

No.N/260/2018

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.**

Dated: 16.02.2021

Present

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

OP No. 108/2018

BETWEEN:

M/s Growth Street Solar Private Limited,
A Company incorporated under
Companies Act, 1956 having its
Registered office at Office No.903,
Eros Corporate Tower, Opp: Nehru Place,
Metro Station,
New Delhi-110 019.

... PETITIONER.

[Represented by Sri Shridhar Prabhu, Advocate]

AND:

1) Bangalore Electricity Supply Company Limited,
A Company registered under the provisions
of the Indian Companies Act, 1956 having
its Registered Office at K.R. Circle,
Bengaluru-560 001.
(Represented by its Managing Director)

2) Karnataka Power Transmission Corporation Limited,
A Company registered under the provisions
of the Indian Companies Act, 1956 having
its Registered Office at K.G. Circle,
Bengaluru-560 009.
(Represented by its Managing Director)

... RESPONDENTS.

[Respondents 1 & 2 represented by
M/s Just Law, Advocates]

ORDERS

1. This petition is filed under Section 86 (1) (f) of the Electricity Act, 2003 by the Petitioner praying for the following reliefs:

- a) To approve the grant of extension of time of Scheduled Commissioning Date issued by Respondent BESCO vide letter dated 17th November 2017 without levy of Liquidated damages at Annexure-P14;
- b) To direct the Respondent BESCO to pay the Petitioner for every unit of energy delivered at the rate of Rs.4.89 per unit along with interest or late Payment surcharge as per PPA including the pendent lite; and
- c) To direct the Respondent BESCO to refund Rs.50,03,200/- which is illegally deducted as liquidated damages.

2. The material facts stated by the Petitioner, required for the disposal of the controversies involved in the above case may be stated as follows:

- a) The Karnataka Renewable Energy Development Limited (KREDL) being the Nodal Agency, for facilitating the development of the renewable energy in Karnataka, invited applications for development of solar power projects of 1,200 MW (AC) to be implemented in 60 taluks through private sector participation, as resolved by the Government of Karnataka (GoK), as per Request for Proposal (RfP) dated 20.11.2015 for selection of bidders for undertaking development of Solar PV Ground-mount power plant. Pursuant to it, number of bidders participated and after evaluation of the proposals received, M/s Growth Street Consultants Private Limited, D-122, Basement,

Saket-110 017 was selected as successful bidder in respect of Harapanahalli taluk, Davangere district, and Letter of Award (LoA) and Allotment Letter dated 23.03.2016 (Annexure-P1) was issued by KREDL. The said successful bidder undertook to develop 4 MW Solar Power Project in Harapanahalli taluk, and to supply the solar power @ Rs.4.89 per unit. The other terms and conditions are stated in the LoA dated 23.03.2016 (Annexure-P1).

- b) As per the terms of RfP, the successful bidder M/s Growth Street Consultants Private Limited, incorporated M/s Growth Street Solar Private Limited as Special Purpose Vehicle (SPV) for executing the Power Purchase Agreement (PPA) and to develop the solar power project. Accordingly, the Petitioner who is the SPV of the successful bidder entered into PPA dated 27.05.2016 (Annexure-2) with the 1st Respondent (BESCOM). This Commission approved the PPA subject to certain corrections/modifications being incorporated in the PPA. The approval of PPA was communicated to the Petitioner and the 1st Respondent through letter dated 17.10.2016 (Annexure-P3). Accordingly, SPPA dated 16.11.2016 (Annexure-P4) was executed between the Petitioner and the 1st Respondent incorporating the corrections/modifications suggested by the Commission.
- c) The PPA provides that "Effective Date" is the date of approval of the PPA. The timeline fixed for achieving the Conditions Precedent is eight months and for achieving the commissioning of the project is twelve months from the Effective Date. Therefore, the Conditions Precedent

is required to be achieved on or before 16.06.2017 and the project is to be commissioned on or before 16.10.2017. As evidenced by Commissioning Certificate dated 29.12.2017 (Annexure-P17), the Solar Power Project was commissioned on 26.12.2017.

- d) During the course of completion of the Solar Power Project, the Petitioner wrote letter dated 11.09.2017 (Annexure-P9) to the 1st Respondent requesting for extension of commissioning date for a period of six months on the grounds that there was delay on the part of the 2nd Respondent (KPTCL) in issuing Bay Estimate and Bay Lease approval letter and there would be delay in obtaining the HT Panel from the approved KPTCL Vendor and that the land conversion order was not yet issued by the concerned Authority. The Petitioner also wrote such letter dated 13.10.2017 (Annexure-P12) to the Commission requesting 120 days' extension for commissioning the project as the Petitioner had done everything it could do to execute the project within the timelines, but could not achieve the same due to the delay caused by KPTCL in issuing the various approvals. The 1st Respondent issued letter dated 17.11.2017 (Annexure-P14) communicating approval to commission the project on or before 16.02.2018 subject to the conditions mentioned in the said letter. As noted above, the project was commissioned on 26.12.2017. In the letter dated 17.11.2017 (Annexure-P14), the 1st Respondent intimated that the tariff applicable was as per KERC Generic Tariff Order dated 12.04.2017 (i.e., Rs.4.36 per

unit) and that the liquidated damages as per PPA Clauses 4.3 & 5.8 were applicable and that the Petitioner could file a petition before the Commission with all relevant grounds/ documents for justification of claims for extension of time under Force Majeure events stated in the PPA. After supplying the energy to the grid, the 1st Respondent recovered the liquidated damages and paid energy charges at Rs.4.36 per unit. Thereafter, the Petitioner filed the present petition on 29.11.2018 before this Commission praying for the reliefs noted above.

- e) The Petitioner has produced the following letters/approvals issued by the KPTCL/CEIG (some of which are wrongly/incorrectly described in the petition).

Sl. No.	Annexure No.	Description of the letter/approval	Date
1	2	3	4
1	P5	Regular Evacuation Scheme approval issued by the Chief Engineer (Ele.) Transmission Zone, KPTCL, Tumakuru.	24.07.2017
2	P7	Letter by the Superintending Engineer (Ele.) SCADA, KPTCL, Bengaluru addressed to the CE (Ele.), Transmission Zone, KPTCL, Tumakuru.	08.08.2017
3	P8	Approval of Single-line Diagram and Layout Diagram approved by the CE (Ele.), Transmission Zone, KPTCL, Tumakuru addressed to the SE (W&M), Transmission Circle, KPTCL, Davangere, with copy marked to the Petitioner.	17.08.2017
4	P11	Letter intimating to make payment of necessary charges for issuance of approval for taking up work at Bay in Bennihalli Sub-station written to the Petitioner by the CE (Ele.) Transmission Zone, KPTCL, Bengaluru.	27.09.2017

1	2	3	4
5	P13	Approval for 11 kV Porcelain Vacuum Circuit Breaker drawings issued by CE (Ele.), Transmission Zone, Tumakuru addressed to the Petitioner.	26.10.2017
6	P15	Approval of Electrical installation pertaining to 4 MW Solar Power Project of the Petitioner issued by the CEIG.	22.12.2017
7	P16	Provisional inter-connection approval issued by the CE (Ele.), Transmission Zone, KPTCL, Tumakuru addressed to the Petitioner.	23.12.2017
8	P17	Commissioning Certificate issued by the Executive Engineer (Ele.), 400/220 kV Station, KPTCL, Guttur, certifying the commissioning of the project on 26.12.2017.	29.12.2017

- f) The Petitioner has produced Official Memorandum dated 12.09.2017 (Annexure-P10) issued by the Deputy Commissioner, Davangere district, Davangere, regarding land conversion. The Petitioner has also produced Ministry of New & Renewable Energy (MNRE), New Delhi, letter dated 28.07.2017 (Annexure-P6) addressed to the State Governments explaining the circumstances under which the extension of time for commissioning the project might be allowed.
- g) The Petitioner has relied upon the following facts for claiming extension of time on the ground of Force Majeure for commissioning the project:
- (i) Despite the follow-ups by the Petitioner, the 2nd Respondent (KPTCL) did not issue the letter for payment of requisite charges towards Bay Estimation and the rent payable for leasing of space for Bay, in spite of lapse of three months from the date of approval letter for sparing the land for Bay construction. As

per the Single Line Diagram approved on 17.08.2017 (Annexure-P8), the Petitioner was required to install the HT panel at 11 kV terminal Bay and there was only one approved KPTCL vendor corresponding to 11 kV HT panel and due to excess work-load to the approved vendor obtaining the HT panel would take six months' time. The Petitioner has informed the subsistence of the said Force Majeure event in its letter dated 11.09.2017 (Annexure-P9) addressed to BESCOM requesting for extension of Scheduled Commissioning Date. The delay in commissioning the project was solely on account of the in-action of the 2nd Respondent (KPTCL) in giving Bay Estimation approval.

(ii) Further, there was delay in issuing the land conversion order vide OM dated 12.09.2017 (Annexure-P10) by the Deputy Commissioner, Davangere district, Davangere, which resulted hindrance in the progress of the project from time to time by local administration and police.

h) The Petitioner has relied upon the following legal grounds for claiming the tariff of Rs.4.89 per unit as agreed in the PPA:

(i) The tariff discovered under competitive bidding process held under Section 63 of the Electricity Act, 2003 cannot be altered even at the instance of this Commission for any reason. The Generic Tariff Order relating to Solar Power Projects cannot be

made applicable to the projects in respect of which the tariff is discovered through competitive bidding.

- (ii) Article 5.7.1 of the PPA provides for extension of time on certain grounds by BESCO and the said PPA is approved by the Commission. The terms of the PPA do not provide that the approval of the Commission is essential for availing the benefit of extension of time granted by BESCO.
- (iii) The Commission could not have issued the letter dated 04.10.2017 (Annexure-R4) to BESCO directing to allow the Developer to commission the project with certain terms and conditions stated therein.
- (iv) The BESCO has considered the grounds urged by the Petitioner requesting for extension of time for commissioning the project as stated in the letter dated 11.09.2017 (Annexure-P9) and extended the time for six months up to 16.02.2018 as per its letter dated 17.11.2017 (Annexure-P14). The said extension of time by BESCO is binding and final and the imposition of the terms & conditions stated in Annexure-P14 are not valid and such terms & conditions were imposed only because of the direction issued by this Commission. Therefore, the extension of time granted by BESCO is to be read as unconditional and without any limitation. The project is commissioned well within the extended time.

(v) The Generic Tariff Order dated 30.07.2015 relating to Solar Power Project could be made applicable as the project was commissioned within the period stipulated in this order. The subsequent Generic Tariff Order dated 12.04.2017 relating to Solar Power Project could not have been applied for the project of the Petitioner.

(vi) The tariff invoices submitted by the Petitioner subsequent to the commissioning of the project were not disputed by the 1st Respondent (BESCOM), therefore it could not have deducted any amount from the said invoices towards liquidated damages or it could not have reduced the tariff.

(vii) The Hon'ble Supreme Court of India in the case of BESCOM Vs Konark Power Projects Limited and Another (Civil Appeal No.5612 of 2012 decided on 28.04.2015) has held that the tariff once agreed in the PPA cannot be varied even by the Regulator.

i) For the above reasons, the Petitioner has requested to allow its prayers.

3. Both the Respondents appeared through their counsel and filed separate Statement of Objections. The contents of both the Statement of Objections are similar in nature. The gist of the Statement of Objections may be stated as follows:

a) The Respondents have not disputed the execution of the PPA including the Supplemental PPA (SPPA) and issuance of various letters and approvals by the concerned Authorities/Respondents stated by the Petitioner in the petition.

b) The Respondents have narrated the dates showing the progress of the events regarding issuance of the approvals/intimations by KPTCL as follows:

(i) On 13.04.2017, the Petitioner herein made an application seeking for evacuation approval. On 18.04.2017, the 2nd Respondent informed the Petitioner herein of the necessary processing fee and documents for granting evacuation approval. On 02.05.2017, the Petitioner herein requested the 2nd Respondent for Evacuation approval. The processing fee for evacuation approval was paid only on 06.05.2017.

(ii) On 18.05.2017, the Superintending Engineer (W&M), KPTCL, Davangere submitted the feasibility report and the same was forwarded to the Chief Engineer (P&C), KPTCL, Bengaluru on 26.05.2017.

(iii) On 03.06.2017, 124th Terminal Bay (TB) Committee decided to spare available KPTCL land for construction of 11 kV TB along with metering arrangement at 66/11 kV Bennihalli Sub-station to the Petitioner herein. On 06.06.2017, the 2nd Respondent spared land for construction of 11 kV TB with net-metering and called

upon the Petitioner herein to pay the lease charges for the land spared at 66/11 kV Bennihalli Sub-station.

- (iv) On 27.06.2017, tentative evacuation approval was granted to the Petitioner herein by the 2nd Respondent. A copy of the tentative evacuation approval dated 27.06.2017 is produced as Annexure-R1. The Petitioner herein conveyed his acceptance to the tentative evacuation approval on 10.07.2017 (Annexure-R2). Based on the same on 24.07.2017 (Annexure-P5), a regular evacuation scheme was approved by the 2nd Respondent.
- (v) On 08.08.2017, the 2nd Respondent herein requested the Petitioner to pay Rs.84,845/- and admissible taxes for using KPTCL SCADA infrastructure.
- (vi) On 17.08.2017, the 2nd Respondent herein vide letter had communicated the approval of Single Line Diagram (SLD) and layout diagram subject to few terms and conditions. A copy of approval dated 17.08.2017 is produced as Annexure-R3, which corresponds to Annexure-P8.
- (vii) On 27.09.2017, the Petitioner herein was intimated by the 2nd Respondent for payment of necessary processing charges towards construction of the terminal bay (Annexure-P11).
- (viii) This Commission vide letter dated 04.10.2017 (Annexure-R4) informed the 1st Respondent (BESCOM) to direct the Petitioner

to file a petition before this Commission with all relevant documents justifying their claims for extension of time.

- c) The Respondents have contended that the Petitioner has made the application for evacuation approval belatedly only on 13.04.2017. The reasons assigned for the delay in commissioning of the project cannot be attributed to the Respondents herein. That the reasons given by the Petitioner for the delayed execution of the project do not constitute Force Majeure under Article 14 of the PPA. Unless notice as contemplated under the PPA is issued, the party is not entitled to claim relief under the Force Majeure clause. That the 2nd Respondent (KPTCL) has acted diligently and the delay in commissioning the plant cannot be attributed to the Respondents herein.
- d) That the Petitioner has failed to establish any Force Majeure event for claiming the extension of time for commissioning of the project. The Petitioner is liable to pay the liquidated damages as per the terms of PPA and the Petitioner would be entitled to only tariff of Rs.4.36 per unit in terms of the Generic Tariff Order dated 12.04.2017 which was applicable at the time when the Petitioner commissioned its plant.
- e) The averment of the Petitioner that this Commission does not have power to alter the tariff discovered under competitive bidding process is denied as untenable. The averments in the petition that this Commission has no power to issue the letter dated 04.10.2017 (Annexure-R4) directing the 1st Respondent (BESCOM) to extend the date for commissioning the project

with the conditions noted therein and that the letter dated 17.11.2017 (Annexure-P14) issued by the 1st Respondent (BESCOM) to the Petitioner imposing the conditions for extending the time for commissioning the project is illegal and that the extension of time granted by the 1st Respondent (BESCOM) is binding and final without any restrictions and limitations, are denied as false. It is contended that the reliance on the decision in BESCOM Vs. Konark Power Projects Limited that the tariff cannot be varied even by the Regulator, is not applicable to the facts of the present case. All other grounds raised by the Petitioner are specifically denied by the Respondents as untenable.

f) Therefore, the Respondents have contended that the Petitioner is not entitled to any of the reliefs claimed in the petition and the petition may be dismissed.

4. We have heard the learned counsels for the parties.

5. From the rival contentions and the submissions made by the parties, the following Issues arise for our consideration:

Issue No.1: Whether legal grounds urged by the Petitioner as noted in para 2 (h) are valid and acceptable?

Issue No.2: Whether the facts urged by the Petitioner for claiming the extension of time on the ground of Force Majeure events as noted in para 2 (g) are proved?

Issue No.3: To which reliefs the Petitioner is entitled to, on the basis of the findings on Issues 1 & 2?

Issue No.4: What Order?

6. Issue No.1: Whether legal grounds urged by the Petitioner as noted in para 2 (h) are valid and acceptable?

a) Regarding: The tariff discovered under competitive bidding process cannot be altered?

(i) Section 63 of the Electricity Act, 2003 reads as follows:

“63. Determination of tariff by bidding process – Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

(ii) It is contended that the tariff discovered under Section 63 of the Electricity Act, 2003 is not subject to any re-determination under Section 62, therefore, any of the Generic Tariff Order passed by the Commission cannot be applied. Therefore, it is contended that even in the case of delay in commissioning the project, the tariff determined under the Generic Tariff Order passed by this Commission cannot be made applicable in the present case.

(iii) The said contention appears to be not correct. Article 12.1 of the PPA provides that the Developer shall be entitled to receive the tariff of Rs.4.89 per unit of the energy supplied. Article 12.2 which is a proviso to Article 12.1 provides that as a consequence of delay in commissioning of the project beyond the Scheduled Commissioning Date, if there is any change in KERC applicable tariff, the applicable tariff for the project shall be the lower of the tariff stated in Article 12.1 or KERC applicable tariff as on the

Commercial Operation Date (CoD). In view of this specific provision, in case of delay in commissioning the project, there could be reduced tariff as provided in Article 12.2 of the PPA. However, the Developer can claim extension of time for commissioning of the project on the proof of Force Majeure event as provided in Article 14 of the PPA. Therefore, the contention of the Petitioner that in no case, the tariff discovered under competitive bidding process cannot be altered is not acceptable.

b) Regarding: The Commission could not have imposed any condition stated in the letter dated 04.10.2017 (Annexure-R4) while directing the BESCO to allow the Developer to commission the Solar Power Project:

- (i) The Petitioner relied upon Article 5.7.1 of the PPA to contend that the extension of time due to the reasons stated in the said Article, is within the discretion of the 1st Respondent (BESCO) and the exercise of such discretion cannot be interfered with by this Commission. It is also pointed out that this Commission has approved the PPA including Article 5.7 relating to the extension of time. Therefore, it is contended that the Commission could not have issued the letter dated 04.10.2017 (Annexure-R4) to BESCO directing to allow the Developer to commission the project with the terms & conditions stated therein.
- (ii) Based on the request of certain Solar Power Developers (SPDs) including the Petitioner, the 1st Respondent (BESCO) wrote letter

dated 12.09.2017 seeking directions of Commission for extension of time to achieve the CoD in respect of certain Solar Power Projects. In response to it, the Commission issued letter dated 04.10.2017 (Annexure-R4) directing as follows:

“(i) To allow the developer of the said projects to commission the Solar Project;

(ii) As per the terms of the original PPA, depending upon the actual Commercial Operation Date (CoD), the BESCO should enforce reduced tariff, recovery of liquidated damages due to delay in achieving the CoD and other related aspects; and

(iii) To direct the developer of the said projects, to file a petition before the Commission after successful commissioning of the project with all the relevant grounds/documents, for justifying their claims for extension of time under Force Majeure conditions of the PPA, if so advised.”

(iii) On the basis of the above direction of the Commission, the 1st Respondent (BESCO) extended the time for six months up to 16.02.2018 as per its letter dated 17.11.2017 (Annexure-P14) imposing the conditions as per Commission's direction. It may be noted that the Petitioner had requested for extension of six months' time for commissioning the project in its letter dated 11.09.2017 (Annexure-P9).

(iv) The learned counsel for the Petitioner submitted that this Commission has no jurisdiction to call upon the Petitioner to file a petition, for proving the Force Majeure events, in view of the specific term contained in PPA allowing the 1st Respondent

(BESCOM) to grant extension of time on the ground of Force Majeure event. On the other hand, the learned counsel for the 1st Respondent (BESCOM) relied upon the decision in All India Power Engineer Federation & Others Vs. Sasan Power Limited & Others reported in (2017) 1 SCC 487 and contended that the Commission alone has the jurisdiction to decide regarding the proof or otherwise of the Force Majeure events claimed by the Petitioner.

- (v) In the above said decision, the Hon'ble Supreme Court of India has considered the effect of a 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 stated in the said decisions are as follows:

“The general principle is that everyone has a right to waive and to 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 is the right of party alone or of the public also in the sense that the general welfare of the society is involved.” [Paragraph-23]

“... If there is any element of public interest involved, the court steps in to thwart any waiver which may be contrary to such public interest.” ...” [Paragraph-24]”

In the Sasan Power case, the question was, 'whether the waiver of a provision of the PPA by the Distribution Licensee, having an effect of increasing the agreed 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 the PPA, is invalid. 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 the PPA, in respect of a Force Majeure event, which has the effect of an 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 the extension of time, for commissioning the Solar Power Project, on the ground of Force Majeure events.

(vi) It is not in dispute that, if the commissioning of the Solar Power Project does not take place within the specified time, the SPD would be entitled to only the lower of the tariff as discovered in the bidding process or the tariff determined by KERC, applicable as on the date of the commercial operation of the Project. Therefore, the indiscriminate extension of time, on the purported ground of a Force Majeure event, unjustly benefits the SPD against the terms of PPA and thereby infringes the interest of consumers. In the present case, as per the term of the PPA, the

Project was required to be commissioned, on or before 16.10.2017, however, the Project was commissioned at a later date. It is also not in dispute that, the tariff payable for the Solar Power Projects was reduced during the subsequent Control Periods. Therefore, the 1st Respondent (BESCOM), accepting or consenting the Force Majeure Events, claimed by the Petitioners on insufficient grounds or otherwise, would affect the tariff payable under the PPA, which in turn, would affect the interest of the consumers. In such an event, the Commission has a duty to intervene and satisfy itself, as to whether the claim of the Petitioners for the extension of time, on the ground of the Force Majeure Events, is properly met or not, irrespective of the satisfaction of the 1st Respondent (BESCOM) on the said fact.

(vii) Therefore, wherever the terms of the PPA provide for reduction in 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 authorizing the 1st Respondent (BESCOM) to extend the time for commissioning of the Project by the Petitioners, on the ground of Force Majeure Events, should yield to the jurisdiction of the Commission, to determine the proper proof of Force Majeure events alleged. It is only this Commission

that has the exclusive jurisdiction to adjudicate upon the existence or otherwise of such an event which affects the tariff.

(viii) A similar question has arisen in Appeal No.351 of 2018 between Chennamangathihalli Solar Power Project LL.P. Vs. BESCO and Another decided on 14.09.2020 by the Hon'ble Appellate Tribunal for Electricity (Hon'ble ATE). While answering such question under Issue No.1, the Hon'ble ATE in paragraph 7.11 of the judgment has held as follows:

“In the light of various judgments of the Apex Court as also relied by the Respondent's learned counsel, it is well within the jurisdiction of the State Commission to interfere and settle the issues for a logical conclusion in accordance with law. We do not find force in the submissions of the Appellants that the State Commission has interfered in the case on its own which is beyond its jurisdiction. Accordingly, we opine that while the State Commission has prima-facie, acted in accordance with law and statute.”

However, while answering Issue No.2, the Hon'ble ATE has held that the finding of the Commission that the Appellants had failed to establish Force Majeure events was not justified and on re-appreciation of the facts held that the Appellants in that case established the Force Majeure events pleaded by them.

ix) The learned counsel for the Petitioner relied upon certain observations made by the Hon'ble ATE in Appeal No.351 of 2018 while giving findings on Issue No.2. The Issue No.2 was framed in the said appeal to the effect that “whether the State Commission

has correctly held that there was no Force Majeure conditions so as to grant extension of time and the appellants are entitled for reduced tariff applicable for future control periods?" While considering this Issue there are certain observations made by the Hon'ble ATE that the time extension of six months granted by the Distribution Licensee could not have been interfered with by the Commission, in view of the specific terms contained in the PPA enabling the Distribution Companies to grant extension of time. Therefore, the learned counsel for the Petitioner submitted that the Commission could not have imposed any condition stated in the letter dated 04.10.2017 (Annexure-R4). In other words, he contended that the terms in the PPA enabling the 1st Respondent (BESCOM) to grant extension of time cannot be interfered with.

x)As already noted, the Hon'ble ATE on Issue No.1 held that Commission has jurisdiction to interfere and settle the issues on the question of delay in commissioning the project in spite of the Distribution Companies extending six months' time acting under the terms of the PPA. The finding on Issue No.2 is purely based on the disputed question of facts. The Hon'ble APTEL has found that there was 7-8 months' delay in issuing various approvals and then also made the observation regarding the terms of PPA enabling the distribution company to grant extension of time.

xi) The learned counsel for the Respondents relied on para 9 of the decision cited in (2002) 3 Supreme Court Cases 533 between Padma Sundara Rao (Dead)and Others Vs. T.N. and Others in which it is held as follows:

“9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.”

xii) We find that the facts involved in the above said Hon'ble ATE judgment were quite different from the facts of the present case. In the case involved before the Hon'ble ATE, the Respondent – Distribution Licensee had voluntarily granted six months' time as per the decisions taken in the Board Meetings. Subsequent to such extension of time, the Commission had intimated not to grant extension and further asked the Distribution Company to direct the developer to file the petition before Commission to establish the Force Majeure events. In the present case, the 1st Respondent (BESCOM) has not voluntarily granted the extension of time for commissioning the project. On the other hand, it acted as per the direction of the Commission. In the case involved before the Hon'ble ATE, Respondent – Distribution Licensee had not opposed the claims of the developer for extension of time during the proceedings

before this Commission. But that is not the case here. Therefore, one can say that the facts involved in the case before the Hon'ble ATE is quite different from the facts involved in the present case. Hence, certain observations made by the Hon'ble ATE while deciding the disputed question of facts are not helpful to the Petitioner.

xiii) The learned counsel for the Petitioner relied upon certain observations made in para 22 (j), (k) & (l) by this Commission while deciding OP No.29 of 2018 decided on 11.11.2020.

xiv) OP No.29 of 2018 was decided on 11.11.2020 relying on the above said decision of the Hon'ble ATE. Both counsel appearing in OP No.29 of 2018 had not enlightened as to whether the decision of the Hon'ble ATE could be relied upon or not in the factual situation of OP No.29 of 2018. Therefore, the view taken in OP No.29 of 2018 is not helpful for the Petitioner, in light of the contentions raised by the learned counsel for Respondents.

xv) For the above reasons, we hold that the contention of the Petitioner that Commission could not have imposed any conditions stated in the letter dated 04.10.2017 (Annexure-R4) is to be rejected.

c) Regarding: The BESCO has considered the grounds urged by the Petitioner and extended the time for six months:

i) The letter dated 17.11.2017 (Annexure-P14) is written by the 1st Respondent (BESCO) to the Petitioner extending the time for six months to commission project i.e., up to 16.02.2018. The contents of

this letter discloses that the 1st Respondent (BESCOM) has simply carried out the directions issued by the Commission and extended the time for six months imposing the required conditions. Therefore, one cannot say that the 1st Respondent (BESCOM) has considered the grounds urged by the Petitioner and satisfied as to the correctness of the said grounds and thereafter granted the extension of time.

ii) Therefore, the further contention of the Petitioner that the extension of time granted by the 1st Respondent (BESCOM) is binding and final and imposition of the terms & conditions stated in Annexure-P14 were not valid and binding are untenable.

d) Regarding: Applicability of Generic Tariff Order dated 30.07.2015:

The Petitioner has contended that the Generic Tariff Order dated 30.07.2015 issued by this Commission provided that in respect of the projects that were commissioned during the period from 1st September 2015 to 31st March 2018 for which the PPAs had been entered into, the tariff as per this Generic Tariff Order would be applicable and that the case of the Petitioner squarely covered under this Order since the PPA was entered on 27.05.2016 and the plant was commissioned on 26.12.2017. It is pointed out by the Petitioner that in this Generic Tariff Order, the tariff determined was Rs.6.51 per unit. Therefore, it is contended that the tariff agreed in PPA at Rs.4.89 per unit could not have been reduced as the Generic Tariff was Rs.6.51 per unit. It may be noted that this Commission has passed the Generic Tariff Order

dated 12.04.2017 fixing Generic Tariff at Rs.4.36 per unit for the new plants entering into PPA from 01.04.2017 to 01.04.2018, by curtailing the "Tariff Period" fixed as per Generic Tariff Order dated 30.07.2015. Therefore, one can say that the Generic Tariff Order that was prevailing as on the date of the commissioning the project on 26.12.2017 was the Generic Tariff Order dated 12.04.2017. Therefore, the contention of the Petitioner that the Generic Tariff Order dated 30.07.2015 should be taken into consideration while considering the delay in commissioning the project, cannot be accepted.

e) Regarding: Effect of not disputing tariff invoices:

The Petitioner has relied upon Article 13.7 of the PPA dealing with disputed bill. This Article provides that if the 1st Respondent (BESCOM) does not dispute a monthly bill or a supplementary bill raised by the Developer by the due date, such bill shall be taken as conclusive subject to reconciliation as per Article 13.8 of the PPA. Article 13.7.2 provides that if the 1st Respondent (BESCOM) disputes the amount payable under a monthly bill or a supplementary bill, it shall pay 95% of the disputed amount and it shall within 15 days of the receiving of such bill, issue a notice (the bill dispute notice) to the Developer setting out the details regarding disputed amount and the reasons for disputing the amount claimed in the bill. We are of the considered opinion that Article 13.7 relating to the disputed bill does not help the Petitioner in any way. The monthly bill/supplementary bill shall include the energy charges and other charges as per the terms of the PPA.

Even earlier to the commissioning of the project, the 1st Respondent (BESCOM) wrote letter dated 17.11.2017 (Annexure-P14) to the Petitioner stating that the time was extended for commissioning the project with reduction of tariff and payment of liquidated damages. Therefore, it amounted that the 1st Respondent (BESCOM) disputed the monthly bills claiming tariff of Rs.4.89 per unit. Further, it may be noted that Article 13.7.2 relates to the dispute regarding the amount payable under a monthly bill or a supplementary bill, when there was no dispute regarding the rate of tariff applicable for the energy supplied. Therefore, the 1st Respondent (BESCOM) not raising the dispute under Article 13.7 of the PPA does not dis-entitled it to deduct any amount from the said invoices towards liquidated damages or towards reduction of the tariff.

f) Regarding: The principles stated in Konark Power Projects Limited case:

In this case, the Hon'ble Supreme Court of India, on the facts of that case has held that the tariff agreed in the PPA cannot be varied during the term of the PPA even by the Regulator. The PPA involved in the said case did not contain a term like Article 12.2 of the present PPA for reduction of tariff for the delay in commissioning of the project beyond the Scheduled Commissioning Date (SCD). Therefore, the principles stated in the said decision is in no way helpful to the Petitioner.

g) For the above reasons, we hold that the legal grounds urged by the Petitioner as noted in para 2 (h) are not valid and acceptable. Accordingly, Issue No.1 is held in negative.

7. Issue No.2: Whether the facts urged by the Petitioner for claiming the extension of time on the ground of Force Majeure events as noted in para 2 (g) are proved?

a) Regarding: Delay caused by the KPTCL:

i) The Petitioner in its letter dated 11.09.2017 (Annexure-P9) addressed to the Managing Director of the 1st Respondent (BESCOM), has more succinctly narrated the facts for claiming Force Majeure events. Some more details regarding the Force Majeure events are stated by the Petitioner in its letter dated 13.10.2017 (Annexure-P12) addressed to this Commission requesting for extension of time for commissioning the project. The averments made in the petition urging delay caused by the KPTCL, to claim Force Majeure events, are without required particulars and they are very bald and vague. Para 27 of the petition alone contains some of the facts disclosed in the above said letters addressed to the 1st Respondent (BESCOM) and this Commission claiming Force Majeure events. Therefore, for clarity, we may note the relevant portion of the contents of the said letters.

ii) The letter dated 11.09.2017 (Annexure-P9) addressed to the 1st Respondent (BESCOM) states as follows:

“We are at a very advanced stage of completing the Installation of Solar Power Plant in Benihalli Village, Harapanahalli Taluk, Davangere District. However, we have encountered certain delays in execution of our project through no fault of our own and that are beyond our control. The following are details:

1. We have obtained bay approval on 6th June vide Letter No.KPTCL/SEE(Plg)/EE-PSS/KCO-93/F-9252/81145/2017-18. It has been more than 3 months but we have not received the Bay Estimate and Bay Lease Letter from KPTCL.
2. Further we received regular evacuation approval Letter No.CEE/TKRTZ/SEE(O)/AEE2/F30/CYS-38 dated 24.07.2017 but KPTCL has revised the Single Line Diagram (SLD) and we received the new SLD approval on 17.08.2017. As per new SLD we need to install HT Panel at 11 kV Terminal Bay. There is only one approved KPTCL vendor corresponding to 11 kV HT Panel and due to excess load it will take them 6 months to deliver HT panel.
3. Further, Section 109 approval has not been granted to us yet. It has been almost been 4 and half months since we filed the 109 application with all necessary documents. As a result, the construction work has been stopped time to time by local administration and police.

We therefore, by this letter, request a time extension of 180 Calendar days under the terms and provisions of above referenced contracts."

- iii) The letter dated 13.10.2017 (Annexure-P12) addressed to this Commission states as follows:

"We write this letter to bring to your attention the current status of our works and bring forward the delay from state authorities in providing timely approvals with respect to evacuation and bay erection, at the grid sub-station.

We have completed the installation activities at the plant side as well as the transmission line but are yet to begin the work on the terminal bay because we haven't received the required approvals from KPTCL.

We had obtained bay approval on 6th June vide Letter No.KPTCL/SEE(plg)/EE-PSS/KCO-93/F-9252/81145/2017-18. After that we received the approved terminal bay SLD on 17.08.2017. KPTCL took one more month to give us the bay estimate on 27.09.2017 vide Letter No.CEE/TKR/SEE(O)/AEE2/F30/6102-04 as per the approved SLD. We submitted the fees as per the bay

estimate on 04.10.2017 vide Letter No.CEE/TKR/TZ/SEE/AEE2/F20/6247-48 but this letter didn't approve drawings for PCVCB and MCVCB which are the longest lead time items. The lead time for MCVCB is 4 months as there is only one KPTCL approved OEM. Although we are prepared to commission the plant from our end but due to non-availability of the bay we won't be able to commission the plant on time.

With this letter we want to highlight that as a developer we have done everything we could do to execute the project within the timelines, but are getting penalized for things which are beyond our control. We therefore, by this letter, request a time extension of 120 Calendar days under the terms and provisions of above referenced contracts."

iv) In the letter dated 11.09.2017 (Annexure-P9) addressed to the 1st Respondent (BESCOM), the following grievances are made:

(a) that the Bay Estimate and Bay Lease was not yet received;
and

(b) that HT Panel at 11 kV Terminal Bay is to be installed and getting delivery of 11 kV HT Panel would take nearly six months as there was only one approved KPTCL Vendor from whom it should be purchased.

v) Subsequently, Bay Estimate and Bay Lease intimation was received as per letter dated 27.09.2017 (Annexure-P11) issued by KPTCL to the Petitioner. The Petitioner has paid on 04.10.2017, the amount stated in the letter dated 27.09.2017 (Annexure-P11). Thereafter, on 09.10.2017, the drawing approval for the some of the equipment to be installed in Bay was received from the KPTCL. However, the drawing approval for PCVCB & MCVCB was not yet received. In the letter dated 13.10.2017 (Annexure-P12) addressed to this Commission, the grievance made out is that the drawings for PCVCB & MCVCB (Breaker drawings) were not

yet received and that the lead time for obtaining the breaker would be four months as there was only one KPTCL approved OEM (Original Equipment Manufacturer).

- vi) The Petitioner received approval for 11 kV PCVCB drawings vide letter dated 26.10.2017 (Annexure-P13). This letter shows that the Developer requested on 16.10.2017 for issue of such approval for 11 kV Breaker.
- vii) The Petitioner has not produced any evidence to ascertain the date on which it approached the KPTCL approved vendor for obtaining 11 kV HT Panel and the date on which it received that 11 kV HT Panel. In the same way, the Petitioner has not produced any evidence to ascertain the date on which he approached the approved vendor of breaker and the date on which the breaker was supplied.
- viii) In the letter dated 11.09.2017 (Annexure-P9), the Petitioner has stated that Regular Evacuation Scheme approval dated 24.07.2017 was received, but KPTCL has revised the SLD and the Petitioner received the new SLD approval on 17.08.2017. Annexure P8 is the approval of SLD and layout diagram. There is nothing on record to infer that this was the revised SLD as claimed by the Petitioner in Annexure-P9. Annexure-P8, the approval of SLD, does not show that this is the revised drawing approval. Annexure-P5, the Regular Evacuation Scheme approval dated 24.07.2017 imposes the condition that the standards and accuracy clause of tariff metering shall be as per Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006, etc.,

Annexure-P8, the approval of SLD drawings provides for required specifications of different equipment, to be installed.

ix) As per the required procedure for approval of any drawing or diagram, the party has to submit the draft drawing or diagram. The Petitioner has not specifically stated the date on which it produced the draft drawing for approval of SLD and layout diagram and in the similar way it has also not stated the date on which it furnished the draft drawing for approval of the circuit breaker. Annexure-P13, the approval for circuit breaker shows that the Petitioner had requested through letter dated 16.10.2017 for issue of approval for circuit breaker. Thereafter such approval was issued on 26.10.2017. But in case of approval of SLD and layout diagram (Annexure-P8), it cannot be ascertained on which date the Petitioner has submitted the draft drawing of SLD and layout diagram. Unless the date of furnishing the draft drawing or diagram of SLD or circuit breaker, is provided, it is not possible to infer whether there was delay in issuing approvals of such drawings or diagrams.

x) The CEIG Report dated 22.12.2017 (Annexure-P15) shows that the Petitioner has submitted Work Completion Report on 15.11.2017. Therefore, one can say that before submitting Work Completion Report, the 11 kV HT Panel as well as the breakers were obtained by the Petitioner and they were installed in the Meter Cubicle and Bay. It is not the case of the petitioner that subsequent to submission of Work Completion Report dated 15.11.2017 to CEIG, there was any delay either by CEIG in issuing the CEIG approval or in issuing the provisional

inter-connection approval and the actual commissioning of the project. It may be noted that the project was commissioned on 26.12.2017. In the letter dated 11.09.2017 (Annexure-P9) addressed to the 1st Respondent, the Petitioner claims that "we are at a very advanced stage of completing the installation of the Solar Power Plant in Benihalli village". In the letter dated 13.10.2017 (Annexure-P12) addressed to this Commission, the Petitioner claims that "we have completed the installation activities at the plant side as well as the Transmission Line but are yet to begin the work on Terminal Bay, because we have not received the required approvals from KPTCL." Therefore, one can say that for completion of the work in Terminal Bay, the time taken was from 13.10.2017 to 15.11.2017.

- xi) The Petitioner does not allege any delay till issuing the Regular Evacuation Scheme as per Annexure-P5 dated 24.07.2017. Thereafter, approval of Single Line Diagram (SLD) was issued as per Annexure-P8 dated 17.08.2017. Here also the Petitioner does not allege any delay in issuing the SLD. The Petitioner apprehend that as per SLD it had to install the HT Panel at 11 kV terminal bay and obtaining 11 kV HT Panel might take about six months as there was only one KPTCL vendor. As already noted the Petitioner has not stated the date on which it applied for obtaining HT Panel and the date on which it received the said HT Panel. HT Panel is an equipment required to be installed in the metering cubical.

- xii) The other grievances of the Petitioner are that Bay Estimate and Bay Lease approval letter was not received as on 11.09.2017, the date on which it made request for extension of time with the 1st Respondent (BESCOM). We are of the opinion that Bay Estimate and Bay Lease letter dated 27.09.2017 (Annexure-P11) should have been issued earlier and the delay from 11.09.2017 to 27.09.2017 (16 days) in issuing Annexure-P11 may be accepted. The letter dated 11.09.2017 (Annexure-P9) could be considered as the notice issued intimating the 1st Respondent (BESCOM) regarding the commencement of Force Majeure event, of not receiving Annexure-P11 within reasonable time.
- xiii) Pursuant to the letter dated 27.09.2017 (Annexure-P11), the Petitioner has paid the fee on 04.10.2017 and received approval of drawings for some of the equipment on 09.10.2017, but the drawing approval for PCVCB and MCVCB was received only on 26.10.2017 as per Annexure-P13. The Petitioner is required to submit the draft drawing for approval of PCVCB and MCVCB drawing. Annexure-P13 shows that the Petitioner applied for it on 16.10.2017. The approval was issued on 26.10.2017 as per Annexure-P13. We think the approval of PCVCB drawings was issued within a reasonable time.
- xiv) From the above facts, we hold that the Petitioner could establish that there was delay of 16 days in issuing the intimation regarding the payment of Bay Estimate and the Bay Lease amount by the 2nd Respondent (KPTCL) and it failed to establish delay in issuing any other approvals by KPTCL.

b) Regarding delay in issuing land conversion order?

i) The Petitioner has merely stated in para 13 of the petition regarding the receipt of land conversion order dated 12.09.2017 (Annexure-P10). There is no averment in the petition that there was delay in receiving the land conversion order and such delay affected the Petitioner in implementing the project in any way. Only in the letter dated 11.09.2017 (Annexure-P9) addressed to the 1st Respondent (BESCOM), the Petitioner has stated that the non-receipt of the land conversion order till that date resulted in intermittent stoppage of work by local administration and police. This stoppage of work is not supported by any documentary evidence. The said version is not stated in the letter dated 13.10.2017 (Annexure-P12) addressed to this Commission. As already noted the petition, does not contain any averment that the Petitioner had to stop the progress of project work intermittently due to the interference of local administration and police.

(ii) Para 18 of the Solar Policy 2014-21 provides that the Developer need not wait to start the project execution work till obtaining the land conversion order. It reads as follows:

“ Conversion of agricultural land for setting up of solar projects:

Developers will be allowed to start project execution without waiting for formal approval on filing application for conversion of agricultural land for setting up of solar power projects on payment of specified fees.”

(iii) From the above facts, we hold that the Petitioner has failed to establish that the delay if any, in getting the Land conversion order has caused any impediment in the progress of the project execution work.

c) For the above reasons, we hold on Issue No.2 that the Petitioner has able to prove the Force Majeure event for claiming 16 days' extension of time for commissioning the project. Issue No.2 is held accordingly.

8. Issue No.3: To which relief the Petitioner is entitled to, on the basis of the findings of Issues 1 & 2?

a) It is found that the Petitioner is entitled to claim extension of 16 days' time extension for commissioning of the project. However, there is a delay of almost 70 days in commissioning the project. Therefore, the tariff applicable is Rs.4.36 per unit as per the Generic Tariff Order dated 12.04.2017 which was in force on the Commercial Operation Date.

b) The Petitioner was required to fulfill the Condition Precedent on or before 16.06.2017 as per the term of the PPA. The Petitioner has not pleaded any Force Majeure event for claiming extension of time to fulfill the Conditions Precedent. The Force Majeure events claimed by the Petitioner were subsequent to 16.06.2017. The Petitioner could obtain even the tentative evacuation scheme approval only on 27.06.2017, subsequent to 16.06.2017, the last date for fulfilling the Condition Precedent. The Petitioner has also not produced any evidence to show as to when it had produced documents of title relating to lands required for the project evidencing the clear title and possession. Therefore, the

Petitioner would be liable for payment of damages for delay in fulfilling the Conditions Precedent as per Article 4.3 of the PPA.

- c) The Petitioner was required to commence supply of power to the 1st Respondent (BESCOM) by Scheduled Commissioning Date i.e., 16.10.2017. However, it is found that the Petitioner is entitled to claim 16 days' extension of time due to Force Majeure event. Therefore, the extended deemed date of Scheduled Commissioning Date is to be considered as 02.11.2017 for claiming the liquidated damages under Article 5.8 of the PPA.
- d) The Effective Date is 17.10.2016, the date on which the Commission communicated the PPA approval to the Petitioner as well as the 1st Respondent (BESCOM). Earlier to it, LoA was issued on 23.03.2016 and the PPA was executed on 27.05.2016. The Petitioner for the first time filed application for evacuation on 13.04.2017 and thereafter paid processing fee on 06.05.2017 as per the intimation dated 18.04.2017 sent to it for payment of processing fee. The Petitioner has not whispered anything in its petition for the delay of nearly six months from the Effective Date i.e., 17.10.2016, in approaching the 2nd Respondent (KPTCL) requesting for issue of evacuation approval. The Petitioner had twelve months' time from Effective Date for commissioning the project. Therefore, the unexplained delay of nearly six months in approaching the 2nd Respondent (KPTCL) for evacuation scheme approval indicates that the Petitioner had not taken reasonable care or complied with prudent utility

practices. It is evident that this delay was the real cause for not meeting the timeline for achieving the Conditions Precedent as well as the Scheduled Commissioning Date.

e) Issue No.3 is held accordingly.

9. Issue No.4: What Order?

For the above reasons, we proceed to pass the following:

ORDER

- a) The Petitioner is not entitled to claim any of the reliefs prayed for in the petition;
- b) The Petitioner is liable to reduced tariff of Rs.4.36 per unit for the energy supplied from the date of commissioning of the project during the term of the PPA; and
- c) The Petitioner shall be liable for payment of liquidated damages as per Article 4.3 & 5.8 of the PPA, considering the extended deemed date of Scheduled Commissioning Date i.e., 02.11.2017.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member