

No. N/402/2017

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560052

Dated: 29.05.2020

Present

Shri Shambhu Dayal Meena	: Chairman
Shri H.M. Manjunatha	: Member
Shri M.D. Ravi	: Member

OP No.219/2017

BETWEEN:

Messrs Clearsky Solar Private Limited
30, ST Bed,80 Feet Road,
Kormangala,
Bengaluru-560 047.
(Represented by Navayana Law Offices,
Advocates)

..... Petitioner

AND:

- 1) Gulbarga Electricity Supply Company Limited
Station Road,
Kalburagi-585102.
(Represented by its Managing Director)
- 2) Karnataka Renewable Energy Development Limited,
No.39, " Shanthi Gruha"
Bharat Scout & Guides Building,
Palace Road,
Bengaluru-560 001.
(Represented by its Managing Director)
- 3) Karnataka Power Transmission Corporation Limited,
Kaveri Bhavan
Bengaluru-560 009.
(Represented by its Managing Director)

4) The State of Karnataka
Energy Department,
Vikasa Soudha
Bengaluru- 560001

(Represented by its Additional Chief Secretary)

.... Respondents

(Respondents 1 & 3 represented by Indus Law,
Respondent -2 represented by Sri Rakshit Jois Y.P.
Respondent -4 represented by Sri G.S.Kannur,
Senior Advocate, Bengaluru)

ORDERS

1. The Petitioner has filed this petition under Section 86 (1) read with Section 86(1) (f) of the Electricity Act, 2003, praying for the following reliefs:

- a) Approve the extension of Scheduled Commissioning Date granted by Respondent.
- b) Direct the Respondent to pay the tariff of Rs.8.40 per unit as agreed under the Power Purchase Agreement 29th August, 2015 produced as Annexure P-1.
- c) Accord approval to the Supplemental Agreement dated 16th March 2017 at Annexure P- 35 without altering the tariff in the PPA dated 29th August 2015.
- d) Pass such other order/s including an order as to costs, to meet the ends of justice.

2. The material facts stated in the petition are as follows:

- a) The Karnataka Renewable Energy Development Limited (KREDL)/ Respondent No.2 being the Nodal Agency, for facilitating the

development of the renewable energy, invited applications for development of solar power projects under Segment-I, Category-I of Solar Policy 2014-21, in compliance of Government Order No. EN 62 VSC 2014, dated 26.08.2014. One Mr. Bhaskar Rao, a Solar Power Developer (SPD) proposed to develop 3 MW Solar Power Project at Survey No.40, Jonnikeri village, Aurad Taluk, Bidar District. After evaluation of the proposal of the SPD, his application was accepted and KREDL issued a Letter of Award (LoA) dated 25.08.2015.

- b) In pursuance of this, a Power Purchase Agreement (PPA) dated 29.08.2015 was executed between the Respondent-1 and the Petitioner (Annexure P-1). As per terms of the PPA, the project had to be commissioned on or before 28.02.2017. The Tariff agreed in the PPA was Rs.8.40 per kWh, however, a provision is made under Article 5.1 of PPA that if there is a delay in commissioning of the project beyond the Scheduled Commissioning Date and during such period there is a variation in the KERC Tariff, then varied tariff/ lower tariff will be applicable on the date of commercial operation. The said PPA was approved by the Karnataka Electricity Regulatory Commission (KERC) on 07.09.2015 (Annexure P-2). As per the terms of PPA, the time line fixed for achieving the Condition Precedent is 365 days, from the Effective Date. The "Effective Date" as defined under Clause 1.1 (xiv) of PPA is the date of signing of the PPA by the parties. Therefore, the Conditions

Precedent were to be achieved on or before 28.08.2016 and the Scheduled Commissioning Date on or before 28.02.2017.

- c) Karnataka Power Transmission Corporation Limited (KPTCL) by its letter dated 07.04.2016 directed the Petitioner and accordingly collected the process fee on 26.04.2016 towards the approval of evacuation (Annexure P3 collectively). KPTCL, Humnabad on 06.05.2016 submitted its viability Report of evacuation of the Solar Plant of the Petitioner (Annexure P4).
- d) KPTCL accorded approval for tentative evacuation on 20.05.2016 and directed the Petitioner to construct 33 kV overhead lines for a distance of about 6.0 kms from the Generation plant to Sub-Station at Santhpur with a Terminal Bay along with required matching Control Equipment (Annexure P5).
- e) The Petitioner on 24.05.2016 (Annexure-P6) requested the Chief Engineer, KPTCL, Kalaburagi to provide suitable land at Santhpur, Sub-Station for construction of Terminal Bay. In turn the Chief Engineer, on 28.05.2016 directed KPTCL, Humnabad to provide a diagram duly marking the proposed land for the construction of Terminal Bay.
- f) By virtue of clause 12.11 (i) of the said PPA, the SPD formed a Special Purpose Vehicle (SPV) and entered into a Memorandum of Understanding on 25.05.2016 with M/s Clearsky Solar Private Limited/the petitioner (Annexure P7). A Supplemental Power Purchase Agreement

(SPPA) dated 01.06.2016 (Annexure-P8) modifying the original PPA dated 29.08.2015 was executed between the Petitioner and the Respondent. KERC approved the said SPPA on 28.06.2016 (Annexure P8 collectively).

- g) The Chief Engineer (Electrical) Transmission Zone, KPTCL, Kalaburagi on 01.06.2016 communicated to Chief Engineer (Electricity) (P&C) KPTCL, Bengaluru, its approval to provide the proposed space to the Petitioner at Santhpur Sub-Station (Annexure P9 collectively).
- h) The Petitioner submitted to the Respondent that "Conditions Precedent" as per clause No.2.1 of the PPA were achieved vide its letter dated 24.08.2016. (Annexure P10).
- i) KPTCL accorded approval for Regular Evacuation under Self Execution Basis on 12.12.2016. (Annexure P11).
- j) The Petitioner requested the Chief Engineer (Electrical) KPTCL, Kalaburagi, on 16.12.2016 (Annexure-P12) to provide the proposed land for erection of Terminal Bay extension at Santhpur, Sub-Station Power Grid. (Annexure P12). The Superintendent Engineer of SCADA, KPTCL, Bengaluru intimated the Chief Engineer (Electricity), Transmission Zone, KPTCL, Kalaburagi on 21.12.2016 about the charges and advised Petitioner to integrate bay Energy meter with SCADA System along with status and measures (Annexure P13).

- k) The Petitioner on 06.12.2016 sought extension of time for the COD with the Respondent (Annexure-P14). On 24.12.2016 (Annexure-P15), again requested the Respondent for extension of time for SCOD from 28.02.2017 to 27.05.2017.
- l) The Respondent directed the Petitioner on 03.01.2017 (Annexure-P16) to pay a sum of Rs.3,60,000 on the ground that the Petitioner had not fulfilled the Conditions Precedent as per Article 2.1 of the PPA. The petitioner informed the Respondent on 10th January, 2017 that they have already fulfilled the Conditions Precedent and had submitted with its previous letter dated 24th August, 2016 (Annexure P17).
- m) The Respondent on 24th January, 2017 asked the Petitioner to attend a joint meeting on 27th January 2017 to discuss the Petitioner's request for extension of time for the Scheduled Commercial Operation Date (SCOD). The Petitioner attended the meeting. The Respondent stated that while the Petitioner had filed an application for land conversion, the conversion order was not obtained, hence the Petitioner had not achieved the conditions precedent and directed the Petitioner to pay a sum of Rs.3,60,000 which the Petitioner paid on 16th March, 2017. (Annexure P18 Collectively).
- n) The Bidar office of the Respondent issued a letter dated 24.01.2017 to the Petitioner stating that the construction of Transmission Line was

taken up un-authorisedly. The Petitioner obtained a clarification from KPTCL vide letter dated 18th March 2017, and this event also caused delay in execution of the project. (Annexure P19 Collectively).

- o) The Chief Engineer (Electricity) Transmission Zone, KPTCL, Kalaburagi directed the Petitioner on 27th January, 2017 to pay the SCADA integration charges towards the KPTCL SCADA infrastructure. The Petitioner requested Chief Engineer (Electricity) KPTCL, Kalaburagi on 30th January, 2017 to give approval for SLD, layout diagrams for erection of Terminal Bay at Santhpur Sub-Station. (Annexure P20 Collectively). The Petitioner requested Chief Engineer (Electricity) KPTCL, Kalaburagi on 1st February, 2017 to issue a receipt for having paid the SCADA integration charges. (Annexure P21 Collectively). The Chief Engineer (Electricity) Transmission Zone, KPTCL, Kalaburagi by its letter dated 3rd February, 2017 communicated the approval to the Superintending Engineer (Ele) KPTCL, Kalaburagi for collecting fee for allotting land to the Petitioner for construction of Terminal Bay at Santhpur Sub Station. (Annexure P22 Collectively). The Executive Engineer, KPTCL, Bidar submitted the cost of estimation for construction of Terminal Bay at Santhpur Sub-Station to Superintending Engineer (Ele) KPTCL, Kalaburagi on 4th February, 2017. (Annexure P23). The Petitioner by its letter dated 6th February, 2017 communicated to the Chief Engineer (Ele) KPTCL, Transmission Zone, Kalaburagi payment of charges for the land allotted for construction of

Terminal Bay at Santhpur Sub-Station by enclosing Demand Draft dated 6th February, 2017 and requested to issue the Work Permit for construction of Terminal Bay. (Annexure P24).

- p) The Petitioner by its letter dated 14th February, 2017 by submitting MCT & MPT Drawing requested the Chief Engineer, KPTCL, Kalaburagi to approve the same (Annexure P25).
- q) The petitioner by its letter dated 15th February 2017 submitted drawings of the electrical installations to the C.E.I.G. for approval (Annexure P26 Collectively).
- r) The KPTCL, Bengaluru by its letter dated 17th February, 2017 directed the Petitioner to pay inspection charges and to arrange for inspection of the material. The Petitioner by letter dated 18th February, 2017 communicated to the Manager, KPTCL, Bengaluru the payment of inspection charges and requested to take necessary action. (Annexure P27). The Respondent issued Meter Test Certificate dated 18th February, 2017 with respect to the Petitioner's plant. (Annexure P28).The Chief Engineer (Electricity) KPTCL, Kalaburagi accorded approval for construction of Terminal Bay at Santhpur Sub-Station) (Annexure P29) by its letter dated 21st February, 2017 .
- s) The C.E.I.G. accorded approval of drawings pertaining to the 3 MW Solar plant of the Petitioner by letter dated 21st February 2017. The petitioner requested CEIG for inspection on 22.02.2017 (Annexure

P30). The C.E.I.G. accorded Electrical Safety Approval for Electrical Installation of the Solar Power Plant, by letter dated 23rd February, 2017 (Annexure P31). The C.E.I.G. on 25.02.2017 directed the petitioner to pay inspection charges so as to arrange for the inspection of material at site (Annexure P32). The petitioner by letter dated 27.02.2017 paid and communicated the demanded charges and got the receipt. (Annexure P33 Collectively).

- t) The Respondent accorded approval for extension of time for achieving the Scheduled Commissioning Date (SCOD) up to 27th May, 2017 vide letter dated 15th March, 2017 (Annexure 34).
- u) A SPPA dated 16.03.2017 was executed between the Respondent and the Petitioner, incorporating the extension of SCOD (Annexure P35).
- v) The Petitioner by its letter on 11.04.2017 requested the Chief Engineer (Electricity) KPTCL, Kalaburgi to provide interconnection approval (Annexure P36).
- w) The Respondent earlier accorded approval for extension of SCOD by letter dated 15.03.2017 and signed a SPPA, later renewed on it by citing a letter of this Commission advising the petitioner to file a Petition before the Commission on 28.04.2017 seeking approval for the extension of SCOD (Annexure P37).

- x) The Petitioner submitted letter dated 12.05.2017 to the Respondent stating that they have completed all conditions precedent, including obtaining the land conversion and paying the relevant land conversion fee and requested the Respondent for synchronization of the project (Annexure P38). The Petitioner submitted a letter dated 22nd May 2017 to the respondent to synchronize and commission the project (Annexure P39).
- y) The Respondent by its letter dated 27.05.2017 accorded approval for synchronization of the Solar Power Project (Annexure P41). The Petitioner commissioned the project on 27.05.2017 and KPTCL issued commissioning Certificate dated 29.05. 2017 (Annexure P42).
- z) The Commission has not approved the SPPA dated 16.03.2017. The Petitioner has commissioned the project within the time extended by the Respondent. As per the practice, the Respondent has requested the Commission to accord approval for the SPPA. However, the Commission has directed the petitioner to approach the Commission for seeking approval for extension of the Commissioning date which is already granted and approved by the Respondent. Aggrieved by the same and having no other alternative remedy this Petition is filed.
3. The grounds urged by the petitioner are:
- a) The Respondent has already granted time extension to the Petitioner which was documented by way of a SPPA dated 16.03.2017 wherein

the Scheduled Commission Date (SCD) stands extended to 27th May, 2017. The Petitioner has commissioned the project well within the SCOD agreed as per the SPPA dated 16.03.2017. Hence, the Petitioner is entitled to the tariff agreed to in the PPA dated 29th August, 2015.

- b) As per the Commission's Generic Tariff Order relating to Solar Energy tariff dated 10.10.2013 and 30.04.2015, the petitioner is entitled to the tariff of Rs.8.40 per unit. Article 5.1 of the PPA clearly mentions that the tariff is determined as per the order dated 10th October 2013 of the Commission. The order dated 30.07.2015 passed in modification of the order dated 10.10.2013 mentions that in respect of the projects getting commissioned during the period from 01.09.2015 to 31.03.2018 for which the PPAs have been entered into and submitted to the Commission prior to 01.09.2015 for approval, the tariff agreed in the PPA would continue.
- c) The Commission's Generic Tariff Order dated 12.04.2017 is clear that the tariff determined therein is applicable to the projects that are not commissioned within the specified COD but got commissioned from 01.04.2017 to 31.03.2018. In the present case, the Petitioner's project got commissioned within the specified commissioning date assigned as per the PPA dated 29th August, 2015 read with SPPA dated 16.03.2017. Further, it is clarified in the order dated 12th April, 2017 that in respect of the projects that are commissioned during the period from 1st April 2015 to 31st March 2018 for which PPAs have been entered into and received in the Commission's Office on or before 31st March 2017 for approval, the

tariff as per the said agreement shall be applicable. Hence, viewed from any angle, the Petitioner is entitled for the tariff of Rs.8.40 per unit.

d) The Commission in the order dated 28th July,2016 passed in O.P. 25 of 2016 has stipulated that for the PPAs entered into prior to 01st September,2015 the tariff of Rs.8.40 per unit is made applicable. The petitioner who entered in to PPA prior to 1st September 2015 is also entitled to the tariff of Rs.8.40 per unit.

e) The Respondent has already noted and signed PPA for revision of SCOD, and hence, there is no question of levy of any liquidated damages or penalties.

4. Upon issuance of Notices, the Respondents appeared through their Counsel and filed Statement of Objections.

5. The learned Counsel for Respondent No.1/ GESCOM has filed statement of Objections as follows:

i) The averments made by the petitioner seeking to shift the responsibility on the respondents on the baseless ground of delays in granting approvals for acquisition of land is an after-thought and has no basis in facts. It is contrary to the facts narrated in the requests for extension of time. It is oxymoronic to state on one hand that delay in the project was on account of lack of approvals for land and on the other hand to seek-time on account of inability to pay the wages to the labourers and procure materials causing the construction to come to a 'grinding halt'.

- ii) The grounds for seeking extension of time are demonetisation and resulting difficulties arising in payment of wages to labour as well as delays in transporting materials to site causing the work on site to come to a grinding halt. None of these reasons for delay are attributable to the respondents and admittedly the delay has occasioned solely due to the defaults/problems faced by the petitioner.
- iii) Considering the request for extension of time for commercial operation made by the petitioner on 06.12.2017, the Respondent asked the petitioner to attend a joint meeting on 24.12.2016 at the Headquarters of GESCOM to discuss the request made for extension of the COD. In the said meeting, the Respondent asked the petitioner as to why approval of land conversion from the Revenue Department was not obtained and no report for achieving conditions precedent was sent to the Respondent, but the Petitioner did not give any satisfactory reply.
- iv) The Respondent/Chief Engineer (Ele.) (Corporate Planning) GESCOM issued a notice on 03.01.2107 to Sri Bhaskar Rao for non-fulfilment of the Conditions Precedent in respect of 3 MW solar Power Project stating that as per the Article-2 of the PPA dated 29.08.2015, the conditions precedent had to be fulfilled by the developer within 365 days from the date of signing PPA, but GESCOM had not received any progress report in respect of fulfilment of conditions precedent. If the developer does not fulfil any or all of the conditions precedent, then as per Article 2.2 of the PPA dated 29.08.2015, the developer shall pay damages as envisaged in the said clause. For delay in fulfilment of conditions precedent, the damages works out to Rs.3,60,000 and the petitioner was requested to pay the said penalty within 7 days from the date of the notice, otherwise action

will be taken to encash the same out of the Bank Guarantee of Rs.30,00,000 furnished by him. In compliance of this, the petitioner paid Rs.3,60,000 on 16.03.2017, for which the Respondent issued Receipt No.16204.

- v) With regard to the contention of the petitioner that the Respondent No.1 having granted approval for extension of commissioning date from 28.02.2017 up to 27.05.2017, cannot be permitted to renege from its stand, it is stated by the Respondent that the approval for the time extension of COD was not absolute, but was given on certain conditions and the time extension Order dated 15.03.2017, states that other terms and conditions of the PPA dated 29.08.2015 remain unaltered except for application of tariff in line with Article 5.1 of the PPA according to which GESCO will follow the KERC Order.
- vi) The Article 5.1 of the PPA has expressly provided for revision in applicable tariff to the lower of the following in case of extension of time:
 - a) Rs.8.40 per Kwh;
 - b) Varied tariff applicable as on date of commercial operation.

The petitioner was well aware of the terms of the PPA and cannot now say that the tariff was fixed at Rs.8.40 per unit.

- vii) In the Order of this Commission in OP No.25/2016, the Commission has specifically held that due to improvement in technology and substantial reduction in capital cost of solar plant, the tariff has been reducing and that the Respondent is under no obligation to pay a higher tariff and take the power from the petitioner, when there has been a delay in supply of power by the petitioner. Further, the

Hon'ble Supreme Court in All India Power Engineer Federation Vs. Sasan Power Limited has held that the tariff of electricity will eventually affect the consumers and hence it is to be regulated by the State Electricity Regulatory Commission. The Respondents being State Entities cannot be made to suffer loss due to actions/inactions of the Petitioner/ Generator.

6. The Counsel for Respondent No.2/KREDL filed the statement of objections stating that:

- i) The KREDL had called on line applications from the eligible land owners for development of solar power projects in pursuance of the Solar Policy 2014-21 and guidelines issued vide notification dated 26.08.2014 by G.O. No. EN62 VSC 2014. The allotments were done on the first come, first serve basis after following the due process. The Letter of Allotment was issued in favour of Sri Bhaskar Rao on 25.8.2015 for developing and commissioning of 3MW Solar Power Plant at Survey Number 40 of Jonnikeri Village, Bidar District. Apart from this, there is no role of KREDL in any other matters.
- ii) Further, the petitioner has not made any averments against KREDL. Hence, KREDL is not a necessary party to this petition. Therefore, the petition with respect to it may be dismissed.

7. Learned Counsel for Respondent No.3/KPTCL filed statement of objections on 06.08.2019 stating that:

- i) The petitioner requested KPTCL for sparing land at Santhpur village for construction of the terminal bay. KPTCL, through its Executive Engineer informed the petitioner of the availability of 20.6 metres space in the existing 33 KV Station for construction of the terminal bay. The Chief Engineer (Ele.) conveyed his approval

to the petitioner towards the construction of the terminal bay and requested the petitioner to deposit the one- time non-refundable deposit as per KPTCL norms.

- ii) Any delay on the part of the petitioner and its inability to commission the project on time is not attributable to KPTCL. The respondent had timely granted temporary evacuation approval of the project on self- execution basis and as per provisions of PPA, it is the responsibility of the petitioner to put up, own, operate and maintain a dedicated evacuation line.
- iii) It is the responsibility of the petitioner to ensure all the requisite clearances and approvals were sought, applied for and obtained within the time limit prescribed. There was no delay on the part of the respondent in responding to the requests made by the petitioner.
- iv) The contention made by the petitioner that on account of demonetisation and the resulting difficulties arising in payment of wages to labourers as well as in transporting material at site caused the delay in completion of project, it is stated that none of these reasons for delay are attributable to the respondent and delay has been occasioned solely due to the defaults/ problems faced by the petitioner. In view of above, the petition has no cause of action as against the KPTCL and hence the petition may be dismissed.

8. On behalf of Respondent No.4/State of Karnataka, the Counsel has filed statements of objections stating that:

- i) The KREDL is the Nodal agency for facilitating the development of renewable energy in the State of Karnataka and it has called for Request for Proposal (RfP) for development of renewable energy in Karnataka. The Respondent No.2 has issued Letter of Allotment dated 25.08.2015 in favour of Sri Bhaskar Roa for commissioning of solar power plant of 3 MW at Jonnikeri Village, Bidar District.
- ii) The petitioner cannot blame the delay on the part of the Respondent as petitioner's request was being considered to benefit him. The petitioner cannot at one breath ask the respondent to relax certain conditions and then turnaround to say that the respondent did not act within time.
- iii) The petitioner is neither entitled for grant of extension of time nor entitled for the tariff of Rs.8.40 per unit as much as the petitioner is responsible for the delay in commissioning the project.

The Respondents have prayed for dismissal of the petition.

9. In the Rejoinder dated 09.07.2019, the petitioner has contended against the objection statement of the 1st Respondent, as hereunder:

- a. The 1st Respondent has taken a complete U-turn on the stand it had taken while granting approval of time extension to the Petitioner.
- b. In the third week of October, nearly 2 months after signing of the original PPA, the 1st Respondent, vide letter dated 19.10.2015 wrote to the Commission stating that:

“...individual solar power developers are requesting for original PPA for the project implementation and also the bankers are insisting for furnishing original power purchase agreements for sanctioning the loans....” (Annexure P43).

- c. On 15th December, 2015 the Commission wrote back to the 1st Respondent returning all the original PPAs as per Annexure P44. Thus, the Petitioner received the original PPA more than 105 days after the signing of the original PPA.
- d. The SPD wrote to the 1st Respondent by letter dated 9th January, 2016 requesting for irrevocable assignment of rights for the Project in favour of Petitioner (SPV) along with the Memorandum of Association and Articles of Association of the Petitioner. (Annexure P45 collectively). Based on the advice and the format provided by the 1st Respondent, the SPPA dated 8th February, 2016 was executed to assign the project to the Petitioner (Annexure P46). By e-mail dated 2nd April, 2016, the 1st Respondent informed the SPD that the SPPA dated 08.02.2016 was not in conformity with the latest format issued by the Commission and asked to execute another SPPA as per the format approved by the Commission vide letter dated 21st March, 2016 issued to all the ESCOMs. This was the first time that the 1st Respondent provided the Petitioner with

the correct format of the SPPA and MoA/AoA) as approved by the Commission (Annexure P47 collectively).

- e. After receiving the e mail dated 2nd April, 2016, the Petitioner proceeded to make changes in its MoA and AoA and immediately applied to the Registrar of Companies. It took approximately one and a half months to complete the necessary process and formalities including execution of relevant agreements. Pursuant to above, the Petitioner wrote to the 1st Respondent on 25th May, 2016 forwarding the amended AoA and MoA and requested the 1st Respondent to execute the SPPA (Annexure P48 collectively). The Petitioner and the 1st Respondent entered into SPPA on 1st June, 2016 (Annexure P8). The Commission approved the SPPA by letter dated 28th June, 2016 (Annexure P8).
- f. By letter dated 8th August, 2016 KREDL directed the Petitioner to approach the 1st Respondent to seek extension of time as the said respondent had signed the SPPA and accordingly request was made to the 1st Respondent by way of letter dated 12th August, 2016, for extension of time to achieve conditions precedent and commissioning the project (Annexure P-49, P-50 and P-51).

- g. On 4th November, 2015 the Petitioner was invited to attend the meeting organized by the 2nd Respondent for discussing progress of projects under this scheme. A copy of the minutes of the meeting dated 4th November, 2015 is produced as Annexure P52.
- h. On 01.12.2015, the 4th Respondent issued guidelines for Deemed Land Conversion (Annexure P53). The petitioner wrote to the Assistant Commissioner, Bidar on 29th January, 2016, seeking deemed conversion of land. (Annexure P54).
- i. On 24th February, 2016 the Petitioner submitted a copy of the approved PPA to the Assistant Commissioner, Bidar, as the SPPA dated 8th February 2016 had not yet been approved by the Commission (Annexure P55).
- j. The petitioner by way of abundant caution, started applying for and collating the 13 documents which were to be submitted as a part of the regular land conversion approval (Annexure P56 collectively).
- k. The documents evidencing the difficulties and delays faced by the petitioner in obtaining the Land Conversion Order dated 24th May, 2017 along with a copy of the Land Conversion Order dated 24th May, 2017 are produced as Annexure P57 collectively.

- l. The land sketch map was received by the Petitioner on 22nd July, 2016 although the Petitioner had applied and paid the requisite fees for this on 27th May, 2016 (i.e., after a lapse of about two months from the application date). As soon as the Petitioner collected all the 13 requisite documents from different statutory authorities, the Petitioner applied for land conversion (through the regular process) on 3rd August, 2016. On the acknowledgement of the application, it was mentioned that the same would be processed in 120 working days and had it been done within 120 days, the project would not have been delayed.
- m. Being a small sized solar power project, and acting under duress of the 1st Respondent's strong language in the letter at Annexure P16 and left with no other option in the face of the pressure by the 1st Respondent, who is in a dominant position, the petitioner paid the sum demanded towards damages for delay in fulfilling the conditions precedent.
- n. The Petitioner received the Land Conversion Order on 24th May, 2017.
- o. Without the original PPA and due to delay in executing the SPPA on 01.06.2016, financial closure, signing of EPC agreement etc., were not possible.

p. The Energy Minister, Government of Karnataka has issued a letter dated 18th November, 2016 and the Additional Chief Secretary (Energy) has written to the ESCOMs on 24th November, 2016 to consider extension of time as per terms of the PPA. (Annexure P58 collectively).

10. In the Common Rejoinder against objections filed by Respondents-2, 3 and 4 on 15.10.2019, the petitioner has stated as follows:

a) The originals of PPA and SPPA were not with him till 05.07.2016 as evident from the letter of GESCOM (Annexure P59). The Petitioner's letter to KREDL dated 01.08.2016, further the petitioner requested on 05.12.2016 for extension of time for Commercial Operation Date due to demonetization which may be seen at Annexure P-60.

b) The delay in project execution was due to the following reasons:

- i) Delay in handing over copy of the original PPA dated 29th August, 2015 to the Petitioner;
- ii) Delay, due to incorrect format of SPPA provided by the 1st Respondent, with respect to assignment of the project by the SPD to the Petitioner-SPV;
- iii) Delay due to Lack of Clarity regarding Deemed Land Conversion Scheme; and

- iv) Delay in issuance of Land Conversion Order.
- c) The delay is also for the following additional reasons/ documents:
 - i) Internal communications issued by the 1st Respondent;
 - ii) Official communications to which the 1st Respondent is privy (obtained by the Petitioner through RTI); and
 - iii) The proceedings of the meeting under 'Land Owner Farmer Scheme Committee' held on 27th January, 2017 at 4 p.m. at Corporate Office, GESCOM, Kalaburgi as recorded in the Letter dated 14th February, 2017 which contains records of the aforesaid meeting.
- iv) A conjoined reading of the above demonstrate that the delay in commissioning the project falls within the Force Majeure Clause of the PPA dated 29th August, 2015 and the same was also discussed in the meeting dated 27th January, 2017.
- d) In certain cases, even the Commission has questioned the delay in handing over the original SPPA after it was approved. The practice is that GESCOM signs the PPA/SPPA with the developer, sends it to KERC for approval. Only after the approval GESCOM hands over the original PPA. A copy of the authorization letter dated 4th July 2016 to collect that original SPPA with GESCOM's acknowledgement on 5th July, 2016 proving that the Petitioner did not have the original till 5th July, 2016 is produced as Annexure P59.

e) The KERC issued the solar tariff order on 10th October, 2013 wherein the Control Period was fixed up to 31st March, 2018. Thereafter, the KERC issued the solar tariff order on 30th July, 2015 altering the tariff fixed in the tariff order of 10th October, 2013 and the Control period, making it applicable for PPAs entered after 01.09.2015 and the late commissioned projects as mentioned in the Order. As the Petitioner has commissioned the project before 31st March, 2018, the tariff order dated 30.07.2015 is not applicable to the petitioner.

11. The learned Counsel for the petitioner submitted written arguments reiterating the earlier submissions. Arguments of learned Counsel of all the parties are heard. Records are perused.

The issues that arise for our consideration are as follows:

Issue No.1: Whether there are sufficient grounds as contented by the petitioner to accord the approval of extension of SCOD in its favour as granted by the respondent No.1?

Issue No.2: Whether the Petitioner is entitled to get the approval of KERC to its Supplemental Power Purchase Agreement dated 16.03.2017 (Annexure P-35) without getting alteration of the tariff awarded in Power Purchase Agreement dated 29.08.2015 (Annexure P-1)?

Issue No.3: Whether the petitioner is entitled to get the tariff of Rs.8.40 per unit in terms of PPA/Annexure -1 dated 29.08.2015?

Issue No.4: Whether the SCOD extended by the GESCOM empowers the petitioner to get the approval of the same as contended?

Issue No.5: To what Order and reliefs the parties are entitled to?

12. After considering the submissions of the parties and material on record, our findings on the above issues are hereunder:

13. Issue No.1: Whether there are sufficient grounds as contended by the Petitioner to accord the approval of extension of Scheduled Commissioning Date as granted by the Respondent No.1?

a) The Respondent No.1/ GESCOM and Sri Bhaskar Rao, Solar Power Developer (SPD) have entered into a Power Purchase Agreement (PPA) on 29.08.2015 for developing a 3MW Solar Power Project in Survey Number 40 at Jonnikeri Village of Aurad taluk in Bidar District. The project was to be commissioned in 18 months and Conditions Precedent had to be achieved within 365 days from the effective date of PPA. The tariff payable was Rs.8.40 per KWh. Sri Bhaskar Rao had written a letter dated 9.1.2016 to the Managing Director, GESCOM stating that he had approached Banks and Financial Institutions seeking financial assistance for securing loans for the project and also met some contractors to undertake various activities to develop the project. Since he is an agriculturist, lacks the technical expertise and does not have funds required to set up a Solar Power Project under the PPA, it will be impossible for him to raise bank loans in his individual capacity. He thus found that without incorporating a Special Purpose Vehicle (SPV) and without assignment of the rights of the SPD under the PPA in favour of the SPV, bank loans and contractor negotiations will be difficult and implementation of the project within time would not be possible. Hence, as required under proviso to Article 12.11 (i) of the PPA, he incorporated a SPV by name M/s Clearsky Solar Power Private Limited on 25.05.2016. a legal entity for the financing, design, construction, development, commissioning

and operation of the project. Consequently, the Petitioner and GESCOM/Respondent No.1, entered into SPPA dated 01.06.2016 with modifications to the original PPA dated 29.08.2015, stating that all other terms and conditions of the aforesaid PPA shall remain unaltered, subject to the approval by the Karnataka Electricity Regulatory Commission. The Supplemental PPA dated 01.06.2016 was approved by the KERC on 28.06.2016 (Annexure P-8).

- b) Before proceeding to consider this issue No.1, we note the relevant provisions of PPA, which defines "Effective Date", "Scheduled Commissioning Date" and "Commercial Operation Date" and relevant part of PPA relating to Conditions Precedent and Damages for delay by the Developer and Tariff Payable/ Applicable.
- c) Article 1.1 (xiv) defines "Effective Date" shall mean date of signing of this agreement by the parties. Article 1.1 (xxxi) defines "Scheduled Commissioning Date" shall mean Eighteen months from the effective date. Further, Article 2.1 specifies the obligations of both parties. Under this article, the SPD shall fulfil the conditions indicated (under this article) in full within 365 days from the effective date. In the instant case, the Conditions Precedent are to be achieved on or before 28.08.2016 and the project should be commissioned on or before 28.02.2017.
- d) The petitioner has relied upon the following grounds or circumstances for claiming the extension of time:
 - (a) Delay in handing over the original PPA;
 - (b) Delay in execution of SPPA dated 01.06.2016;
 - (c) Delay in granting evacuation approval;
 - (d) Delay in sparing land for Terminal Bay;
 - (e) Demonetization to treat as "Change in Law event"; and

14. We have clubbed together the grounds made in the main Petition and Rejoinders to Statement of Objections filed by the Petitioner and will examine/consider one by one and give our findings in subsequent paras of this order.

15. Regarding: Delay in handing over the Original PPA:

- i) It is alleged by the Petitioner that, the delay in handing over the original PPA or a copy thereof, by the Respondent caused the delay in obtaining the approvals. The petitioner has alleged that at the time of signing of original PPA dated 29.08.2015, the 1st Respondent did not even provide a copy of the PPA, even though the SPD had continuously followed up with the respondent due to which the petitioner could not approach to the financial institutions for raising funds for the project. As per the recitals of the PPA, a copy of the PPA was delivered to the Petitioner on the date of signing itself. It is alleged that, the initialled PPA was sent to the Commission for approval and was approved on 07.09.2015. It is alleged that the signing of the PPA can happen only after approval of the PPA. The Commission has taken only 8 days for the regulatory process of approval of the PPA from the date of its execution and this period may not have much impact on the commissioning of the project, more so when the delay in commissioning of the project is not only 8 days but much more. The allegation of the petitioner that the PPA is signed only after approval by the Commission cannot be accepted as the last portion of the PPA mentions that 'the PPA is executed and copies delivered to each part on the day and year first above stated' (i.e., on 29.08.2015). If a copy of the PPA was not delivered on the date of signing the PPA, the petitioner ought to have demanded the same from the respondent and obtained a copy. The Petitioner could have initiated the preliminary works towards implementing the Project with a copy of the

PPA, as the approved PPA would be required only at the final stages of loan approval, land conversion approval, etc. A signed copy of the PPA would be sufficient to proceed with the implementation of the Project. The Petitioner has not mentioned the authority or institution which refused the application of the SPD for loans, approval, etc., required for Project implementation for want of approved copy of the PPA.

- ii) The petitioner, along with the rejoinder filed on 09.07.2019, has filed certain documents. In the letter dated 19.10.2015, written by the Chief Engineer (Ele.), Corporate Planning, GESCOM to the Secretary, KERC, it is stated that GESCOM has entered into PPA with 1-3 MW Solar Power Developers for development of solar power project in GESCOM; that the PPA copies were sent to KERC for approval and same have been approved by the Commission; that the individual solar power developers were requesting for returning of original PPAs for the project implementation as bankers were insisting for furnishing original PPA for sanctioning the loans (Annexure-P43). It is stated by the petitioner that in response to above said letter, Secretary, KERC had returned the Original PPAs entered into between GESCOM and the Developers (25 numbers including original PPA of Sri Bhaskar Rao) in respect of 1-3 MW Solar Power Projects (Land Owner's Project) (Annexure- P44). It could be observed from the above said letter that GESCOM had not submitted the Original of 25 PPAs relating to the Solar Power projects to KERC's Office for approval and had sent only copies of PPAs.
- iii) Moreover, it could be seen from the letter dated 09.01.2016 written by Sri Bhaskar Rao to the Managing Director, GESCOM, wherein he has admitted that the PPA dated 29.08.2015 had been executed between himself and GESCOM and wanted to create a special purpose vehicle, under the proviso to Article 12.11(i) of the PPA to assign his rights, obligations, responsibilities etc. to SPV for execution and commissioning

the solar power project. He further requested the M.D. to issue a letter of acknowledgement stating that the GESCOM acknowledges the irrevocable assignment of the rights of SPD under the said PPA to the SPV i.e., M/s Clearsky Solar Power Private Limited which shall enable the SPV to approach various Lender, Contractors, EPC and other Vendors for negotiations. This clearly shows that after the execution of PPA between him and Respondent No.1 the SPD was not in a position to commence the project without assigning the irrevocable rights of the SPD to the SPV i.e., M/s Clearsky Solar Private Limited (Annexure- P45). Therefore, the real reason for delay in execution of the project, was not the delay in receipt of original PPA but the delay in formation of SPV by the SPD.

16. Regarding: Delay in Execution of SPPA dated 01.06.2016:

- i) It is contended by the petitioner that pursuant to Article 12.11 of the PPA, the SPD wrote to the 1st Respondent by letter dated 09.01.2016 informing about formation of SPV and sent a copy of MoA and AoA; that based on advice given and format provided by the 1st Respondent, a SPPA dated 08.02.2016 was executed, in order to assign the project to petitioner. The petitioner came to know through e-mail dated 02.04.2016 sent by GESCOM that the SPPA dated 08.02.2016 was not in conformity with the format issued by the Commission and hence, GESCOM called upon the petitioner to execute another SPPA as per format approved by the Commission. This was the first time that the 1st Respondent had provided the petitioner with the correct format of SPPA (Memorandum of Association (MoA)/Articles of Association (AoA) as approved by the KERC. After receipt of email dated 02.04.2016 from the GESCOM, the petitioner proceeded to carry out necessary changes in the MoA and AoA and thereafter, applied to the Registrar of Companies, which took approximately one and half months to

complete the necessary process and formalities including execution of relevant agreements. Finally, the petitioner and respondent entered into a fresh SPPA on 01.06.2016.

- ii) It is noted that after signing of PPA on 29.08.2015, the petitioner for the first time informed the respondent-1 about formation of SPV vide letter dated 09.01.2016 and requested for an acknowledgement in this regard. This is after more than 4 months from the date of the signing of the PPA. This delay is not explained by the petitioner. Further, creation of SPV for implementing the project was not mandatory but an option provided to the SPD.
- iii) The SPD was fully aware while signing the PPA that there is a time frame for achieving Conditions Precedent and commissioning the project. Further, Article 2.1.1 (i) of the PPA mandates that the SPD shall obtain all clearances and approvals (whether statutory or otherwise) as required to execute and operate the project and should also notify GESCOM in writing at least once a month on the progress made in satisfying the Conditions Precedent as per Article 2.1.3 of the PPA. The SPD/ Petitioner has not placed any substantial material to substantiate that it has notified the monthly progress in satisfying the compliance of achieving Conditions Precedent. The petitioner has failed to prove that the delay in execution of SPPA was due to non- co-operation and default on the part of GESCOM/Respondent No.1.
- iv) In view of the above reasons, we are of the opinion that no fault can be attributable to Respondent No.1 for delay in execution of SPPA dated 01.06.2016.

17. Regarding: Delay in granting Evacuation Approval by the KPTCL:

- i) It is contended by the petitioner that there was a delay in providing Evacuation approval for the proposed power plant by the Respondent No.3/KPTCL. To counter this allegation, the KPTCL submitted its statement of objections dated 03.08.2019 stating that the Respondent had promptly granted all its approvals and sanctions in a timely manner depending on compliance on the part of petitioner.
- ii) It is noted that the Chief Engineer (Ele), Transmission Zone, Kalaburagi vide his letter dated 07.04.2016, referring the letter dated 24.02.2015 of the petitioner, asked the petitioner to submit a Detailed Project Report (DPR), Toposheet and RTC pertaining to the generation of 3 MW Solar Power Project to his Office as per the Guidelines framed by the KPTCL and to remit the process fee of Rs.57,250 and informed that soon after payment of said fee, the proposal will be processed observing KPTCL norms(Annexure P3). In response to this letter, the petitioner remitted the fee of Rs.57250 and sent the documents such as DPR, Toposheet and RTC to the Chief Engineer, Transmission Zone, on 20.04.2016.
- iii) On 06.05.2016, the Executive Engineer, Humnabad has sent a Feasibility Report along with station layout sketch and single line diagram for evacuation of proposed solar power plant to the Superintending Engineer, Transmission Circle, Kalburagi for needful action (Annexure-P4).
- iv) On 20.5.2016, the Chief Engineer (Ele) Transmission Zone, Kalaburagi, accorded Tentative evacuation scheme approval to the petitioner with a condition that the petitioner has to "construct of 33 KV overhead line for a distance of 6 Kms with Coyote conductor from its generation plant to 110/33-11 KV sub-station at Santhapur with terminal bay (DP structure) along with the required matching control equipment at

both ends of the line and extension of existing control room with allied civil works as per the layout and technical specification to be approved from KPTCL." Further, it was mentioned in this letter that after hearing acceptance for the evacuation scheme with other conditions by the petitioner, tentative evacuation scheme will be regularised and detailed approved evacuation scheme along with terms, conditions and clearance for commencing work of evacuation will be conveyed (Annexure-P5).

v) On 06.02.2017, the petitioner made a request to the Chief Engineer, KPTCL for sparing of land measuring 1928.13 feet for construction of terminal bay at 110 KV Sub-station Santhpur and remitted of Rs.4,23,331 and requested to issue work permit for construction of terminal bay at 110 KV Sub-station (Annexure-P24).

vi) It is alleged by the petitioner that there was delay on the part of KPTCL in granting evacuation approval. It could be seen from above facts that there was no delay on the part of KPTCL in giving tentative evacuation scheme approval. We note that the tentative evacuation approval given by the Chief Engineer, Transmission Zone, KPTCL on 20.05.2016 was with a condition that the petitioner has to construct 33 KV overhead line from its generation plant to 110/33-11 KV Sub-station as per Technical specification to be approved by the KPTCL and seek clearance for commencing of work of evacuation. On the perusal of records and documents available on record, it is found that the petitioner has not commenced any construction of 33 KV overhead line as per tentative evacuation approval. The petitioner requested to KPTCL vide letter dated 24.5.2016 to spare suitable land either on leased basis or sale basis. The Chief Engineer, Transmission Zone, KPTCL gave regular evacuation approval on 12.12.2016 to be executed by the petitioner under "self-execution" basis (Annexure-P11). The

petitioner requested on 16.12.2016 to allot land for erection of bay extension at Santhapur Sub-station and on 06.02.2017 an amount of Rs.4,23,331 was remitted towards sparing of land measuring 1928 square feet for construction of terminal bay at 110KV at Santhapur Sub-station and sought permission for issuing work permit. This shows that KPTCL has acted promptly and facilitated in providing the required approvals for power evacuation to the petitioner without any delay. In view of above, we are of the opinion that reasons for delay in achieving in SCOD, cannot be attributable to the KPTCL and grounds made in the petition are not sustainable.

18. Regarding: Delay in sparing space/land for construction of 33 KV Terminal Bay:

- i) The petitioner attributed one of the reasons for delay in commissioning of its power project is that KPTCL had taken sufficient time for providing space/ land at Santhapur Sub-station for construction of 33 KV terminal bay extension for its power plant. Under the evacuation scheme dated 20.05.2016, the petitioner was required to procure suitable land adjacent to the switch yard of KPTCL/GESCOM Sub-station for construction of terminal bay. The petitioner requested the Chief Engineer, KPTCL, Kalabuargi on 24.05.2016 to spare land at Santhapur 110/33-11 KV Sub-station, either on leased basis or sale to construct terminal bay for terminating the evacuation lines (Annexure-P6).
- ii) On 28.05.2016, the Chief Engineer, Transmission Zone, KPTCL, asked Executive Engineer, Humnabad to furnish the single line diagram of the station duly marking the land to be spared for solar power evacuation scheme of M/s Clearsky Solar Power Private Limited.
- iii) On 30.05.2016, the Executive Engineer, KPTCL, Humnabad informed the Chief Engineer, KPTCL stating that there is space of 20.6 meters

available from the existing 33 kV station tower to station security fencing for construction of 33 kV terminal bay (Annexure-P9).

- iv) On 01.06.2016, the Chief Engineer, Transmission Zone, KPTCL Kalaburagi has sent a proposal to the Chief Engineer (P&C), KPTCL, Bangalore, stating that he has accorded approval for tentative evacuation scheme for the proposed 3 MW Solar Power Project to construct 33 KV overhead lines for a distance of about 6 kms with Coyote conductor from generating plant to 110/33-11Kv S/S at Santhapur with terminal bay. He further, requested to convey approval to spare KPTCL land to the petitioner for construction of 33 kV terminal bay and also to collect one-time, non- refundable amount as per Corporate norms.
- v) On 12.12.2016, the Chief Engineer, Transmission Zone, Kalaburagi accorded Regular evacuation scheme approval to the petitioner (Annexure- P11). This also required the petitioner to procure land for construction of terminal bay.
- vi) On 16.12.2016, the Petitioner made a request to the Chief Engineer, Transmission Zone, KPTCL to allot land for erection of bay extension at Santhapur Sub-station Power Grid (Annexure P-12).
- vii) On 21.12.2016, the Superintending Engineer, SCADA, KPTCL wrote a letter to the Chief Engineer, Transmission Zone stating that the petitioner has requested to integrate its power plant at 33KV bus of 110 KV Sub-station Santhapur by using the KPTCL SCADA infrastructure for which they have to pay Rs.97,572 towards this as per KPTCL norms (Annexure-P13).

- viii) On 27.01.2017, the Chief Engineer, Transmission Zone, KPTCL requested to the petitioner to remit SCADA integration charges of Rs.97,572, which was paid by the petitioner on 01.02.2017 in the office of the Chief Engineer, Transmission Zone (Annexure-P20). The Petitioner made the payment and requested the Chief Engineer, Transmission Zone to integrate solar power plant.
- ix) On 03.02.2017, the Chief Engineer, Transmission Zone, communicated to the Superintending Engineer, KPTCL to collect Rs.4,23,331 towards sparing of 1228 square feet KPTCL land for construction of the terminal bay at 110 KV sub-station at Santhapur and in turn, the requisite amount was paid by the petitioner on 06.02.2017 (Annexure-P22).
- x) On 04.02.2017, the Executive Engineer, KPTCL submitted estimate for construction of 33 KV terminal bay at 110/33-11kv Sub-station at Santhapur, under self-execution (Annexure-P23).
- xi) On 06.02.2017, the petitioner requested to the Chief Engineer, Transmission Zone to issue work permit for construction of terminal bay 110 KV Sub-station Santhapur (Annexure-P24)
- xii) On 14.02.2017 the petitioner made request to the Chief Engineer, Transmission Zone to give approval of MCT & MPT Drawings for 33 KV Terminal Bay at existing 110/33-11 KV KPTCL Santhapur Sub-station (Annexure-P25).
- xiii) On 15.02.2107, the petitioner submitted four sets of Drawings to CEIG pertaining to Electrical Installation of 3 MW solar power plant and paid requisite fee on 17.02.2017(Annexure-P26).

- xiv) On 22.02.2017, the petitioner made a request to Chief Electrical Inspector to Govt. (CEIG) to carry out inspection of its electrical installations and associated equipment (Annexure- P30).
- xv) On 23.02.2017, the CEIG accorded electrical safety approval for electrical installation pertaining to 3 MW solar power plant under distributed power generation through land owned farmers scheme at Survey No.40, Jonnikeri village of the petitioner (Annexure- P31).
- xvi) On 27.05.2017, the solar power plant of the petitioner was commissioned and Commissioning Certificate issued by the Executive Engineer (Ele.) 220 KV Receiving Station, KPTCL, Humnabad (Annexure-P42).
- xvii) We note from above sequence of dates and proposals submitted by the petitioner, that the Respondent/ KPTCL extended full support to the petitioner in giving necessary evacuation approvals, sparing the land for terminal bay and integrated the 3MW solar power project with the KPTCL infrastructure. Therefore, we are of a view that there was no delay on part of Respondent No.3/KPTCL as alleged in the petition. Hence, grounds made by the petitioners for delay caused by the Respondent in sparing space/ land for construction of 33kv terminal bay which has resulted in delay in Commercial Operation of its projects, are not tenable on the basis of reasons stated above.

19. Regarding: Delay in Land Conversion under Deemed Conversion Scheme:

- i) It may be noted here that the petitioner submitted multiple Statement of Rejoinders to Objections filled by the Respondent No.1 and Common Statement of Rejoinder to statement of objection filed by the Respondent No.2, 3 and 4, by adding new grounds, which were not there in original

petition. The Respondents have not raised any new points outside the scope of the petition while submitting their statements of Objections. While considering the new grounds made in Rejoinders filed by the petitioner, we have to go through the relevant provisions of KERC (G&C) Regulations. The Regulation-25 of the KERC. (General & Conduct of Proceedings) Regulations, 2000, states that where the Respondent wishes to state additional facts as may be necessary for just decision of the case, the Commission may allow the petitioner to file a rejoinder, to the reply filed by the Respondent. The procedure mentioned above for filling of the reply shall apply mutatis mutandis to the filing of the rejoinder". However, the Respondents have not preferred to submit their replies to new grounds made in the rejoinders by the petitioner. We consider that it would be appropriate to allow the issues raised in the rejoinders filed by the petitioner. Hence, in the interest of justice, we allowed them for our consideration and giving findings thereon.

ii) The petitioner has filed its Rejoinder to objections filed by the Respondent No.1/GESCOM on 09.07.2019 and common rejoinder on 15.10.2019 to statement of Objections filed by the Respondents No.2 to 4. In these rejoinders, the petitioner has submitted a sequence of events and alleged the delays caused by the Revenue Department in granting land conversion permission for its solar power project, which are as follows:

- 4.11.2015- KREDL conducted a meeting of SPDs to review the progress of implementation of 1-3 MW solar power projects;
- 1.12.2015- Guidelines for deemed land conversion issued by the Revenue Department;

- 29.1.2016- Petitioner approached the Assistant Commissioner, Bidar Sub-Division requesting for permission to submit application under deemed land conversion scheme;
- 24.02.2016- Petitioner submitted a copy of PPA along with a letter of allotment of solar power to A.C. Bidar;
- 03.08.2016- Petitioner submitted a set of documents to Deputy Commissioner, Bidar, requesting for land conversion;
- 06.09.2016 – Petitioner requested A.C. and Tahsildar, Bidar to carry out site visits;
- 18.02.2017 - A.C. Bidar submitted his Report to D.C. Bidar for considering the proposal.
- 27.02.2017 to 20.3.2017- Proposal sent by the D.C. Office to the Assistant Director, Town and Country Planning and Joint Director, DIC for their opinion and concurrence and after seeking their opinion, Deputy Commissioner, Bidar issued land conversion order on 24.05.2017 (Annexure-P57).

iii) It could be seen from the above, that the Authorised Signatory on behalf of the petitioner has approached Assistant Commissioner, Bidar on 29.01.2016 stating that land continues to be in the name of Sri Bhaskar Rao and that he has promoted and assigned the solar power project to M/s Clearsky Solar Power Private Limited and Revenue Department of GoK has issued a Circular permitting the District Officials to issue Land Conversion Orders under Deemed Conversion Scheme and submitted a copy of the said circular and requested him to guide and permit them to apply for land conversion under the scheme (Annexure-P54). Similarly, he approached A.C, Bidar on 24.02.2016 with same type of

request (Annexure- P 55). This clearly demonstrates that the Petitioner did not apply to the concerned Authority with relevant documents as required under the deemed conversion scheme indicated in Circular dated 01.12.2015 issued by the Revenue Department. As per available records, Sri Bhaskar Rao applied for conversion of agricultural land for non- agricultural purpose to the Deputy Commissioner's Office on 03.08.2016 through On- line Portal (GSC No. RD099-00014-92449). Thereafter, the proposal was processed by the Deputy Commissioner's Office and sent to Tahsildar's office and Assistant Commissioner's office for necessary action. The concerned Revenue Officials examined the proposals and conducted field visits and submitted reports to Deputy Commissioner office and Deputy Commissioner issued the land conversion on 24.05.2017.

- iv) We observe that there was delay in issuing land conversion order by the Deputy Commissioner's Office, but it could be attributed to administrative reasons as Land Conversion proposal requires examination of various provisions of the Karnataka Land Reforms Act, 1961, the Karnataka Land Revenue Act, 1964, Karnataka Land Grant Rules, 1969 and the Karnataka Scheduled Castes and Scheduled Tribes(Prohibition of Transfer of Certain Lands) Act, 1978 and getting filed reports and consultation with concerned Departments before issuing the land conversion order.
- v) We note that the land conversion order was passed on 24.5.2017 by the DC, but this has not affected the progress of the project, as the project was completed and commissioned on 27.5.2017, within 3 days of the land conversion order. Therefore, the delay in receipt of land conversion order cannot be treated as force majeure event which hindered the progress of the project.

- vi) It is the duty of the SPD/petitioner to seek required legal approvals from the concerned authorities well in time as a prudent developer in order to achieve the Conditions Precedent within 365 days from the date of signing of PPA. In present case, the petitioner did not achieve the Conditions precedent for which a notice was issued to Sri Bhaskar Rao, by the Chief Engineer (Corporate Planning), GESCOM on 03.01.2017 stating that as per Article 2.2 of the PPA dated 29.08.2015, he has delayed in fulfilment of conditions precedent, the damages work out to Rs.3,60,000. Therefore, he has to pay the aforesaid penalty within 7 days from the date of letter. The petitioner had paid the penalty on 16.03.2017 vide receipt No.16204. From this, an inference is drawn that the petitioner had failed in achieving the conditions precedent within 365 days as envisaged under Article 2.1 of the PPA dated 29.08.2015.
- vii) The petitioner has contended in Para 42 of its Rejoinder dated 09.07.2019 that the Ministry of New and Renewable Energy, Government of India, had communicated to State Governments vide letter dated 28.07.2017 stating that:
- "Ministry had requested not to give time extension of all the obligations are fulfilled by the concerned State Government Authorities/PUSs etc.in a project. However, if there are delays of any kind on the part of the State Government Authorities/ PSUs like land allotment, transmission/evacuation facilities, connectivity permission or force majeure, the competent authority in the State/ SECI/ NTPC may consider providing extension of time duration strictly as per the contractual agreement."*
- It is also to be clarified that if the project equipment/materials have been purchased/ ordered and substantial advances paid as per original completion date, and there is a delay on the part of the state organisations regarding land, transmission or any reasons, the extension of the project may be allowed—".*

- viii) It could be seen from the letter referred above, that if the project developer had purchased/ ordered equipment/ materials and paid advances against the supplies as per original completion date and if there is a delay on the part of the State Authorities, regarding land allotment, transmission/evacuation facilities, connectivity permission or force majeure, the competent authority may consider providing extension of the time strictly as per Contractual Agreement.
- ix) In the present case, no documents pertaining to procurement of solar panels, inverter, battery and related equipment are produced by the petitioner to show that the petitioner had procured required number of solar power panels and other materials and its plant was ready for execution. The petitioner cannot take shelter of the letter dated 28.7.2016 of the Ministry of New and Renewable Energy, Government of India, for seeking extension of time to complete its project.
- x) The petitioner has failed to establish that delay caused in granting of land conversion by the Revenue Department qualifies a Force Majeure Event as per provisions of Article 8.3 of the PPA.

20. Regarding: Demonetisation to be treated as "Change in Law event":

- i) The petitioner had made its submission in Para 46 of the rejoinder filed on 09.07.2019 stating that due to announcement of demonetisation by the Central Government, the work of land levelling, construction work had come to a standstill, as these were labour intensive in nature and payment of wages to the labourers and material suppliers/vendors could not be made due to acute cash crisis during the demonetisation period. This has contributed in delay in commissioning the project, therefore, this event is to be treated as "Change in Law" event and also a force majeure event. On these grounds, the petitioner had requested the Chief Engineer, GESCOM, Corporate Planning, vide letter dated 06.12.2016 and 24.12.2016 and sought extension of Commercial

Operation Date (Annexures P-14 & 15) and which was considered by the Respondent while issuing the time extension order on 15.03.2017.

- ii) Per contra, the Respondent No.1 had contended that averments made by the petitioner shifting the responsibility on the respondents on the baseless grounds for not paying the wages to the labourers, delays in granting of evacuation approvals, land conversion etc. are not sustainable in light of the provisions of the PPA.
- iii) It would be appropriate to go through the provisions pertaining to Force Majeure Clauses of the PPA. Article- 8 of PPA dated 29.08.2015 mentions the provision of Force Majeure and Article 8.3 indicates the events which could be covered under this provision, but this provision does not cover the demonetization as force majeure event. Further, the Article 8.3 (b)(i) of the said PPA, stipulates an excuse to the affected SPD whose performance has been affected by an event of Force Majeure. The non-performing party has to give the other party a written notice describing the particulars of the Force majeure event as soon as practicable after its occurrence. In the present case the petitioner had written letters dated 06.12.2016 and 24.12.2016 to the Chief Engineer (Electricity), (Corporate Planning), GESCOM, Kalaburagi and requested for granting extension of Commercial Operation Date, citing the reasons for not completing its solar power project due to announcement of Demonetisation by the Central Government (Annexure P-14 & 15). It could be noted that the Central Government had announced Demonetisation on 08.11.2016 and it continued till 03.12.2016. The petitioner had written letters to the Respondent after a lapse of about a month's period. Moreover, the petitioner had not issued any specific notice to the Respondent stating that the announcement of 'Demonetisation' is to be treated as 'Change in Law Event' and 'Force Majeure Event' by invoking the clauses of Article 8.3 and Article 8.3 (b) (i) of the PPA as soon as the announcement of demonetisation by

the Central government. Further, no reliable material evidence such as how many labourers were working at project site and how much wages to be paid and how many bills/ amount were pending payment to the suppliers. No material is placed by the petitioner along with the rejoinders to prove the claim that announcement of demonetisation by the Central Government had badly affected the progress of its project and demonetisation is to be treated as Force Majeure Event. In view of above facts, we are of the opinion that the letters dated 06.12.2016 and 24.12.2016 written by the petitioner to the Respondent Seeking Extension of Commercial Operation Date, cannot be treated as notice for declaring demonetisation as "Change in Law Event" and also a Force Majeure Event under the aforesaid Articles of the PPA. Hence, the request of the petitioner cannot be considered and it is liable to be rejected.

- iv) For the reasons discussed above, the petitioner has failed to prove existence of any grounds, so as to get extension of Scheduled Commissioning Date granted by the Respondent No.1 by this Commission. Therefore, we hold Issue No.1 in negative.

21. Issue No.2: Whether the Petitioner is entitled to get the approval of KERC to its Supplemental Power Purchase Agreement dated 16.03.2017 (Annexure P-35) without getting alteration of the tariff awarded in Power Purchase Agreement Dated 29.08.2015 (Annexure P-1)?

- i) The petitioner has submitted in Para 36 of the Main Petition that the Respondent No.1/ GESCOM has accorded its approval of time extension in date of commissioning of 3 MW Solar Power Project from scheduled date of Commercial Operation Date (COD) i.e., 28.02.2017 up to 27.05.2017 vide its Order dated 15.03.2017 and this Commission is

requested to approve the SPPA dated 16.03.2017 without altering the tariff in the PPA dated 29.08.2015.

- ii) The Respondent submits that it is admitted that the 1st Respondent had accorded approval for time extension for the scheduled commissioning date and SPPA was executed on 16.03.2017, but this approval was subject to revision of tariff and approval of this commission. Therefore, the approval for time extension of COD was not absolute.
- iii) To counter the argument of the respondent, the petitioner has reiterated in para 47 of the Rejoinder that any fair, business minded person with understanding of commerce would have viewed this as a force majeure event in terms of the original PPA. In fact, that is probably why the 1st Respondent too had done the same in its internal communication dated 14.02.2017, recognising that the non- granting of land conversion attracts the force majeure clause in the PPA. Therefore, it is very strange and unfair that the answering Respondent is now resoling its recorded and assured position. The Petitioner contends that the SPPA records that all the terms of the original PPA remain unaltered, except for the application of tariff in line with Articles 5.1 of the PPA, and that the Respondent will follow the Commission's order. The petitioner further made its submission in rejoinder that the said Article 5.1 is subject to Article 2.5, and it is for the 1st Respondent to justify how and why it is reading Article 5.1 into the exclusion of Article 2.5.
- iv) It is noted that the 1st Respondent has accorded approval for time extension of Scheduled date of COD from 28.02.2027 up to 27.05.2017 vide order dated 15.03.2017 imposing certain conditions inter alia that there will be no change in the effective date of PPA dated 29.08.2015 and the petitioner has to enter into the SPPA subject to approval by the KERC. It could be seen from the SPPA dated 16.03.2017, therein that

both the parties signed and agreed to amend/modify the agreement dated 29.08.2015 as follows:

1. Article 1 Definitions:

Existing:

xxxi "**Scheduled Commissioning Date**" shall mean 18 (eighteen) months from the Effective Date.

To be modified as:

xxxi "Revised Scheduled Commissioning Date" shall mean 27.05.2017.

- v) It may be noted here that last paragraph of this SPPA states that the PPA dated 29.08.2015 and Supplemental Agreement dated 01.06.2016 shall stand modified subject to the approval by the Karnataka Electricity Regulatory Commission. The above stated facts, clearly state that whatever amendments/ modifications are made by both the parties mutually agreed upon has to be approved by the KERC.
- vi) The petitioner has submitted that the Respondent No.1 had extended the time of SCOD and both the parties have mutually agreed to the modified terms and conditions in the SPPA dated 16.03.2017, therefore they are entitled to get tariff of Rs.8.40 per unit as agreed in the original PPA. The petitioner has placed reliance on the Order dated 28.07.2016 passed by the KERC in OP No.25/2016 in Case of Sri Murralli M. Baaldev Vs. KREDL and Another, wherein this Commission has held as under:

"11. Whether the petitioner is entitled to tariff of Rs.8.40 per unit for the PPA executed on or after 01.09.2015, as he received the Letter of Award dated 25.08.2015?

XXX

XXX

(c) The Solar Tariff Order, 2013 was made applicable for Solar Power generators entering into PPA on or after 01.04.2013, till the expiry of the Control Period specified in the said Order, i.e., till 31.03.2018. This Commission, however, noted that there was substantive mid-course improvement in technology and considerable reduction in Capital Cost relating to Solar Photo Voltaic MW Scale Power Plants, and thereby there was a reduction in the cost of solar power generation, and therefore there arose a necessity for passing a revised Tariff Order for solar photovoltaic power plants, curtailing the Control Period. Subsequently, after following the due procedure, the Solar Tariff Order 2015 was passed determining the tariff for Solar Photo Voltaic MW Scale Power Plants at Rs.6.51 per unit and making it applicable to all new grid connected Solar Power Photo Voltaic MW Scale Power Plants entering into PPA on or after 01.09.2015. It is also made it clear in the said Order that the earlier tariff of Rs.8.40 per unit was applicable to the Solar Photo Voltaic MW Scale Power Plants, having entered into PPAs prior to 01.09.2015.

vii) On the basis of above said Tariff Order, the petitioner's contention that the Commission has clearly stipulated that for the PPAs entered in prior to 01.09.2015, the tariff of Rs.8.40 per unit is made applicable. Since the PPA of the Petitioner is entered into prior to 01.09.2015, the petitioner is entitled to the tariff of Rs.8.40 per unit.

viii) To counter this averment made by the petitioner, the Respondent No.1 has submitted that it is admitted that as per clause 5.1 of the PPA, the applicable tariff was initially fixed at Rs.8.40 per unit, however if there was delay in commissioning of the solar power project beyond the scheduled commissioning date and if during that period there is a variation in the KERC tariff, then the applicable tariff would be either the varied tariff as on the date of commercial operation or Rs.8.40 per unit whichever was lower. The reliance placed by the petitioner on the KERC

Order in OP 25/2016 is again misleading. The SPPA dated 16.03.2017 entered between the Petitioner and Respondent was with pre-condition of seeking approval of this Commission.

ix) To answer the Issue No.2, it is evident that Sri Bhaskar Rao has entered into PPA with the Respondent on 29.08.2015 and subsequently this petitioner has made SPPA dated 01.06 2016 in pursuance of Article 12.11(i) of the PPA wherein this Petitioner has been given irrevocable rights by Sri Bhaskar Rao but other terms and conditions of the PPA dated 29.08.2015 had not been altered. It shows that no inference can be drawn by the petitioner that Commission has agreed to the alteration/ modification made in SPPA dated 16.03.2107 as contended by the petitioner.

22. Issue No.3: Whether the petitioner is entitled to get the tariff of Rs.8.40 per unit in terms of the PPA dated 29. 08.2015?

- i) The petitioner has prayed that this Commission may direct Respondent No.1 to pay the tariff of Rs.8.40 per unit as agreed under the PPA dated 29.08.2015, as the Respondent has already granted an extension to the petitioner which is clearly demonstrated in the SPPA wherein the revised Scheduled Commissioning Date (SCD) stands extended to 27.05.2017. The petitioner has commissioned the project well within the Scheduled Commissioning date agreed as per the SPPA dated 16.03.2017. Hence, the petitioner is entitled to the tariff agreed to under the PPA dated 29.08.2015.
- ii) It is further submitted that as per KERC's Generic Tariff Order dated 10.10.2013 and 30.7.2015, the petitioner is entitled to the tariff of Rs.8.40 per unit. Article 5.1 of the PPA clearly mentions that the tariff determined as per the Order dated 10.10 2013. Subsequently, this Commission has modified the tariff Order dated 10.10.2013 by Tariff Order dated

30.07.2015 which clearly mentions in respect of the projects getting commissioned during the period from 01.09.2015 to 31.03.2018 for which the PPAs have been entered into and submitted to the Commission prior to 01.09.2015 for approval, tariff agreed in the PPA would apply. The petitioner's project has been commissioned on 27.5.2017. Hence, it is entitled to get a tariff of Rs.8.40 per unit.

iii) The Respondent in its statement of objection has stated that the tariff as per Clause 5.1 of the PPA dated 28.09.2015 would apply and the tariff which is lower of the following would apply:

- a. Rs.8.40 per kWh;
- b. Varied tariff applicable as on date of commercial operation.

iv) The project has been commissioned on 27.05.2017, hence, entitled to get the tariff applicable on the date of commissioning of the project.

v) It would be appropriate to go through the provisions of the PPA dated 29.08.2015 entered between Sri Bhaskar Rao and GESCOM. Article 5.1 of PPA deals with Tariff Payable which is produced here under:

"The SPD shall be entitled to receive the Tariff of Rs.8.40 per KWh based on the KERC Tariff Order No. S/03/01 dated 10.10.2013 in respect of SPD's solar PV projects in terms of this agreement for the period between COD and the expiry date. However, subject to Clause 2.5, if there is a delay in commissioning of the project beyond the Scheduled Commissioning Date and during such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects as on the date of commercial operation.

(i) Rs.8.40 per kWh

(ii) Varied tariff applicable as on the date of commercial operation."

- vi) It is very clear in Article 5.1 of the PPA that if there is a delay in commissioning of the project beyond the scheduled commissioning date and during such period there is a variation in KERC tariff, then whichever is the tariff would be applicable. In the instant case, the scheduled commissioning date was eighteen months from the effective date. The project ought to have been commissioned on or 28.02.2017, but actually project has been commissioned on 27.05.2017 (Annexure-P42) with about 3-months delay. In view of above, the petitioner is not entitled to get tariff of Rs.8.40 per kWh as sought for but entitled to get KERC tariff applicable as on the date of commissioning.
- vii) As contended by the Petitioner in its petition that the Tariff Order dated 10.10.2013 which was modified on 30.07.2015 and the petitioner's project has been commissioned during the period from 01.04.2015 to 31.03.2018 for which PPA have been entered into and supplemental agreement signed by both the parties. Hence, viewed from any angle, the petitioner is not entitled for the tariff of Rs.8.40 per unit.
- viii) The KERC Generic Tariff Order dated 10.10.2013 was made applicable for solar power generators entering into PPAs on or after 01.04.2013, till expiry of the control period till 31.03.2018. This Commission found that there were substantiate improvement in technology and reduction of capital cost relating to Solar Photo Voltaic MW Scale Power Plant and after following due procedure, determined the tariff on 30.07.2015 for solar photo voltaic MW scale Power plants at Rs.6.51 per unit.
- ix) This Tariff Order clearly mentions applicability for the projects under clause-3 of the Generic Tariff Order dated 30.07.2015 which is reproduced as follows:

"This Order shall be applicable to all new grid connected MW Scale Solar Power Plant and Solar Thermal Power Plants, entering into PPA on or after 01.09.2015 and getting commissioned during the period from 01.09.2015 to 31.03.2018 for which PPAs have not been entered into, prior to 01.09.2015.

In respect of the projects that are commissioned during the period from 01.9.2015 to 31.03.2018 for which PPAs have been entered into and submitted to the Commission prior to 01.09.2015 for approval, the tariff as per the said agreement shall be applicable.

The tariff determined in this order shall be applicable for the terms of the PPAs entered into in respect of projects covered by this order."

- x) In the instant case, it may be noted that the original PPA was entered between Sri Bhaskar Rao/SPD and GESCO on 29.08.2015, which is prior to 01.09.2015 as indicated in latter portion of paragraph of-2 applicability clause 3 of the Generic Tariff Order dated 30.07.2015. Hence, we are of the view that the above said proviso would not be applicable in this case as allegedly claimed by the Petitioner. Moreover, the latter part of para-3 of the Tariff Order mentioned above, states that" the tariff as per said agreement shall be applicable." Article 5.1 of PPA dated 29.08.2015 provides for contingencies, in which varied tariff is applicable for the solar power project. If the project is liable for a varied tariff, the same should be considered and applicability of such varied tariff is not taken away in the latter part of Paragraph-3 of the Tariff Order, noted above." The tariff as per said agreement, does not mean that it is only the tariff of Rs.8.40 per unit in all cases, but it could be a varied tariff, in the event of any delay in commissioning of solar power project, as provided in the Article 5.1 of PPA.

xi) We rely upon the Civil Appeal No.1220 of 2105 (Gujarat Urja Vikas Nigam Limited Vs. EMCO Limited and an others) decided on 02.02.2016, where in Hon'ble Supreme Court of India has held, as follows:

“31. Apart from both the Respondent No.2 and the Appellant tribunal failed to notice that the 1st Respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.20 of the PPA: -

“In case, commissioning of solar power project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by the Hon'ble GERC for solar power project effective on the date of commissioning of solar power project of above mentioned tariff, **whichever is lower.**”

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first Respondent not being able to commence the generation of electricity within the “control period” stipulated in the first tariff order. It also visualised that for the subsequent control period, the tariff payable to the project/power producer (similarly situated as the first Respondent) could be different, in recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1st Respondent would be entitled only the varied of the two tariffs---“

Further, in the decision of the Hon'ble Appellate Tribunal for Electricity in Appeal No.221/2016 & others, dated 07.05.2018 (Savitha Oil Technologies Limited Vs. KERC and Another), it has been held that, the tariff as on the Commercial Operation Date, is applicable for a project.

The ratio of the above Judgments of the Hon'ble Supreme Court of India and Appellate tribunal for Electricity, is applicable to the petitioner's case. Hence, we hold that the petitioner's solar power plant

is entitled to a tariff of Rs.4.36 per unit for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017, prevalent as on the date of commissioning the project. Hence, in the circumstances and on the facts of the case, we hold that the petitioner's solar power plant is entitled to a tariff of Rs.4.36 per unit for the term of the PPA. As per the Generic Tariff Order dated 12.04.2017.

- xii) In view of above, we are the considered opinion that the petitioner is entitled a tariff of Rs.4.36 per unit, as per the Generic Tariff Order dated 12.04.2017 and as per terms of Article 5.1 of Power Purchase Agreement dated 29.08.2015 as petitioner has commissioned its project on 27.05.2017 after the aforesaid Tariff Order. Therefore, we hold the Issue No.3, in negative,

23. Issue No.4: Whether the Scheduled Commercial Operation Date (SCOD) extended by the GESCOM/ Respondent No.1 is justifiable?

- i) The petitioner submitted that a request for extension of Commercial Operation Date was made on 06.12.2016 to the Chief Engineer (Corporate Planning), GESCOM stating that due to announcement of demonetisation by the Central Government, certain materials did not reach at the site as per originally planned schedule as various vendors were having problems transporting the materials to site, current work of land levelling, construction works, auguring works had come to a stand-still, as these are labour intensive in nature. The workers did not have bank accounts and had been demanding their wages in cash. Another letter was also written to him on 24.12.2016. The petitioner had written a letter to the Chief Engineer, GESCOM on 10.01.2017 stating that they have achieved the conditions Precedent and it was reported to the Managing Director, GESCOM vide letter dated 24.08.2016. Further, the Chief Engineer, GESCOM asked the petitioner to attend a scheduled meeting on 27.01.2017 to discuss the matter for time extension of COD. After long deliberations, the Chief Engineer (Ele), Corporate Planning,

GESCOM, passed an order dated 15.03.2017 and accorded approval for extension of commissioning from the scheduled date of COD i.e. 28.02.2017 up to 27.05.2017 with certain conditions (Annexure- P34).

- ii) Pursuant this extension order, SPPA dated 16.03.2017 came to be executed between the Respondent and the Petitioner effecting modification with respect to extension of scheduled commissioning date which was agreed to by the respondent.
- iii) It is pertinent to that 1st Respondent's approval for the time extension of COD was not absolute. The said extension was subject to approval of the same from this Commission. Further, the 1st Respondent had also categorically stated that though most of the terms of the PPA will remain same, the tariff will be subject to the order of the Commission.
- iv) The Respondent submitted that it is under no obligation to pay a higher tariff and take power from the petitioner, when there has been delay in supply of power by the petitioner. The Hon'ble Supreme Court of India in All India Power Engineer Federation Vs. Sasan Power Limited has held that the tariff of electricity will eventually affect the consumers and it is to be regulated by the Karnataka Electricity Regulatory Commission.
- v) It may be noted that the Article 2.5.1 of the PPA provides extension of time, in the event that the SPD is prevented from performing its obligations under clause 4.1 by the Scheduled Commissioning Date due to:
 - a) Any GESCOM event of default; or
 - b) Force Majeure events affecting GESCOM; or
 - c) Force Majeure Events affecting the SPD.

In case of extension occurring due to reasons specified in clause 2.5.1 (a), any of the dates specified therein can be extended, subject to the condition and the Scheduled Commissioning Date would not be extended by more than six months.

vi) In the instant case, we observe that on behalf of Respondent No.1/ GESCOM, the Chief Engineer, (Ele) Corporate Planning, GESCOM, has cited various internal correspondence letters in the preamble of his Order dated 15.03.2017 wherein approval is accorded for time extension of commissioning from scheduled date of COD i.e. 28.2.2017 in respect of 3 MW Solar Power Plant of the petitioner. The operation portion of this order is as follows:

“under the circumstances explained above, approval is accorded for time extension of commissioning from scheduled date of COD i.e., 28.02.2017 in respect of 3 MW Solar Power Plant of M/s Clearsky Solar Private Limited, located at Jonnikeri Village, Aurad Taluk, Bidar District subject to application Article 2.5.1 (c) read with Article 2.5.7 and further subject to the following conditions:

- a) There will be no change in effective date of the PPA dated 29.08.2015.
- b) To extend the date of commissioning upto 27.05.2017.
- c) To enter into a Supplement PPA for the above effect subject to vetting by Hon'ble KERC, Bengaluru.
- d) The performance security (Bank Guarantee) shall be valid up to 31.12.2017. Other terms and conditions of the PPA dated 29.08.2015 remains unaltered except for application of tariff in line with article 5.1 of the PPA according to which GESCOM will follow the Hon'ble KERC Order. Further the firm should strictly adhere to the extended time line for commissioning of the project.” (Annexure- P34).

vii) It could be seen from the above, the time extension Order dated 15.03.2017 issued by the Chief Engineer, Corporate Planning on behalf of GESCOM, would show that no specific findings/ reasons are

recorded in this order for time extension of commissioning date from scheduled date of COD and as to whether the obligations cast upon the petitioner under Article 4.1 of PPA were fulfilled or otherwise and whether the grounds made by the petitioner are met in full as envisaged under Article 2.5 of the PPA, before considering the extension of time for commissioning the project.

- viii) It is settled law, that the State Electricity Regulatory Commission (SERC) has the exclusive jurisdiction to determine the tariff for supply of electricity by a generating company to a distribution licensee and to regulate the purchase of electricity and procurement process of the distribution licensees including the price at which electricity shall be procured from the different agencies through PPAs.
- ix) The above view, we have taken, is based on the principle stated in the judgement rendered by the Hon'ble Supreme Court of India, in case of All India Power Engineer Federation Vs. Sasan Power Limited and Others, reported in (2017) 1 SCC 487. In the said decision, the Hon'ble Supreme Court had considered the effect or waiver of a right, by the Distribution Licensee, under the provision of the PPA, which would adversely affect the tariff agreed to under the PPA, the principles are stated thus: -

“The general principle is that everyone has the right to waive and agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy----- (Paragraph 22).

“The test to determine the nature of interest, namely private or public is whether the right which is renounced the right of party alone or of the public also in the sense that the general welfare of the society is involved ----- (Paragraph-23).

Further, it is held that: -

“----- if there is any element of public interest involved, the court steps into thwart any waiver which may be contrary to such public interest” -----(Paragraph-24).

In the said case, the question, “whether the waiver of a provision of the PPA by the Distribution Licensee, having an effect to increase tariff was valid or not?”. It is held that, the increase in the tariff would adversely affect the consumers and thereby, any waiver by the Distribution licensee against the terms of PPA, is invalid.

- x) We are of the considered opinion that, the principle stated above would squarely apply to a case where the Distribution Licensee gives its consent, against the terms of PPA, in respect of a “ Force Majeure Event” which has the effect of any increase in the tariff, which in turn, would affect the consumers. Therefore, it becomes the duty of this Commission to scrutinize, as to whether there was a case for extension of time for commissioning the project, on the ground of Force Majeure Events.
- xi) In view of above principle lay down by the Hon'ble Supreme Court in aforesaid judgement, this Commission has the exclusive jurisdiction to determine the tariff for supply of electricity by a generating company to a distribution licensee, as per the provisions of Sections 61 to 64 of the Electricity Act, 2003 and the relevant Regulations framed there under. The generating company is prohibited from recovering a price or charge exceeding the tariff determined by the Commission. Therefore, wherever the terms of PPA provide for varied tariff on occurrence of certain events, the Commission alone has the jurisdiction to pronounce a finding regarding the proof or otherwise of the occurrence of such events. The parties concerned being in agreement regarding the occurrence of such events, is irrelevant. Therefore, in the

present case, the clause in the PPA authorising the Respondent i.e. GESCOM / to extend the time for commissioning of the Solar Power Project by the petitioner, on the ground of Force Majeure Events is contrary to the provisions of the Electricity Act,2003, as it has the effect of taking away the jurisdiction of the Commission, to determine the applicable tariff. The parties cannot confer or take away the jurisdiction of a Court or Adjudicating Authority. It is only this Commission that has the exclusive jurisdiction to adjudicate upon the existence or otherwise of such an event which affect the tariff. In the light of above. We are of the opinion that the time extension for Scheduled Commercial Operation Date i.e.28.2.2017 up to 27.5.2017 in respect of 3MW Solar Power Project of the Petitioner by the GESCOM (Chief Engineer, Corporate Planning, GESCOM) vide Order dated 15.3.2017 is not justifiable and not tenable as reasons stated above and liable to be set aside. Hence, we hold issue No.4 in negative.

24. Issue No.5: To what Order and reliefs the petitioner is entitled to?

For the foregoing reasons, we pass the following Order.

ORDER

- a) Extension of Schedule Commissioning Date granted by the 1st Respondent is hereby set-aside;
- b) The petitioner is entitled to a tariff of Rs.4.36 (Rupees Four and Paise Thirty Six) only per unit, the varied tariff as applicable on the date of Commercial Operation of the petitioner's power project, as fixed by this Commission in the Tariff Order dated 12.04.2017 for the term of the Power Purchase Agreement, as per Article 5.1 of the PPA dated 29.08.2015.

c)The petitioner is liable to pay the penalty of Rs.3,60,000 as damages for non- fulfilment of the Conditions Precedent as per Article 2.2 of the PPA dated 29.08.2015, which it has already paid on 16.03.2107 vide Receipt No.16204, and the same shall be forfeited.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D.RAVI)
Member

