

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**

No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

**Dated : 27<sup>th</sup> September, 2018**

**Present:**

Shri M.K. Shankaralinge Gowda .. Chairman  
Shri H.D. Arun Kumar .. Member  
Shri D.B. Manival Raju .. Member

**O P No. 166/2017**

**BETWEEN:**

LPD Solar Power Pvt. Ltd.,  
No.655/8, 2<sup>nd</sup> Floor, F, 1<sup>st</sup> C Main Road,  
40<sup>th</sup> Cross, 8<sup>th</sup> Block,  
Jayanagar,  
Bengaluru – 560 082.

.. **PETITIONER**

*[Represented by Kumar & Bhat, Advocates]*

**AND:**

- 1) Bangalore Electricity Supply Company Limited,  
Corporate Office,  
K.R. Circle,  
Bengaluru – 560 001.
- 2) Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan,  
Kempgowda Road,  
Bengaluru – 560 009.
- 3) Karnataka Renewable Energy Development Limited  
Bharath Scouts and Guides Building,  
Palace Road,  
Bengaluru – 560 001.

- 4) The Deputy Commissioner,  
Ubavva Circle,  
Maniyur,  
Chitradurga District- 577 501.

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**RESPONDENTS**

[Respondents 1 & 2 represented by Shri Shahbaaz Husain, Advocate,  
Respondent 3 represented by Shri Rakshith Jois, Y.P., Advocate,  
Respondent 4 unrepresented]

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**ORDERS**

- 1) This Petition is filed under section 86(1)(b) of the Electricity Act, 2003, praying to:
- (i) direct the 1<sup>st</sup> Respondent (BESCOM) to comply with the original terms of the Power Purchase Agreement (PPA) and provide the confirmation for time extension with original tariff under Article 8 i.e., force majeure;
  - (ii) direct the 1<sup>st</sup> Respondent (BESCOM) to accept the original tariff agreed in the PPA, i.e., Rs.8.40 per kWh and remit the same to the Petitioner;
  - (iii) declare that the Petitioner is entitled to the *Force Majeure* condition as per Article 8 and consequently is eligible to seek extension of time as per Article 2 of the PPA with original tariff;
  - (iv) restrain the 1<sup>st</sup> Respondent (BESCOM) from deducting any Liquidated Damages from the Petitioner as *Force Majeure* events have caused the delay;

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- (v) declare that the Petitioner is entitled to extension of time with original tariff as per Article 2 of the PPA without imposing or changing any conditions in the PPA; and,
  - (vi) grant such other reliefs, as the Commission deems fit, in the interest of justice and equity.
- 2) The facts of the case, as mentioned by the Petitioner and the grounds urged, in support of its prayers, may be summed up, as follows:
- (a) The Petitioner is a company, registered under the Companies Act, 2013, carrying on the business of developing, executing, managing and running solar energy plant. The Government of Karnataka (GoK) issued the Karnataka Solar Policy 2014-21, vide Notification dated 22.05.2014. Under the said Policy, GoK envisaged Utility Scale Grid Connected Solar Photo Voltaic and concentrated Solar Power Projects and endeavoured to promote the Solar Energy Projects, preferably by land owning farmers, with a minimum capacity of 1 MW and maximum capacity 3 MW per land owning farmer, in the State, for sale of power to the Electricity Supply Companies (ESCOMs), at the KERC determined tariff from time to time
  - (b) The GoK issued Guidelines vide Notification No.EN VSC 2014, Bangalore, dated 26.08.2014, inviting applications from the eligible land owners, for

awarding 1 - 3 MW capacity Solar Photo Voltaic Power MW Scale Plants and to enter into PPAs with the ESCOMs concerned.

- (c) Pursuant to the same, Smt. R Lakshmiddevamma, a land owning farmer, had made an application for grant of Solar Power Project, with capacity of 2 MW, to be established in her land at Sy.No.193/5, Kaluvehalli, Challakere Taluk, Chitradurga District. The KREDL issued Letter of Award, in her favour, vide allotment letter dated 17.03.2015. The 1<sup>st</sup> Respondent (BESCOM) executed a PPA dated 29.06.2015 with her [Solar Project Developer (SPD)], for purchase of power from the 2 MW Solar Power Plant.
- (d) As the SPD had no capacity to invest and establish the Solar Power Plant, she found the investor and formed the Petitioner-SPV, with the SPD as a 26% shareholder, as permitted under Article 12.11 of the PPA. A supplemental PPA (SPPA) dated 02.09.2016 was also entered into between the 1<sup>st</sup> Respondent (BESCOM) and the Petitioner-SPV, for development of the Solar Power Plant, with the consent of the SPD.
- (e) Immediately after entering into the PPA, the Petitioner started the Project development works on the site, like land levelling, fencing, obtaining necessary approvals and sanctions, such as conversion of land, evacuation line, funds, from the authorities concerned and loan sanction from the banks for the establishment of the Solar Power Project. As per Article 2 of the PPA, the Project had to be completed, on or before the Scheduled

Commissioning Date i.e., within eighteen (18) months from the Effective Date. Even though, the PPA was signed on 29.06.2015, the same had to be approved by the Commission. After approval of the Commission, the PPA was handed over to the Petitioner on 28.08.2015.

Here itself we may note that, many of the actions stated to be initiated / taken by the Petitioner are, in fact, of the SPD.

- (f) The Petitioner lost about two months' time to receive the approved PPA, which is to be treated as a *Force Majeure* Event, under Article 8.3. The 1<sup>st</sup> Respondent (BESCOM) had not initially understood the formalities of forming an SPV and the modalities of the Supplemental Agreement. The Commission had clarified the same during December, 2015 and even after that, the 1<sup>st</sup> Respondent (BESCOM) could not understand the clarification given by the Commission and the Commission issued new formats for AOA, MOA and supplemental PPA, on 21.03.2016. In between the above-said two clarifications, nine (9) months had lapsed, from the date of the PPA. As there was no clarity with regard to assignment of the PPA, the Petitioner could not get any investor to provide funds for the Project.
- (g) The GoK issued a Circular dated 01.12.2015, fixing the time for grant of deemed conversion of agricultural land as, 15 days. As per the Circular, the Petitioner had submitted all the requisite documents, like PPA, the KREDL letter, RTC, PTCL NOC and other relevant documents on 01.04.2016, before

- the Deputy Commissioner, for the conversion of land. The Deputy Commissioner passed an Order on 22.08.2016, granting the conversion of land, after a delay of 4 months 22 days. The Petitioner had also applied for the evacuation approval, before the 2<sup>nd</sup> Respondent (KPTCL) on 23.03.2016, and the same was granted on 23.9.2016, after a delay of 6 months. Subsequent to the power evacuation approval, the 2<sup>nd</sup> Respondent (KPTCL) granted the Work Order to carryout the Sub-station work on 16.12.2016, resulting in a delay of 9 months. Also, subsequent to the evacuation approval, the Petitioner could obtain the Work Order, to construct the 11 kV line, only on 18.11.2016.
- (h) The Petitioner made a request on 30.08.2016, for providing the MEI breaker, and the same was received on 15.12.2016, after 3 months.
- (j) The 11 kV line from the Petitioner's Plant to the nearest Sub-station of Mylanahalli, which was 14 kms away, had to pass through private lands, with crossing of multiple lines of BESCOM / KPTCL. Neither the 1<sup>st</sup> Respondent (BESCOM), nor the Government, took steps to provide protection, to lay the line or to resolve the issue between the farmers and the Petitioner. The Petitioner negotiated with the farmers and laid the line, for which 3 months' time was consumed.
- (k) The request for the extension of time, to commission the Plant was made before the 1<sup>st</sup> Respondent (BESCOM) on 08.12.2016, but the same was

received by the Petitioner on 02.03.2017, after a delay of 3 months. As the above-said approvals are valid for 18 months, from the date of the signing of the PPA, the Petitioner could not carryout the Sub-station work, as the extension of time was not granted, immediately, despite a direction by the GoK, in the Circular dated 24.11.2016, that the 1<sup>st</sup> Respondent (BESCOM) had to extend the time, under the PPA, within 15 days. Hence, there was a delay of 3 months in granting the extension of time. Further, there was a delay of three months, due to demonetisation, which has to be treated as a *Force Majeure* Event.

- (l) Owing to the inordinate delay in the issuance of the various permissions and sanctions, including the land conversion Order, the time fixed, under the PPA, had expired and the Petitioner had sought for the extension of time, to commission the Project. The reasons for the delay in the CoD would fall under the *Force Majeure* Events, as defined under Article 8 read with Article 2 of the PPA and, therefore, the application for the extension of time with the original tariff has to be considered by the Commission.
  
- (m) The Petitioner has invested Rs.13 Crores and has committed to revenue sharing with the farmer, assuming the original tariff. If any change is effected to the original tariff, the same would amount to violation of the PPA, cause heavy losses to the Petitioner and affect the livelihood of the farmer.

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- (n) After the execution of the PPA between the Petitioner and the 1<sup>st</sup> Respondent (BESCOM), the conditions set forth, therein, would only apply and there would be no scope for any third party to intervene, guide, or alter the agreement and no substantive regulations can vary the clauses on conditions, timelines, tariff, etc., in the said PPA.
- 3) Upon issuance of Notice, the Respondents, except the 4<sup>th</sup> Respondent (Deputy Commissioner), appeared through their counsel and filed Statement of Objections. The 4<sup>th</sup> Respondent (Deputy Commissioner) remained unrepresented.
- 4) The objections of the 1<sup>st</sup> Respondent (BESCOM) may be stated, as follows:
- (a) As the Petitioner was unable to execute the Project, in a timely manner, she sought for the extension of time for commissioning the Project, by six months, under the *Force Majeure* conditions. As several requests for extension of the Scheduled Commissioning Date were received from the Solar Developers, the GoK issued an Order dated 24.11.2016, directing all the ESCOMs to constitute a 3-member Committee, to consider and to dispose of the requests of the farmers / developers. Accordingly, a Committee was constituted by the 1<sup>st</sup> Respondent (BESCOM), to consider the requests for the extension of time, sought for, by the 1 to 3 MW Solar Generators, under the land owning farmers' category. The said Committee held a meeting on 15.02.2017, wherein the causes for the delayed achievement of the



scheduled commercial operation were considered in respect of eleven generators, including the Petitioner and decision was taken to accord the extension of six months' time to achieve the SCOD.

- (b) The Petitioner furnished the documents to the Committee constituted for the purpose, for consideration of the request for extension of time. As per the same, the following information was gathered, pertaining to the various reasons assigned, for the delayed execution of the Project.

*Land conversion:*

Date of submission of application :	06.06.2016
Date of conversion :	22.08.2016
Delay in getting approval :	nearly 2½ months

*KPTCL evacuation approval (Regular):*

Date of submission of application :	04.08.2016
Date of approval :	23.09.2016
Delay in getting approval :	more than 1½ months

- (c) The Committee, after detailed discussions and scrutiny of all the documents, opined that, approval may be accorded for the extension of SCOD, by six months, considering Article 2.5 of the PPA, as there is a delay in the issuance of approvals, by the various Government entities.

- (d) On 02.03.2017, the 1<sup>st</sup> Respondent (BESCOM) addressed a letter to the Petitioner, informing about the extension of time, by six months, for the SCOD. The subject was placed before the 82<sup>nd</sup> Meeting of the Board of Directors of

the 1<sup>st</sup> Respondent (BESCOM), held on 11.05.2017, for evaluation / disposal of the requests of the land owning farmers / SPVs, for the extension of time for the CoD, in respect of 1 to 3 MWs Solar Power Plants, in Karnataka, under the farmers' category. The Board has ratified of the extension of time, issued by the 1<sup>st</sup> Respondent (BESCOM).

- (e) On 16.03.2017, the Commission addressed a letter to all the ESCOMs in the matter, pertaining to the extension of time, granted to the Solar Generators and informed them, not to allow any extension of time, beyond the scheduled commissioning, if any, 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 owning Solar Developers / SPVs, to approach the Commission and seek for approval of the extension of time. In furtherance to the same, the Petitioner has filed this Petition.
- (f) The Additional Chief Secretary to Government, Energy Department, vide letter dated 25.04.2017, addressed to the Commission, has sought for its approval to the extension of the CoD, given by the 1<sup>st</sup> Respondent (BESCOM) for six months from the date of SCOD, as per Articles 2.5 and 8 of the PPA.
- (g) The Project was commissioned on 31.03.2017.

- (h) In respect of the extension of the Project duration of the already awarded Solar Power Projects, the Ministry of New and Renewable Energy, has issued letter No.30/106/2014-15/NSM dated 28.07.2017, addressed to the Principal Secretaries (Power/Energy) of the State Governments, as stated below :

*"Ministry has requested not to give time extension if all the obligations are fulfilled by the concerned State Government Authorities/PSUs, etc., in a project. However, if there are delays of any kind on the part of State Government Authorities/PSUs like land allotment, transmission/Evacuation facilities, connectivity permission or force majeure, the competent authority in the State/SECI,NTPC, etc., may consider providing extension of the time duration strictly as per the contractual agreement.*

*It Is also to be clarified that if a project equipment/materials have been purchased/ordered and substantial advances paid as per original completion date, and there is a delay on part of the state organisations regarding land, transmission or any such reasons, the extension of the project may be allowed."*

- (j) The 1<sup>st</sup> Respondent (BESCOM) has prayed that the Commission may be pleased to issue directions in the present Petition, in the interest of justice.

5) The objections of the 2<sup>nd</sup> Respondent (KPTCL) may be stated, as follows:

- (a) The Petitioner's allegation that, there is a delay of 6 months, on the part of the 2<sup>nd</sup> Respondent (KPTCL), in approving the power evacuation, is denied as false. The application for power evacuation was not received on

23.03.2016, as stated by the Petitioner, but was received by the 2<sup>nd</sup> Respondent (KPTCL) on 11.07.2016. The chain of events, with regard to the approval of power evacuation is, as hereunder:

- (i) Application received on 11.07.2016.
- (ii) On receipt of application, letter was addressed to the Petitioner on 03.08.2016 to pay the processing charges of Rs.57,500/- along with BESCO feasibility, copy of the land conversion order from the concerned Deputy Commissioner, original RTC and detailed information of IPP developer.
- (iii) On 04.08.2016, the above documents were produced by the Petitioner.
- (iv) On 10.08.2016 the Petitioner submitted the receipt of processing fees and RTC land conversion copy.
- (v) The tentative evacuation approval was issued to the Petitioner on 22.08.2016.
- (vi) On 24.08.2016, the Petitioner submitted the acceptance letter agreeing with the terms and conditions of tentative evacuation approval and requested for allotment of one terminal bay for evacuation of power from its power plant.
- (vii) On 31.08.2016 the field report was received from the field officers regarding the availability of spare space to accommodate a 11 kV terminal bay.

- (viii) On 01.09.2016 the field report was submitted to CEE, P&C for administrative approval.
- (ix) In the 77<sup>th</sup> TB Committee meeting held on 17.09.2016, the matter was discussed and approval was accorded for utilization of space available in the Sub-station, for construction of a Terminal Bay.
- (x) On 23.09.2016, the land conversion order was produced and the regular evacuation approval was issued to the Petitioner.

From the above chain of events, it is clear that the 2<sup>nd</sup> Respondent (KPTCL) has not delayed the process of according evacuation approval to the Petitioner.

- (b) The Petitioner's contention that, there is a delay of 9 months by the 2<sup>nd</sup> Respondent (KPTCL), in granting the Work Order on 16.12.2016, to carryout Sub-station work, is denied as false. The Work Order can be sanctioned, only subsequent to approval of the power evacuation and the evacuation approval was granted on 23.09.2016. The Work Order to carryout the Sub-station work, was granted on 16.12.2016, whereas the Petitioner's averment that there is a delay of 9 months, is absolutely false as the Work Order was granted in about 2 ½ months' time. The chain of events, leading to sanction of the Work Order is, as follows:

- (i) The estimate for the subject work was received on 01.12.2016.

- (ii) Intimation for payment of necessary charges towards land lease, O&M and supervision was issued on 08.12.2016.
- (iii) The Petitioner paid the charges and payment letter received on 14.12.2016.
- (iv) The technical sanction was issued on 14.12.2016.
- (v) The work approval was issued on 16.12.2016.

Thus, the 2<sup>nd</sup> Respondent (KPTCL) has not delayed, in sanctioning of the Work Order or in approving the power evacuation.

- (c) The Petitioner's allegation that, the delay in receiving the MEI breaker is attributable to the 2<sup>nd</sup> Respondent(KPTCL), is denied. The Petitioner took more than 2 months to submit the request for inspection of the 11 kV MCVCB and the chain of events leading to the delivery of the MEI breaker is, as follows:

- (i) On 31.08.2016, the Petitioner submitted the MEI switch gear drawings for approval.
- (ii) On 29.09.2016, the 11 kV PCVCB drawing approval letter was issued.
- (iii) On 12.12.2016, the Petitioner submitted the request for inspection of the 11 kV PCVCB.
- (iv) On 15.12.2016 and 20.12.2016, inspections were carried out and TAQC acceptance letter was issued on 28.12.2016.

Therefore, there is no delay, on the part of 2<sup>nd</sup> Respondent (KPTCL), as alleged.

- (d) The 2<sup>nd</sup> Respondent (KPTCL) has prayed the Commission to issue directions in the Petition, in the interest of justice.
- 6) The 3<sup>rd</sup> Respondent (KREDL), in the Statement of Objections, has stated that, it is for the 1<sup>st</sup> Respondent (BESCOM), to counter the contentions urged by the Petitioner and that it is not a necessary party to this petition. Hence, the 3<sup>rd</sup> Respondent (KREDL) has prayed that the Petition, against it, may be dismissed.
- 7) We have heard the learned Counsel for the parties and perused the material placed on record. The following issues would arise, for our consideration:
- (1) Whether the extension of time of six months, granted by the 1<sup>st</sup> Respondent (BESCOM) to the Petitioner, for achieving the commercial operation of the Petitioner's Plant, can be subjected to legal scrutiny by the Commission?
  - (2) Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant, under *Force Majeure* Events, as per the PPA?
  - (3) What should be the tariff for the Project, for the term of the PPA?
  - (4) What Order?

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- 8) After considering the submissions made by the learned counsel for the parties and the pleadings and other material placed on record, our findings on the above issues are, as follows:
- 9) **ISSUE No.(1):** *Whether the extension of time of six months, granted by the 1<sup>st</sup> Respondent (BESCOM) to the Petitioner, for achieving the commercial operation of the Petitioner's Plant, can be subjected to legal scrutiny by the Commission?*
- (a) Article 2.5 of the PPA does not specifically stipulate that, any extension of time granted by the BESCOM should be got approved by the Commission. However, Article 2.5.1 of the PPA stipulates the grounds on which alone the time could be extended for achieving the commercial operation. Article 5.1 of the PPA provides for reduction of tariff as a consequence of delay in the commissioning of the Project beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein. Whenever an event affects the quantum of tariff applicable for supply of energy to the Distribution Licensees, we are of the considered opinion that the same should be scrutinized and approved by the Commission. It is a settled law that this Commission has the exclusive jurisdiction to determine the tariff for supply of electricity by a Generating Company to a Distribution Licensee and it has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which the electricity shall be procured from different agencies through PPAs. Therefore, we hold that, even in the absence of a specific term in the PPA, an event affecting or



altering the tariff already approved in the PPA should be got approved by this Commission.

- (b) The Petitioner has contended that, as the 1<sup>st</sup> Respondent (BESCOM) has accepted the claim of the *Force Majeure Events* and granted extension of time, the Commission has to pass an Order, in favour of the Petitioner, treating the averments and pleadings of the Petitioner as admitted by the Respondent. Reliance is placed by the Petitioner on the judgments of the Hon'ble Delhi High Court, in the case reported in AIR 2005 Delhi 319 and the Hon'ble Supreme Court, in the case reported in AIR 2005 SC 2765, in support of such contention. We are unable to accept the contention of the Petitioner. Any extension of time to commission a Power Project, has a bearing on the tariff payable. The tariff determination / fixation of price for electricity is not an adversarial proceedings. The consumer, though, not a formal party, ultimately pays for the supply of electricity and is the most affected party. The Commission is required to safeguard such consumers' interest. While upholding the role of the Commission, as a regulator and custodian of the interest of consumers, the Hon'ble Supreme Court, in the case of *All India Power Engineers Federation Ltd v. Sasan Power Ltd.*, reported in (2017) 1 SCC 487, has held that, even if parties to a contract (generating company - seller of energy and distribution licensee - buyer of energy) waive off a certain term affecting the tariff, the Commission, as a custodian of consumers' interest, has to intervene and exercise its regulatory power. Accordingly, we hold that the Commission has the mandate and

powers to scrutinize the correctness and legality of the extension of time granted by the 1<sup>st</sup> Respondent (BESCOM).

(c) Therefore, we answer Issue No.(1), in the affirmative.

10) **ISSUE No.(2):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant under force majeure events, as per the PPA?*

(a) It would be useful to extract the relevant clauses of the PPA, before we deal with this issue:

#### **“2.1 Conditions Precedent:**

*The obligations of BESCOM and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.*

**2.1.1 (i)** *The SPD shall obtain all permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the Project (hereinafter referred to as “Approvals”):*

*(ii) The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:*

*(a) The DPR to BESCOM and achieve financial closure and provide a certificate to BESCOM from the lead banker to this effect;*

*(b) All Consents, Clearances and Permits required for supply of power to BESCOM as per the terms of this Agreement; and*

(c) Power evacuation approval from Karnataka Power Transmission Company Limited or BESCO, as the case may be.

**2.1.2** SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and BESCO shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent.

**2.1.3** The SPD shall notify BESCO in writing at least once a month on the progress made in satisfying the Conditions Precedent. The date, on which the SPD fulfills any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify BESCO of the same.

## **2.2 Damages for delay by the SPD**

**2.2.1** In the event that the SPD does not fulfill any or all of the Conditions Precedent set forth in Clause 2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to BESCO or due to Force Majeure, the SPD shall pay to BESCO 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 fulfillment of such Conditions Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days, BESCO at its discretion may terminate this Agreement

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## **2.3.2 Appropriation of Performance Security**

Upon occurrence of delay in commencement of supply of power to BESCO as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, BESCO shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages. Upon such encashment and appropriation from the Performance Security, the SPD shall, within 30 (thirty) days thereof, replenish,

in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the SPD shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which BESCO shall be entitled to terminate this Agreement in accordance with Article 9."

## **"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 BESCO Event of Default; or
- (b) Force Majeure Events affecting BESCO; 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 BESCO through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or BESCO, or till such time such Event of Default is rectified by BESCO.

**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 be extended by more than 6(six) months.

**2.5.6** As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined date shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement.

### **2.5.7 Liquidated damages for delay in commencement of supply of power to BESCO.**

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to BESCO by the scheduled commissioning date, the SPD shall pay to BESCO, liquidated damages for the delay in such commencement of supply of power as follows:

(a) For the delay up to one month- amount equivalent to 20 % of the performance security.

(b) For the delay of more than one month up to three months - amount equivalent to 40 % of the performance security.

(c) For the delay of more than three months up to six months - amount equivalent to 100 % of the performance security.

For avoidance of doubt, in the event of failure to pay the above mentioned damages by the SPD, the BESCO entitled to encash the performance security."

### **"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) Acts of God;

(ii) Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;

- (iii) *Strikes, work stoppages, work slowdowns or other labour dispute which affects a Party's ability to perform under this Agreement;*
- (iv) *Acts of war (whether declared or undeclared), invasion or civil unrest;*
- (v) *Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the SPD or BESCO of any Law or any of their respective obligations under this Agreement);*
- (vi) *Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
- (vii) *Fire, Earthquakes, explosions, accidents, landslides;*
- (viii) *Expropriation and/or compulsory acquisition of the Project in whole or in part;*
- (ix) *Chemical or radioactive contamination or ionizing radiation; or*
- (x) *Damage to or breakdown of transmission facilities of either Party;*

*(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) We note that, under the Article 2.5 of the PPA, extension of time for commissioning the Project can be granted, if the SPD is prevented from performing its obligations due to the 1<sup>st</sup> Respondent (BESCOM)'s 'Event of Default' or the *Force Majeure* Events. The *Force Majeure* Events and the requirement of issuing a written Notice are mentioned in Article 8.3 of the PPA. Under the said clause, it is also necessary to prove that, the *Force Majeure* Event was not caused by the non-performing party's negligent or intentional acts, errors or omissions. In this backdrop, we need to examine, if the Petitioner or the SPD, in any manner, was negligent in performing its obligations under the PPA.
- (c) The PPA is signed by the parties on 29.06.2015. As per Article 2.1 of the PPA, the Conditions Precedent had to be achieved within 365 days, from the date of signing of the PPA and the Project had to be commissioned within 18 months, from the date of signing of the PPA. The achievement of the Conditions Precedent, would include obtaining of all the approvals by the SPD. The Petitioner claims that, the delay in handing over a copy of the PPA after approval on 28.08.2015 by the Commission has caused delay in implementing the Project. The recitals in the PPA would reveal that, the parties have signed the PPA and copies of the same were delivered on the date of the PPA. A signed copy of the PPA would be sufficient to proceed

with the preliminary works for implementation of the Project. It was the obligation of the Petitioner to demand and obtain a copy of the PPA after signing it. The approval of the PPA, by the Commission, has no bearing on the initial obligations of the SPD, such as, applying for approvals, loans, etc. The Petitioner has not produced any documents, to show that any of its application for approval, loans etc. was rejected or delayed, on this count. Therefore, we are unable to accept that, the time taken for approval of the PPA is a *Force Majeure* Event, causing delay in the commissioning of the Project. The provisions of the PPA do not provide for exclusion of the time taken for approval of the PPA, in counting the period available for commissioning the Project. Hence, the time taken, in the regulatory process, for approval of PPA, cannot be termed as 'delay'. In any case, as noted earlier, it is not shown that the absence of approved PPA, prevented the SPD from taking any step / action to implement the Project.

- (d) It is the case of the Petitioner that, the SPD applied for the conversion of land on 01.04.2016. The Petitioner has stated that, ANNEXURE-J dated 01.04.2016 is the application for conversion. However, there is no ANNEXURE-J to the Petition and the copy of the application is not produced. The Order of the Deputy Commissioner, Chitradurga reveals that the application was made before the Deputy Commissioner, for the conversion of land on 6.8.2016. This is after a lapse of more than one year, from the Effective Date of the PPA. No explanation is given for this inordinate delay, on the part of the SPD, in applying for the land conversion. The land conversion charges were paid



by the SPD on 22.08.2016. The land conversion Order was passed by the Deputy Commissioner, on 22.08.2016, in about 15 days from the date of application, which is found to be reasonable. In fact, the Petitioner has tried to mislead the Commission, by furnishing incorrect dates and facts.

- (e) The Petitioner has stated that, the SPD applied for the evacuation approval to the 2<sup>nd</sup> Respondent (KPTCL) on 23.03.2016. The Petitioner has stated that, ANNEXURE-K is the application. However, there is no ANNEXURE-K to the Petition and the copy of the application is not produced. The 2<sup>nd</sup> Respondent (KPTCL) has filed the copy of the application with the Statement of Objections, and the same is dated 11.07.2016. This is after more than a year, from the date of the PPA. No explanation is given for this delay in making the application. The Petitioner has alleged that the 2<sup>nd</sup> Respondent (KPTCL) has caused delay of 6 months in granting the evacuation approval. The 2<sup>nd</sup> Respondent (KPTCL), in the Statement of Objections, has furnished the dates and events leading to the grant of evacuation approval. The regular evacuation approval was granted on 23.09.2016, within 3 months, from the date of application. This short period of time, cannot be termed as 'delay'. In fact, the Petitioner has tried to mislead the Commission by furnishing incorrect information regarding this aspect also.
- (f) It is the further allegation of the Petitioner that, there was delay of 9 months by the 2<sup>nd</sup> Respondent (KPTCL) in granting of the Work Order, to carry out the

Station Work. This allegation is countered by the 2<sup>nd</sup> Respondent (KPTCL), in its Objections. The time taken by the 2<sup>nd</sup> Respondent (KPTCL) from 23.9.2016, the date of granting of the regular evacuation approval, to 16.12.2016, the date of granting of the Work Order, is only 2½ months, which is considered as reasonable. When a time line of 365 days is provided in the PPA, for getting all approvals, the inordinate delay by the SPD / Petitioner, in applying for such approvals and thereafter attributing the delay to the authorities, cannot be accepted. The 1<sup>st</sup> Respondent (BESCOM), while granting the extension of time to commission the Project, ought to have taken note of these aspects.

- (g) The other allegation is that, a delay of 3 months in the execution of the Project work was caused by the demonetisation decision of the Central Government. This allegation is not substantiated and, in any case, cannot be treated as a *Force Majeure* Event.
- (h) The other allegation of the Petitioner is that, the Respondents did not assist the Petitioner in resolving the disputes with the farmers, for laying the 11 kV line. We note that, it is the obligation of the Petitioner to obtain all the approvals and develop the Project, within 18 months, under the clauses of the PPA and the allotment letter dated 17.03.2015, issued by the 3<sup>rd</sup> Respondent (KREDL). The 1<sup>st</sup> and 2<sup>nd</sup> Respondents cannot intervene in the disputes between farmers and the Petitioner in respect of sparing of their land for construction of the 11 kV line. Therefore, the events relating to the

laying of the 11 kV line, cannot be considered as covered under the *Force Majeure* clause of the PPA.

- (j) It is also the allegation of the Petitioner that, the breaker was supplied by the MEI, after a period of 3 months, from the date of the Order. We note that, the breakers have to be tailor-made, based on the drawing submitted, tested and certified by the TAQC and thereafter, despatched. Considering the various steps involved, the period of about 3 months, in supply of breakers, cannot be termed as 'delay'. It is also not explained, as to why there was a delay on the part of the Petitioner, in placing the Purchase Order for the breaker. Further, the averment of the 2<sup>nd</sup> Respondent (KPTCL) that there was a delay of two months by the Petitioner, in this regard, is not countered.
- (k) It is also the case of the Petitioner that, the communication on the extension of time for the SCOD was sent on 2.3.2017, after 2 months from the date of the request on 8.12.2016 and the Petitioner could not carry out the Sub-station work, as the approval had lapsed, by then. We have noted earlier, the inordinately long time taken by the Petitioner in making applications for grant of the various approvals. Had timely action been taken, the chain of events would have been completed, within the stipulated time and the Plant could have been commissioned, within the SCOD.

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- (l) We note that, it is a settled law that the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under the clause, is stated to be issued by the Petitioner to the 1<sup>st</sup> Respondent (BESCOM). None of the reasons or events cited by the Petitioner, for the delay in commissioning of its Project would fall under the *Force Majeure* Events mentioned in the PPA, as held in the preceding paragraphs. Hence, we hold that, the Petitioner is not entitled to the extension of time, as provided in the clauses of the PPA. Consequently, the Petitioner would be liable for payment of Liquidated Damages as per Article 2.5.7 of the PPA.
- (m) We have held that, the Petitioner is not entitled to the extension of time, beyond the SCOD, to commission the Project. Admittedly the SPD / Petitioner has not achieved the Conditions Precedent, within the specified time, as required under Article 2.1 of the PPA. The actual dates, on which they were achieved, have not been furnished or elaborated by the Petitioner. For the same reason as applicable to rejection of the Petitioner's claim for the extension of time, for achieving SCOD, any claim of the Petitioner for extension of time for achieving Conditions Precedent, is liable to be rejected. Thus we hold that, for not complying with the timelines, as mentioned in the PPA, for Conditions Precedent and commissioning of the Project, the Petitioner is required to pay damages for such delay, as per Articles 2.2 and 2.5.7 of the PPA.

- (n) The Hon'ble Supreme Court of India, in Civil Appeal No.3600 of 2018 (*M.P. Power Management Company Ltd. Vs Renew Clean Energy Pvt. Ltd., and another*), decided on 05.04.2018, has held that, for delay in achieving the Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages, as stipulated in the PPA.
- (p) Therefore, we answer Issue No.(2), in the negative.
- 11) **ISSUE No.(3):** *What should be the tariff for the Project, for the term of the PPA?*
- (a) Clause 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 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) Article 5.1 of the PPA, provides for reduction of tariff, as a consequence of the delay in commissioning of the Solar Power Project, beyond the

Scheduled Commissioning Date, subject to certain terms and conditions stated, therein. This is in view of the fact that, this Commission periodically determines generic tariff for supply of electricity, generated from the various sources, to the Distribution Licensees, based on, among other parameters, mainly the Capital Cost of the Generating Plant. Such generic tariff is made available for a period, normally longer than a year, called as 'Control Period', during which the Generating Plants get implemented and commissioned at the normative Capital Cost, adopted in the Generic Tariff Order, generally after the execution of a PPA with Distribution Licensee. Such PPA also has a clause, stipulating the time within which the power supply should commence, so that the Distribution licensee can plan further supply to its consumers. The time ordinarily required to complete various pre-commissioning activities, which in respect of megawatt scale Solar Power Plants is taken as, 12 months to 18 months. Any delay or failure in the commencement of power supply, within the agreed date, would disrupt the operation of the Distribution Licensees, like the 1<sup>st</sup> Respondent (BESCOM), which could also result in their power procurement from alternative expensive sources leading to higher retail tariff to the consumers or short supply leading to revenue loss to them and even to imposition of penalties, for not meeting the Renewable Purchase Obligation (RPO) fixed by this Commission. The capital cost of the Solar Power Plants has been coming down very rapidly, in the recent years, because of the advancement in technology and production efficiency as well as the economies of scale in the backdrop of largescale Solar capacity addition, across the globe. Thus,

generic tariff for megawatt scale Solar Power Plants, which was fixed at Rs.14.50 per unit in the Commission's Order dated 13.07.2010, has been successively reduced to Rs.8.40 per unit in the Order dated 10.10.2013, Rs.6.51 per unit in the order dated 30.07.2015, Rs.4.36 per unit in the Order dated 12.04.2017 and Rs.3.05 per unit in the Order dated 18.5.2018.

- (c) We note that, the Petitioner SPV took the risk of implementation of the Project after more than a year, after execution of the PPA, with barely six months left for its commissioning, as agreed to in the PPA and could not do it, for certain reasons and events, which we have held to be, not falling under the *Force Majeure* clause in the PPA, that could have entitled the Petitioner to seek the extension of the commissioning date, agreed to in the PPA. It is safe to infer that, the normative Capital Cost of the Solar Power Plants, when the Petitioner took effective steps to procure capital equipment for its Project, was lower than the normative cost of the Solar Power Plants, assumed in the Generic Tariff Orders dated 10.10.2013 and 30.07.2015. Thus, the Petitioner is not entitled to the tariff, originally agreed to in the PPA, when admittedly the Plant was not commissioned, within the stipulated time and it is entitled only for the revised tariff, as on the date of commissioning of the Plant, as per Article 5.1 of the PPA. Admittedly, in the present case, the generic tariff for the Solar Power Plants, that was agreed to in the PPA, was revised much before the Plant was ready for commissioning. In any case, the Petitioner having voluntarily entered into a PPA, which has a clause providing for the revision of the tariff agreed to, if there is a delay in commissioning of the

Project, within the scheduled period, cannot now wriggle out of such a clause, without valid grounds.

- (d) The Petitioner has not furnished any material particulars of the cost incurred in implementing the Project and the period when investments were actually made, except for a mere statement that, Rs.13 crores are spent on the Project. The Petitioner has stated that, the owner of the Project had no capacity to invest and establish the Plant and hence, found the investor- SPV (the Petitioner). We may safely infer it that, the major part of investments has been made, after the formation of SPV and execution of SPPA, by which time the Capital Costs of the Solar Power Projects had fallen. In any case, as noted earlier, as per the terms and conditions of the PPA, the tariff payable to the SPD / Petitioner, is not based on the Capital Cost incurred by the SPD/Petitioner in Project implementation, but the tariff as per the relevant clauses of the PPA.
- (e) Article 5.1 of the PPA provides that, the tariff as on the date of commercial operation will be applicable for the Project. Article 2.5.7 of the PPA provides for payment of damages, if the commencement of the supply of power is not made by the SCOD. The Project is statedly commissioned on 31.03.2017, and no proof of injection of energy, on the said date, is produced. In the Memo filed on 21.08.2018, it is stated by the Petitioner that, the Plant was synchronized on 31.03.2017 and the energy injection was gradually ramped through the commissioning of each SMBs and inverters. It is stated that, the



meter at CT/PT level and the breaker, may not show the quantum jump in the initial days, due to the high meter constant. The documents produced, do not prove the injection of energy, on the date of commissioning of the Project, as per the definitions of 'Delivered Energy' and 'Delivery Point' in the PPA. It is safe to infer that, there was no injection of energy from the Plant, into the Grid on 31.3.2017.

- (f) The Hon'ble Supreme Court of India, in Civil Appeal No.1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided on 02.02.2016, has held, 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...."*

- (g) In the Order dated 29.05.2018, in OP No.028/2018 (*Aikyam Holdings Pvt Ltd-Vs-BESCOM and another*), relating to a Wind Project, the Commission has distinguished between 'commissioning' and 'commercial operation' of a Project, as follows:

*"(b) Under the PPA, there is no definition of 'Commission / Commissioning of Project'. However, it is not in dispute that the words 'Commissioning' and 'Commercial Operation' are one and the same, when there is commissioning of the Project subsequent to the execution of the PPA. 'Commissioning / Commercial Operation' of the Project would imply the injection of the energy into the State Grid, in pursuance of some commercial transactions, either with a Distribution Licensee or with a third party availing Open Access. The above view of the Commission is supported by various definitions and the clauses in the PPA, as noted above.*

*(c) Article 5.1 of the PPA provides that, the BESCOM shall, for the Delivered Energy, pay for the term of the PPA from the Commercial Operation Date (COD) to the Company at the rate of Rs. 4.50 per unit without any escalation. This liability would arise from the COD for the Delivered Energy. Therefore, one could infer that, without there being the energy delivered, there cannot be any Commercial Operation of the Project. Article 9.1 of the PPA provides for the term of the PPA, which states that, the term of the PPA would be for a period of twenty (20) years from the COD, unless terminated earlier. The term of the PPA should begin from the time when the energy is delivered from the Project, for the purpose of counting the period of completion of the term.*

*(d) The Commissioning Certificate issued by the authorities concerned (ANNEXURE-5 to the Petition) and the connected papers may, at best, evidence that the Wind Power Project of*

the Petitioner was interconnected to the Grid System on 28.03.2017. The veracity of the Commissioning Certificate could be accepted, provided there is injection of energy into the Grid, soon after the interconnection of the generator with the Grid. Therefore, it could be said that, the Commissioning Certificate does not prove the Commercial Operation of the Project, which requires actual injection of power into the Grid as on 28.03.2017. In the absence of any valid explanation for non-injection of energy into the Grid, the inference that could be drawn is that, all the facilities for the interconnection had not been provided. This is the reason why the Petitioner has pleaded at Paragraph-4 of the Petition that, 'Commercial Operation' does not contemplate the actual generation of power or delivery of power into Grid system. For the above reasons, we are of the considered view that, the actual injection of the energy into the Grid is an essential ingredient for claiming the 'Commercial Operation' of the Project at a particular time and date.

(e) Therefore, the learned counsel for the Petitioner has mainly contended that, in the present case, there was injection of 511 units of energy into the Grid between 23:03:25 hours and 23:18:28 hours on 28.03.2017. The learned counsel for the Petitioner has pointed out that, the Meter at the Delivery Point has a multiplying constant of 1,50,000, thereby, the meagre 511 units of energy injected into the Grid by the Wind Power Project of the Petitioner could not be recorded in the Meter at the Delivery Point. The Petitioner has not produced the generation details from 29.03.2017 to 31.03.2017. The non-production of such evidence would lead to an inference that, from 29.03.2017 to 31.03.2017, there was no generation from the Petitioner's Wind Power Project. The Commissioning Certificate produced by the Petitioner would only show that the Project was interconnected to the Grid on 28.03.2017 without stating anything with regard to the actual injection of energy into the Grid. The Commission notes that, the possibility of the Meter at the Generation Point recording the generation of certain units of power, by connecting it to some load, without there being any interconnection to the Grid, cannot be ruled out. Assuming that 511 units of energy was injected into the dedicated transmission line, admittedly,

*the quantum of Delivered Energy at the Delivery Point was 'nil', as recorded in the Meter at the Delivery Point. As noted above, even at the Generation Point, there was no generation of energy during the period, from 29.03.2017 to 31.03.2017. The Petitioner has not stated the reason as to why there could not be any generation of energy during this period. Therefore, we hold that, the 'Commercial Operation' has not taken place on or before 31.03.2017, as far as the Petitioner's Project is concerned. It is noted that, during the period from April, 2017 to June, 2017, there was injection of energy into the Grid. On the date of conclusion of the arguments, the Petitioner was asked to produce the extract of the Log Book, to ascertain the date from which the injection of energy had commenced in April, 2017. But, the Petitioner has not, so far, produced any such extract of the Log Book. Therefore, it could be inferred that, even during the beginning of April, 2017 also, there was no injection of energy into the Grid.*

*(f) We may note here that, the meaning of the word 'commissioning', as could be made out from the contents of the 'Commissioning Certificate', is only 'interconnection / synchronization of the Plant with the Grid, after following the Technical / Safety requirements'. The meaning of the word 'commissioning', as used in the various Generic Tariff Orders, is 'commercial operation of the Plant by injecting energy into the Grid, after interconnection with the Grid'.*

- (h) The terms of the PPA, in the case on hand, though, a Solar Project, are similar to a Wind Project. Therefore, the above decision read with the decision of the Hon'ble Supreme Court in the EMCO case, insofar as the requirement of the injection of energy into the grid, on the date of commissioning of the Plant is concerned, holds good, in this case also.

- (j) Hence, in the circumstances and on the facts of the case, we hold that, the Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit, for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017.
- (k) Accordingly, we answer Issue No.(3), as above.
- 12) **ISSUE No. (4):** *What Order?*

For the foregoing reasons, we pass the following:

**ORDER**

- (a) It is declared that the Petitioner is not entitled to any of the reliefs sought;
- (b) The Petitioner is entitled to a tariff of Rs.4.36 (Rupees Four and Paise Thirty-Six) only per unit, the varied tariff, as applicable on the date of commissioning of the Petitioner's plant, as fixed by the Commission in the Order dated 12.4.2017, for the term of the PPA, as per Article 5.1 of the PPA; and,
- (c) The Petitioner is also liable to pay damages, as provided under Articles 2.2 and 2.5.7 of the PPA.

Sd/-  
(M.K. SHANKARALINGE GOWDA)  
CHAIRMAN

Sd/-  
(H.D. ARUN KUMAR)  
MEMBER

Sd/-  
(D.B. MANIVAL RAJU)  
MEMBER