



ARUNACHAL PRADESH STATE ELECTRICITY REGULATORY COMMISSION
O.T. BUILDING, 2ND FLOOR, NITI VIHAR MARKET, T.T. MARG
NITI VIHAR, ITANAGAR - 791111
Tel : 0360-2310642, Fax : 0360-2310643, E-mail : apserc-arn@gov.in
website : www.apserc.nic.in

No. F. APSERC/RA-8/III/2023-24/152

BEFORE THE

ARUNACHAL PRADESH STATE ELECTRICITY REGULATORY COMMISSION,

ITANAGAR

PETITION NO: MP-03 of 2024.

Coram:

Hon'ble Chairperson, Mr. R. K. Joshi

Hon'ble Member (Law), Mr. Nich Rika

Appearance:

1. Er. Duyu Tacho, Chief Engineer (Commercial) Department of Power.
2. Er. O Chiram, SE, Department of Power.
3. Er. Rajesh Kumar, JE, Department of Power. (For Petitioner)
4. Ms. Shikha Ohri, Advocate
5. Mr Parinay Deep Sah, Advocate (For Respondent)
6. Mr. Choudhury Prasanjit Mishra, Director.
7. Mr. Neeraj Kumar

In the matter of:

Petition for approval of the Power Purchase Agreement between Department of Power, Government of Arunachal Pradesh and M/s Kangteng Hydro Power Pvt. Ltd.

In the matter of:

Department of Power, Govt. of Arunachal Pradesh, Vidyut Bhawan,
Itanagar, Arunachal Pradesh (DOPAP)

..... **Petitioner**

Versus

M/s Kangteng Hydro Power Pvt. Ltd.

..... **Respondent**

Date of Order: 12th June 2024

This petition has come up for hearing finally on **8.05.2024**. After carefully considering the materials available on record and after hearing the arguments from both the parties, the commission passed the following

ORDER

1. The instant petition has been filed by the petitioner, Department of Power, Government of Arunachal Pradesh, Itanagar (hereinafter referred to as the "DOPAP") seeking approval from the Hon'ble Commission in regard to the Power Purchase Agreement (hereinafter referred to as the "PPA") with respondent M/s Kangteng Hydro Power Private Limited (hereinafter referred to as the "KHPPL").
2. The respondent, KHPPL on 05. 03. 2024 had submitted its reply to the petition and has shown to supports the present petition but prays to seeks modification in Clause 6 of the PPA.

Submissions of the petitioner:

3. The petitioner has submitted that.
 - i. On 23.06.2022 a Memorandum of Agreement (MOA) was signed between M/S Raajratna Energy Holdings Private Limited & M/S Alliance Trading Company Consortium, Plot No. 304-L-III, Road No. 78, Jubilee Hills, Hyderabad, Telangana - 500096 and the Government of Arunachal Pradesh on 23-06-2022, for the execution of Khantang Hydro Electric Project (3 X 2.5 MW) on Build, Own, Operate and Transfer (BOOT) basis for a lease period of 50 years.
 - ii. As per Provision in clause No.2.23 on Page No. 11 of MOA, M/S Raajratna Energy Holdings Private Limited has created a Special Purchase Vehicle (SPV) in the name and style of M/S Kangteng Hydro Power Private Limited, Plot No. 304-L-III , Road No. 78, Jubilee Hills, Hyderabad, Telangana - 500096 for implementation of this project which is acknowledged vide letter No. HPD(M)-120 11/16/2022 – O/o CE(M)-HPD/943-45, dated 14-07-2022.
 - iii. As per clause 5.1 of MOA, the highest bid of M/S Raajratna Energy Holdings Private Limited & M/S Alliance Trading Company Consortium accepted for 4.6% Free Power over and above 8% base, totalling 12.6% free power vide Letter No. CE(M)/HPD/W225/Khantang/2009-10/238-47 dated 11-05-2022.
 - iv. The Arunachal Pradesh State Govt. has approved for Power Purchase Agreement (PPA) and accorded the willingness of the state to buy power from Khantang Hydro Electric Project vide

file No CE(COM)/PPA/KHANTANG/117/2022-23(Computer No. 82650) under Note # 13 dated 19/10/2022 timed 10:57 AM.

- v. The Petitioner has got the Draft PPA duly vetted by Finance Department (under File No. CE(COM)/PPA/KHANTANG/117/2022-23 (Computer No. 82650) Note # 39 dated 30/01/2024 and timed 12:53 PM) and Law Department (under File No. CE(COM)/PPA/KHANTANG/117/2022-23 (Computer No. 82650), Note # 39 dated 16/01/2024 and timed 01:59 PM) Government of Arunachal Pradesh.
- vi. Draft Power Purchase Agreement (PPA) duly initialed by both the parties is attached with the petition.
- vii. Thus the Petitioner now seeks the Approval of the APERC on the Draft Power Purchase Agreement (PPA).

Submissions of the respondent:

- 4. Respondent in a written reply submitted that:
 - i. KHPPL supports the present petition and seeks the approval of this Hon'ble Commission for the PPA between DOPAP and KHPPL. However, prayed that this Hon'ble Commission may graciously be pleased to approve the PPA between DOPAP and KHPPL, after modifying Clause 6, as follows:

Article 6.1

DoPAP shall accept and purchase the power made available to DoPAP's system, from the KHPPL facility at the project specific levelised tariff (as per DPR) @ ₹ 3.84 per unit (with transmission line) or as determined by the APERC (Arunachal Pradesh State Electricity Regulatory Commission) under the provisions of relevant Regulations, as amended from time to time. "

Article 6.2

May pleased be deleted as the contents has been covered under Article 6.1

- ii. That the existing clause -6, in the PPA is contrary to the provisions of the Electricity Act, 2003 and undermine the powers of this Hon'ble Commission. The existing Clauses of the PPA are reproduced hereunder, for ready reference:

"6.0 TARIFF

6.1 DoPAP shall accept and purchase the power made available to DoPAP's system either directly or through the transmission licensee's system, from the KHPPL facility at the project-specific levelised tariff @ ₹ 3.84 per unit (with transmission line). or as determined by the APERC (Arunachal

Pradesh State Electricity Regulatory Commission) under the provisions of relevant Regulations, as amended from time to time whichever is lower."

6.2 As per Clause 5.2 of the MOA, the State Government will pay 10 paisa lower than the tariff as determine by the CERC/SERC or the State Govt. as the case may be."

- iii. It is pertinent to mention herein that the tariff of Rs. 3.84/- per unit (as mentioned in Clause 6.1), is based on the TEC of the Project which was based on the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020. However, tariff for the Project has to be determined on the basis of the Arunachal Pradesh State Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2018 and not the CERC Regulations.
- iv. In the MOA signed between M/S Raajratna Energy Holdings Private Limited & M/s Alliance Trading Company Consortium and the Government of Arunachal Pradesh on 23.06.2022 states the following:

"5.2 Over and above the free power, the State Government will purchase the power generated from the Project at a tariff Rs. 0.10 less as finalised by State Electricity Regulatory Authority or as per tariff of TEC whichever is less. A separate PPA will be entered into for such purchase of power between the State Government and the Company."
- v. The aforesaid clause is an encroachment upon the powers and functions solely vested under the provisions on the Electricity Act, 2003, upon this Hon'ble Commission. It is most respectfully submitted that in terms of Section 62 of the Electricity Act, 2003, the power to determine tariff has been solely vested in the Appropriate Commission, which shall be guided by the principles (cost-plus tariff determination) specified under Section 61 of the Electricity Act, 2003 while discharging such function. The abovementioned provision is in contravention of Section 62 of the Electricity Act, 2003.
- vi. It is a settled principle of law that the very purpose of the creation of the Regulatory Commissions is to distance the Government from the tariff determination process and to ensure that the tariff is determined on a viable basis to recover the cost of expenditure of the licensees **(para 35, Delhi Transco Limited vs. Delhi Electricity Regulatory Commission & Ors., Appeal No. 184 of 2011, judgment dated 27.02.2013).**

vii. In the case of ***Polyplex Corporation Limited vs. Uttarakhand Electricity Regulatory Commission (Appeal No. 41, 42 and 43 of 2010)***, by a judgment dated 31.01.2011, it was held that in matters of tariff determination, the State Commission is bound only by its Tariff Regulations and not the directions issued by the State Government under Section 108 of the Electricity Act, 2003.

viii. In ***PTC India Ltd. v. CERC (2010) 4 SCC 603***, it has categorically held that once the Appropriate Commission frames and notifies regulations, then it is bound by such regulations and further that the regulations so framed override even existing contracts between the Parties.

ix. That The KHPPL has filed a petition, before this Hon'ble Commission seeking determination of tariff under Section 62 of the Electricity Act, 2003 (36 of 2003) read with provisions of the APERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2018. In the said petition, KHPPL has, inter alia, sought the following prayers:

In the facts and circumstances mentioned above, it is respectfully prayed that the Hon'ble Commission may be pleased to:

- a. Determine levelized tariff of Rs. 4.35/kWh, in terms of Section 62 of the Electricity Act, 2003 for the 7.5 Small Hydro Project of the Petitioner.
- b. Approve the power purchase agreement with a levelized tariff of Rs. 4.35 /kwh for the 7.5 MW Small Hydro Project of the Petitioner and,
- c. It is most respectfully submitted that the ceiling tariff provided in the existing Clause 6 of the PPA, will render the Project economically unviable and it is humbly prayed that this Hon'ble Commission may take the aforesaid into consideration while granting approval of the PPA. It is stated that disposal of the present petition, without considering the tariff petition filed by KHPPL will render the aforesaid prayers infructuous. In light of the aforesaid, it is prayed that this Hon'ble Commission may be pleased to approve the present PPA with the modifications proposed by KHPPL herein. In the alternative, the Hon'ble Commission may consider tagging the present petition with the tariff determination proceedings. KHPPL, in the tariff petition, has demonstrated the difference in levelized tariff calculated under the CERC and the APERC Regulations. It is further pertinent to note that the useful life of the Project under the CERC Regulations is 40 years, whereas the same is 35 years, in terms of the APERC RE Regulations.

- x. In M/s. Gayatri Sugars Ltd. v. APNPDCL & Anr. (Appeal No. 310 of 2013) by a judgment dated 20.11.2014 it was held that the power of the State Commission to modify the terms of existing long term concluded PPA, especially where the tariff of a renewable project agreed to between the parties is unviable. According to the Appellant the production of electricity is commercially unviable by showing various circumstances. The variable cost in so far as the present case is concerned had been determined by the State Commission by the Order dated 31.03.2009 for the period 2009-2014 and for the period 2014-2019, the State Commission determined the same on 16.05.2014. Thus, the variable rates as determined by the State Commission from time to time coupled with the fixed cost exceed tariff ceiling in Schedule 1A of the PPA. Moreover, the cost of production of electricity far exceeds the rate at which it is being sold to the distribution licensee.

Hearing on dated 06/03/2024:

5. During the adjudication period the Commission vide ROP of hearing dated 06/03/2024 directed the Petitioner to submit the requisite fee and rejoinder affidavit on the written reply of respondent within 7 days.

Additional submission and time extension request of petitioner:

6. In additional submission, Petitioner submitted that.
- i. The present petition was just for approval of consented PPA between the parties, but surprisingly on 06/03/2024 the applicant came to know about an Affidavit-in-Opposition filed by the respondent just before scheduled hearing. Here it needs to be mentioned that though the respondent submitted the Affidavit – in – Opposition to the “Despatch & Received branch” on 05/03/2024 but same came to knowledge of the applicant only just before scheduled hearing on 06/03/2024 as such the applicant could not go through the content of the Affidavit-in-Opposition properly. During the hearing only the applicant was made to understand that there is some claims and objection by the Respondent. Accordingly, this Hon’ble Commission granted 1 (one) week time to file necessary reply to the Affidavit-in-Opposition filed by the respondent.
 - ii. After completion of hearing, passed instructions to the concerned sub-ordinate officer to coordinate with the Standing Counsel of the department to draft necessary reply in the case. There only, the Petitioner was informed by the Standing Counsel of the department that the copy of the Affidavit-in-Opposition served to the applicant is not in proper order and not readable and understandable as the continuity of the pages are not maintained.

- iii. The Petitioner most respectfully prayed that this Hon'ble Commission may be pleased, to direct the respondent to re-furnish a proper and understandable "affidavit-in-Opposition" with annexure to the Petitioner AND further may be pleased to grant 3 (three) weeks to the Petitioner to submit the necessary reply in the case; the 3 (three) weeks reckoned from the day on which the Respondent re-furnishes a proper and understandable affidavit-in-Opposition with annexure to the Petitioner.

Rejoinder filed by the petitioner:

7. On the time extension granted by the Commission as requested by the petitioner, in reply to the Affidavit-in-opposition of Respondent, Petitioner further submitted following.
- i. The petitioner filed a petition before Hon'ble Commission praying approval of PPA between the Respondent (M/S Kangteng Hydro Power Private Limited) and Petitioner, as a follow up action, after receipt of approval of the very same draft PPA from the competent authority of the Government of Arunachal Pradesh, duly vetted by the Law Department of Govt of Arunachal Pradesh.
 - ii. That the Department of Power, Govt. of Arunachal Pradesh has received a copy of the Affidavit-in-Opposition from Hon'ble Commission filed by the Respondent.
 - iii. That saves and except, the statements made in the Affidavit in-Opposition which are specifically admitted, the rest are deemed to be denied which are not contrary to record.
 - iv. That as regard to the averments made in para I of the Affidavit-in-Opposition, the Petitioner/Deponent begs to submit that the Power Purchase Agreement (PPA) submitted before Hon'ble Commission is mutually consented Power Purchase Agreement (PPA) between the parties; and the very same draft PPA was approved by the competent authority of Govt. of Arunachal Pradesh, duly vetted by the Law Department of Arunachal Pradesh.
 - v. That as regard to the averments made in para 3 of the Affidavit-in-Opposition, the Petitioner/Deponent begs to submit that it is absurd on the part of the Respondent to support the approval of mutually consented PPA on one hand and on the other hand is seeking modification of Clause 6 of the PPA. The Respondent cannot approbate and reprobate something simultaneously. The draft PPA submitted for approval before this Hon'ble Commission had been duly consented by the Respondent and approved by competent authorities of the Government of Arunachal Pradesh after following due process of procedures as prescribed by the Government of Arunachal Pradesh. Further, the Petitioner/Deponent begs to submit that clause 6 in the PPA was incorporated as per the clause 5.2 of the Memorandum of Agreement (MoA), which was agreed and signed by the Respondent. Therefore, if the

Respondent has any objection against mutually consented draft PPA prepared in line with the MOA then the Petitioner/Deponent has no alternative other than to withdraw the petition filed for approval of the Draft PPA before this Hon'ble Commission.

- vi. That as regard to the averments made in the Affidavit-in-Opposition, the Petitioner/Deponent begs to submit that Clause 5.2 of the Memorandum of Agreement (MOA) was result of mutually agreed terms and conditions between the parties.
- vii. That as regard to the averments made in the Affidavit-in-Opposition, the Petitioner/Deponent begs to submit that there is no question of encroachment upon the powers and functions solely vested on this Hon'ble Commission under the Electricity Act, 2003. At the cost of repetition, it is again reiterated that Clause 5.2 of the Memorandum of Agreement (MoA) was result of mutually agreed terms and conditions between the Government of Arunachal Pradesh and the Respondent. Moreover, the Memorandum of Agreement (MoA) dated 23/06/2022 was entered by the competent authority of the Government of Arunachal Pradesh in pursuance to policy decision of State Government and therefore, the Petitioner/Deponent has no authority to comment on the legality and validity of Memorandum of Agreement (MOA) dated 23/06/2022. Now, at this juncture, due to unethical and last-stage objection of the Respondent, the Petitioner/Deponent has no alternative remedy other than to withdraw the petition filed for approval of draft PPA from this Commission and place the matter before the competent authority of the Government of Arunachal Pradesh for appropriate decision. Further, the Petitioner (Deponent begs to submit that in any circumstances this Hon'ble Commission is not appropriate forum to test the legality and validity of the Memorandum of Agreement (MoA) dated 23/06/2022.
- viii. That as regard to averment made in the Affidavit in-Opposition, the Petitioner/Deponent begs to submits that the case cited by the Respondent has no similarity and relevancy with the case in hand. The case cited by the respondent is pertaining to an issue about Hon'ble Commission's power to determined viable tariff, on which the Petitioner/Deponent has no dispute. But in the case in hand the draft PPA is mutually consented and as the Respondent had agreed on the terms and conditions of draft PPA so it can safely be assumed and concluded that the tariff mentioned in the Draft PPA is viable to the Respondent. So, last stage objection by the Respondent is unacceptable.
- ix. That as regard to the averments made in the Affidavit-in-Opposition, the Petitioner/Deponent begs to submit that the case cited by the Respondent have no relevance and similarity with the case in hand. The case cited by the Respondent is pertaining to an issue about whether this Hon'ble Commission is bound by the direction issued by the State Government under Section

108 of the Electricity Act, 2003 in tariff determination. But in this instant case, no such direction to determine the tariff is given by the State Govt. to the Commission. As per Clause 5.2 of the MOA, which was duly accepted and signed by the Respondent states that "the state Govt. will purchase the power generated from the project at a tariff Rs. 0.10 less as finalised by the State Electricity Regulatory Commission or as per tariff of TEC whichever is less". Accordingly, the Petitioner/Deponent prepared the draft PPA which was duly ratified by the Respondent himself, approved by the competent authority of the Government of Arunachal Pradesh and then filed the petition before the Hon'ble Commission for approval of the same. Therefore, the last stage objection of the Respondent is beyond imagination and is unacceptable.

- x. That as regard to the averments made in the Affidavit-in-Opposition, the Petitioner/Deponent begs to submit that after giving consent to the draft PPA, the objection raised by the Respondent at this last stage is not desirable and not acceptable. Under these circumstances, the Petitioner/Deponent has no other alternative other than to withdraw the petition filed for approval of draft PPA from this Hon'ble Commission for the simple reason that the Petitioner/Deponent cannot file a petition for approval of a draft PPA which is not approved by the state Govt.
- xi. That as regard to the averments made in the Affidavit-in-Opposition, the Petitioner/Deponent begs to submit that the case cited by the Respondent has no similarity and relevancy with the present case before this Hon'ble Commission. So, the Petitioner/Deponent out rightly objects such irrelevant citation by the Respondent before this Hon'ble Commission.
- xii. That as regard to the averments made in the Affidavit-in-Opposition, the Petitioner/Deponent begs to submit that the statement of the Respondent is objectionable and not acceptable. In the draft PPA it is clearly mentioned that the state Govt. will purchase power generated from the project at Rs. 0.10 lower than the tariff finalised by the SERC or fixed by the TEC whichever is less. This condition is as per the relevant clause of the MoA which was duly accepted and signed by the Respondent. And therefore, the Petitioner/Deponent begs to submit that there is no connection in between the tariff petition filed by the Respondent to the Commission and the instant case of petition filed by the Petitioner/Deponent for approval of a draft PPA already ratified by the respondent and duly approved by the competent authority of the Government of Arunachal Pradesh. If the Respondent is insisting on modification of draft PPA filed by the Petitioner/Deponent before this Hon'ble Commission then the Petitioner/Deponent has no alterative other than to make a prayer before this Hon'ble Commission to allow the Petitioner/Deponent to withdraw the petition filed for approval of draft PPA so as to enable the Petitioner/Deponent to place the objections of the Respondent before the State Government for

appropriate decision as the Deponent/Petitioner is not competent to modify the draft PPA already approved by the competent authority of Government of Arunachal Pradesh.

- xiii. That as regard to the averments made in the Affidavit-in-Opposition, the Petitioner/Deponent begs to submit that at the cost of repetition it is again submitted that the case cited by the respondent has no similarity and relevancy with the present case before this Hon'ble Commission so the Petitioner/Deponent out rightly object such irrelevant citation by the respondent before this Hon'ble Commission. In the case cited by the respondent the issue was about treatment of the petitioner therein at par with other generator whereas in this case the draft PPA is only between the Department of Power, Government of Arunachal Pradesh and the respondent, there is no other party with whom the respondent would claim parity.
- xiv. That as regard to the averment made in the Affidavit-in-Opposition, the Petitioner/Deponent begs to submit that the Petitioner / Deponent do not agree with the statement of the Respondent on the ground that the Detailed Project Report (DPR) was prepared by the highly rated consultant, the IIT, Roorkee where it is shown that the project is economically viable at tariff of Rs. 3.84 per unit. Further, the Petitioner/Deponent begs to submit at the cost of repetition that there is no relation in between the Tariff Petition filed by the Respondent and the Petition filed by the Deponent/Petitioner to the Commission for approval of the draft PPA. Now, contrary to the commitment made in the MOA; if the Respondent insists on modifying the already consented Draft PPA approved by the competent authority of Government of Arunachal Pradesh then, it is humbly prayed that this Hon'ble Commission may be pleased to allow the Petitioner/Deponent to withdraw the petition filed for approval of draft PPA before this Hon'ble Commission so as to allow the Petitioner/Deponent to place the objections of the Respondent before the State Government for appropriate decision as the Deponent/Petitioner is not competent to modify the draft PPA, already approved by the competent authority of the Government of Arunachal Pradesh. And, in such turn of event, it is also humbly prayed that the respondent may be made to bear the cost of filing the petition by the petitioner, since the respondent has caused this extraneous and unproductive work for the petitioner.

WRITTEN "REPLY -IN- OPPOSITION" OF RESPONDENT:

8. Respondent in its Reply- in- opposition to the rejoinder of petitioner has submitted that
- i. Department of Power, Government of Arunachal Pradesh (hereinafter referred to as the "Department") by its affidavit in reply dated 26.03.2024 has opposed the Respondent's prayer for modification of Clause 6 of the PPA on, *inter alia*, the following grounds:

- a. The Respondent has consented to the draft PPA and cannot seek a modification thereof. As the Respondent has agreed on the terms and conditions of the draft PPA, it can be assumed that the tariff mentioned therein is viable to the Respondent;
 - b. Clause 6 of the draft PPA is based on Clause 5.2 of the Memorandum of Understanding (MoA) signed by the Respondent with the Government of Arunachal Pradesh;
 - c. There is no connection between the tariff petition filed by the Respondent and the instant petition filed by the Department/ Petitioner for approval of the draft PPA.
- ii. In response to the aforesaid, the Respondent humbly submits as follows:
- a. Clause 5.2 of the MoA states as follows:

"5.2 Over and above the free power, the State Government will purchase the power generated from the Project at a tariff Rs. 0.10 less as finalised by State Electricity Regulatory Authority or as per tariff of TEC whichever is less. A separate PPA will be entered into for such purchase of power between the State Government and the Company."

Thus, the MoA provides for sale of electricity from the Project to the Petitioner at a tariff Rs. 0.10 less than the tariff finalised by this Hon'ble Commission or the tariff as per the TEC, whichever is less. In the present case, the TEC provides for a tariff of Rs. 3.84/- per unit. Accordingly, Clause 6 of the draft PPA provided by the Department/ Petitioner mentions a project-specific levelized tariff of Rs. 3.84/unit. The relevant clause is reproduced hereunder for convenience:

"6.0 TARIFF

6.1 DoPAP shall accept and purchase the power made available to DoPAP's system either directly or through the transmission licensee's system, from the KHPPL facility at the project-specific levelised tariff @ ₹ 3.84 per unit (with transmission line) or as determined by the APERC (Arunachal Pradesh State Electricity Regulatory Commission) under the provisions of relevant Regulations, as amended from time to time whichever is lower.

6.2 As per Clause 5.2 of the MOA, the State Government will pay 10 paisa lower than the tariff as determine by the CERC/SERC or the State Govt. as the case may be.

It is most respectfully submitted that Rs. ₹ 3.84 per unit (as mentioned in Clause 6.1) and as also provided in the TEC of the Project, is based on the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020. However, tariff for the Project has to be determined on the basis of the Arunachal Pradesh State Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable

Energy Sources) Regulations, 2018 and not the CERC Tariff Regulations. In fact, the tariff petition filed by the Respondent herein is for seeking determination of Project-specific tariff of the Project, in terms of the Arunachal Pradesh State Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2018. Thus, the figure of Rs. ₹ 3.84 per unit (as mentioned in Clause 6.1) is erroneous and cannot be relied upon. In the interest of complete and proper adjudication of the issues arising between the parties, it is necessary for the present petition to be tagged/ heard along with the tariff petition filed by the Respondent herein. This will ensure that a tariff determined in line with the provisions of the Arunachal Pradesh State Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2018 read with the MoA is made applicable to the Project. This will also address the concerns of the Department and ensure a viable tariff is determined for the Project.

The tariff (as proposed by the Petitioner herein) of Rs. 3.84 per unit (as mentioned in Clause 6.1 of the draft PPA) is based on the TEC and not the MoA, which TEC has erroneously computed tariff on the basis of the CERC RE Regulations instead of the APSERC Regulations. It is pertinent to mention herein that it is not the case of the Petitioner that the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 ought to be made applicable to the Project. Once it is admitted that the relevant regulations in the present case are the Arunachal Pradesh State Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2018, it is critical that the present petition be tagged with the tariff determination petition filed by the Respondent, to ensure a tariff determined in terms of Section 62 of the Electricity Act, 2003 read with the Arunachal Pradesh State Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2018 and the MoA, is incorporated in the PPA.

The Respondent most respectfully submits that the power/jurisdiction to determine tariff solely vests in this Hon'ble Commission, which fact also stands recognised in the MoA.

Accordingly, the Respondent is proposing Clause 6 of the draft PPA to be modified as under:

"Article 6.1

DoPAP shall accept and purchase the power made available to DoPAP's system, from the KHPPL facility at the project-specific levelised tariff (as per DPR) @ ₹ 3.84 per unit (with transmission line) or as determined by the APSERC (Arunachal Pradesh State Electricity

Regulatory Commission) under the provisions of relevant Regulations, as amended from time to time.

Article 6.2

May please be deleted as the contents has been covered under Article 6.1

Apart from the aforesaid, it is pertinent to mention herein that the Project is ready for commissioning and the Respondent is being denied connectivity as the draft PPA is pending approval. In the absence of a duly approved PPA, the Respondent is unable to commission the Project and is facing an imminent threat of stranded capacity. It is humbly submitted that the Respondent has incurred a project cost of Rs. 8199.53 Lakhs and has duly completed the Project, in line with the directives of the Government of Arunachal Pradesh. Under such circumstances, any further delay in approval of the PPA and determination of tariff for the Project in accordance with the provisions of the Arunachal Pradesh State Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2018 is causing severe prejudice to the interest of the Respondent. Courts have time and again recognised that stranded generation is a national loss. Accordingly, this Hon'ble Commission may approve the PPA and determine tariff applicable to the Project in terms of Arunachal Pradesh State Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2018, at the earliest.

Thus, it is humbly prayed that this Hon'ble Commission may graciously be pleased to list the tariff petition filed by the Respondent, at the earliest, and in the interim permit the Respondent to commission its Project and supply electricity to the Petitioner at a provisional/interim tariff of Rs. 3.84/unit, subject to adjustment once the final tariff is determined.

- b. It is denied that the tariff of Rs. 3.84/unit is viable for the Respondent, which is why the Respondent has consented to it. It is most respectfully submitted that the Respondent vide its letters dated 07.06.2023, 06.12.2023 to the Petitioner herein and letter dated 08.02.2024 to this Hon'ble Commission objected to the tariff of Rs. 3.84/unit and asserted the fact that the sole jurisdiction to determine tariff vests in this Hon'ble Commission.
- iii. In view of the aforesaid facts and submissions it is humbly prayed that this Hon'ble Commission may graciously be pleased to approve the draft PPA with the modifications suggested by the Respondent and/or tag the present petition with the tariff petition filed by the Respondent herein.

COMMISSION'S ANALYSIS & ORDER

9. On the above written submission, a hearing was conducted on 08.05.2024 and after hearing the oral arguments put forth by both the sides and going through their written submissions, commission analysed the case as below.

- i. It's a matter of a Hydro Power Project, allotted to a private developer by Government of Arunachal Pradesh (GoAP) as per its Small Hydro Power Policy on the basis of a competitive bid where free power was made bidding criteria. The successful bidder quoted 4.6% additional free power over & above 8% mandatory, thus making free power from the project as 12.6%.
- ii. The Developer and GoAP, entered into an agreement (MoA) for development of the project. The specific relevant clauses with the matter are as below.

Clause 2.26 The DPR of the project submitted by the company for System Coordination & Techno-Economic Clearance (SC&TEC) shall be scrutinised by the standing committee, appointed by the State Government on its own or through the consultant. The standing committee shall look into all facets of the project viz.(a)Coordinated system planning of the project (b)Technical Soundness of the project and (c) Economy of the project for the purpose of accord of System Coordination & Techno-Economic Clearance (SC&TEC).

Clause 5.2 Over and above the free power, the State Government will purchase the power generated from the Project at a tariff Rs. 0.10 less as finalised by State Electricity Regulatory Authority or as per tariff of TEC whichever is less. A separate PPA will be entered into for such purchase of power between the State Government and the Company."

- iii. Accordance to these conditions of MoA, TEC for Rs. 8199.53 Lakhs based on the appraisal of Detail Project Report (DPR) made by IIT Roorkee as the consultant of State Government was accorded to the developer by the State Government on the recommendation of standing committee. The relevant clauses of the TEC which will be required for analysis is as below.

4(iii) Developer accepted to sign the PPA on the tariff as per DPR i.e @ Rs.3.84 / unit at 61.02% PLF and Rs. 5.02 at 45% PLF or as decided by SERC, whichever is lower.

- iv. In furtherance to the MoA and TEC clauses, a Power purchase agreement (PPA) is initiated between petitioner and developer. Agreement reached between them for all the proposed conditions in PPA except clause 6 which is as below.

"6.0 TARIFF

6.1 DoPAP shall accept and purchase the power made available to DoPAP's system either directly or through the transmission licensee's system, from the KHPPL facility at the project-specific levelised tariff @ ₹ 3.84 per unit (with transmission line) or as determined by the APERC (Arunachal Pradesh State Electricity Regulatory Commission) under the provisions of relevant Regulations, as amended from time to time whichever is lower.

6.2 As per Clause 5.2 of the MOA, the State Government will pay 10 paisa lower than the tariff as determine by the CERC/SERC or the State Govt. as the case may be.

10. While examining these clauses for veracity and legality in the regulated regime of power sector as per Electricity Act-2003, it is noted that in the plain reading of MoA condition clause 2.26 regarding SC&TEC, is not interfering with EA Act 2003, but while examining the conditions mentioned in TEC order clause 4(iii), it is found that it is reflecting different tariff for different PLFs and restricting the developer to sell power at a tariff of TEC and APERC's determined tariff, whichever is lower. Respondent in its reply -in- opposition also mentioned that the TEC tariff is calculated on the basis of old CERC regulation and not on the prevalent APERC tariff regulation as amply explained in DPR Clause 8.3(c), 8.4(a) and 8.9. It is a well settled law available in various rulings of Hon'ble higher courts that the tariff of power procurement will be decided based on the relevant regulations by the State Regulatory Commissions and there is no provision of purchasing power from any project on a negotiated tariff. Here a discussion about Section 61 of Electricity Act-2003, perhaps will come in front to decide the course of justice. The basic principles on which tariff is to be determined as laid down in Section 61 of the Act are that generation, transmission and distribution and supply of electricity should be conducted on commercial principle; factors which would encourage competition, efficiency, economic use of resources, good performance and optimum investment are to be kept in mind: ***Punjab State Power Corporation Limited v. Punjab Electricity Regulatory Commission A.I.R. 2015 S.C.1190:(2015)6 S.C.C.387.*** The part of clause as articulated in MoA restricting the tariff is in contradiction to the provisions of Electricity Act Clause 61 & 62 which provide that the appropriate Commission shall determine the tariff in accordance with the provisions of the EA-2003 for supply of electricity by a generating company to a distribution licensee and therefore, to that extent the TEC order is FOUND, contravening the provisions of Electricity Act 2003.
11. Simultaneously, the other part of Clause 5.2 of MoA regarding Rs 0.10 lesser than the rate decided by the commission or TEC, also needs to be analysed for similar interference. The concession of Rs 0.10 as articulated into MoA can be analysed in two ways.

- a. To agree to sell power @ 10 paisa less than the tariff decided by APERC is a commercial decision of Respondent while selling his power to State Government and he is ready to part away his Return on Capital/Equity to that extent without passing it on to tariff. As this is a policy provision of Government of Arunachal Pradesh notified under Small Hydro Power policy 2007, and the developers who have signed the MOA having such provisions are well conversant of the impact of the clause in their revenue streams during operation of the project.
- b. Or it is an indirect attempt to disturb the regulated electricity market regime, which otherwise needs a discovery of tariff in accordance to the tariff regulations by the Regulatory Commission to enhance the growth of sector as a whole and make enabling environment to imbibe competition, efficiency and economy in the activities of electricity industry in the state. Any policy or a contract impacting it to lower or higher side subsequent to tariff fixation by APERC, shall be considered as "negotiated ", which is in clear conflict of provisions of section 86(1)(a) & (b) of EA-2003.

After careful examination of the clause, it is clear that any provision in any Policy or contract leading to a negotiated tariff is certainly in contradiction to the provisions of tariff fixation by Regulatory Commission according to the provisions of 86(1)(a) &(b), section 62 and section 63 of the Electricity Act-2003. This part can also be analysed in two ways. One is that, it is a conflict between two different laws of State Government Policy and EA-2003, or second it's not interfering the tariff fixation powers of appropriate commission but impacting the revenue after the determination of tariff by Commission based on a private agreement on the will of the generator.

12. On the aspect of interference of an existing law with the provisions of EA 2003, as the policy document of State Government is also having the support of legal jurisprudence. Here comes the clause 173,174 & 175 of the Act for help. The provisions are as below.

Clause 173- Inconsistency in laws- Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or Regulation shall have effect insofar as it is inconsistent with any other provisions of Consumer Protection Act-1986(68 of 1986) or the Atomic Energy Act, 1962 (33 of 1962) or the Railways Act, 1989(24 of 1989).

Clause 174-Act to have overriding effect- Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Section 175- Provisions of this Act to be in addition to and not in derogation of other laws- Any provision of this Act are in addition to and not in derogation of any other law for time being in force.

In **A. P. Power Coordination Committee vs Lanco Kondapalli Power Ltd., (2016) 3 SCC 468**, the Supreme Court held that a plain reading of section 175 leads to a conclusion that, unless the provisions of the Electricity Act are in conflict with any other law- when the Electricity Act will have overriding effect as per section 174, the provisions of the Electricity Act will not adversely affect any other law for the time being in force. In other words, as stated in section 175, the provisions of Electricity Act will be additional provisions without adversely affecting or subtracting anything from any other law which may be in force. The Expression "Any other law for the time being in force" in section 175 would cover laws which were in operation when the Electricity Act was enacted as well as laws made after the enforcement of Electricity Act (**Pioneer Urban Land & infrastructure Ltd. Vs Union of India, (2019)8 SCC 416**). The term "in derogation of", used in section 175, would mean "in abrogation or repeal of" (**KSL & Industries Ltd. Vs Arihant Threads Ltd., (2015) 1 SCC 166**) i.e. The Electricity Act will not in any way nullify or annul or impair the effect of the provisions of any other enactment. The effect of section 175 would be that in addition to the provisions of the Electricity Act, in respect of proceedings initiated under the said Act, it will in order for a party to fall back on the provisions of any other Act also. The legislative intent is for the Electricity Act to co-exist along with the other enactment and, save inconsistency, not to annul or detract from its provisions. (**KSL & Industries Ltd. Vs Arihant Threads Ltd., (2015) 1 SCC 166**). As long as the provisions of the other Act are not inconsistent with the provisions of the electricity Act, both the Acts would complement each other. (**Mathwe Varghese Vs. M Amritha Kumar, (2014) 5 SCC 610**).

It is only if there is an inconsistency between the other Act with its provisions, that of Electricity Act will, in view of section 174, prevail (**Forum for people's Collective Efforts Vs, State of W.B., (2021) 8 SCC 599**) and the other Act will yield. Both sections 174 & 175 can be read harmoniously holding that when there is any express or implied conflict, between the provisions of Electricity Act, 2003 and the other Act, the provisions of Electricity Act 2003, will prevail, but when there is no conflict, express or implied, both the Acts should be read together. (**Gujrat Urja Vikash Nigam Ltd. V. Essar Power Ltd., (2008)4 SCC 755**).

While applying the above clauses of EA 2003, it will be useful to outline the clause 86(1)(a) &(b) too to properly understand the issue.

Clause 86(1)(a) &(b)

The State Commission shall discharge following functions, namely-

- a. Determine the tariff for the generation, supply, and transmission and wheeling of Electricity, wholesale, bulk or retail, as the case may be, within the state. Provided*

that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

b. Regulate electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from the generating companies or licensees or from the other sources through agreements for purchase of power for distribution and supply within the state

13. The Small Hydro Power Policy 2007 of Government of Arunachal Pradesh in exercise of powers conferred by clause (3) of article 246, entry no 17 in seventh schedule List-11, state list of the constitution of India, which have been notified in Arunachal Pradesh Gazette in February 2008 has a provision for sale of power in clause 17, which is as below.

Clause 17

1. The developer under IPP category can enter into contract to sell power to the State Government through a PPA to be signed within 6 months after signing of MoA at a tariff, 10 paisa lower than the tariff as determined by the CERC/SERC or the State Government as the case may be for sale to outside the state. The point of sale of power shall be at the place of injection to the state grid, unless such point of sale expressly incorporated into PPA. The metering point shall be located at the point of sale defined in the PPA under the policy.

The same clause had been amended by notification dated 30 September, 2011 by Government of Arunachal Pradesh as below.

Amended Clause 17 (Amendment notified on 30th September, 2011)

1. Over and above the free power, the state Government will have the first right to purchase power generated from the project at a tariff 10 paise lower than the tariff as determined by CERC/SERC or the state Government as the case may be. The State Government shall exercise its aforesaid right within 90 days of receipt of such offer from the developer after the DPR is approved from all angles and accord of Technical Clearance (TEC). A separate PPA shall be entered into for such purchase of power between the State Government and the Developer. In case State Government decides not to exercise the aforesaid right, then the developer shall be entitled to sell the power from the project to any other party at its discretion.

14. Now after reading clause 86(1)(a) & (b) with clause 173, 174 & 175 of Electricity Act 2003, and Hydro power policy-2008 clause 17 as amended in 2011, it is clear that the instant case is not about the conflict between the laws as the Policy is expressly accepting the tariff determination powers of appropriate Commission and only provisioning the concession of Rs 0.10 after the

determination of the tariff by commission, which if a generator is willing to part away from his return from the investment through signing a private agreement, it shall impact section 61, 62 & 86 of EA-2003.

15. Therefore, since the other conditions as agreed by both petitioner and respondent do not interfere with provisions of Electricity Act-2003, the only clause-6, where there is a difference of opinion in interpreting the rule position, Commission is clear that no PPA having any negotiated rate can be approved as per provisions of the Electricity Act-2003 by the Commission in accordance of Section 86, read with section 61 & 62. Therefore, the clause 6 of submitted PPA with petition shall stand modified as below.

"6.0 TARIFF"

6.1 DoPAP shall accept and purchase the power made available to DoPAP's system either directly or through the transmission licensee's system, from the KHPPL facility at the project-specific levelised tariff as determined by the APERC (Arunachal Pradesh State Electricity Regulatory Commission) under the provisions of relevant Regulations.

6.2 As per Clause 5.2 of the MOA of generator with the State Government, the DoPAP will pay 10 paisa lower than the tariff as determined by the APERC (Arunachal Pradesh State Electricity Regulatory Commission) under the provisions of relevant Regulations.

16. The petition is disposed of in the terms of the observations and directions contained in para 8-15 cumulative of this order.
17. Ordered accordingly.

Sd/-
(Nich Rika)
Member (Law)

Sd/-
(R. K. Joshi)
Chairperson