

No. N/346/2017, N/347/2017 & N/343/2017

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

**Dated: 05.10.2021**

**Present**

<b>Shri Shambhu Dayal Meena</b>	<b>: Chairman</b>
<b>Shri H.M. Manjunatha</b>	<b>: Member</b>
<b>Shri M.D. Ravi</b>	<b>: Member</b>

**OP No.173/2017**

**BETWEEN:**

Sirar Solar Energies Private Limited,  
Regd. Office:  
25/A, 1<sup>st</sup> Floor, 3<sup>rd</sup> Main, 3<sup>rd</sup> Cross,  
3<sup>rd</sup> Stage, 2<sup>nd</sup> Block, Basaveswaranagar,  
Bangalore-560 079.  
(Represented by its Director Sri S.R. Sham Sunder)

**..... PETITIONER**

**AND:**

- 1) The Karnataka Renewable Energy Development Limited (KREDL),  
# 39, "Shanthigruha",  
Bharath Scouts & Guides Building,  
Palace Road, Gandhinagar,  
Bangalore-560 001.
- 2) Hubli Electricity Supply Company Limited (HESCOM),  
Corporate Office, Navanagar,  
PB. Road,  
Hubballi-580 025.
- 3) The General Manager (Technical),  
Hubli Electricity Supply Company Limited,  
Corporate Office, Navanagar,  
Hubballi-580 025.

**....RESPONDENTS**

**OP No.174/2017**

**BETWEEN:**

Sirar Dhotre Solar Private Limited,  
Regd. Office:  
25/A, 1<sup>st</sup> Floor, 3<sup>rd</sup> Main, 3<sup>rd</sup> Cross,  
3<sup>rd</sup> Stage, 2<sup>nd</sup> Block, Basaveswaranagar,  
Bangalore-560 079.  
(Represented by its Director Sri S.R. Sham Sunder)

..... PETITIONER

**AND:**

- 1) The Karnataka Renewable Energy Development Limited (KREDL),  
# 39, "Shanthigruha",  
Bharath Scouts & Guides Building,  
Palace Road, Gandhinagar,  
Bangalore-560 001.
- 2) Hubli Electricity Supply Company Limited (HESCOM),  
Corporate Office, Navanagar,  
PB. Road,  
Hubballi-580 025.
- 3) The General Manager (Technical),  
Hubli Electricity Supply Company Limited,  
Corporate Office, Navanagar,  
Hubballi-580 025.
- 4) The Chief Engineer (Electricity)  
Karnataka Power Transmission  
Corporation Limited (KPTCL)  
Zonal Office Complex,  
Opp: Sector No.45,  
110/11 kV Stn Premises,  
Navanagar,  
Bagalkote-587 103.

....RESPONDENTS

**OP No.175/2017**

**BETWEEN:**

Sevalal Solar Private Limited,  
Regd. Office: Mathru Pithru Nilaya,  
Vidyagiri Bus Stop,  
Bagalkot-587 102.  
(Represented by its Director Sri S.R. Sham Sunder)

..... PETITIONER

**AND:**

- 1) The Karnataka Renewable Energy Development Limited (KREDL),  
# 39, "Shanthigruha",  
Bharath Scouts & Guides Building,  
Palace Road, Gandhinagar,  
Bangalore-560 001.  
(Represented by its Managing Director)
- 2) Hubli Electricity Supply Company Limited (HESCOM),  
Corporate Office, Navanagar,  
PB. Road,  
Hubballi-580 025.
- 3) The General Manager (Technical),  
Hubli Electricity Supply Company Limited,  
Corporate Office, Navanagar,  
Hubballi-580 025.
- 4) The Chief Engineer (Electricity)  
Karnataka Power Transmission  
Corporation Limited (KPTCL)  
Zonal Office Complex, Opp: Sector No.45,  
110/11 kV Station Premises,  
Navanagar,  
Bagalkote-587 103.

**....RESPONDENTS**

(Petitioners represented by Sri S. Narasimhan,  
Advocate for M/s NSK Attorneys,  
in all the above three cases)

(Respondent No.1 represented by  
Sri Y.P. Rakshith Jois, Advocate &  
other Respondents represented by  
Sri P. Chinnappa, Advocate &  
Ms. Rithika Ravikumar, Advocate  
for M/s Induslaw Advocates,  
in all the above three cases)

**COMMON ORDERS**

1. The above three cases, involve almost similar question of facts and common questions of law, therefore, these cases are taken up together for disposal.

2. These petitions are filed under Section 86 (1) (f) of the Electricity Act, 2003. Subsequently, the request of the petitioners to insert a new prayer in the relief column of the petitions was allowed vide Order dated 28.01.2021. The petitioners carried out the amendment and filed amended petitions. Thereafter, the reliefs claimed in the petitions read as follows:

**(i) OP No.173/2017 is filed praying to:**

- a) Pass an order granting extension of time by four months from 26<sup>th</sup> June 2017 to enable the petitioner to execute and commission the project granted to him under the supplementary PPA under Annexure-B2; **or in the alternative**, direction may be issued to the 2<sup>nd</sup> Respondent to consider the request for extension dated 19<sup>th</sup> September 2017 produced under Annexure-B7 submitted to the 2<sup>nd</sup> respondent in the interest of justice and equity.
- b) *Pass an order granting extension of time up to the date of CoD i.e., 12<sup>th</sup> February 2018 to enable the petitioner to execute and commission the project granted to him under the supplementary PPA **or in the alternative**, direction may be issued to the 2<sup>nd</sup> respondent to consider the request for extension of time up to the date of CoD i.e., 12<sup>th</sup> February 2018 in the interest of justice and equity;*
- c) *Pass an order allowing a tariff of Rs.8.40 per unit as per the supplementary PPA executed between the petitioner and the 2<sup>nd</sup> respondent in the interest of justice and equity;*
- d) Pass such other orders as this Commission deems fit and proper based on the facts and circumstance of the above case in the interest of justice and equity.

**(ii) OP No.174/2017 is filed praying to:**

- a) Pass an order granting extension of time by 4 months from 02.07.2017 to enable the petitioner to execute and commission the Project granted to him under the Supplementary PPA under Annexure-B2; **or in the alternative**, direction may be issued to the 2<sup>nd</sup> Respondent to consider the request for extension dated 19.09.2017 produced under Annexure-B7 submitted to the 2<sup>nd</sup> respondent in the interest of justice and equity.
- b) *Pass an order granting extension of time up to the date of CoD i.e., 4<sup>th</sup> February 2018 to enable the petitioner to execute and commission the project granted to him under the supplementary PPA; **or in the alternative**, direction may be issued to the 2<sup>nd</sup> respondent to consider the request for extension of time up to the date of CoD i.e., 4<sup>th</sup> February 2018 in the interest of justice and equity;*
- c) *Pass an order allowing a tariff of Rs.8.40 per unit as per the supplementary PPA executed between the petitioner and the 2<sup>nd</sup> respondent in the interest of justice and equity;*
- d) Pass such other orders as this Commission deems fit and proper based on the facts and circumstance of the above case in the interest of justice and equity.

**(iii) OP No.175/2017 is filed praying to:**

- a) Pass an order granting extension of time by 4 months from 2<sup>nd</sup> July 2017 to enable the petitioner to execute and commission the Project granted to him under the Supplementary PPA under Annexure-B2; **or in the alternative**, direction may be issued to the 2<sup>nd</sup> Respondent to consider the request for extension dated 19<sup>th</sup> September 2017 produced under Annexure-B7;

- b) *Pass an order granting extension of time till COD i.e., 3<sup>rd</sup> May 2018, since this is a completed project; **or in the alternative,** direction may be issued to the 2<sup>nd</sup> respondent to consider the request for extension of time till CoD, since this is a completed project in the interest of justice and equity;*
- c) *Pass an order allowing a tariff of Rs.8.40 per unit as per the supplementary PPA executed between the petitioner and the 2<sup>nd</sup> respondent in the interest of justice and equity;*
- d) *Pass such other orders as this Commissions deems fit and proper based on the facts and circumstance of the above case in the interest of justice and equity.*

Note: In all the above three cases, reliefs (b) & (c) respectively are the prayers newly inserted after allowing the amendments as per order dated 28.01.2021.

3. The material facts stated by petitioners, required for the disposal of the controversies involved in these cases, as can be gathered from the pleadings and documents produced by the petitioners and the contesting respondents, may be stated as follows:

- a) Pursuant to the Solar Policy 2014-21, Guidelines were issued vide Government Notification No.EN 62 VSN 2104 dated 26.08.2014 to call for applications from the eligible land owners with regard to establishing of 1 to 3 MW Solar Power Plants in the State of Karnataka under the land owner farmers category to develop 300 MW Solar Power Projects. In furtherance of the same, the KREDL invited applications from eligible farmers. The Solar Power Developers (SPDs) concerned in these cases, participated in the selection process and they were found eligible and

the KREDL allotted Letter of Allotments (LoAs) dated 16.03.2015 to each of them for developing 1 MW Power Project on their lands. The particulars are as follows:

<b>Particulars</b>	<b>OP No.173/2017</b>	<b>OP No.174/2017</b>	<b>OP No.175/2017</b>
Name of the SPD	Sunil Roopsingh Rathod, Bijapur	Ashok Bhima Dhotre, Bijapur	Smt. Shakuntala Nayak, Bagalkote.
Land description in survey numbers	157/1 & 157/3	303/4	39
Village	Thidagundi	Ahirasanga	Araladinni
Taluk	Bijapur	Indi	Basavana Bagewadi
District	Bijapur	Bijapur	Bijapur

b) These SPDs executed separate Power Purchase Agreements (PPAs) with 2<sup>nd</sup> respondent (HESCOM) for sale of Solar Power of 1 MW capacity. The different milestones to be achieved by the SPDs in terms of the PPAs and the actual dates of commissioning the projects, are as follows:

<b>Particulars</b>	<b>OP No.173/2017</b>	<b>OP No.174/2017</b>	<b>OP No.175/2017</b>
Date of PPA	26.06.2015	02.07.2015	10.07.2015
Conditions Precedent – 365 days from the date of PPA	26.06.2016	02.07.2016	10.07.2016
Scheduled Commissioning Date – 18 months from the date of PPA	26.12.2016	02.01.2017	10.01.2017
Actual Date of Commissioning	12.02.2018	04.02.2018	03.05.2018

c) The SPDs filed applications for conversion of agricultural lands into non-agricultural purpose and also for evacuation scheme facility to evacuate the power from the project sites to nearest Sub-stations/Receiving Station. The particulars are as follows:

Particulars	OP No.173/2017	OP No.174/2017	OP No.175/2017
Date of application for conversion of land	02.12.2015	03.12.2015	26.05.2016
Date of payment of conversion fee	22.08.2016	10.06.2016	Conversion Order not pursued (But NOC dated 07.09.2016 by Village Panchayat was obtained)
Date of issuance of conversion order	07.10.2016	25.06.2016	
<b>Total no. of days taken from the date of application up to the date of payment of conversion fee/date of issuance of conversion order</b>	<b>264/310</b>	<b>191/206</b>	—
Date of application for evacuation	15.06.2016	18.04.2016	25.07.2016
Date of issue of Tentative Evacuation Scheme	08.08.2016	23.04.2016	28.09.2016
Date of acceptance of the terms of Tentative Evacuation Scheme	08.08.2016	02.05.2016	03.10.2016
Date of issue of Regular Evacuation Scheme	08.11.2016	15.06.2016	06.10.2016
Name of the S/s – R/s to which evacuation is granted	Thidagundi S/s	Indi R/s	Nidagundi S/s
<b>Total no. of days taken for issue of regular evacuation scheme from the date of application</b>	<b>146</b>	<b>59</b>	<b>73</b>

d) The SPDs, in terms of 2<sup>nd</sup> proviso to Article 12.11 of the PPAs have formed three separate Special Purpose Vehicles (SPVs) for taking over all the rights, responsibilities, obligations, liabilities, etc., of the SPDs under the PPAs. The particulars of the SPVs and the subscribers to the MoA & AoA while forming the SPVs are as follows:

Particulars	OP No.173/2017	OP No.174/2017	OP No.175/2017
Name of the SPV	Sirar Solar Energies Pvt. Ltd.,	Sirar Dhotre Solar Pvt. Ltd.,	Sevalal Solar Pvt. Ltd.,
Dates of MoA/AoA	01.10.2016	01.10.2016	18.05.2016
Names of the Subscribers to MoA/AoA	1) S.R. Sham Sunder 2) Sunil Roopsingh Rathod (SPD)	1) S.R. Sham Sunder 2) Ashok B Dhotre (SPD)	1) Shakuntala Gopal Nayak (SPD) 2) S.R. Sham Sunder 3) Ajit Kiran Durbha
Date of Certification of Incorporation	25.10.2016	21.10.2016	22.06.2016



e) Subsequent to the formation of SPVs, the required SPPAs have been executed between the respective SPVs and the 2<sup>nd</sup> respondent (HESCOM) and the same were submitted for approval to Commission and those SPPAs were approved by the Commission. The particulars are as follows:

<b>Particulars</b>	<b>OP No.173/2017</b>	<b>OP No.174/2017</b>	<b>OP No.175/2017</b>
The date of SPPA	21.11.2016	21.11.2016	25.10.2016
The date of approval of the SPPA	08.12.2016	08.12.2016	09.11.2016
<b>Total no. of days taken for approval of SPPA from the date of SPPA</b>	<b>17</b>	<b>17</b>	<b>15</b>

f) The SPDs have requested the Mysore Electrical Industries Limited, Bengaluru, to send the quotations for supply of breaker (MCVCB). Subsequently, the breakers were supplied to the SPDs in OP No.173/2017 & OP No.174/2017 as per their orders placed for supply. The SPD in OP No.175/2017 has not placed orders for supply of breaker.

<b>Particulars</b>	<b>OP No.173/2017</b>	<b>OP No.174/2017</b>	<b>OP No.175/2017</b>
Date of receipt of quotation	17.08.2016	10.08.2016	26.09.2017
Date of supply of breakers	23.06.2017	23.06.2017	has not placed orders for supply
<b>Total no. of days taken for supply of breaker</b>	<b>310</b>	<b>317</b>	<b>-----</b>

g) That the SPDs on execution of the PPAs sought to partner with some investors, but they could not succeed in receiving funds on time since all the potential investors insisted on conversion of agricultural lands into non-agricultural status without which registered Lease Agreements of the agricultural lands cannot be executed in favour of SPVs to be formed by SPDs which was the founding requirement of third party investment into the Solar Projects. The same situation of insistence of registered Lease

Agreement of Project land for more than 25 years would hold good even if the petitioners were to approach a financial institution for financial facilities. In OP No.173/2017 & OP No.174/2017, it is averred that there was enormous delay in issuing land conversion orders by the Deputy Commissioner. The details are as shown in sub-para (c) of para 3 as noted above.

In OP No.175/2017, it is averred that the petitioner had submitted an application dated 26.05.2016 with all enclosures at the office of the Deputy Commissioner, Bijapur district, Bijapur, requesting conversion of land, but no communication was received from there. The petitioner was asked to submit a NoC from the Village Panchayat and accordingly, the petitioner obtained NoC dated 07.09.2016. Subsequently, the petitioner was informed that consequent on the transfer of a case worker, the file was reportedly missing and efforts were on to trace the same, but since 16 months from the date of submission of the application, the petitioner had not received any reply and it was left with no option than to apply again.

h) The SPDs applied for evacuation scheme approvals for evacuating the power from the respective Project sites to the nearest allotted Sub-stations of KPTCL. The petitioners have averred in the petitions that there was inordinate delay in issuing the regular evacuation scheme approvals. The details are as shown in sub-para (c) of para 3 as noted above.

- i) The SPDs sought expert participation in receiving project finance and investment and thus caused formation of three different SPVs along with S.R. Sham Sunder, who had decades of experience in project finance having worked in two financial institutions and was willing to invest in the equity of the SPVs. The particulars of the formation of SPVs are as shown in sub-para (d) of para 3 as noted above.
- j) Subsequent to formation of SPVs, the petitioners have executed the SPPAs with HESCOM. The SPPAs were submitted to this Commission for approval. There was considerable delay in approving the SPPAs. The particulars of SPPAs and the dates of approval of SPPAs are as shown in sub-para (e) of para 3 as noted above. The petitioners have averred that only after the SPPA was approved by the Commission, an investor or lender would entertain an investment or loan proposal as otherwise, it will be treated as an agricultural or farm loan which has its own rules and regulations. Further that with a SPPA in hand, a Solar developer could make reasonable efforts to receive investment or loan into the SPV.
- k) In right earnest, the petitioners started work at the Project sites and had made initial progress like; land levelling; land development, transmission line work etc., Most of these works involved cash payment to labourers on a daily basis. Due to Demonetisation Policy of the Government of India, no cash was available during that period and the labourers had no individual bank accounts where money could be credited. This led to labour unrest and the labour force left the Project sites and went away.

The delay caused was nearly for 44 days and all hopes of demonstrating the progress in work, before the petitioners could approach financial institutions also suffered significantly.

l) Confronted with various delays as noted above and other delays, the petitioners made separate requests dated 24.12.2016 to HESCOM, stating the grounds/reasons for extension of time by 120 days from Scheduled Commissioning Dates (SCDs) to complete the Projects. On such requests, HESCOM has granted six months' time from SCDs for completion of the Projects, relying upon Article 2.5 & Article 8 of the PPA vide its letters dated 04.02.2017. The petitioners have contended that the extension letters dated 04.02.2017 were received by them only on 13.02.2017 after a lapse of 51 days from the date of their applications for extension of time.

m) The petitioners have contended that in spite of so many difficulties they did not give up the search for investors and finally convinced M//s REnergo Developers Private Limited, a Delhi based company registered under the Companies Act to invest into the Project on a mutually acceptable shareholding pattern. Pursuant to it, a MoU was signed on 20.03.2017 and an advance payment was also made by the said investor. This Commission vide its letter dated 05.04.2017, caused instruction that the extension of time for completion of the Project should be sought by the Project developers by filing petition making out the grounds for extension of time. The effect of this letter was that the time

extended earlier by the HESCOM could not be relied upon and the Project developer had to file petition before the Commission. This has led the investor M/s REnergo Developers Private Limited (REnergo) to withdraw from the MoU dated 20.03.2017 vide e-mail dated 16.04.2017 addressed to S.R. Sham Sunder, one of the Directors of all the SPVs.

- n) Thereafter, the petitioners could search an excellent investor M/s Kurlon Enterprises Limited (Kurlon) and entered into MoUs dated 10.05.2017. However, Kurlon agreed to invest on the condition that the EPC Contractor should accept an LC for the entire EPC Value and that the LC would be honoured on completion of the Project as per the Purchase Order.
- o) It was very difficult to find an EPC Contractor on payment through LC basis, but finally an EPC Contractor from Hyderabad, namely; M/s Natural Power Asia Private Limited, accepted on LC Terms. The LC could be opened on 29.05.2017 after a delay of 19 days from execution of MoU dated 10.05.2017, as the Managing Director of Kurlon had to leave for Germany immediately after executing the MoU. Since the LC was payable on achievement of COD, the EPC Contractor from Hyderabad, expressed his inability to continue and withdrew from the Purchase Order which he had duly accepted.
- p) There was a need for Contractor who could take responsibility to complete the Project on time and the deadlines were already fast approaching. A licensed contractor by name; M/s Seundo Energy

Private Limited (Seundo), accepted to implement the Project within the deadline on the condition that payments have to be made in advance and stage by stage. This Contractor was introduced to Technical Consultant of Kurlon on 06.06.2017 (inadvertently stated as 06.06.2016 in the petitions) and on approval by the Technical Consultant, was asked to submit a quotation. Kurlon was convinced to pay advance payment of Rs.1.5 crores to Seundo before the Purchase Order was raised on the commitment that it would start work right away. Accordingly, Kurlon released advance of Rs.1.5 crores to Seundo. Unfortunately, though Seundo accepted the advance payment, undertook to complete work on time but failed to even commence work even after 12 days except behaving like a procurement agency to procure material. The petitioners had to then ask Seundo to confirm as to whether they would honour their commitments and at time, Seundo wrote to Kurlon directly on 22.06.2017 and 27.06.2017 that they were withdrawing from the contract due to the reason that the Purchase Order from Kurlon reached them late.

- q) Seundo had transferred fund to CEIG for drawing approvals of these Projects and had charged the petitioners for drawing preparation, submission, liaison and payment of fees. However, when the petitioners approach CEIG through another contractor, there was no file with CEIG in respect of these Projects. The burden of complying with the entire CEIG process had again fallen on the petitioners and they had to restart the entire process through another contractor.

- r) The petitioners have suffered larger loss, interest cost, contractor default, blockage of funds, and most important, extra GST whereas the project was entitled for total exemption before July 2017, but the entire procurement for these projects was done beyond 01.07.2017.
  - s) In spite of the above difficulties, the Projects were ready for synchronization in all respects except for CEIG formalities and the petitioners have initiated CEIG approvals and they would be in a position to synchronize the Projects very quickly.
  - t) It is stated that all the above stated events or circumstances causing delay in the progress of project works, would amount to 'Force Majeure' as provided in Article 8 of the PPA. Therefore, the petitioners have filed the present petitions on 03.10.2017 praying for extension of time by four months from the respective extended dates granted by HESCOM in these cases, on the grounds of 'Force Majeure' events to enable to petitioners to commission the projects. Subsequent to amending the relief columns, the petitioners have prayed for extension of time till the dates of Commercial Operation of the respective Projects.
4. The respondents appeared through counsel. The 1<sup>st</sup> respondent (KREDL) filed its statement of objections in all the cases, contending that it is not a necessary party and no relief is claimed against it, thereby the petitions may be dismissed against it. The KPTCL, where it is made party in two cases, has not filed any statement of objections. The respondents 2 & 3 (hereinafter

referred as HESCOM) have filed statement of objections in each of the cases, contesting the claims of petitioners.

5. The statement of objections filed by HESCOM in all the cases, contain almost similar defence and grounds while contesting the claims of the petitioners. The substance of the statement of objections and the grounds urged may be stated as follows:

- a) HESCOM has not disputed the execution of the PPAs with the petitioners and grant of six months' extension of time from the respective Scheduled Commissioning Date (SCD) in all the cases. It is also not disputed that during the pendency of these petitions, the Solar Projects involved in these cases were commissioned on different dates as claimed by petitioners.
- b) That the petitioners have failed to commission the Projects within six months' time extended by it and the petitioners have failed to make out any valid grounds for extension of time on Force Majeure events or otherwise, to claim further extension of time till the respective dates of commissioning of the Projects.
- c) That the delay in commissioning of the Projects beyond the time allowed, has significant effects on the supply of electricity that the HESCOM is obliged to meet and has a direct consequence on the consumers as well. The petitioners are liable to pay to HESCOM Liquidated Damages for not fulfilling the Conditions Precedent as well as the commissioning of the Projects as stipulated in the PPAs. The bank guarantees that were



furnished under the PPAs were lapsed as on 23.06.2018, 13.08.2018 & 08.07.2018 respectively.

d) The petitioners have not complied with mandatory requirement of notifying the HESCOM of the Force Majeure events claimed by them, which were alleged to have hindered the progress of the project works. It is established in law that this notice is not a mere formality, but a mandatory requirement.

e) Regarding the extension of six months' time for commissioning the projects, it is stated that the directions were issued by GoK vide letter No.EN 75 VSC 2016 dated 24.11.2016 to:

- form Committee of 3 Members;
- take action as per clause 2.5 & Article 8 of the PPA; and
- dispose the requisitions within 15 days.

As per the directions of the GoK, the HESCOM formed the Committee, to examine and to take decision with regard to extension of time for SCD consisting of:

- Director (Technical), HESCOM. --- Chairman
- General Manager (Tech), HESCOM. --- Member
- Executive Engineer (EI), O&M Division  
(of the respective Divisions where the  
Solar Project is taken up). --- Member

The Committee, after detailed discussion and scrutiny of all the field reports sought from the respective Executive Engineer (EI), O&M Division, decided to accord approval for extension up to six months from the date of SCD clearly mentioning that all other terms & conditions of the PPA

shall remain unaltered for the farmers/SPVs including the petitioners herein, taking into consideration Articles 2.5 & 8 of the PPA.

- f) On 16.03.2017, this Commission addressed a letter to all the ESCOMs of the State, in the matter pertaining to extension of time granted to solar generators and informed them, not to allow any extension of time beyond the scheduled commissioning date as per the original PPA without obtaining prior opinion of the Commission. Further, vide letter dated 05.04.2017, the ESCOMs were directed by the Commission to advise all land owner solar developers/SPVs to file a petition before the Commission with all relevant grounds/documents for seeking approval for the extension of the Commissioning Date and the same was intimated to the petitioners.
- g) Each of the petitioners has failed to justify the reasons and to prove, for the delays beyond the extension of six months that was granted to them and that such delays are attributable to Force Majeure events. The averments made by the petitioners regarding the letter of credit not being granted on time, withdrawal of investors, problems with the contractors etc., do not amount to Force Majeure events and the petitioners are put to strict proof of the same.
- h) The petitioners have failed to meet even its own deadline as per the prayers earlier made in the petitions. This goes to further show that the petitioners have not taken timely steps in the implementation of the projects. That the time is essence of the contracts of this nature and

delay in commissioning of the projects has led to great losses that are incurred by HESCOM and thereby the petitioners are liable to pay Liquidated Damages and compensate the HESCOM for the losses incurred on account of the delay in commissioning of the projects.

i) That the HESCOM has not traversed each and every averment made in the petitions, however, this cannot be construed as an admission of such averment unless any fact is specifically admitted. That all other averments made in the petitions that have not been specifically admitted are herein denied.

j) Therefore, the HESCOM has prayed for dismissal of the petitions and to allow Liquidated Damages and compensation and to apply the reduced tariff owing to the delay in commissioning of the projects as per the terms of the PPAs.

6. The petitioners have filed rejoinders denying the legality of the grounds urged by the HESCOM. It is also contended that this Commission could not have interfered with the extension of time granted by HESCOM. The claim for Liquidated Damages and compensation for the delay in commissioning the projects, is not legally sustainable. It is also contended that reduction of review periods of Generic Tariff Orders and reducing Generic Tariff from time to time relating to Solar Projects issued by this Commission, from 30.07.2015 to 12.04.2017 to the disadvantage of the Solar Project Developers are legally not sustainable etc.,

7. We have heard the learned counsel for the parties. They have also filed the written submissions and cited certain precedents.

8. From the pleadings and documents filed by the parties and the rival contentions advanced by them, the following Issues arise for our consideration.

Issue No.1: Whether the Commission has jurisdiction to review the extension of time granted for a period of six months by the HESCOM for commissioning of the projects involved in these cases?

Issue No.2: Whether the petitioners in these cases, have made out a case for extension of time till the actual dates of commissioning of the respective projects from the Scheduled Commissioning dates?

Issue No.3: Whether the petitioners are liable to pay damages under Article 2.2.1 of the PPA for failure to meet the Conditions Precedent within the time allowed?

Issue No.4: Whether the petitioners are liable to pay Liquidated Damages under Article 2.5.7 of the PPA for delay in commencement of supply of power to HESCOM?

Issue No.5: Whether the petitioners are liable for reduction of tariff as provided in latter part of Article 5.1 of the PPAs?

Issue No.6: To which reliefs the petitioners are entitled to?

Issue No.7: What Order?

9. After considering the material on record and the pleadings and the submissions of the learned counsels for the parties, our findings on the above issues are as follows:

10. Issue No.1: Whether the Commission has jurisdiction to review the extension of time granted for a period of six months by the HESCOM for commissioning of the projects involved in these cases?

- a) The pleadings of the petitioners particularly the rejoinders filed by them, would show that this Commission has no jurisdiction to review the extension of time granted by HESCOM, acting under Articles 2.5 read with 8 of the PPA. The petitioners have objected for having issued instructions to all ESCOMs, vide letter dated 05.04.2017 issued by the Commission, wherein it was directed to advise the concerned SPD/SPVs under Land Owners/Farmers Scheme to file a petition before the Commission with all relevant grounds/ documents for seeking approval for any extension of the commissioning date. During the arguments the learned counsel for the petitioners relied upon para 8.15 of the judgment of the Hon'ble ATE in Chennamangathihalli Solar Power Project LLP Vs. BESCOM & Others (Appeal No.351 of 2018) dated 14.09.2020, to contend that the extension of time granted by HESCOM cannot be reviewed by the Commission.
- b) The above proposition advanced by the petitioners, in our considered opinion is not correct. Now it is accepted that in spite of a provision in a PPA enabling the distribution licensee, to grant extension of time from the SCD for commissioning of the project, the Commission as a Regulatory Authority, has power to review the legality of the extension of time granted, as to whether such extension of time, would fall within the four corners of the terms of the PPA or not. A similar contention as urged by the present petitioners was taken in Channamangathihalli case before the Hon'ble ATE, in which the terms of PPA for extension of time

were similar. On consideration of the rival contentions, the Hon'ble ATE at para 6 of Channamangathihalli case framed the following issues:

*Issue No.1: Whether in the facts and circumstances of the matter, the State Commission was justified to intervene on its own when there was no dispute between the parties?*

*Issue No.2: Whether the State Commission has correctly held that there were 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 answering Issue No.1, the Hon'ble ATE in para 7.11 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 submission 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. The finding on Issue No.2 is purely based on the disputed question of facts. The Hon'ble ATE 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. Therefore, the question of law as to whether the Commission has jurisdiction to call upon the developer to produce proper evidence for the scrutiny of the Commission to establish the Force Majeure event relied upon by it, rendered in Issue No.1, would clearly establish that the Commission has the jurisdiction to scrutinize the evidence and to render a finding on the Force Majeure event.

- c) The learned counsel for the petitioners relied upon the following portion of the observations made by the Hon'ble ATE in para 9.2 of the aforesaid judgment:

*".....Further, it is mandate upon the State Commission to promote co-generation and generation of power from renewable sources of energy, however, in the present case, the State Commission has suo motto interfered for the ultimate loss to RE developers who are land owning farmers and had participated in the programme of the Government for solar power development. In fact, the entire solar project is structured on the basis of assured tariff as per Article 5.1 of the PPA being an incentivised tariff and financial institutions have advanced loans on the basis of the assured tariff as per PPA."*

As already noted the Hon'ble ATE on appreciation of the facts of that case had found that there was 7-8 months' delay in issuing various approvals and had further found that such delays were to be condoned. In that context, the Hon'ble ATE has observed as noted above in para 9.2 of the aforesaid judgment. The said observations cannot be read as ratio of the decision holding that in no case the State Commission has power

to interfere with the extension of time granted by ESCOM. If it is so interpreted, it would contradict the ratio laid down on Issue No.1 of the said judgment.

- d) In this connection, we may also note the decision of the Hon'ble Supreme Court of India in the case of All India Power Engineer Federation & Others Vs. Sasan Power Limited & Others reported in (2017) 1 SCC 487. In the said decision, the Hon'ble Supreme Court has considered the effect of a waiver of a right, by the Distribution Licensee, under the provision of the PPA, which had the effect of adversely affecting the tariff agreed to under the PPA. The principles are stated thus:

*"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 into thwart any waiver which may be contrary to such public interest." ..."* [Paragraph-25]

In the said case, the question was, 'whether the waiver of a provision of the PPA by the Distribution Licensee, having an effect to increase the 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 giving up the benefit of reduction in tariff which would affect the interest of 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.

- e) 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, one cannot contend that the decision to extend the time for commissioning of the Solar Power Project under the provision of PPA is not subject to scrutiny by the Commission.
- f) In the preamble of the letter dated 05.04.2017 issued by this Commission the first 3 paras read as follows:

*"The Commission is receiving, for its approval several Supplementary PPAs executed in respect of Solar Projects under Land Owners/Farmers Scheme. Such Supplemental PPAs mainly seek to extend time to the developers to achieve CoD beyond the date specified in the original PPAs. The ESCOM concerned has stated that a Committee formed with*

*its Director Technical as chairman as directed by the Govt. in Energy Department to resolve the issue of granting extension of CoD by considering Article 2.5 and 8 of the PPA, has decided to grant extension of time for achieving scheduled commissioning of the project as requested by the developer.*

*2. The Commission has noted that, the grounds cited to grant extension of time and the duration of such extension vary from case to case. However, the proceedings of the said Committee and the proposal of the ESCOMs which are not supported by any documents and independent findings, are inadequate to enable the Commission to take a decision in the matter.*

*3. As already clarified in the Commission's letter dated 17.03.2017 cited under reference, the Commission has the jurisdiction of legal scrutiny of validity of the extension of time granted in any case by an ESCOM. Such proceedings being a part of judicial functions of the Commission require reasonable opportunity to be given to both parties of the PPA to present their case."*

For the above reasons in para 4 of the said letter signed by the Secretary, the directions given to ESCOMs are as follows:

*"4. Hence, I am desired by the Commission to inform that the Commission directs all the ESCOMs to advice the concerned SPD/SPVs under Land Owners/ Formers Scheme to file a petition before the Commission with all relevant grounds/ documents for seeking approval for any extension of the commissioning date. It may also be noted, this direction of the Commission applies to even such cases where the ESCOMs have not entered into Supplementary PPAs following the*

*decision of the 'Committee' to grant extension of commissioning date."*

- g) For the above reasons one cannot contend that the decision of HESCOM to extend the time for commissioning of the Solar Power Projects in the present cases, is not subject to scrutiny by the Commission.
- h) Accordingly, Issue No.1 is held in affirmative.
11. Issue No.2: Whether the petitioners in these cases, have made out a case for extension of time till the actual dates of commissioning of the respective projects from the Scheduled Commissioning dates?
12. Before proceeding to consider the facts on merits, we may note the meaning and scope of Force Majeure and its applicability in a given set of facts or circumstances.
- a) The relevant clauses in Article 2.5 relating to Extension of Time and in Article 8 relating to Force Majeure are as follows:

*" 2.5 – Extensions of Time:*

*2.5.1 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 HESCOM Event of Default: or*
- b. Force Majeure Events affecting HESCOM; or*
- c. Force Majeure Events affecting the SPD,*

*2.5.2 The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than 'day for day' basis, to permit the SPD or HESCOM through the use of due diligence, to overcome the effects of the Force Majeure*

Events affecting the SPD or HESCOM, or till such time such Event of Default is rectified by HESCOM.

- 2.5.3 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 that the Scheduled Commissioning Date would not to be extended by more than 6 (six) months.
- 2.5.4 In case of extension due to reasons specified in Article 2.5.1 (b) and (c), and if such Force Majeure Event continues even after a maximum period of 3(three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 9.
- 2.5.5 If the Parties have not agreed, within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 10.
- 2.5.6 As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement.

## 8 Force Majeure

- 8.1- Definitions: In this Article, the following terms shall have the following meanings:
- 8.2 – Affected Party: An Affected party means HESCOM or the SPD whose performance has been affected by an event of Force Majeure.
- 8.3 Force Majeure Events:

(a) Neither party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to

*meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following;*

*(i) to (x) .....*

*(b) The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:*

*(i) The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;*

*(ii) The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event;*

*(iii) The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;*

*(iv) The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;*

*(v) In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."*

b) The reading of Article 2.5.1 shows that the Extension of Time in favour of the SPD for commissioning the project can be granted due to: (a) Any HESCOM Event of Default; or (b) Force Majeure Events affecting HESCOM; or (c) Force Majeure Events affecting the SPD.

- c) It appears in the present cases the HESCOM has extended six months' time for commissioning of the projects from SCD, assuming that the delays claimed by the petitioners in their letters dated 24.12.2016 were the HESCOM Event of Default. Article 9.2.2 of the PPA provides for what constitutes an Event of Default by HESCOM. One cannot dispute that the grounds stated in the letters dated 24.12.2016 regarding the delays in issuing the land conversion orders, in approving SPPAs by the Commission and the delay occurring due to demonetization, cannot be termed as HESCOM Event of Default as stated in Article 9.2.2 of the PPA. It appears the instructions issued by the Government, might have led the HESCOM to grant six months' time.
- d) The HESCOM could have extended the time on the ground of Force Majeure Events affecting the SPD. The SPD can claim exclusion of the time taken during a Force Majeure Event, provided he issues the notice describing the particulars of Force Majeure Event as soon as practicable after its occurrence and issues notice of resumption of performance as soon as the Force Majeure Event ceases to have effect. The extension of time should be co-extensive with the duration of the Force Majeure Event. The Force Majeure Event should not have been caused by the SPD's negligent or intentional acts, errors or omissions, or by his negligence/failure to comply with any material law, or by any material breach or default under the PPA. These are the limitations and restrictions for availing the Force Majeure Event benefit by a party, as

stated in Article 8.3 (b) of the PPA. Thereafter as provided in Article 2.5.5, within thirty days after the SPD resumes its performance, the HESCOM can extend the time on evaluating the facts and, if there is no agreement between the parties regarding the duration for which the extension of time is to be granted, the SPD may raise the disputes to be resolved in accordance with Article 10 of the PPA.

e) In the present case, the petitioners have written letters dated 24.12.2016 claiming extension of time for commissioning the project, without issuing any notices for any of the Force Majeure Events alleged by them. The HESCOM has granted six months' time, which is not in terms of the relevant provisions in PPA, as noted above.

f) The ingredients of 'Force Majeure Events' may be analysed as follows:

(i) Neither party shall be responsible or liable for or deemed in breach hereof;

- because of any delay or failure in the performance of its obligations hereunder;
- or failure to meet milestone dates;
- due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party whose performance has been affected by such delay or failure, including the occurrence of any of the following:

(i) to (x) xxxxxxxxxxxxxxxxxxxxxx

(ii) The availability of the Force Majeure Event stated above to excuse a Party's obligations under the PPA due to a Force

Majeure Event, is mainly limited and restricted on the condition that the Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under the PPA;

13. Keeping in mind the above principles it is to be seen, as to whether petitioners have proved the Force Majeure Events stated by them to claim extension of time for commissioning the projects. The petitioners have relied upon the following facts and circumstances as 'Force Majeure Events':

- (a) Delay in issuing land conversion orders has resulted delay in forming SPVs;
- (b) Delay in forming SPVs and delay in approval of the SPPAs after formation of SPVs, have resulted delay in entertaining the proposal for investment by the potential investors;
- (c) The above facts & circumstances stated in (a)&(b), delayed in achieving financial closures;
- (d) Delay in issuing regular evacuation scheme approvals;
- (e) Delay in supply of breakers (MCVCB); and
- (f) Delay in the progress of project works due to Demonetization Policy by the Government of India;

The petitioners have contended that the above Force Majeure Events and circumstances contributed for the delay in completion of the project works.



14. Regarding: Delay in issuing land conversion orders has resulted delay in forming SPVs;

a) In OP No.173/2017 and OP No.174/2017, the MoA/AoA were executed on 01.10.2016 and Incorporation Certificates were obtained on 25.10.2016 & 21.10.2016 respectively. The conversion fees were paid on 22.08.2016 & 10.06.2016 and land conversion orders were issued on 07.10.2016 & 25.06.2016 respectively in these cases. Therefore, it appears the petitioners in these cases have contended that approval of land conversion orders was a pre-requisite for formation of SPVs. Such contention has no legal basis. The PPA does not prescribe such a term for forming the SPV. The SPV in OP No.175/2017 is formed on 18.05.2016 by executing a MoA/AoA even before applying for land conversion and subsequently Incorporation Certificate was obtained on 22.06.2016. Admittedly in this case, the land conversion order is not yet obtained. Sri S.R. Sham Sunder, the lead member, who is a Managing Director of the SPV related to OP No.175/2017 is also the Managing Director of SPVs in other two cases. These facts clearly point out that the parties had not waited for land conversion orders for forming the SPVs. It can be clearly inferred that the SPDs were not vigilant in searching the suitable persons to form SPVs, within a reasonable time from the date of execution of PPAs. In the first two cases, the delay is about 15 months and in the last case, the delay is about 1 year from the date of execution of the PPAs. It is clear that such averments are made to hide the delay in forming the SPVs. The above facts & circumstances would clearly indicate that the

SPDs were negligent in forming the SPVs, within a reasonable time subsequent to execution of the PPAs.

- b) The petitioners in OP No.173/2017 & OP No.174/2017 have alleged that the delay in issuing land conversion orders is the total number of days taken for issue of conversion order from the date of application. This is not the correct approach to calculate the delay in issuing the land conversion orders. The reasonable time required for making necessary enquiries before issue of the land conversion orders is to be deducted out of the total period from the date of application to the date of issuance of the land conversion orders. Apart from it, Section 95 (10) of the Karnataka Land Revenue Act, 1964 provides for deemed conversion of agricultural land into non-agricultural purpose on payment of conversion fee. Therefore, on the date of payment of conversion fee, it is deemed that the land had been converted for non-agricultural purpose. A period of two months from the date of application requesting for conversion of land to the date of payment of conversion fee, may be taken as the reasonable period for necessary enquiries. Therefore, the delay in issuing the intimation to pay conversion fee may be considered as 200 days & 130 days in OP No.173/2017 & OP No.174/2017 respectively. However, the petitioners in these cases have failed to establish that such delay has affected or hindered the progress of the project works.

c) From the above discussions, we hold that the delay in issuance of the land conversion orders has not resulted delay in forming SPVs.

15. Regarding: Delay in forming SPVs and delay in approval of the SPPAs after formation of SPVs, have resulted delay in entertaining the proposal for investment by the potential investors:

a) We have already dealt with the so-called delay caused in forming the SPVs. Now, we may consider as to whether there is any delay in the approval of the SPPAs and as to whether it caused delay in entertaining the proposal for investment by the potential investors. The total number of days taken for approval of SPPA from the date of SPPA in the first two cases is about 17 days and in the last case is about 15 days. The SPPAs are to be executed between petitioners and HESCOM. Thereafter, the HESCOM submits the SPPAs to Commission for approval. The Commission has to verify the contents of the SPPAs and thereafter, it has to give approval to them. Therefore, we hold that the number of days taken for approval of SPPAs from the date of execution of SPPAs, cannot be considered as delay in approval of the SPPAs.

b) The petitioners have stated in the petitions that only after the approval of the SPPAs by the Commission, an investor or lender would entertain an investment or loan proposal as otherwise, it would be treated as an agricultural or farm loan which has its own rules and regulations. Further they stated that with a SPPA in hand, a Solar developer could make reasonable efforts to receive investment or loan into the SPV. Therefore,

according to the petitioners, without approval of SPPAs they could not have searched for an investor or lender who could invest into the SPV. This statement is also far from reality. A financial institution or an investor may at best insist for completion of the entire documentations before release of the loans, but not at the stage of considering the proposals for loans. There is no prohibition to entertain the request for loan or investment into the SPV before completion of all the documentations.

c) For the above reasons, the ground alleged by the petitioners that only after the approval of SPPAs by the Commission, an investor or lender would come forward to entertain the investment or loan proposal is not acceptable.

16. Regarding: The above facts & circumstances stated in (a)&(b), delayed in achieving financial closures:

a) In these petitions, it is stated that the SPDs on their own, subsequent to execution of PPAs sought to partner with some investor, but they could not succeed in receiving the funds on time. The reasons stated are that all the potential investors insisted on conversion of agricultural lands into non-agricultural status and forming the SPVs for taking up the construction of the project works. Further it is stated that after forming the SPVs, the SPPAs were executed and subsequently the same were approved by the Commission. It is the case of the petitioner that only after the approval of the SPPAs they went in search of the potential investors.

b) The pleadings of the petitioners do not disclose that any of the SPDs approached any bank or financial institutions for financial facility for the execution of the project. No specific reason is assigned for not approaching the bank or the financial institution. The pleadings do not throw light over the potential investors with whom the SPDs approached for investment and at what dates. It may be seen that the SPDs have approached the Deputy Commissioner for conversion of lands nearly after 6 months in the first two cases and nearly after 10½ months in the last case, from the date of PPAs. If at the earlier stage, the SPDs had come to know that the potential investors would insist for conversion of agricultural lands into non-agricultural status, there would not have been such delay in approaching the Deputy Commissioner requesting for conversion of lands. Therefore, the say of the SPDs that immediately on execution of PPAs they sought to partner with some investors for development of the projects and they insisted land conversion before their participation is not an acceptable version.

c) The petitioners who are SPVs started search of investors after approval of the SPPAs. The SPPAs were approved on 08.12.2016, 08.12.2016 & 09.11.2016 respectively in the above cases. It is stated by the petitioner that finally they could convince M/s REnergo Developers Private Limited, a Delhi based company registered under the Companies Act to invest into the projects on a mutually acceptable shareholding patterns. Thereafter, a MoU was signed on 20.03.2017 in each of the cases.

Though in the petitions it is stated that the said MoU dated 20.03.2017 has been produced in each of the cases, it is found that such MoU is produced only in OP No.173/2017 but not in other two cases. In OP No.174/2017 though a MoU was produced, it related to the project concerned in OP No.173/2017. It is further stated in the petitions that the letter dated 05.04.2017 issued by the Commission stating that the extension of time for completion of the project should be sought by the project developers by filing petition making out the grounds for extension of time, led the investor M/s REnergo Developers Private Limited to withdraw from the MoU dated 20.03.2017 vide e-mail dated 16.04.2017 (produced in OP No.173/2017). The e-mail dated 16.04.2017 does not reveal the reason stated by the petitioners for termination of MoU dated 20.03.2017. This e-mail merely states that the termination was as per the conversations (verbal and written, through email, sms or chats) on this matter. This would show that the petitioners were not in a position to produce documentary evidence disclosing the reasons for the termination of MoU, by the investor M/s REnergo.

d) We have already extracted the material portion of the letter dated 05.04.2017 and the directions issued under it. There is nothing in this letter causing threat to any investor from withdrawing from the investment agreement on reading this letter. An investor might feel un-comfort only in the event that the HESCOM had granted extension of time unreasonably and without proper application of mind.

- e) The MoU dated 20.03.2017 states that the investor had agreed to bring in entire equity required for the project, expected to be INR 1.40 crs. and the SPV had agreed to take over the responsibility of arranging long term debt expected to be INR 5 Crs. in each case. The SPV does not claim that it had arranged the long term debt to the extent of INR 5 Crs. in each case or it had initiated the process of making arrangement for it.
- f) Further the MoU provides that the investor has to reimburse the entire money spent by the SPV to carry out the development activities for the project from the equities to be infused into the SPV.
- g) The termination clause of the MoU provides procedure for termination. It states a Defaulting Party be given seven days' notice to remedy the Default and in case of not curing the defect within seven days, the other party shall be free to terminate this MoU. This would show that the SPV was a Defaulting Party and it had not cured the defect pointed out and thereby allowed the investor to terminate the MoU.
- h) From the above facts & circumstances, it can be said that the petitioners have set up an unacceptable reason that the directions contained in the letter dated 05.04.2017 of the Commission made the M/s REnergy Developers Private Limited to go out from the MoU.
- i) It is averred in the petitions that finally an investor by name M/s Kurlon, who agreed to invest came forward for the development of projects on certain conditions. It is stated that in this connection, MoU dated 10.05.2017 has been entered in each of the cases. The petitioners have

produced copy of the MoU dated 10.05.2017 in all the cases. The material terms of debt arrangement under this MoU may be stated as follows:

- Kurlon, the investor is described as Lessor and the SPV is described as Lessee. Kurlon agreed to bear the entire cost of the project of Rs.5.50 crores on certain securities to be offered by Lessee and agreed to let out the project material to SPVs on rent for the term of the projects.
- The Lessor would pay the full amount of Rs.5.50 crores to the EPC Contractor directly on condition that the EPC Contractor completing the project to the satisfaction of the Lessor within the COD as per PPA.
- The payment to the EPC Contractor shall be secured through a confirmed Letter of Credit with certain conditions.
- Operational decision including awarding of contracts in full or part shall be made by the Lessee. However, for selection of the EPC Contractor, consent of the Lessor is to be obtained.
- The repayment by the Lessee to Lessor shall be by 60 EMIs or such other number of EMIs with interest at 20% on the investment of Rs.5.50 crores.

j) The petitioners have further stated that:

- (i) With all difficulties M/s Natural Power Asia Private Limited, an EPC Contractor from Hyderabad, accepted to execute the project work on accepting the term regarding LC. The LC could be opened on 29.05.2017 after a delay of 19 days from the MoU dated 10.05.2017 as the Managing Director of Kurlon, had to leave for Germany, immediately after executing the MoU. Since the LC was payable on achievement of COD, the EPC Contractor from



Hyderabad, expressed its inability to continue and withdrew from the Purchase Order, which it had duly accepted.

- (ii) Thereafter, there was a need for Contractor who could take responsibility to complete the Project on time and the deadlines were already fast approaching. A licensed contractor by name; Seundo, accepted to implement the Project within the deadline on the condition that payments have to be made in advance and stage by stage. Kurlon released advance of Rs.1.5 crores to Seundo. Unfortunately, though Seundo accepted the payment, undertook to complete the work on time, but failed to even commence the work even after 12 days, except behaving like a procurement agency to procure materials. Then, the petitioners had to ask Seundo to confirm as to whether they would honour their commitments and at that time Seundo wrote to Kurlon directly on 22.06.2017 and 27.06.2017 that they were withdrawing from the contract due to the reason that the Purchase Order from Kurlon reached them late.
- k) From the above facts narrated by the petitioners it can be said that till the last week of June, 2017 the financial closure had not taken place in the real sense.
- l) For the above reasons, we hold that the delay in achieving the financial closure was not due to delay in issuing the land conversion orders or delay in forming SPVs and delay in approval of SPPAs etc., but such

delay has taken place due to the act or omissions leading to imprudent approach by the petitioners in achieving the financial closures.

17. Regarding: Delay in issuing regular evacuation scheme approvals:

- a) We have already noted in latter part of para 3 (c) of this order that the total number of days taken are 146, 59 & 73 days respectively in these cases for issue of regular evacuation scheme from the date of application to the date of regular evacuation scheme. A reasonable time required for issue of regular evacuation scheme subsequent to filing of application is to be ascertained before concluding as to whether there was delay in issuing regular evacuation scheme. Here itself we may note that in these cases applications for evacuation approvals were filed on 15.06.2016, 18.04.2016 & 25.07.2016 respectively, almost lapse of one year from the date of execution of PPAs. The petitioners have not come forward to offer any explanation for such a long delay in applying for the evacuation approvals.
- b) Subsequent to filing of application for evacuation, the KPTCL has to verify as to whether all required documents are produced or not. Thereafter, it has to intimate the process fee payable by the applicant. After payment of process fee, 'load flow' study is to be conducted and a spot inspection is also undertaken. If it is feasible, the KPTCL issues tentative evacuation scheme with the required terms & conditions. After acceptance of the terms & conditions stated in the tentative evacuation scheme, a regular evacuation scheme would be issued. In

the absence of any evidence led by the parties to ascertain the reasonable time that would be necessary to comply with the different steps stated above in a particular case, we are of the considered opinion that a three-months' time may be taken as reasonable time for issuance of the regular evacuation scheme from the date of application. The parties have not placed any material in this regard.

c) Applying the above test, it can be said that the delay in issuing the regular evacuation scheme in OP No.173/2017 may be taken as 56 days. However, in other cases it is to be concluded that there is no delay in issuing the regular evacuation schemes.

d) The further question is as to whether the delay of 56 days caused in OP No.173/2017, has affected the performance of the SPD or the petitioner in the progress of the project work. As noted above, as on the dates of issuance of regular evacuation schemes, the petitioners had not arranged finance and had not entered into any EPC contract. The construction of evacuation line is to be carried out by a licenced EPC (Engineering, Procurement & Construction) contractor alone.

e) For the above reasons, the delay if any in issuing the regular evacuation scheme does not come to the help of petitioners, for claiming extension of time.

18. Regarding: Delay in supply of breakers (MCVCB);

a) A total number of days taken for supply of breaker from the date of receipt of quotation to the date of supply of breaker, is 310 days & 317

days in OP No.173/2017 & OP No.174/2017 respectively as noted in para 3 (f) of this order. The date of supply of breakers is taken as 23.06.2017 in both cases as claimed by the petitioners. The petitioners have not stated the date on which orders were placed for supply of breakers. They have also not produced any intimations sent by the manufacturer of the breakers intimating to take delivery of the breakers. The petitioners have relied upon the date of supply of breakers as 23.06.2017, the date on which the breakers were inspected by the KPTCL official in the factory premises. The breaker is a device to be installed within the bay adjacent to KPTCL Sub-station. The petitioner in OP No.173/2017 has made its request for providing the space for bay on lease as per his application dated 17.06.2017. Subsequently, within few days the land adjacent to Sub-station was provided on lease basis. The petitioner in OP No.174/2017 has not produced any document to establish, the date on which it made application for providing space for construction of bay. However, it has produced copy of Inspection Report dated 23.06.2017 conducted by KPTCL in respect of breaker concerned in this case. From this document it can be said that little earlier to it, the petitioner in OP No.174/207 also might have requested for sparing the land adjacent to KPTCL Sub-station for construction of bay. Thereafter, the work at bays can be commenced. It is quite possible that the breakers were ready for delivery even earlier to the inspection of breakers on 23.06.2017. The quotation for supply of breaker contains a term that the delivery would be after 10-12 weeks from date of placing the order for supply. As

already noted the petitioners have not placed any evidence to show that the date on which orders were placed for supply of breakers. Therefore, at best it may be taken that there was delay of 6 months in supplying the breakers.

- b) The petitioners have engaged EPC contractor Seundo about in 1<sup>st</sup> week of June, 2017. That EPC contractor withdrew from the contract on 27.06.2017. It is not known on which date the subsequent EPC contractor was appointed. The pleadings of the petitioners would show that the entire procurement of material was done beyond 01.07.2017. Therefore, it can be said that even if there is delay in supply of breakers it had not prevented the petitioners in the progress of the project works, as by that time the petitioners had not engaged any EPC contractor and the required material were not produced.
- c) For the above reasons, the delay if any in supply of breakers has not resulted into a 'Force Majeure' event.

19. Regarding: Delay in the progress of project works due to Demonetization Policy by the Government of India;

- a) The petitioners have not stated the period during which the Demonetization Policy of the Government of India, was in force. It is ascertained that the said period was between 08.11.2016 to 31.12.2016 (50 days).
- b) In this connection, the averments made in all the petitions are similar and the same are as follows:

*“The petitioner submits that its co-promoter, who joined the SPD in the SPV, had decades of experience in project finance and was confident that he will be able to convince a financial institution to lend, at least when they see progress of the project at actual implementation level. Therefore, in right earnest, the petitioner started work at the site and had made initial progress like land levelling, land development, transmission line work etc. Most of these works involved cash payment to labourers on a daily basis. Due to demonetization policy of the Government of India, no cash was available for an extended period and the labourers had no individual bank accounts where money could be credited. This led to labour unrest and the labour force left the work site and went away. The delay caused to us was for nearly 44 days and all our hopes of demonstrating progress in work before we approach financial institutions also suffered significantly.”*

c) The petitioners have not stated the dates from which they started work at their respective sites. As the petitioners have stated that the delay due to demonetization was nearly for 44 days, it can be assumed that the work was started at least a month earlier to imposition of demonetization. The petitioners do not say that subsequent to withdrawal of certain restrictions for cash transactions in the banks, the date on which they resumed the work at the project sites. They do not mention the number of labourers engaged and how much work of land levelling, land development and transmission line work etc., had taken place. They also do not specify the amount spent for such work. Ultimately at the end of relevant para containing the averments in this respect, it is stated that *“all our hopes of demonstrating progress in work before we approach financial institutions also suffered significantly.”* It can be seen

that the petitioners have subsequently not approached any recognized financial institutions for project finance, but approached only the private investors in months of March & May, 2017, as noted earlier. In the letters dated 24.12.2016 requesting for extension of time for SCD, in OP No.173/2017, one of reasons stated is that very little land development work could be taken up at the project site, but on the other hand where the same request was made in OP No.174/2017, it is stated that the land development work was taken up and a fair progress had been achieved. In OP No.175/2017, though it is claimed that letter dated 24.12.2016 seeking extension of time for SCD, is filed along with the petition, no such letter is forthcoming. However, it is found that the letter dated 24.12.2016 related to OP No.174/2017 is wrongly filed in OP No.175/2017. These letters contradict each other on the question of land development carried out on different project sites and inconsistent with the pleadings made in the petitions. Hence, we hold that petitioners have failed to prove that demonetization has affected the progress of the project works.

20. For the above reasons in our considered view, the petitioners have failed to prove any of the facts or circumstances relied on by them, entitling for extension of time on the grounds of 'Force Majeure' events.
21. The petitioners have not averred any facts causing delay in executing the projects subsequent to the last week of June, 2017 up to the dates of commissioning the projects. They have filed these petitions on 03.10.2017.

In these petitions, it is stated that in spite of the above difficulties, the projects were ready for synchronization in all respects except for CEIG formalities and the petitioners have initiated CEIG approvals and they would be in a position to synchronize the projects very quickly. It can be seen that the projects were actually commissioned on 12.02.2018, 04.02.2018 & 03.05.2018 respectively after a delay of 13-16 months from the dates of SCD. The petitioners had requested in their petitions to extend four months' time in continuation of the six months' time already granted by HESCOM from the respective dates of SCD. The petitioners had not commissioned the projects even within the four months' time as prayed for by them in the petitions. Still there was delay of 3-6 months' in commissioning of the projects. The petitioners have not pleaded any relevant facts to claim the extension of time in respect of the said 3-6 months' delay in commissioning of the projects.

22. In OP No.175/2017, it is stated that the petitioner had submitted an application dated 26.05.2016 with all enclosures at the office of the Deputy Commissioner, Bijapur district, Bijapur, requesting conversion of land. Further, it is stated that subsequently the file was found missing and it could not be traced till filing of the petition. The petitioner has not produced any endorsement issued by the office of the Deputy Commissioner, Bijapur district, Bijapur, acknowledging the missing of file and inability to trace it. In the absence of such written endorsement, the say of the petitioner cannot be relied upon. In the same way, the petitioners have claimed that



Seundo, the EPC contractor had submitted the required electrical drawings and transferred fund to CEIG towards processing fee for drawing approvals of these projects. Further it is stated that when the petitioners approached CEIG through another EPC contractor after Seundo withdrew from its responsibilities, there were no files with CEIG in respect of these projects. Further it is stated that the burden of complying with the entire CEIG process had again fallen on the petitioners and they had to re-start the entire process with the help of another EPC contractor. The petitioners have not properly established the missing of files in the office of CEIG. Such allegations should be supported by proper documentary evidence. But the petitioners have not produced any supporting direct or circumstantial evidence to prove that the files were missing in the office of the CEIG.

23. For all the above reasons, we hold that petitioners in these cases have failed to make out a case for extension of time till the actual dates of commissioning of the respective projects from the SCDs. Accordingly, Issue No.3 is held in the negative.

24. Issue No.3: Whether the petitioners are liable to pay damages under Article 2.2.1 of the PPA for failure to meet the Conditions Precedent within the time allowed?

a) Article 2.2.1 of the PPA reads as follows:

*"2.2.1. – In the event that the SPD does not fulfil any or all the Conditions Precedent set forth I Clause 2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to HESCOM or due to Force Majeure,*

*the SPD shall pay to HESCOM damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum period of 60 (sixty) days. On expiry of the said 60 (sixty) days, HESCOM at its discretion may terminate this Agreement."*

- b) Achieving financial closure and getting power evacuation approval from KPTCL/HESCOM as the case may be within 365 days from the date of execution of PPA would mainly comply with the requirement of fulfilling the Conditions Precedent. As already noted, the financial closures had not taken place even after two years from the date of execution of PPAs. The petitioners have applied for evacuation approvals nearly after a year from date of execution of PPAs. Therefore, it cannot be imagined that they would be in a position to get the evacuation approvals within one year from the date of execution of the PPAs.
- c) As already noted, the petitioners could not blame any others for the delay in complying the said Conditions Precedent.
- d) Therefore, they are liable to pay the damages as provided Article 2.2.1 of the PPA. It is found that during the pendency of these proceedings, the Performance Security furnished by the petitioners have been lapsed and the petitioners were not asked to provide fresh Performance Security. The lapse of Performance Security does not debar the

HESCOM from recovering the damages by some other modes as may be provided under law.

e) Accordingly Issue No.4 is held in affirmative.

25. Issue No.4: Whether the petitioners are liable to pay Liquidated Damages under Article 2.5.7 of the PPA for delay in commencement of supply of power to HESCOM?

a) We have already found that the petitioners have failed to establish any of the Force Majeure events alleged by them which hindered the progress of the project works. The delay had taken place only because of the negligence on the part of the SPDs in commencing the different steps towards the progress and completion of the projects within the stipulated time and the SPDs & petitioners were lacked in foresight and planning of the projects at appropriate time to complete them within the stipulated time. These were the real reasons for the delay in commissioning of the projects. The projects were commissioned nearly after 13-16 months from the date of SCDs.

b) In the rejoinders, the petitioners have contended that the claim for the Liquidated Damages for the delay in commissioning of the projects is not legally sustainable. It is further explained in the rejoinders that the HESCOM can claim Liquidate Damages only on proof of actual loss sustained by it due to delay in supply of energy. The learned counsel for the HESCOM countered the said contention and stated that in the case of delay in supply of energy by a generator to the distribution licensee, the actual loss sustained cannot be established and in such

cases the loss is deemed to have been established as has been decided in several other decisions of this Commission.

c) Now it is an accepted principle that in the case of delay in supply of energy to the distribution licensee under PPA, itself is sufficient to award Liquidated Damages agreed in the PPA provided the Liquidated Damages agreed is a genuine pre-estimate. In the present cases for the delay in supply of energy up to one month, 20% of the Performance Security; and for the delay for more than one month up to three months 40% of the Performance Security; and for the delay for more than three months up to six months 100% of the Performance Security, can be imposed. The Performance Security specified in the PPA is Rs.10 lakhs for one MW project. In our considered view the quantum of damages agreed to between the parties for the delay in commencement of energy is quite reasonable.

d) For the above reasons, we hold Issue No.5 in the affirmative.

26. Issue No.5: Whether the petitioners are liable for reduction of tariff as provided in latter part of Article 5.1 of the PPAs?

a) Article 5.1 of the PPA reads as follows:

*"5.1 – Tariff payable:*

*The SPD shall be entitled to receive the Tariff of Rs.8.40 (Rupees eight and Paise forty only) per kWh based on the KERC Tariff Order S/03/1 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 shall be the lower of the following:*

*(i) Rs.8.40/- per kWh.*

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

b) In OP No.173/2017 & OP No.174/2017, the varied tariff applicable as on the dates of actual commissioning of the projects was Rs.4.36 per unit & in OP No.175/2017, the varied tariff applicable as on the date of actual commissioning of the project was Rs.3.05 per unit.

c) The learned counsel for the HESCOM relied upon the relevant portion of the decision rendered by the Hon'ble Supreme Court of India, in Civil Appeal No.1220 of 2015 (Gujarat Urja Vikas Nigam Limited Vs. EMCO Limited & Another), decided on 02.02.2016 [reported in (2016)11 Supreme Court Cases 182] which reads as follows:

*“31. Apart from that both the Respondent No.2 and the appellate tribunal failed to notice and the 1<sup>st</sup> Respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA:*

*‘In case, commissioning of Solar Power Project is delayed beyond 31<sup>st</sup> December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of Solar Power Project or 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 1<sup>st</sup> tariff order. It is also visualised that for the subsequent control period, the tariffs payable to a PROJECTS/power producers (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 1<sup>st</sup> Respondent would be entitled only for lower of the two tariffs.....”*

- d) The above decision also supports the reduction of tariff due to delay in commissioning of the projects beyond the specified SCDs. Therefore, the petitioners in these cases are liable for reduction of tariff as provided in latter part of Article 5.1 of the PPAs. Accordingly, Issue No.6 is held in affirmative.

27. Issue No.6: To which reliefs the petitioners are entitled to?

- a) The petitioners are paid for the energy supplied subsequent to commissioning of the projects at the rate of Rs.4.36 per unit in the first two cases and of Rs.3.05 per unit in the last case, as per the interim orders passed by this Commission in these cases. We have found that they are not entitled to any higher tariff other than the tariff noted above.
- b) Hence, petitioners are not entitled to any of the reliefs as sought in their respective petitions.

c) Issue No.7 is held accordingly.

28. Issue No.7: What Order?

a) It is made clear that the 2<sup>nd</sup> Respondent (HESCOM) in all the above cases is at liberty to recover damages from the respective petitioners as provided in Article 2.2.1 and Liquidated Damages for delay in commencement of power supply as provided in Article 2.5.7 of the PPAs.

b) For the foregoing reasons, we pass the following:

**ORDER**

(i) The petitioners are not entitled to any of the reliefs prayed for by them in their respective petitions.

(ii) As a consequence of delay in commissioning of the projects, the 2<sup>nd</sup> Respondent (HESCOM) is at liberty to recover damages as provided in Article 2.2.1 & Article 2.5.7 of the PPAs. Further, the petitioners are liable for reduction of tariff as provided in latter part of Article 5.1 of the PPAs?

(iii) The original order be kept in OP No.173/2017 and the copies of it be kept in OP No.174/2017 & OP No.175/2017.

sd/-

(SHAMBHU DAYAL MEENA)  
Chairman

sd/-

(H.M. MANJUNATHA)  
Member

sd/-

(M.D. RAVI)  
Member