project, Anakampoil power plant shall be treated as 'Must Run', but this clause has not included in the initialled draft PPA.

The petitioner also submitted that, in order to avoid any ambiguity and potential dispute in future, express incorporation of this provision in the PPA is required as per Regulation 38 (1) of the KSERC (Renewable Energy and Net Metering) Regulation, 2020 (hereinafter referred to as the "KSERC Regulation, 2020).

10. Comments of KSEB Ltd

The Regulation 38(1) of the KSERC (Renewable Energy and Net Metering) (first amendment) Regulations, 2022 stipulates that all renewable energy power plants having valid Power Purchase Agreement (PPA) approved by the Commission, unless and otherwise exempted by the Commission for reasons to be recorded in writing, shall be treated as 'MUST RUN power plants and shall not be subjected to 'Merit Order Dispatch' principles.

Hence KSEB Ltd submitted that, there is no need to specify 'must run status' in explicit terms in the PPA. Further, as per the Electricity (Promotion of Generation of Electricity from must-run power plant) Rules 2021 dated 22.10.2021, stipulates that 'must run plants' are not subjected to 'Merit Order Dispatch' principles.

Hence KSEBL submitted that, since this clause is already defined in the KSERC (Renewable Energy & Net Metering) (first amendment) Regulations, 2022 as well as in the Electricity (promotion of generation of electricity from

must run power plant) Rules 2021, inclusion of the clause is not required in the PPA.

Analysis and Decision of the Commission

11. The Commission has examined the deliberations of the subject matter in detail, and noted the following;
 - (1) The Anakampoil SHP (8MW) established by the petitioner is a renewable source of energy in terms of the provisions of the KSERC (Renewable Energy & Net metering) Regulations, 2020 and other Rules and Regulations in force.
 - (2) The Regulation 38 of the KSERC (Renewable Energy & Net Metering) (First Amendment) Regulations, 2022, deals with the “Principles for the dispatch for Electricity Generated from Renewable Energy Sources”. The relevant Regulations is extracted below for ready reference.

“38(1) All the renewable energy power plants having valid Power Purchase Agreement (PPA) approved by the Commission, unless and otherwise exempted by the Commission for reasons to be recorded in writing, shall be treated as ‘MUST RUN’ power plants and shall not be subjected to ‘Merit Order Dispatch’ principles.

38(2) Scheduling of Renewable Energy plants shall be governed by the Regulations issued by the Commission from time to time.”
 - (3) As above, as per the Regulation 38(1) of the KSERC (Renewable Energy & Net Metering) (First Amendment) Regulations, 2022, the Anakampoil SHP (8MW) of the petitioner shall be treated as ‘Must Run’ power plant and it is exempted from ‘Merit Order Dispatch’ principles.
12. There is no dispute between the petitioner and respondent regarding that the Anakampoil SHP has to be treated as ‘must run’ power plant and the scheduling of the plant is exempted from merit order principles. The only issue raised by the petitioner is that, a clause may be incorporated in the PPA to specify in explicit term that, the Anakampoil SHP of the petitioner shall be treated as ‘must run’ power plant and it is exempted from merit order principles.

However, KSEBL argued that, since as per the Regulation 38 of the KSERC (Renewable Energy & Net Metering) (First Amendment) Regulations, 2022, all the RE power plants having valid PPA is treated as ‘must run’ power plants and such plants are exempted from ‘merit order dispatch’ principles’. Hence there is no need to specify the same in the PPA to be signed between the parties for the purchase of power from the Anakampoil SHP.

13. The Commission has examined the arguments of both the parties. Since the Power Purchase Agreement (PPA) is a legally enforceable contract as per the Indian Contract Act, 1872, there is no harm in specifying in the PPA in explicit term that, the Anakampoil SHP (8MW) of the petitioner shall be treated as

'must run project' and exempted from 'merit order dispatch' principles' as per the KSERC (Renewable Energy & Net Metering) Regulations and its amendments from time to time.

However, the Commission hereby clarify that, the scheduling of power from the power plant is subject to the Regulations, if any, to be notified by the Commission for scheduling as provided under Regulation 38(2) of the KSERC (Renewable Energy & Net Metering) (First Amendment) Regulations, 2022.

14. Considering the entire aspects in detail as discussed in paragraphs 11,12 and 13 above, the Commission hereby approve to include the following clause as 'Clause 5.9 of the draft initialled PPA' submitted before the Commission for approval.

"5.9 The Anakampoil SHP (8MW) shall be treated as 'must run' power plant and exempted from 'merit order despatch principles' as provided under the Regulation 38 of the KSERC (Renewable Energy & Net Metering) Regulations 2020 as amended from time to time. The scheduling of power from the power plant shall be governed by the Regulations, if any, notified by the Commission on this behalf from time to time"

Issue No.2 Article 5.4 of the PPA regarding tariff

15. Suggestions of the petitioner

The Article 5.4 of the initialled PPA provide as follows;

"5.4 Tariff for power generated from the project shall be project specific tariff as determined by the Commission or generic tariff notified by the Commission, which ever is lower".

The petitioner further submitted that, the tariff for the power generated from the Project shall be project specific tariff as determined by the Commission. Accordingly, the clause 5.4 of the initialled PPA has to be modified as;

"Tariff for the power generated from the project shall be project specific tariff as determined by the Commission".

However, KSEBL is not agreeable for the proposal.

16. Comments of the respondent KSEBL

KSEB Ltd submitted that the Commission vide Order dated 23.11.2023 in petition OP No. 01/2021 had determined the project specific tariff at Rs. 4.15 per unit, duly considering the benefit of accelerated depreciation.

Hence, KSEBL requested to modify the Clause 5.4 of the PPA as follows;

"Tariff for power generated from the project shall be Rs 4.15/unit duly considering the benefit of accelerated depreciation".

Analysis and Decision of the Commission on Issue No.2

17. The Commission has carefully examined the deliberations of the subject issue. As per the Order of the Commission dated 23.11.2023 in petition OP No. 01/2021 that, the tariff of the project shall be the project specific tariff as determined by the Commission. Further, vide the same Order, the Commission has determined the tariff @Rs 4.15/unit with the benefit of accelerated depreciation and Rs 4.43/unit without the benefit of accelerated

depreciation. Further, as per the proviso to paragraph 61 of the same Order dated 23.11.2023, the Commission has directed KSEBL to sign the PPA with the petitioner @Rs 4.15/unit, for the purchase of the entire electricity generated from the project.

18. Subsequently, the petitioner vide the review petition dated 06.01.2024 submitted that, the developer is not intending to avail the benefit of accelerated depreciation and request to review the Order accordingly.

Duly considering the review petition in detail, the Commission vide the Order dated 13.06.2024 in Review Petition 01/2024 had given the option to the parties to sign the PPA at the tariff @Rs 4.15/unit with the benefit of accelerated depreciation or Rs 4.43/unit without availing the benefit of accelerated depreciation. The relevant paragraph of the Order dated 13.06.2024 is extracted below.

“The Commission further clarify that, KSEBL has the freedom to decide on the purchase of power from the Anakampoil Power Project (8MW), in case the petitioner does not intend to avail the accelerated depreciation benefit. The Commission expects the petitioner and KSEB Ltd to arrive at rational decisions through discussions on the matter of availing benefit of accelerated depreciation and consequently on the matter of entering into the PPA, within two months from the date of this Order.”

As above the Commission has directed the generator M/s APPL and the buyer KSEB Ltd to arrive a rational decision through discussions on availing benefit of accelerated depreciation and consequently on the matter of entering into the PPA, within two months from the date of this Order. The parties may modify the Clause 5.4 of the draft PPA through mutual consensus.

19. Considering these aspects in detail as above, the Commission hereby Orders to modify the Clause 5.4 of the draft PPA as follows;

“Tariff for the power generated from the project shall be project specific tariff of Rs.____Per unit as determined by the Commission vide the Order dated 23.11.2023 in petition OP No. 01/2021 and the review Order dated 13.06.2024 in petition RP No. 01/2024 and as mutually agreed between the parties”.

Issue No.3. Payment Security for the electricity generated and supplied to KSEBL from the Anakampoil SHP(8MW)

20. Suggestions of the petitioner

- (i) The petitioner submitted that, the project financier M/s Power Finance Corporation (PFC) vide letter dated 15.02.2021 has proposed a payment mechanism, in line with the Model PPA enclosed along with the tender documents floated by the energy management center (EMC) on behalf of the State Government for the selection of the developers for implementing SHPs under IPP/CPP route. The relevant clause of the Model PPA is extracted below.

“9.6 Payment

Board shall make payments of the amounts due in Indian Rupees on or before Due Date of payment. On the first default of payment by Board, the Board shall open an irrevocable, confirmed revolving letter of credit (LC) in favour of the Company. The initial value of the LC shall be the value payable for the preceding three (3) months”.

However, KSEB Ltd informed that the facility of LC is not extended by it to any developer within the State which is not covered under a Tripartite Agreement.

- (ii) The petitioner further submitted that the MoP vide Order dated 28.06.2019 had observed that a robust Payment Security System requires adequacy and validity of Letter of Credit to cover the payments due on account of drawal of power.
- (iii) The petitioner vide the rejoinder dated 18.01.2024 further submitted that, KSEBL is extending the facility of irrevocable unconditional revolving LC in favour of CGPs and IPPs outside the State. KSEBL has not provided valid reasons for not extending the benefits to the projects within the State, including the project of the petitioner.

The petitioner further submitted that, the Clause on payment security mechanism only get triggered in the case of a default in payment by KSEBL. In the absence of a default, KSEBL is not bound to open an irrevocable letter of credit. Hence the petitioner requested to add the following clause in the PPA.

"KSEB Ltd shall make payments of the amounts due in Indian Rupees on or before Due Date of Payment. On the first default of Payment by KSEB Ltd., KSEB Ltd. shall open an irrevocable, confirmed revolving Letter of Credit (LC) in favour of the Developer. The initial value of the LC shall be the value payable for the preceding 3 months."

21. Comments of KSEBL

KSEBL submitted that, the model PPA is for reference purpose only. In actual PPAs KSEBL is not encouraging Letter of Credit (LC) to any developer within the State.

KSEB Ltd further submitted that the prevailing Regulations of KSERC does not stipulate creation of payment security mechanism. KSEBL further submitted that, till date there has been no case of defaulting regular payment from KSEBL side to the generator. But in the case of CGS/IPP's outside the State, as per MoP policy, KSEBL is bound to establish an irrevocable unconditional revolving Letter of Credit.

Hence, the request of the generator to include payment security mechanism in the draft PPA is not acceptable to KSEBL.

Analysis and Decision of the Commission on Issue No.3

22. The Commission has noted the arguments of both the parties on the issue. The Commission is of the view that, insisting for payment security by the petitioner for its obligations to supply electricity from the Anakampoil SHP cannot be termed as against the interest of KSEBL. However, the petitioner shall also keep in mind that, none of the generators/traders supplying power to KSEBL had complained about default in regular payments of power purchase, till date.
23. The Commission after examining the entire issue in detail, is of the considered view that, a clause for payment security may be included in the draft initialled PPA between the petitioner and KSEBL, similar to the payment security provided in the Clause-9 of the PPA dated 07.06.2007, signed between the generator M/s Viyyat Power Pvt Ltd and KSEBL, which is similar to the clause 9.6 of the model PPA regarding payment security mechanism. As such, if the KSEBL promptly make payment for the electricity purchase within the due date, the necessity of opening of Letter of Credit does not arise.
24. Considering the entire aspects in detail as discussed in the preceding paragraphs, the Commission hereby approve to insert the following clauses as Clause 6.6 below in the initialled draft Power Purchase Agreement as payment security.

“6.6 Payment

KSEBL shall make payment of the amounts due in Indian Rupees on or before Due Date of Payment. On the first event of default of payment, if any, by the KSEBL, the KSEBL shall open an irrevocable, revolving Letter of Credit (LC) in favour of the Company. The initial value of the LC shall be the average value payable for the preceding 3 months”

Issue No.4. Billing and Payment

25. Suggestions of the petitioner

- (i) The petitioner submitted that, the provision of Billing and Payment as mentioned in clause 6.1 of initialled PPA, is not in line with Regulation 47 of the KSERC Regulation 2020. The petitioner requested that, KSEBL may be directed to align the provisions of Billing and payment in the PPA with the provisions of the RE Regulations, 2020.
- (ii) The Clause 6.1 of the draft initialled PPA provide as under;
- “6.1 Billing date is the 5th business day after the metering date. Due date of payment is the 10th day from the date of receipt of bill....”*
- (iii) However, the Regulation 47 of the KSERC Regulation 2020 provide as under;

“47. Rebate.- (1) If the payment of bills for charges payable under these Regulations is made by the distribution licensee to the renewable generator within five calendar days of presentation of bills by the renewable generator, a rebate of 2% shall be allowed to the licensee”.

- (iv) Considering the above, the petitioner requested to modify the Clause 6.1 of the draft initialled PPA as under;

“6.1 Billing date is the 5th business day after the metering date. Due date of payment is the 5th day from the date of receipt of bill...”

26. Comments of the respondent KSEBL.

- (i) KSEBL submitted that, as per the Clause 6.1 of the mutually initialed PPA provide as under;
“6.1 Billing date is the 5th business day after the metering date. Due date of payment is the 10th day from the date of receipt of bill....”

Further, the Clause 6.4 of the mutually initialed PPA provides that;

“If KSEBL pays the amount due within the due date of payment, then a rebate of 2% shall be given to KSEBL by the developer . The rebate shall be availed in advance at the time of payment’.

- (ii) KSEBL further submitted that, the Regulation 47 of the KSERC (Renewable Energy & Net Metering) Regulations, 2020 provides that, for availing the 2% rebate, the payment has to be made within five (5) calendar days from the date of presentation of bills. However, in other PPAs of SHPs initialed by KSEBL, the date of payment for availing 2% rebate is within 10 days of presentation of the bill. Hence, KSEBL submitted that, there is no need to modify the Clause 6.1 of the initialed PPA. KSEBL further submitted that, it is making prompt payment to all GENCOs.

Analysis and Decision of the Commission

27. The Commission has examined the issue raised by the petitioner M/s Anakampoil Power Private Ltd and the comments of the KSEBL on the issue of billing and payment.
28. The Commission vide the notification dated 7th February 2020 has notified the KSERC (Renewable Energy & Net Metering) Regulations, 2020, by invoking the statutory powers conferred on the Commission under Section 181 of the EA-2003. The Regulations was notified after completing the statutory procedures for notifying the subordinate legislation including pre-publication, stakeholder consultation and public hearings. The Regulations once notified is applicable to all parties including the Commission, unless specific relaxation/ exemption is granted by the Commission by invoking powers for such exemption in writing as per the provisions of the said Regulations.

29. In the present case, the Commission is yet to amend or modify the the Regulation 47 of the KSERC (Renewable Energy & Net Metering) Regulations, 2020. Hence the parties to the present initialed PPA, M/s Anakampoil Power Private Ltd and the KSEBL shall follow the Regulations, 47 while finalizing the Clause 6.1 of the PPA.
30. Considering the entire aspects as discussed above, the Commission hereby approve to modify the second line of Clause 6.1 of the draft initialed PPA as follows;

“6.1.....

Due Date of payment is the 5th day from the date of receipt of bill.....”

Issue No.5 Incorporation of relevant provisions in the Implementation Agreement

31. Suggestions of the petitioner

- (1) The petitioner M/s Anankampoil Power Private Limited submitted that, the provisions of the tender/ implementation agreement/ model PPA pertaining to (i) change in law, (ii) roles and responsibilities of parties to the agreement , (iii) representation and warranties from the side of parties to agreement are not included in the draft PPA.
- (2) Petitioner further submitted that the Implementation Agreement was executed between GoK and the Petitioner for implementation of the Project, while the PPA is commercial contract to be executed between the Respondent and the Petitioner.

The IA does not suitably cover the provisions related to the operations as well as the sale and purchase of Power. Further, the Implementation Agreement will not automatically become the essential part of the PPA. Hence, the petitioner requested that, the following provisions shall be incorporated in the PPA;

- (i) Roles and responsibilities of parties to the Agreement;
- (ii) Representation and warranties,
- (iii) Change in law,.

32. Comments of KSEBL

KSEBL during the deliberations of the subject petition submitted that, the above issues raised by the petitioner to include in the PPA are already covered in the ‘implementation agreement’ signed by the petitioner with the State Government. The implementation agreement is an integral part of the PPA to be signed with KSEBL.

The Clause -1(aj) of the initialled PPA, defined as follows;

“(aj) ‘Implementation Agreement’ ‘the Agreement dated 16.01.2015 entered into between the Government of Kerala and the Company for this project which is attached as Schedule to this PPA”.

Further, as per the Clause 10.9 of the initialled PPA, it is mentioned that,

“The annexure and the schedule of this Agreement will form an integral part of this agreement and will be in full force and effect as through they were expressively set out in the body of this Agreement”.

By the combined reading of clauses-1 (aj) and 10.9, the claim of the petitioner is fully addressed. Hence no need to modify the initialled PPA clause.

Analysis and decision of the Commission on the Issue No.5

33. The Commission has examined the argument of both the parties in detail and noted the following;

(1) Subsequent to the allotment of the Anakampoil SHP to the petitioner by the Government vide the Order G.O (Ms) No. 23/2014/PD dated 21.07.2014, the State Government had signed an Implementation Agreement with the petitioner M/s Anakampoil Power Private Limited on 16th January-2015. The said agreement deals with the various aspects of the Anakampoil SHP, including (but not limited to) the following;

- (i) Term of the Agreement (Article-2)
- (ii) Development of the project (Article-4).
- (iii) Obligations of the developer (here the petitioner) (Article-5)
- (iv) Force majeure conditions (prior to CoD and after CoD) (Article-6)
- (v) Events of default and termination (Article-7)
- (vi) Transfer of project facilities (Article-9).
- (vii) Dispute Resolution (Article-10)
- (viii) Representations and warranties, disclaimer

(2) Since the implementation agreement dated 16.01.2015, cover various aspects of the Anakampoil Project (8MW) from the commencement till the date of transfer of the project including termination as discussed above, the implementation agreement shall also form an integral part of the PPA to be signed between M/s Anakampoil Power Private Limited and KSEBL.

(3) However, it is noticed that, there is no specific clause in the draft initialled PPA stating that, the implementation agreement signed between the petitioner and the State Government dated 16.01.2015 shall form an integral part of the PPA to be signed between the petitioner and respondent KSEBL.

34. Considering the above aspects in detail as discussed above, the Commission hereby approve to amend the ‘Clause 10.9 of the draft initialled PPA’ as follows to make effect that the ‘Implementation Agreement signed by the petitioner with the State Government shall form an integral part of the PPA.

“10.9 The Implementation Agreement (IA) dated 16.01.2015 as defined in Clause (1)(aj), the Annexure and schedules of this Agreement shall form an integral part of this Agreement and shall be in full force and effect as though they were expressly set out in the body of this Agreement”.

Issue No.6 - Inclusion of 'Retention Money' clause

35. Suggestions of the respondent KSEBL

KSEBL submitted that, Article-9 of the Implementation Agreement deals with 'Transfer of the Project' up on the expiry of the BOOT period. The Article 9.2(b) of the Implementation Agreement provide as follow

"For this purpose the company shall ensure that suitable clauses are inserted in the power purchase agreement to enable the board to withhold 25% of bill amount from each payment made to the company during two years prior to the expiry of the power purchase agreement (collectively the 'Retention Amount')".

As above, as per clause 9.2 (b) in Article 9 of the Implementation agreement, the developer shall ensure that suitable clauses, such as Retention Money or Retention Energy are inserted in the PPA to enable the Board to withhold 25% of bill amount from each payment made to the company during two years prior to the expiry of the power purchase agreement. However such clause is not included in the mutually initialed PPA.

Hence, KSEBL requested that, to comply the transfer requirements envisaged in the transfer of project facilities in the implementation agreement, the clause for Retention Money is to be included in the draft PPA.

36. Comments of the petitioner M/s Anakampoil Power Private Ltd

The petitioner submitted that, the Implementation Agreement signed between the petitioner and the State Government deals with the 'retention money' clause in detail. A combined reading of the Clauses 1(a) and 10.9 of the initialled PPA, makes it clear that the 'Implementation Agreement attached as Schedule to the PPA, is an integral part of the PPA. Therefore, the claim of the KSEBL is fully addressed. Hence there is no need to modify the initialled PPA for this purpose.

Analysis and Decision of the Commission

37. The Commission has examined the issue in detail. The Article 9 of the Implementation Agreement (IA) dated 16.01.2015 signed between the petitioner and the State Government, deals with the 'Transfer of the project facilities of the Anakampoil Power Project 8MW' which is extracted below for ready reference.

" Article-9

TRANSFER OF PROJECT

9.1 Transfer of Project

- (a) *Upon the expiry of the BOOT Period by efflux of time and in the normal course, all rights of the developer with respect to the Project gets extinguished and the land found necessary by the Government for the operation and maintenance of the project which was purchased/ leased or obtained otherwise by the Company shall also vest with the Government. The Company shall, transfer the Project Site/ Project Facilities to the Government or Board authorised by the Government free of cost in compliance with the Transfer Requirements as per Schedule H. Title of*

the land which was purchased by the Company shall also be transferred to Government at a nominal consideration. No compensation shall be payable by the Government on any account under this clause.

(b) The process of transfer shall be initiated at least 12 months before the actual date of expiry of the BOOT Period by a joint inspection by Government/ Board and the Company. The Government shall, within 15 days of such inspection prepare and furnish to the Company a list of works/ jobs, if any, to be carried out to conform to the Transfer Requirements. The Company shall promptly undertake and complete such works/ jobs at least two months prior to the date of expiry of the BOOT Period and also ensure that the Project Facilities continue to meet the Transfer Requirements until the same are transferred to the Government.

9.2 Retention Money

- (a) In case the Company fails to carry out the works/ jobs envisaged in Clause 9.1 (b), within the stipulated period the Government shall be at liberty to have the same executed by any other Person at the risk and cost of the Company and in such an event the Company shall be liable to reimburse the Government one and half times the cost incurred (as certified by an Independent Auditor) in carrying out such works/jobs.*
- (b) For this purpose the Company shall ensure that suitable clauses are inserted in the Power Purchase Agreement to enable the Board to withhold 25% of bill amount from each payment made to the Company during two years prior to the expiry of the Power Purchase Agreement (collectively the "Retention Amount").*
- (c) The Retention Amount shall be returned to the Company by the Board upon completion of the Transfer Requirements or appropriated to the extent required towards the costs reimbursable by the Company in terms of sub clause 9 (a)."*

38. As extracted above, the clause 9.2(b) of the Implementation Agreement mandates that, suitable clauses has to be inserted in the agreement to be signed between the petitioner and the respondent KSEBL to ensure to retain 25% of the bill amount from each payment made to the Company during two years prior to the expiry of the PPA.

39. KSEBL submitted that, there is no such provisions in the draft initialled PPA submitted before Commission for approval.

40. The Commission has examined in detail the entire deliberations of the subject matter, and noted the following for the compliance of the petitioner and respondent.

- (1) The petitioner and the State Government has signed an Implementation Agreement (IA) on 16.01.2015, subsequent to the allotment of the project to the petitioner. The Article-9 of the PPA deals with the Transfer of the project and Article 9.2 deals with retention money.
- (2) KSEBL as the Government instrumentality to take over the project facilities after its BOOT period.

41. The Commission vide the paragraph 34 of this Order has already decided to insert an additional Clause 10.9 in the draft initialled PPA to make the Implementation Agreement signed between the State Government and the petitioner as an integral part of the PPA to be signed between the petitioner and KSEB.

The Implementation agreement casts a responsibility on the petitioner to insert suitable clauses in the PPA on the matter of retention money. Accordingly, the parties shall include the following clause as Clause 6.7 in the draft initialled PPA submitted before the Commission for approval.

“6.7 During the two years prior to the expiry of the Power Purchase Agreement, KSEB Ltd shall withhold 25% of bill amount from each payment made to the Developer (Retention Amount) and the Retention Amount shall be returned to the Developer or appropriated to the extent required as ordered by the Government in accordance with the provisions of the Implementation Agreement.”

42. With the above observation and directions on each of the disputes placed before the Commission by the petitioner M/s Anakampoil Power Private Limited and the respondent KSEBL, the Commission hereby direct the petitioner M/s Anakampoil Power Private Limited and the respondent KSEBL to sign the PPA within one month from the date of this Order.

Order of the Commission

43. The Commission, after detailed examination of the petition filed by M/s Anakampoil Power Private Limited, the comments of the respondent KSEB Ltd, the provisions of the Electricity Act,2003, KSERC (Renewable Energy & Net Metering) Regulations, 2020 & its amendments, and other Rules, Regulations and prudent practices, hereby orders the following;

- (1) Approve the draft Power Purchase Agreement (PPA) duly initialled by the petitioner M/s Anakampoil Power Private Limited and the Respondent KSEB Ltd with the inclusions/ modifications as approved in the preceding paragraphs of this Order.
- (2) The petitioner M/s Anakampoil Power Private Ltd and respondent KSEBL shall sign the PPA within one month from the date of this Order.
- (3) A copy of the signed PPA shall be submitted before the Commission for information and record.

The petition is disposed of. Ordered accordingly.

**Sd/-
T K Jose
Chairman**

**Sd/-
Adv. A J Wilson
Member**

**Sd/-
B Pradeep
Member**

Approved for issue

**Sd/-
C R Satheesh Chandran
Secretary**