

**In the Appellate Tribunal for Electricity,**  
**New Delhi**  
**(Appellate Jurisdiction)**

**APPEAL NO. 157 OF 2016**

**Dated: 9<sup>th</sup> July, 2018**

**Present: Hon'ble Mr. I.J. Kapoor, Technical Member**  
**Hon'ble Mr. N. K. Patil, Judicial Member**

**In the matter of:**

**Viyat Power Pvt. Limited**  
**Viyat Kausthubham**  
**Kariyavattom P.O.,**  
**Trivandrum – 695 581**

**.... Appellant**

**Versus**

**1. Kerala State Electricity**  
**Board Limited (KSEBL)**  
**Vydyuthi Bhavanam**  
**Pattom, Trivandrum – 695 004**

**.... Respondent No.1**

**2. Power Department**  
**Government of Kerala**  
**Secretariat, Trivandrum – 695 001**

**.... Respondent No.2**

**3. Energy Management Centre (EMC),**  
**Sreekrishna Nagar, Sreekaryam**  
**Trivandrum – 695 017**

**.... Respondent No.3**

**4. Agency for Non-Conventional Energy and**  
**Rural Technology (ANERT)**  
**PMG Law College Road**  
**Trivandrum – 695 033**

**.... Respondent No.4**

**5. Kerala State Electricity**  
**Regulatory Commission (KSERC)**  
**K.P.F.C. Bhavanam, C.V. Raman Pillai Road**  
**Vellayambalam**  
**Thiruvananthapuram – 695 010**

**.... Respondent No.5**

**Counsel for the Appellant(s)** : Mr. Buddy A. Ranganadhan  
Ms. Anchal Arora  
Mr. Hires Choudhary

**Counsel for the Respondent(s)** : Mr. P.V. Dinesh  
Ms. Arushi Singh for R-1  
  
Mr. Ramesh Babu for R-5

## **JUDGMENT**

### **PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER**

1. The present Appeal is being aggrieved filed by Viyyat Power Pvt. Ltd.(hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the order dated 2.9.2015 (“**Impugned Order**”) passed by Kerala State Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in OP No. 21 of 2015 wherein the State Commission has upheld the order of the ANERT denying accreditation to the Appellant’s Iruttukanam Stage 1 (2x1.5 MW) Small Hydro Electric power project for obtaining Renewable Energy Certificates (“REC”).
2. The Appellant is a generating company engaged in the generation of electricity from renewable sources and have installed Iruttukanam Stage-1 (2x1.5 MW) Small Hydro Electric Power Project (“**SHP**”) in the State of Kerala.

3. The Respondent No. 1 i.e. KSEBL is the distribution licensee in the State of Kerala having PPA with the Appellant for purchase of electricity from the SHP.
4. The Respondent No. 2 is the power department of Government of Kerala (GoK).The Respondent No. 3 is the Energy Management Centre (EMC) in the State of Kerala.
5. The Respondent No. 4 i.e. ANERT is the Nodal Agency designated by the State Commission to act as the agency for accreditation and recommending the renewable energy projects for registration and to undertake functions under Kerala State Electricity Regulatory Commission (Renewable Purchase Obligation and its Compliance) Regulations, 2010 ("**RPO Regulations 2010**")issued under Section 86 (1) (e) of the Act.
6. The Respondent No. 5 i.e. KSERC is the Electricity Regulatory Commission in the State of Kerala discharging functions under the provisions of the Act.
7. **Brief facts of the case in nutshell as follows:**
  - a) Government of Kerala (GoK), in September 2003 issued public tender for inviting bids through transparent bidding process for allotment of 30 Small/Mini Hydel Projects in the State of Kerala for development by successful bidder on Built, Own, Operate & Transfer (BOOT) basis.

- b) Pursuant to the said bidding process, on 21.6.2004, the Appellant was allotted 2 x 1.5 MW Irrutikanam Stage-I Small Hydro Project (“**SHP**”) at a bid tariff of Rs. 2.40/kWh for a period of 30 years on BOOT basis. On 10.12.2004 Implementation Agreement (“**IA**”) was signed between the Appellant and GoK for execution of the SHP.
- c) On 14.6.2006, the State commission issued KSERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2006 (“**Regulations 2006**”) under Section 86 (1) (e) of the Act, which mandated each Distribution Licensee to purchase a quantum of 5% from renewable sources expressed as percentage of its total consumption during a year and the break-up of the 5% was 2% from SHP, 2% from Wind and 1% from all other sources except Small Hydro and Wind.
- d) The State Commission on 15.12.2006 sent its communication to the Respondent No. 1 regarding its approval to the draft Power Purchase Agreement (PPA) to be signed between the Appellant and the Respondent No.1. GoK approved the draft PPA on 2.6.2007 and the PPA was executed between the Appellant and the Respondent No. 1 on 7.6.2007.
- e) On 14.1.2010, Central Electricity Regulatory Commission (CERC) issued CERC (Terms and conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (“**REC**”

**Regulations**”) which introduced a market-based mechanism to promote renewable energy and facilitate Renewable Purchase Obligations (“**RPO**”). Following the regulations of CERC on REC, the State Commission on 23.11.2010 issued RPO Regulations. CERC designated National Load Despatch Centre (“**NLDC**”) as the Central Agency for REC. The State Commission designated ANERT as the State Nodal Agency for accreditation and recommending the renewable energy projects for registration and to undertake functions under State RPO Regulations.

- f) The State Nodal Agency through process of accreditation authorises or endorses the renewable energy generator and recommends it for registration.
- g) The Appellant synchronised and commissioned the first and second units of the SHP on 18.9.2010 & 19.9.2010 respectively. The State Commission vide order dated 10.10.2013 in OP No. 19 of 2013 declared COD of the SHP w.e.f. 18.9.2010.
- h) The Appellant on 28.12.2013 applied with ANERT for accreditation under Renewable Energy Certificate (REC) mechanism. ANERT vide letter dated 28.10.2014 did not grant accreditation to the SHP stating that the Appellant is deemed to have sold REC along with electricity through PPA signed with Respondent No. 1. On representation from the Appellant, ANERT issued order dated 24.3.2015 again denying the said accreditation.

- i) Aggrieved by the order dated 24.3.2015 of ANERT, the Appellant on 8.5.2015 filed a petition OP No. 21 of 2015 before the State Commission. The State Commission vide Impugned order dated 2.9.2015 confirmed the order dated 24.3.2015 of ANERT.
8. The Appellant is questioning the legality and validity of propriety of the Impugned Order passed by the 5<sup>th</sup> Respondent, the State Commission presented this Appeal for considering the following question of law.
  - a) Whether the Appellant's SHP qualifies to be eligible under Regulation 5 of the CERC (REC) Regulations, 2010 read with the Amendments therein?
  - b) Whether the observations of the State Nodal Agency (ANERT), since confirmed by the Impugned Order, are liable to be rejected in light of the eligibility of Appellant's SHP?
9. We have heard the learned counsel appearing for the Appellant and the Respondents at considerable length of time and also carefully gone through the written submissions and submissions putforth during the hearings. Gist of the same is discussed hereunder.
10. The learned counsel Mr. Buddy A. Ranganadhan appearing for the Appellant submitted the following submissions for our consideration on the issues raised by the Appellant

- a) The Impugned Order is erroneous as the Appellant is eligible for REC in terms of CERC (REC) Regulations 2010 and amendments thereof.
- b) Regulation 5 of the REC Regulations has set out the criteria for entity to be eligible for RECs. The SHP of the Appellant is eligible for REC in terms of Regulation 5 of the REC Regulations viz the Appellant does not have PPA with a preferential tariff and the Appellant sells electricity generated from SHP to the Respondent No. 1 at a price not exceeding the pooled cost of power purchase of the Respondent No. 1.
- c) ANERT has erroneously denied accreditation to SHP based on wrong premise that tariff determined through competitive bidding becomes tariff fixed by the State Commission under Section 63 of the Act, that the SHP is accounted by the Respondent No. 1 under RPO and as the Appellant has no provision for separation of electricity component and renewable energy component as the bidding was predated before the Act and hence the whole benefit is transferred to the Respondent No. 1.
- d) Under Regulation 5 of the REC Regulations there are two options namely to sell energy at preferential tariff fixed by the State Commission or to sell electricity generation and environmental attributes associated with renewable energy generations separately. There is no fixing of preferential tariff by the State Commission for SHP as it was installed based

on competitive bidding process initiated by GoK as such it is eligible entity in terms of Regulation 5 (b) of the REC Regulations.

- e) The State Commission has erred in relying on Regulation 3 of RPO Regulations to suggest that power purchase from SHP being *“purchased from renewable sources already being made by the concerned obligated entity”* as no renewable energy is being sold to the Respondent No. 1 at preferential tariff. The State Commission has erred in discriminating the projects before and after issuance of the REC Regulations by CERC.
- f) The Appellant is also an eligible entity in terms of Regulation 5 (c) of REC Regulations as the tariff as per the PPA for sale from SHP is Rs. 2.40/kWh whereas the preferential tariff set by the State Commission is Rs. 2.44/kWh which is lower than the preferential tariff set by the State Commission. In compliance to Regulation 5 (c) the Appellant sells all the power from the SHP to the Respondent No.1 whereas the cost of purchase of the Respondent No. 1 is Rs. 3.24/kWh which is much higher.
- g) The Appellant continues to be eligible entity for RECs even in terms of 1<sup>st</sup> and 2<sup>nd</sup> amendment to the REC Regulations. The main objective of the said amendments was to encourage new capacity addition and provide alternate mode to the renewable energy generators for recovery of their costs. Further, the Appellant does not have the PPA for sale



of electricity required for the purpose of meeting RPO obligations of the obligated entity and the sale from SHP is not exceeding the pooled cost of power purchase of the Respondent No. 2. Further, the second amendment to the REC Regulations clarifies that in the matter of REC mechanism the Regulations of CERC shall prevail upon the State Regulators' regulations.

- h) The PPA has been executed for sale of electricity only which is clear from the Clause F of the recital. There is no sale of electricity from SHP to meet the RPO obligations of the Respondent No. 1. Accordingly, the Appellant continues to be the owner of the renewable energy component for the purpose of the REC Regulations.
- i) The SHP has been approved by Ministry of Renewable Energy Sources (MNRE) and it has also released the capital subsidy. Further, when PPA was executed, no REC mechanism existed & hence there exists no possibility of selling REC to the Respondent No. 1 in furtherance to RPO obligations and hence it cannot be termed that the PPA was to meet RPO obligation of the Respondent No.1. The denial of accreditation by ANERT on this ground is legally untenable.
- j) The Appellant and the Respondent No. 1 have never executed or expressed willingness to sale/purchase of REC either by order or by contract and hence the observation of ANERT that the purchase of power from SHP must be

accounted for RPO obligations of the Respondent No. 1 is baseless.

- k) The Appellant has also denied the various other findings of the State Commission leading to denial of SHP for accreditation by ANERT. The Appellant has also submitted that it is a settled principle in law that where a statute requires to do certain things in a certain way, the thing must be done in that way only. On this issue, the Appellant has relied on judgements of Hon'ble Supreme Court in case of Selvi J. Jayalalitha v. State of Karnataka (2014) 2 SCC 401 and Association of Management of Private Colleges v. AICTE (2013) 8 SCC 271.
- l) The Appellant has also relied on various judgements of Hon'ble Supreme Court on the issue of reliance of the State Commission on Statement of Objects and Reasons to the REC Regulations & its amendments thereof. These judgements include in case of Aswini Kumar Ghose & Anr. v. Arabinda Bose & Anr. AIR 1952 SC 369, Kavalappa Kottarathil Kochuni & Ors. V. State of Madras & Kerala AIR 1960 SC 1080, Tata Engineering and Locomotive Co. v. Gram Panchayat (1976) 4 SCC 177, Govind Saran Ganga Saran v. Commissioner of Sales Tax &Ors. 1985 (Supp) SCC 205, Kumar Jagdeesh Chandra Sinha &Ors. V. Eileen K Patricia D' Roziare (1995) 1 SCC 164 and Bhaiji v. Sub-Divisional Officer (2003) 1 SCC 692.

m) The Appellant has also relied on the judgements of this Tribunal in case of Him Urja Pvt. Ltd. v. UERC 2016 ELR (APTEL) 0027 on the issue that the tariff in PPA prior to the constitution of the State Commission cannot be adopted under Section 63 of the Act. The Appellant has also relied on the judgement of this Tribunal in case of Penna Electricity Company Ltd. v. TNERC.

11. The learned counsel appearing for the Respondent Nos. 1 and 5 Mr. P. V. Dinesh and Mr. Ramesh Babu submitted the following submissions for our consideration are as follows:

a) The Appellant has been supplying power at the rate discovered through competitive bidding process which was adopted by the State Commission and further the Appellant entered into PPA for supply of power to the Respondent No. 1 and the Respondent No. 1 has been accounting such power to meet its RPO in terms of the RPO Regulations.

b) To encourage the development of the Renewable Energy (RE) sources in resource rich States beyond the RPO level fixed by the State Commissions, the concept of REC was introduced. This concept was to address the mismatch between availability of RE sources and requirement of the obligated entities to meet their RPO.

c) If REC is granted to SHP, the Respondent No. 1 would not be in a position to meet its RPO targets and for which it would have to purchase RECs which would be an additional

burden on the consumers of the State. In FY 2010-11 the Respondent No. 1 has already faced shortage of RPO for which it had to shell out additional money to purchase REC to meet the shortfall as per directions of the State Commission.

- d) Allowing REC to the Appellant would be against the provisions of REC & RPO Regulations. The Respondent No. 1 is also reeling under unrecovered accumulated revenue gap of about Rs. 5000 Cr.
- e) The tariff of the SHP discovered through transparent bidding process ensures full cost recovery and the Appellant is in no way faced with the issue of under recovery of cost. Allowing REC will be additional to the tariff under PPA and the claim of the Appellant is with a motive to reap undue profit at the cost of consumers in the State. This will also attract other RE generators in the State to claim REC creating disadvantage to the Respondent No. 1 and other distribution licensees.
- f) The Forum of Regulators (FOR) in November 2008 decided to formulate a policy for adopting common approach for promotion of RE sources in the country by introducing REC mechanism. This mechanism was formulated at the national level to facilitate interstate transaction of renewable energy from different RE sources. Based on the framework of REC evolved by FOR, CERC issued REC Regulations which specify criteria for RE generators to participate in REC mechanism. According to the said criteria the RE generators

who had already entered into PPA with distribution licensee were not eligible for participation under RE mechanism. This is also clear from detailed procedure approved by CERC on a petition filed by NLDC.

- g) Due to concerns related to breach of existing PPAs by RE generators, CERC issued 1<sup>st</sup> amendment to the REC Regulations which defines validity of existing PPA and eligibility of RE generators for REC. CERC vide second amendment addressed certain ambiguities like contracting RE through competitive bidding and self-consumption by RE generator/ CGP etc. This amendment specified that a RE generator who has factored in all costs and risks involved during the life time of the RE project and offered electricity in totality and not the electricity component and environmental attribute separately, will not be eligible for REC.
- h) Further, CERC vide third amendment made distribution licensee eligible for participating in REC mechanism who has procured RE in excess of its RPO. This makes clear that the distribution licensee can account RE power purchased under Section 62/ 63 of the Act. Thus, accounting of generation from RE source will not make RE generator eligible for REC mechanism. Further, before enactment of REC Regulations, the Appellant had already factored in all cost components and risks in its tariff bid as it was not aware that in future REC mechanism would be available.

- i) This Tribunal has also reiterated the above position in its judgement dated 19.5.2016 in Appeal Nos. 251/325 of 2013 in case of Timarpur Okhla Waste Management Company Ltd. v. DERC & Ors. Similar orders were also issued by various other Regulatory Commissions. Hence the appeal is devoid of merits and needs to be set aside.
12. We have heard the learned counsel appearing for the Appellant and learned counsel appearing for the Respondents at considerable length of time on various issues raised in the present Appeal. Our considerations are as follows: -
- a) The main issue raised by the Appellant in this Appeal is that its SHP is eligible for REC in terms of the REC Regulations along with amendments thereof. Dealing this issue would require analysis of the Impugned Order, Regulations related to REC/RPO and relevant facts and circumstances of the case.
- b) We take both the Questions of Law raised by the Appellant together as both the questions are interrelated. On Question No. 7. a) i.e. Whether the Appellant's SHP qualifies to be eligible under Regulation 5 of the CERC (REC) Regulations, 2010 read with the Amendments therein? and on Question No. 7. b) i.e. Whether the observations of the State Nodal Agency (ANERT), since confirmed by the Impugned Order, are liable to be rejected in light of the eligibility of Appellant's SHP?, we observe as below:

- i. Let us first analyse the impugned findings of the State Commission on the issue. The relevant extract from the Impugned Order is reproduced below:

“22. As per the provisions of KSERC (Power Purchase from Renewable Energy by Distribution Licensees) Regulations, 2006 and its amendments, the distribution licensees were made obligated entities and their Renewable Energy Purchase Obligation (RPO) was fixed at 5% of the total consumption during that year. A source wise break up of renewable energy was also specified as follows; (1) From SHP – 2% (2) From Wind Energy – 2% (3) From other renewable energy – 1%

23. Priority in purchase of renewable energy was fixed based on the date of commercial operation of the renewable energy plant.....

.....

26. The KSERC (Renewable Purchase Obligation and its Compliance) Regulation, 2010 specifies provisions relating to Renewable Energy Purchase Obligation (RPO) and its compliance. This regulation defines obligated entity as a distribution licensee or a captive generator or an open access consumer. Considering the special circumstances and the problems relating to harnessing of renewable energy in the State, the Commission had decided

to revise the renewable energy purchase obligation of the obligated entities which was fixed at 5% as per the provisions in KSERC (Power Procurement from Renewable Energy Sources by Distribution Licensees) Regulations, 2006. As per the provisions in KSERC (Renewable Purchase Obligation and its Compliance) Regulation, 2010, the overall renewable purchase obligation of an obligated entity is fixed at 3% of its annual consumption. This regulation specifically provides for a solar renewable purchase obligation, which fixed at 0.25% out of the overall renewable purchase obligation of 3%. It was also specified that the renewable purchase obligation will increase by 0.3% every year (10% of the base RPO of 3%), till the renewable purchase obligation reaches 10% of the total consumption. It has also been provided that while computing renewable purchase obligation of any obligated entity, the purchase of renewable energy being made by the obligated entity, should also be included. Regulation 4 deals with Renewable Energy Certificate (REC), which should be purchased by the obligated entities, to make-up the shortage in the quantum of purchase of renewable energy to meet the specified renewable purchase obligation. ....

.....



32. *The CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010, (hereinafter referred to as REC Regulations, 2010) introduced Renewable Energy Certificates (REC) as a market based instrument to promote renewable energy and facilitate renewable purchase obligations. The renewable energy produced by the generators has two components namely, an electricity component and an environmental benefit component.....*

*..... The salient features of the REC framework which are explained in the 'Statement of objects and Reasons' to the CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010, are quoted hereunder.*

*.....*

*.....*

*35. Thus the REC scheme came into existence on 01.04.2010 and it is applicable only to*

*(1) RE generators recognised or approved by Ministry of New and Renewable Energy, subject to fulfilment of eligibility conditions for participating in REC mechanism in accordance with the provisions stipulated under the REC Regulations, 2010 and*

(2) The RE generators functioning before 01.04.2010 will be eligible for the benefits under REC mechanism only if they have not entered into long term power purchase agreement.

.....

40. Thus the second amendment clearly specifies that, the investor while participating under competitive bidding quotes tariff after considering all costs as well as risks involved during the life time of the operation of renewable energy generation project, and offers the green energy in its totality and, not the electricity component and green attribute separately. Hence they are not eligible for REC mechanism. The legal position evolved after the second amendment of the REC Regulations, 2010 is as summarized below,-

(i) After the enactment of REC mechanism, the Distribution utilities can bid under section-63 of the EA-2003 for procuring electricity from RE generator.

(ii) While participating in the bidding process, the generator bids the tariff duly considering all costs as well as risks involved in the project.

(iii) Before the enactment of the REC regulation in 2010, there was no mechanism to separate the electricity component and the REC component. Hence the generator must have quoted the tariff considering the entire cost of the project and

such tariff is inclusive of electricity component and REC component.

(iv) The distribution licensees which have been purchasing the electricity from the RE generator at the rate derived through the bidding process, have been paying for the REC component also to the RE generator.

(v) Since the cost of purchase is pass through in tariff, the amount paid as cost of renewable energy by the distribution licensees ultimately falls on the consumers of the State.

(vi) If REC is allowed to the RE generator who participated in the bidding process before the enactment of the REC regulation, 2010 there will be double recovery of the 'REC component' i.e., from (1) The distribution licensees and (2) through REC mechanism and both will ultimately be passed on to the electricity consumers.

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42. From the provisions of the CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 and its amendments, it can be found that,

.....

.....

(6) Only those RE generators which have not entered into long term power purchase

agreement will be eligible for the benefits under REC scheme. (7) REC Regulations, 2010 and its amendments do not contain any provision, which directly or indirectly encourages breach of existing power purchase agreements. The power purchase agreements entered into between RE generators and distribution companies before the issuance of REC regulations by the CERC, were with mutual consent of both the parties based on the terms and conditions prevailing at the time of execution of agreement and such agreement have to be honoured unless both the parties mutually agrees to terminate the power purchase agreements.

.....

.....

(9) Any investor while participating under competitive bidding quotes tariff after considering all costs as well as risks involved during the life time of the operation of renewable energy generation project, and offers the renewable energy at a tariff considering all costs and risks of the project and not the electricity component and REC component separately. Moreover, the distribution licensee procures such renewable energy under competitive bidding for fulfilment of its renewable purchase obligation. Thus, such renewable energy generators, selected through competitive bidding under section 63 of the Act,

cannot be given any benefit under REC scheme, as this would amount to double counting of the environmental attributes.

(10) RE generators, who have not entered into power purchase agreements before 01.04.2010 and who have not entered into power purchase agreements at preferential tariff fixed by the Commission, are allowed to sell the electricity components separately and avail the environmental attributes through REC scheme.

.....

.....

(12) A distribution licensee procuring renewable energy at the tariff fixed under Section 62 or approved under Section 63 can account such power towards its RPO, since the distribution licensee is paying the cost of REC component also to the RE generator and such RE generators are not eligible to claim any benefit under the REC scheme in respect of the renewable energy so sold to the distribution licensee.

.....

.....

46. On examination of the entire facts and circumstances of the case it can be seen that the following facts have been admitted by both the petitioner as well as by the respondent.

.....

.....

47. Hence the procurement of electricity by KSEB Ltd from the petitioner was to meet the RPO as specified in the KSERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2006. The petitioner was allotted the above project under bid route and the price of electricity was at the rate quoted by him. When the bid was invited by the Government and when the petitioner had quoted the rate of electricity, the REC scheme was not in existence. The petitioner must have quoted the rate taking into consideration all his expenses and reasonable return. The concept of dividing the cost of renewable energy into the two components namely, cost of electricity and cost of environmental benefits, was introduced only through the REC mechanism. The regulations for implementing the REC mechanism was introduced only as per the REC Regulations, 2010. Therefore by any stretch of imagination, the petitioner cannot claim that the rate for electricity generated from Iruttukanam SHP, quoted by him several years before the introduction of REC scheme, was only for the electricity component and that he is eligible for the benefits of environmental component as per the REC scheme. In this regard the analysis and decision of CERC as quoted in para 33 of this

order is highly pertinent. As such, only new renewable energy projects commissioned after notification of the KSERC (Renewable Purchase Obligation and its Compliance) Regulations, 2010, can choose to sell electricity component and renewable energy component separately. The SHP of the petitioner is a renewable power project specifically established to supply renewable energy to KSEB Ltd and therefore the petitioner cannot claim any benefits under the REC scheme introduced as per REC Regulations, 2010. It can also be seen that the electricity generated from the Iruttukanam SHP of the petitioner is being sold to an obligated entity namely, KSEB Ltd, for compliance of its renewable purchase obligation. The rate of energy in the PPA is inclusive of all the components. Further the second proviso to Regulation 3 in KSERC (Renewable Purchase Obligation and its Compliance) Regulations, 2010, clarifies as follows,-

“Provided further, such obligation to purchase renewable energy shall be inclusive of the purchases if any from renewable sources already being made by the concerned obligated entity.”

Therefore it is found that the power purchased by KSEB Ltd from the SHP of the petitioner can be

legitimately accounted towards the fulfilment of RPO of KSEB Ltd. Accordingly, the electricity purchased by KSEBL from the petitioner was rightly adjusted by the Commission towards KSEB's RPO. Regulation 5 of the REC Regulations, 2010, as amended makes it amply clear that a generator will not be eligible for registration under REC mechanism, if it is selling the electricity generated from renewable sources to any obligated entity for the purpose of fulfilment its RPO. In the present case, the petitioner has been selling the electricity from Iruttukanam SHP to KSEB Ltd for fulfillment of the RPO of KSEB Ltd as per PPA dated 04.07.2006. Only the Renewable Energy Projects which commenced operation after the Central Electricity Regulatory Commission (Terms and conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010, will have the option of selling the renewable energy at the Preferential Tariff or selling the electricity component and the environmental component (represented by the Renewable Energy Certificates) separately. The renewable energy projects which supplies electricity at preferential tariff shall have to continue with the same tariff until the validity of Power Purchase Agreement ceases and such



projects cannot terminate such PPA for availing the benefit of REC. The SHP of the petitioner was already operational and the PPA with KSEB Ltd was already in force prior to the notification of REC Regulations, 2010. In view of the facts and legal provisions explained above it can easily be found that there is absolutely no merit in the contentions or claims of the petitioner and that the petitioner is not eligible to get registration under REC mechanism for the electricity supplied by him from Iruttukanam SHP to KSEB Ltd.. Consequently, the prayers of the petitioner are declined and the petition is dismissed.

#### *Decision*

48. In view of the facts and legal provisions explained in previous paragraphs, the following orders are issued,-

(1) The petitioner is not eligible to get registration under REC mechanism for the electricity supplied by him from Iruttukanam SHP to KSEB Ltd and therefore the decision of ANERT as per its order AO No.48/REC/2015/ANERT dated 24.03.2015 is upheld.

(2) M/s KSEB Ltd is entitled to account the renewable energy purchased from the Iruttukanam SHP of the petitioner as per the PPA

dated 04.07.2006 towards the RPO of KSEB Ltd.

(3) The petition is dismissed.”

From the above it can be seen that the State Commission after considering all the relevant aspects of the case and discussing the matter in detail concluded that the procurement of electricity from SHP was also carried out to meet the requirements under the Regulations 2006 to meet the obligations of the Respondent No. 1 for procurement of power from renewable sources of energy. The SHP was bid out much prior to the notification of REC Regulations and assumed to have factored in all the costs and risks with appropriate return and hence even in accordance with the REC Regulations along with its amendments is not eligible for REC and power generated from SHP is to be accounted for RPO purpose of the Respondent No. 1. Further, as per RPO Regulations the obligation to purchase renewable energy is to be inclusive of the purchases from renewable sources already being made by the Respondent No. 1.

- ii. Now let us analyse the provisions of the REC Regulations related to the eligibility for REC. The relevant extract is reproduced below:

“e) ‘eligible entity’ means the entity eligible to receive the certificates under these regulations;

.....

i) 'obligated entity' means the entity mandated under clause (e) of subsection (1) of section 86 of the Act to fulfill the renewable purchase obligation;

.....

5. Eligibility and Registration for Certificates:

(1) A generating company engaged in generation of electricity from renewable energy sources shall be eligible to apply for registration for issuance of and dealing in Certificates if it fulfills the following conditions:

a. it has obtained accreditation from the State Agency;

b. it does not have any power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the Appropriate Commission; and

c. it sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, at a price not exceeding the pooled cost of power purchase of such distribution licensee, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price.

Explanation.- for the purpose of these regulations 'Pooled Cost of Purchase' means the weighted average pooled price at which the distribution licensee has purchased the electricity including

*cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be.”*

CERC vide second amendment to the REC Regulations made the following changes. These changes also include changes made vide first amendment to the REC Regulations. The relevant extract is reproduced below:

*“3.Amendment of Regulation 5 of Principal Regulations.-*

*(1) Sub-clause (b) of clause (1) of Regulation 5 of the Principal Regulations shall be substituted as under:*

*“(b) it does not have any power purchase agreement for the capacity related to such generation to sell electricity, with the obligated entity for the purpose of meeting its renewable purchase obligation, at a tariff determined under section 62 or adopted under section 63 of the Act by the Appropriate Commission:*

*.....”*

*(2) In sub-clause (c) of clause (1) of Regulation 5 of the Principal Regulations, the words “at price not exceeding the pooled cost of the power purchase of such distribution licensee” shall be*

*substituted with the words "at the pooled cost of power purchase of such distribution licensee as determined by the Appropriate Commission".*

*(3) The provisos under sub-clause (c) of clause (1) of Regulation 5 shall be substituted as under:*

*"Provided that such a generating company having entered into a power purchase agreement for sale of electricity, with the obligated entity for the purpose of meeting its renewable purchase obligation, at a tariff determined under section 62 or adopted under section 63 of the Act by the Appropriate Commission shall not, in case of pre-mature termination of the agreement, be eligible for participating in the Renewable Energy Certificate (REC) scheme for a period of three years from the date of termination of such agreement or till the scheduled date of expiry of power purchase agreement whichever is earlier ,if any order or ruling is found to have been passed by an Appropriate Commission or a competent court against the generating company for material breach of the terms and conditions of the said power purchase agreement:*

*....."*

From the above it can be seen that a RE generator can become entitled entity for REC only when the following conditions are fulfilled:

- Obtaining accreditation from the State Agency.
  - It does not have any PPA with the obligated entity for purpose of meeting RPO at a tariff fixed under Section 62 & Section 63 of the Act.
  - it sells the electricity generated to the distribution licensee of the area in which the eligible entity is located, at the pooled cost of power purchase of such distribution licensee as determined by the Appropriate Commission.
- iii. Based on the above legal position, the Appellant has contended that it does not have PPA with the Respondent No. 1 for the purpose of meeting RPO, neither its tariff is fixed under Section 62 or Section 63 of the Act and it sells electricity generated from the SHP at a tariff lower than the pooled cost of power purchase of the Respondent No. 1 as determined by the State Commission. The Appellant has further contended that the PPA was signed with the Respondent No. 1 only for supply of electricity only and not the environmental attributes. Accordingly, the Appellant has claimed that it is an eligible entity for the purpose of the REC.
- iv. We have gone through the facts and circumstances of the case. We observe that it is a fact and settled position that the SHP was to be set up based on the decision of the GoK. On 21.6.2004, the Appellant was selected through transparent bidding process on the basis of the quoted tariff to construct and operate the SHP on BOOT basis. It

is also a fact that the State Commission on 24.6.2006 vide Regulations 2006 fixed the quantum of energy to be procured from RE sources by the Respondent No. 1 which also includes procurement from the SHP. On 15.12.2006 the State Commission communicated its approval of the draft PPA between the Appellant and the Respondent No. 2 for the SHP at the tariff based on transparent bidding process. Further, the PPA was executed between the parties on 7.6.2007. The COD of the SHP happened in 18.9.2010, the REC Regulations were notified on 14.1.2010 and RPO Regulations were issued on 23.11.2010. On 28.12.2013, the Appellant had applied before ANERT for accreditation.

- v. From the above facts it can be inferred that the tariff so quoted by the Appellant should have included all the related costs of the SHP, associated risks during the term of the PPA and reasonable return as at that point of time there was no other mechanism available for the Appellant to recover the cost in different forms namely electricity component and environmental component which was introduced in REC Regulations. Further, when the PPA was approved and executed, the Respondent No. 1 was already under obligation to procure power from RE sources vide Regulations 2006.
- vi. From the amendments of REC Regulations, it becomes clear that there was possibility that the RE developers may come out of the existing PPAs to claim the benefits

under the REC mechanism. Accordingly, CERC has kept moratorium period to discourage the same and that new RE capacity could be added. This means that the existing PPAs under RE generation were not considered eligible for REC. This becomes more clear from para 3.5.2 of the 'Statement of Objects and Reasons' to the REC Regulations. The same has also being relied by the State Commission. The relevant extract is reproduced below:

*"3.5 Eligibility and Registration for Certificates:*

.....

*3.5.2 The Commission has considered the comments. The Commission would like to clarify that the regulations provide for issuance of REC only to renewable energy (RE) generators. The REC mechanism seeks to promote additional investment in the RE projects and is meant to provide to RE generators an alternative mode for recovery of their costs. The issuance of REC to obligated entities may result in forcing the RE developers to engage in PPAs only with the local utility which in turn may affect new investment in renewable energy sources. Regarding eligibility criteria for CPPs, the Commission would like to clarify that if a captive RE power project meets the eligibility criteria, sale of electricity from such project over and above the captive consumption will qualify for RECs. As regards the eligibility for existing RE generators tied up under long term PPAs, the Commission would like to underscore that the*



regulation cannot make any provision which directly or indirectly encourages breach of existing contracts.”

The same becomes more prominent from Annexure-II wherein CERC replied to the queries of the RE generators on the existing PPAs.

- vii. The State Commission has also relied on the judgement dated 19.5.2015 of this Tribunal in Appeal No. 251 of 2013 and 325 of 2013 in case of Timarpur Okhla Waste Management Company Ltd. v. DERC/CERC. We have gone through the said judgement of this Tribunal and find that this Tribunal on the issue of meeting RPO by the beneficiaries of the project has held as below:

“15. The EPA was executed to supply electricity without any renewable benefits, the EPA was overridden by the DERC RPO Regulations notified by the Delhi Commission on 1.10.2012 and in terms of Regulations 4 and 9 of the Delhi RPO Regulations, the power purchased by BRPL from the Appellant’s project has to be considered towards fulfilment of BRPL’s RPO obligation. As such, only new renewable energy projects commissioned after notification of the DERC RPO Regulations can choose to sell electricity to distribution licensee by separating electricity component from renewable energy component. The Appellant’s project is a renewable power

project specifically established to supply green power in the State of Delhi and as such, it cannot now seek such a dispensation.”

From the above it can be seen that this Tribunal has held that the EPA was overridden by the RPO Regulations and hence power generated from the RE generating plant has to be considered for RPO purpose. This Tribunal further held that only new RE projects commissioned after notification of the DERC RPO Regulations can choose to sell electricity to distribution licensee by separating electricity component from renewable energy component. The project was established to supply green power to the State of Delhi and the dispensation for REC is not allowed to the project.

In the present case too, the SHP was bid out to supply green power to the State of Kerala much before the enactment of the REC Regulations and as per the Regulations 2006 electricity generated from the SHP has to be considered for meeting RPO of the Respondent No. 1. In the instant case REC Regulations were issued in January 2010 which came into force from 1.4.2010 and COD of SHP happened thereafter and further RPO Regulations were issued after COD of the SHP. Accordingly, in terms of this judgement of this Tribunal, the SHP could not be considered for the purpose of REC.

- viii. The Appellant has also contended that it is not covered under Section 62 or 63 of the Act as its tariff was neither determined nor adopted by the State Commission. On this issue we observe that the tariff of the SHP was arrived under transparent bidding process for supply of power to the consumers of the State of Kerala through the Respondent No. 1. The PPA was approved by the State Commission by adopting the tariff so arrived in the transparent bidding process conducted by the GoK. Although there was no mechanism of competitive bidding under Section 63 of the Act, the said bidding process conducted by GoK and approval of the PPA on the so discovered tariff is akin to adoption of tariff through competitive bidding process. The approval of the PPA was also communicated by the State Commission on 15.12.2006 much after the issuance of guidelines for procurement of power under Section 63 of the Act by the distribution licensees through competitive bidding by Govt. of India in January 2006.
- ix. It is also observed that as per RPO Regulations (reproduced above in the extract from Impugned Order) the obligation to purchase renewable energy is to be inclusive of the purchases from renewable sources already being made by the Respondent No. 1. The same has also been relied by the State Commission while deciding that the purchases from the SHP has to be considered for the RPO of the Respondent No. 1. We also

agree to this contention of the State Commission and the same has been rightly relied upon by the State Commission. This becomes more important as both the Regulations i.e. Regulations 2006 and RPO Regulations were enacted under Section 86 (1) (e) of the Act. The Appellant has contended that as per the provisions of the RPO Regulations such purchases have to be in accordance with the order issued by the State Commission and as such no order has been issued by the State Commission to give effect to that extent. On this contention we observe that the PPA was executed after the issuance of the Regulations 2006 as well as RPO Regulations were issued after the commissioning of the SHP and accordingly the electricity so generated from the SHP necessarily to be accounted by the Respondent No. 1 for the purpose of the RPO.

- x. Further, the learned counsel for the 1<sup>st</sup> Respondent has contended that if REC is allowed to the Appellant and energy generated from the SHP is not accounted for RPO this would lead to extra burden on the consumers of the State as this will lead to double recovery by the Appellant on account of environmental attribute in the form of REC. We agree to this contention of the Respondent No. 1 as the tariff already arrived through transparent bidding already covers all the cost and the risks for the lifetime of the SHP with reasonable return. The contention of the Appellant that it has faced several challenges in execution of the SHP leading to cost escalations etc. does not find

any merit as the same has already been inbuilt in the tariff quoted by it.

- xi. The Appellant has also relied on the judgement of this Tribunal in case of Him Urja Pvt. Ltd. v. UERC on the issue that the tariff in PPA prior to the constitution of the State Commission cannot be adopted under Section 63 of the Act. We have gone through the said judgement and find that the present case is different from the case relied by the Appellant on the count that the PPA was signed before the existence of the UERC. In the instant case the PPA was approved by the State Commission on the tariff arrived through transparent bidding process and also Regulations related to RE sources were notified by the State Commission which are relevant to the SHP of the Appellant in respect of purchase of power from RE sources by the Respondent No. 1. Accordingly, the facts and circumstances of the instant case and Him Urja case are different. The reliance of the Appellant on the judgement of this Tribunal in case of Penna Electricity Company Ltd. v. TNERC is misplaced as the Penna case is entirely different from the instant case.
- xii. The Appellant has also relied on various judgements of Hon'ble Supreme Court on the issue of reliance of the State Commission on Statement of Objects and Reasons to the REC Regulations & its amendments thereof. After perusal of the said judgements we observe that the Hon'ble Supreme Court in some of the said judgements

viz. Tata Engineering and Locomotive Co. v. Gram Panchayat, Bhairi v. Sub-Divisional Officer and Kumar Jagdeesh Chandra Sinha &Ors. v. Eileen K Patricia D' Roziareh also observed that the Statement of Objects and Reasons can be pressed into service for limited purpose of understanding background which statute sought to achieve. In the present case there is need to refer to the Statement of Objects and Reasons of REC Regulations to have clarity as the tariff adopted by the State Commission in the PPA of the SHP is neither as per Section 62 of the Act nor strictly adopted in terms of Section 63 of the Act. Further, the tariff of the SHP includes all the costs and risks associated with the project for its lifetime with suitable return. It is to be seen in these peculiar situations that there is no unreasonable profiteering by the Appellant and there should not be undue burden on the consumers of the State. With this background it has become important for this Tribunal to also analyse the Statement of Objects and Reasons used by the State Commission while deciding the case.

- xiii. After considering the written submissions filed by the learned counsel for the Appellant and learned counsel for the Respondents and after through evaluation of the entire relevant material available on record and in view of aforesaid discussions, it would not be wrong to conclude that the power generated from SHP of the Appellant has to be accounted for RPO of the Respondent No. 1 and the Appellant is not eligible for REC from the SHP.

Accordingly, we do not find any legal infirmity in the decision of the State Commission in holding that the Appellant is not eligible to get registration under REC mechanism for the electricity supplied by it from the SHP and the Respondent No. 1 is entitled to account the renewable energy purchased from the SHP towards the RPO.

- xiv. In view of the above the issues raised by the Appellant are decided against the Appellant.

### **ORDER**

For the foregoing reasons as stated supra, we are of the considered opinion that the issues raised in the instant Appeal have no merit.

The State Commission has rightly justified the findings in answering the issues against the Appellant just and proper. Therefore, interference of this Tribunal does not call for.

Hence, the Appeal is hereby dismissed devoid of merits and the Impugned Order dated 2.9.2015 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **9<sup>th</sup> day of July, 2018.**

**(Justice N. K. Patil)**  
**Judicial Member**

✓

**REPORTABLE/NON-REPORTABLE**

mk

**(I.J. Kapoor)**  
**Technical Member**