
**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 27th April, 2017

Present:

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

RP No.14/ 2016

BETWEEN:

Aditya Birla Solar Limited,
A-4, Aditya Birla Centre,
S.K. Ahire Marg, Worli,
Mumbai – 400 030.

..

PETITIONER

[Petitioner is represented by Dua Associates, Advocates]

AND:

- 1) Bangalore Supply Company Limited,
K.R. Circle,
Bangaluru - 560 001
- 2) Karnataka Renewable Energy Development Limited,
No.39, "SHANTHIGRUHA"
Bharath Scouts & Guides Building,
Palace Road,
Bengaluru – 560 001.
- 3) The Secretary,
Karnataka Electricity Regulatory Commission,
6th & 7th Floor, Mahalaxmi Chambers,
No.9/2, M.G. Road,
Bengaluru – 560 001
RESPONDENTS

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*[Respondent – 1 is represented by Just Law, Advocates,
Respondent - 2 is represented by Shri G.S. Kannur, Advocate]*

RP No.15/ 2016**BETWEEN:**

Aditya Birla Solar Limited,
A-4, Aditya Birla Centre,
S.K. Ahire Marg, Worli,
Mumbai – 400 030.

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PETITIONER

[Petitioner is represented by Dua Associates, Advocates]

AND:

- 1) Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.
- 2) Karnataka Renewable Energy Development Limited,
No.39, "SHANTHIGRUHA"
Bharath Scouts & Guides Building,
Palace Road,
Bengaluru – 560 001.
- 3) The Secretary,
Karnataka Electricity Regulatory Commission,
6th & 7th Floor, Mahalaxmi Chambers,
No.9/2, M.G. Road,
Bengaluru – 560 001

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RESPONDENTS

*[Respondent – 1 is represented by Indus Law, Advocates,
Respondent - 2 is represented by Shri G.S. Kannur, Advocate]*

RP No.16/ 2016**BETWEEN:**

Aditya Birla Solar Limited,
A-4, Aditya Birla Centre,
S.K. Ahire Marg, Worli,
Mumbai – 400 030.

..

PETITIONER

[Petitioner is represented by Dua Associates, Advocates]

AND:

- 1) Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.

- 2) Karnataka Renewable Energy Development Limited,
No.39, "SHANTHIGRUHA"
Bharath Scouts & Guides Building,
Palace Road,
Bengaluru – 560 001.
- 3) The Secretary,
Karnataka Electricity Regulatory Commission,
6th & 7th Floor, Mahalaxmi Chambers,
No.9/2, M.G. Road,
Bengaluru – 560 001

.. RESPONDENTS

*[Respondent – 1 is represented by Indus Law, Advocates,
Respondent – 2 is represented by Shri G.S. Kannur, Advocate]*

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COMMON ORDERS

- 1) This common Order is being passed in the above-mentioned Petitions, as common questions of law and facts are involved in these Petitions.
- 2)(a) Being aggrieved by the condition imposed in the Official Memorandum dated 27.5.2016 issued by the 2nd Respondent - Karnataka Renewable Energy Development Limited (KREDL) directing to achieve the Commercial Operation Date (COD) within twelve months from 25.5.2016 for those Solar Energy Developers who have executed Power Purchase Agreements (PPAs) during the period from 25.5.2016 to 3.6.2016, instead of the originally provided period for achieving the COD, as made out during the Tender proceedings, the Petitioner has filed the above Petitions seeking, in substance, for restoration of the originally provided period for achieving the COD.

- 2(b) Based on the terms and conditions stated in the Official Memorandum dated 27.5.2016 issued by the 2nd Respondent (KREDL), this Commission, while approving the PPAs executed by the parties to whom the said Official Memorandum was applicable, directed to effect the necessary corrections in the relevant clauses of the PPAs, so as to comply with the period for achieving the COD within twelve months from 25.5.2016, as indicated in the said Official Memorandum. The PPAs entered into by these parties contained a term that, the Developers have to achieve the COD within twelve months from the date of approval of the PPA by this Commission, which was not in compliance with the said Official Memorandum.
- 3) The material facts required for disposal of the above Petitions may be stated as follows :
- (a) By its 'Request for Proposal' (RFP) dated 20.11.2015, the 2nd Respondent (KREDL) invited proposals from the eligible interested persons for undertaking the development of Solar PV Ground-mounted Power Plants in Karnataka, to be implemented in different Taluks. Pursuant to the said RFP, the 2nd Respondent (KREDL) had received proposals from different bidders, *inter alia* the Aditya Birla Nuvo Limited (ABNL) (a Single Business Entity). After evaluation of the proposals of the different bidders, the bids offered by the ABNL for development of one 20 MW capacity Solar PV Ground-mounted Project each in Mulbagal, Ramadurg and Shirahatti Taluks were

accepted in terms of the RFP, apart from accepting the bids of some others pertaining to other Taluks.

- (b) The 2nd Respondent (KREDL) had issued three separate Letters of Award and Allotment Letters (LoAs) dated 23.3.2016 in favour of the ABNL in respect of the above three Projects. These LoAs informed the ABNL that, the tariff submitted by it for the three Projects in Mulbagal, Ramadurg and Shirahatti Taluks had been accepted and the ABNL had been declared as a 'Selected Bidder' for these Projects. Each of these LOAs contained the following terms and conditions :

"... Please note that the acceptance of your bid is subject to the following terms and conditions :

- a) *In terms of Clause 2.1.16 of the RFP, you are requested to set up a Special Purpose Vehicle (SPV) duly incorporated under the Companies Act, 1956/ 2013. The constitution of such company should comply with the conditions of the shareholder commitments mentioned in the RFP.*
- b) *You are required to execute the Power Purchase Agreement (PPA) with ... Electricity Supply Company Limited (..ESCOM) within 30 days (Thirty Days) from the date of receipt of this Letter of Award, as per clause 3.4.7 of the RFP.*
- c) *in terms of the RFP and PPA, you are requested to furnish the following documents within 15 days (Fifteen Days) from the date of receipt of this Letter of Award, as a pre-requisite to sign the Power Purchase Agreement :*

<i>(i)</i>	<i>XXX</i>	<i>XXX</i>	<i>XXX</i>
<i>(ii)</i>	<i>XXX</i>	<i>XXX</i>	<i>XXX</i>
<i>(iii)</i>	<i>XXX</i>	<i>XXX</i>	<i>XXX</i>
<i>(iv)</i>	<i>XXX</i>	<i>XXX</i>	<i>XXX</i>

(v)	XXX	XXX	XXX
(vi)	XXX	XXX	XXX
(vii)	XXX	XXX	XXX

Kindly note, that this communication by itself does not create any right or contractual relationship with Karnataka Renewable Energy Development Limited (KREDL) or ... Electricity Supply Company Limited (..ESCOM), any such right or relationship shall come into effect only on your fulfilling the above conditions and execution of the Power Purchase Agreement.

You are requested to acknowledge this LoA within seven (7) Days of receipt of this LoA and also requested to indicate a suitable date for execution of the Power Purchase Agreement. ...”

The documents referred to at c(i) to c(vii) above relate to a copy of the Certificate of Incorporation of the SPV, details of the promoters, the nature of Performance Security, information on the technology proposed, information on commitments of the energy generation, etc.

- (d) These LoAs were received by the ABNL on 28.3.2016. The ABNL, by its letters dated 29.3.2016, acknowledged the receipt of the three LoAs. In these letters, the ABNL raised certain queries and requested to issue the revised LoAs at the earliest. The relevant paragraph relating to the queries raised in these letters read thus:

“... While we are already in a process to organize the acknowledgment of these LoAs and all the requisite documents for submissions to achieve PPA signing, we would like to draw your kind attention towards following issues and request issue of revised LoA at the earliest:

- 1) *The LoA for Shirahatti: ABNL has got the allotment of 20 MW in this Taluk and we understand that we need to submit Performance Security Bank Guarantee for Rs.2.00 Crs (in 3 different denominations). However, the current LoA issued has mention of only Rs.1.00 Crs. We request clarity as to whether we need to submit Rs.2.00 Crs. or Rs.1.00 Crs BG. If it is Rs.1.00 Crs then the LoAs for Ramadurg and Mulbagal Taluk also need to be revised since these two LoAs has mention of Rs.2.00 Crs BG.*
- 2) *LoAs for all the 3 Taluks – Clause 3.4.7: As per the RFP Dtd. 20 Nov 2015 the PPA need to be signed within 30 days from the date of acknowledgment of the LoA however, all the 3 LoAs received from KREDL are advising to sign the PPAs within 30 days from the date of receipt of LoAs. We request you to revise all the 3 LoAs in line with the RFP clause no.3.4.7.*
- 3) *As per the RFP clause no.3.4.6 – KREDL would be issuing the Allotment Letter. We request KREDL to confirm whether the LoAs issued includes the Allotment Letter or would there be a separate Allotment Letter issued by KREDL.*
- 4) *KREDL vide the LoAs have advised the developers to submit various documents within 15 days from the date of receipt of the LoAs (Refer Clause – c of the LoA). We have verified with the RFP provisions wherein all the documents are required to be submitted before signing of the PPA. Hence, we request KREDL to revise the LoA accordingly to reflect the RFP provisions.*

We would appreciate your earliest action in revising the 3 LoAs so that we would be able to formally acknowledge the revised LoAs. We would also appreciate if you acknowledge the receipt of this letter. ..."

- (e) The 2nd Respondent (KREDL) did not specifically give any reply to the letters dated 29.3.2016 of the ABNL. However, the 2nd Respondent (KREDL) had issued a common Addendum dated 11.4.2016 to the

LoAs, applicable to all the selected bidders to whom the LoAs had been issued. The material part of the said common Addendum dated 11.4.2016 to LoAs reads thus :

"... Addendum

Subject : Addendum to the Letter of Award and allotment Letter for Development of 1,200 MW (AC) Solar Power Projects in the State of Karnataka to be implemented in 60 Taluks (as per the clause 3.4.6 of RFP dated 20 November 2015).

Ref.: LOAs issued on 23/03/16, 28/3/2016 & 31/03/16 for Development of 1,200 MW (AC) Solar Power Projects.

Preamble :

XXX XXX XXX
XXX XXX XXX

Considering Bidders request for the time extension favorably, the following addendum is issued to the LOAs under reference (1) for implementation Solar Power Projects:

Sl.No.	As Existing	As Amended
b)	You are requested to execute the Power Purchase Agreement (PPA) with concerned Electricity Supply Company Limited (ESCOM) within 30 days (Thirty Days) from the date of receipt of this Letter of Award, as per Clause 3.4.7 of the RFP.	You are requested to execute the Power Purchase Agreement (PPA) with concerned Electricity Supply Company Limited (ESCOM) within 60 days (Sixty Days) from the date of receipt of this Letter of Award, as per Clause 3.4.7 of the RFP.
c)	In terms of the RFP and PPA, you are requested to furnish the following documents within 15 days (Fifteen Days) from the date of receipt of this Letter of Award as a pre-requisite to sign the Power Purchase Agreement. I to VII (documents)	In terms of the RFP and PPA, you are requested to furnish the following documents before the signing of Power Purchase Agreement (PPA) as a pre-requisite to sign the PPA to concerned ESCOMs. I to VII (documents) - No change

Other Terms & Conditions of the LOA shall remain unaltered. This addendum shall be treated as part of LOAs issued under reference (1)."

- (f) The ABNL, by its letter dated 12.4.2016, acknowledged the receipt of the common Addendum dated 11.4.2016 to LoAs issued in respect of the three Projects involved in these Petitions.
- (g) The ABNL promoted and incorporated 'The Aditya Birla Solar Limited', a Company registered under the Companies Act, 1956, as a Special Purpose Vehicle (SPV) in accordance with the terms of the RFP for development of the three Solar Project allotted to the ABNL. The Certificate of Incorporation of the SPV was issued on 6.5.2016. The ABNL also collected the other required documents for arranging for execution of the PPAs by the SPV. By its letter dated 20.5.3016, the ABNL requested the Bangalore Electricity Supply Company Limited (BESCOM) and Hubli Electricity Supply Company Limited (HESCOM) to accept the SPV as the Developer of the allotted Solar Projects within their respective jurisdictions and further, the SPV also, by its letter dated 20.5.2016, requested the BESCOM and HESCOM to accept it as the Developer of the Solar Projects, pursuant to the LoAs issued in favour of the ABNL.
- (h) The Petitioner (SPV) executed a PPA dated 2.6.2016 with the BESCOM in respect of the Solar Project allotted at Mulbagal Taluk and executed two PPAs dated 3.6.2016 with the HESCOM in respect of the

Solar Projects allotted at Ramadurg and Shirahatti Taluks. At the time of execution of the PPAs, the SPV had also furnished the required Bank Guarantees in favour of the BESCO and the HESCO.

- (j) The 2nd Respondent (KREDL) had issued an Official Memorandum dated 27.5.2016 extending the time by eight working days, from 25.5.2016 to 3.6.2016, for executing the PPAs with the ESCOMs concerned, on the condition that, the Developers executing the PPAs by availing of this extension of time should achieve the COD within twelve months from 25.5.2016. The relevant part of the Official Memorandum dated 27.5.2016 reads thus :

“ ... OFFICIAL MEMORANDUM

Subject : Addendum to the Letter of Award and allotment Letter for Development of 1,200 MW (AC) Solar Power Projects in the State of Karnataka to be implemented in 60 Taluks.

Ref.: 1) LOAs issued on 23/03/16, 28/3/2016 & 31/03/16 for Development of 1,200 MW (AC) Solar Power Projects.

2) This Office Addendum No. KREDL/07/RPO/GC/1200MWs-269/2016/1480 dt. 07.04.16.

Preamble :

XXX

XXX

XXX

Based on the Developers request for the time extension to furnish the above documents as the formation of SPV is a lengthy process and taking more time, addendum as in reference 2 was issued extending the time to 60 days from the receipt off LOA. Further, some of the Developers are

requesting for some more time extension. Considering request of Developers for the time extension favorably, the following OM is issued:

- (i) Based on the Developers request approval is accorded to extend the time for 8 working days from 25.05.2016, i.e. upto 03.06.2016 to execute the Power Purchase Agreement (PPA) with concerned Electricity Supply Company Limited (ESCOM).*
- (ii) For the developers who are signing the PPA availing this time extension, the commercial operation date ('Commercial Operation Date'/'COD') for the Project shall be achieved by the Developer within 12 (twelve) months from 25.05.2016.*

Other Terms & Conditions of the LOA shall remain unaltered. This Om shall be treated as part of LOAs issued vide reference (1). ..."

- (k) The ABNL / Petitioner have contended that, the existence of this Official memorandum was not within their knowledge and a copy of the same was served on them, for the first time, on 2.6.2016 during the execution of the PPA with the BESCO. They have contended that, as per their request under letter dated 29.3.2016 referred to above, for issuance of the revised LoAs, an Addendum dated 11.4.2016 to the LoA was issued and therefore, issuance of this Addendum amounted to issuance of the revised LoAs, which were acknowledged under letter dated 12.4.2016 and it had sixty days' time from 12.4.2016, i.e., from the dates of acknowledgment of the revised LoAs, for execution of the PPAs.

- (l) The relevant provisions contained in the RFP regarding issuance of the LoA and its acknowledgment (acceptance), execution of the PPA and the consequence off non-compliance of it, would read thus :

*“3.4.6 After selection, a Letter of Award (the “LOA”) shall be issued, by KREDL to the Selected Bidders and the Selected Bidders shall acknowledge receipt of the LOA within seven (7) calendar days of receipt of LOA, in the event of non-acknowledgment of the LOA by the Selected Bidders within the stipulated date, KREDL may, unless it consents to extension of time for submission thereof, appropriate the Bid Security of such Bidder as genuine loss and damage suffered by KREDL on account of failure of the Selected Bidder to acknowledge the LOA, KREDL may indicate the name of ESCOM with which the Selected Bidder is required to enter into a PPA. Where, this information about the ESCOM is not provided in LOA, KREDL shall issue an allotment letter (the “**Allotment Letter**”), informing the name of ESCOM with which the Selected Bidder is required to enter into a PPA. The procedure for acknowledgment of LOA and the consequence of failure thereof shall mutatis mutandis applicable for Allotment Letter.*

3.4.7 After acknowledgment of the LOA and Allotment Letter, the Selected Bidder shall execute the PPA within 30 (thirty) days of such acknowledgment and within the aforementioned period, shall furnish to KREDL details about the SPV incorporated for the purpose of signing he PPA which shall be further vetted by KERC. The Selected Bidder shall not be entitled to seek any deviation in the PPA.

3.4.8 Failure of the Selected Bidder to comply with the requirements of Clause 3.4.6 shall constitute sufficient grounds for the annulment of the LOA and/or the allotment Letter, as he case may be, and forfeiture of the Bid Security. In such an event, KREDL reserves the right to take any such

measure as may be deemed in the sole discretion of KREDL."

- (m) In the PPAs executed, the Preamble narrates all the required events and facts, including the Addendum dated 11.4.2016 to the LoA and the Official Memorandum dated 27.5.2016. The PPAs define that, "the 'Effective Date' shall mean the date of approval of the PPA by KERC", and "the 'Scheduled Commissioning Date' shall mean 12 (twelve) months from the Effective Date."
- (n) the PPAs executed by the Petitioner and other Developers were submitted in due course to his Commission for approval. This Commission, after obtaining the required clarifications, approved the PPAs relating to the Petitioner and communicated the same by its letter dated 14.10.2016 to the BESCO and other parties, and by its letter dated 7.10.2016 to the HESCO and other parties. Among other corrections and measures, the approval letter stated that, the definition of the 'Effective Date' shall be altered as '25.5.2016' and that the Project should be commissioned within 12 (twelve) months from the Effective Date, i.e., from 25.5.2016. The Petitioner has filed the present Petitions, contending that, there was no scope for altering the definition of the 'Effective Date', as suggested by this Commission in its approval letters dated 14.10.2016.
- 4) In RP No.14/2016, the 1st Respondent (BESCO) and the 2ND Respondent (KREDL) have contested the case. In RP Nos.15/2016 and

16/2016, the 2nd Respondent (KREDL) alone has contested the cases and the 1st Respondent (HESCOM) did not contest the case.

- 5) The gist of the objections of the BESCO may be stated as follows :
 - (a) That there are no grounds made out by the Petitioner for review of the communication sent by this Commission for effecting the necessary correction / amendment of the 'Effective Date'. The Petitioner has executed a Supplemental PPA dated 14.12.2016, effecting the required correction / amendment in respect of the definition of the 'Effective Date', as communicated by this Commission. Therefore, any alteration for the present in the 'Effective Date' stated in the Supplemental PPA would amount to modifying the term of a concluded Contract;
 - (b) That after issuance of the Addendum dated 11.4.2016 to the LoA and the Official Memorandum dated 27.5.2016, the Developers, who had executed the PPAs during the period from 25.5.2016 to 3.6.2016, were required to achieve the COD within twelve (twelve) months from 25.5.2016 and that the Petitioner had executed the PPA on 2.6.2016 and therefore, it was liable to commission the Project within 12 (twelve) months from 25.5.2016.
- 6) In all the above cases, the 2nd Respondent (KREDL) has filed its objections, the gist off which may be stated as follows :

- (a) That the Petitioner was aware of the contents of the Official memorandum dated 27.5.2016 much earlier to the execution of the PPAs and the Petitioner accepted the conditions stated in the stated in the said Official memorandum and entered into the PPAs, thereby the Petitioner was bound to achieve the COD of the Projects within 12 (twelve) months from 25.5.2016, as intimated by this Commission. There was no reply by the 2nd Respondent (KREDL) as against the contention of the Petitioner raised in its letter dated 29.3.2016 requesting to issue the revised LoAs for the reasons stated therein.
- 7) On the facts and in the circumstances of the case and the submissions of the parties, the following issues would arise for our consideration :
- (1) Whether curtailment of the period, as provided in the RFP for achieving the COD of the Project, by the Official Memorandum dated 27.5.2016 is valid in the present cases?
 - (2) Whether on the facts and in the circumstances of the case, the contention of the Petitioner that, it treated the Addendum dated 11.4.2016 to the LoA as the revised LoA, is acceptable?
 - (3) Whether the present Petitions are maintainable?
 - (4) What Order?

8) After considering the material placed on the record and the submissions of the parties, our findings on the above issues are as follows :

9) **ISSUE No.(1)** : *Whether curtailment of the period, as provided in the RFP for achieving the COD of the Project, by the Official Memorandum dated 27.5.2016 is valid in the present cases?*

(a) As already noted, during the Tender proceedings, the parties were made to understand that, the 'Effective Date' shall mean 'the date of approval of the PPA by this Commission' and that the COD shall be achieved within twelve months from the 'Effective Date', i.e., from the date of approval of the PPA by the Commission. It can also be noted that, after the pre-bid conference, the definition of the 'Effective Date' was agreed to be amended as 'the date of approval of the PPA by this Commission' from its earlier version of 'the date of execution of the PPA', for obvious reasons. The effect of the amendment of the definition of 'Effective Date' is that, whatever time spent for getting the approval of the PPA, stands excluded from the period of twelve months provided for achieving the COD of the Project.

(b) Clause 3.4.6 of the RFP provides for extension of time for submission of the acknowledgment of receipt of the LoA beyond seven days from the date of receipt of the LoA. Clause 3.4.7 of the RFP provides for execution of the PPA within 30 days from the date of

acknowledgment of the receipt of the LoA. Therefore, in effect, for valid reasons, time may be extended for execution of the PPA itself beyond 30 days from the date of acknowledgment of the receipt of the LoA. In the present cases, the time limit for the execution of the PPA was extended from 30 days to 60 days from the date of receipt of the LoA. It may be noted that, such exercise of power for extension of time is not strictly in terms of Clause 3.4.6 of the RFP. In substance, there was power to the 2nd Respondent (KREDL) to extend the time for execution of the PPA and it appears as though it has been exercised in an inappropriate manner. As per Clause 3.4.6 of the RFP, the selected bidder could request for extension of time beyond seven days from the date of receipt of the LOA, for acknowledging the receipt of the LoA, and if such selected bidder acknowledges the receipt of the LoA, the PPA should be executed within 30 days from the date of such acknowledgment. Therefore, we hold that, the extension of time granted by the 2nd Respondent (KREDL) by way of the addendum dated 11.4.2016 to the LoA and also the Official Memorandum dated 27.5.2016, can be legally supported.

- (c) None of the provisions in the RFP provides for imposing any condition while extending the time for acknowledging the receipt of the LoA beyond seven days of the receipt of the LoA or while extending the time for execution of the PPA. When there is no such power for imposing any condition while extending the time for execution of the PPA, we are of the considered view that, the 2nd Respondent (KREDL)

cannot unilaterally impose a condition altering the meaning of the 'Effective Date' to the disadvantage of the Solar Project Developer. The power conferred on the 2nd Respondent (KREDL) for extension of time under the RFP cannot be construed to include the power to impose any disadvantageous conditions on the Solar Project Developers. There should be a specific provision in the RFP itself, for this purpose. It cannot be disputed that, the time can be extended only for valid reasons made out by the Developers. Therefore, it was within the discretion of the 2nd Respondent (KREDL) to extend or not to extend the time, depending on the facts and circumstances of each case. However, the 2nd Respondent (KREDL) is not legally authorized to impose any condition unilaterally to the disadvantage of the Solar Project Developer.

- (d) Even assuming that, the 2nd Respondent (KREDL) had the implied authority to impose certain conditions while extending the time under Clause 3.4.6 of the RFP or for execution of the PPA, that power should be exercised in good faith in the furtherance of fulfilling the object of extending the time, by taking into account the matters relevant for exercise of the power, and the condition to be imposed must not be unreasonable or arbitrary. Under the Official Memorandum dated 27.5.2016, the extension of time for eight working days from 25.5.2016 to 3.6.2016 has been granted to execute the PPA with the ESCOM concerned, and for that reason, the Developers, who were signing the PPAs by availing of this extension of time, were directed to achieve the

COD within twelve months from 25.5.2016, which appears to be unreasonable and arbitrary. As already noted, the time allowed for achieving the COD for a Solar Project was twelve months from the date of approval of the PPA by this Commission. By extending the time by eight days to execute the PPA, the period for achieving the COD could have been reduced by eight days or so, in the case of those Solar Project Developers who sign the PPAs during the extended period of eight days. The condition imposed was that, the Solar Project Developers should achieve the COD within twelve months from 25.5.2016. One cannot predict the period within which the Commission would approve the PPA, since it depends on the Commission's satisfaction on the various factors placed before it in a given case. In the present cases, by letter dated 14.10.2016, the communication of this Commission's approval of the PPAs dated 2.6.2016 and 3.6.2016 was sent to the parties concerned. Therefore, it may be noted that, the time taken for approval of the PPAs was nearly four months. The ABNL/Petitioner had received the three LoAs on 28.3.2016. Therefore, the sixty days' period from the date of the receipt of the LoAs would expire on 27.5.2016. In the present cases, the Petitioner has availed nearly 6 to 7 days' extra time to execute the PPAs, for which it was asked to achieve the COD within one year from 25.5.2016. In the case of others, who had not availed of the extension of time under the Official Memorandum dated 27.5.2016, they were required to achieve the COD within one year from the date of approval of the PPA by this Commission, i.e., within one year from

October, 2016. Therefore, the condition imposed in the Official Memorandum dated 27.5.2016 is irrational, unreasonable and discriminatory. For the above reasons, we answer Issue No.(1) in the negative.

10) **ISSUE No.(2)** : *Whether on the facts and in the circumstances of the case, the contention of the Petitioner that, it treated the Addendum dated 11.4.2016 to the LoA as the revised LoA, is acceptable?*

(a) As already noted, the provisions relating to issuance of the LoA to the selected bidders and the time within which the selected bidders shall acknowledge the receipt of the LoA and the consequences of non-acknowledgment of the LoA by the selected bidders within the stipulated time, are stated in Clause 3.4.6 of the RFP, extracted above. A reading of this clause would indicate that the LoA shall be issued by the KREDL to the selected bidder and the selected bidder shall acknowledge the receipt of the LoA within seven calendar days of the receipt of the LoA, and in the event of non-acknowledgment of the LoA by the selected bidder within the time stipulated, the KREDL may appropriate the Bid Security of such bidder, unless it consents for extension of time for submission thereof.

(b) Clause 3.4.7 of the RFP provides that, after acknowledgment of the LoA, the selected bidder shall execute the PPA within thirty days of such acknowledgment and in the meantime it shall furnish to the

KREDL the details about the SPV incorporated for the purpose of signing the PPA.

- (c) Admittedly, in the present cases, the terms and conditions stated in the LoA dated 23.3.2016 issued to the Petitioner are in material variance with Clauses 3.4.6 and 3.4.7 of the RFP. This was specifically pointed out by the Petitioner in its letter dated 29.3.2016 and the Petitioner requested for issuance of the revised LoAs in terms of the said Clauses, to enable it to formally acknowledge the revised LoAs. However, the 2nd Respondent (KREDL) issued an Addendum dated 11.4.2016 to the LoA, allowing sixty days' time for executing the PPA with the ESCOM concerned from the date of receipt of the LoA, and permitting it to furnish the documents stated in the LoA before signing the PPA.
- (d) The LoA should have contained a term regarding the consequences of non-acknowledgment of the LoA within seven calendar days from the date of receipt of the LoA. Such term is not stated in the LoA. Further, the LoA should have stated that, the PPA should be executed within thirty days from the date of acknowledgment of the receipt of the LoA and that, before executing the PPA, the selected bidder shall furnish to the 2nd Respondent (KREDL) the details about the incorporation of the SPV, etc.

- (e) Clause (b) of the terms and conditions incorporated in the LoA is self-contradictory. The said clause reads thus :

“b) You are requested to execute the Power Purchase Agreement (PPA) with concerned Electricity Supply Company Limited (ESCOM) within 30 days (Thirty Days) from the date of receipt of this Letter of Award, as per Clause 3.4.7 of the RFP.”

The main part of the said Clause shows that, the PPA with the ESCOM concerned should be executed '*within thirty days from the date of receipt of the LoA*'. However, Clause 3.4.7 of the RFP provides that, the selected bidder shall execute the PPA '*within thirty days from the date of acknowledgment of the receipt of the LoA*'. Therefore, Clause (b) of the terms and conditions of the LoA is self-contradictory and a definite meaning of it cannot be ascertained regarding the period within which the PPA should be executed. Even after issuance of the Addendum dated 11.4.2016 to the LoA, the discrepancy has continued. It was not possible to exactly ascertain whether the PPA should be executed within sixty days from the date of receipt of the LoA or from the date of the acknowledgment of the receipt of the LoA.

- (f) The Petitioner in its letter dated 29.3.2016 requested for issuance of the revised LoAs in line with Clauses 3.4.6 and 3.4.7 of the RFP, to enable it to properly acknowledge the revised LoAs and to execute the PPAs within the stipulated time. The 2nd Respondent (KREDL) has not specifically replied to this letter, except issuing the Addendum dated

11.4.2016 to the LoA and marking a copy of the same to the ABNL. The Petitioner/ABNL treated this Addendum as the revised LoA and contended that, from the date of receipt of this LoA, PPAs have been executed within sixty days' time allowed. The ABNL has acknowledged the receipt of the LoAs and the Addendum dated 11.4.2016 to the LoA, through its letter dated 12.4.2016.

- (g) In view of the above acts and omissions on the part of the 2nd Respondent (KREDL) in issuing an inappropriate LoA, the contention of the Petitioner that, it treated the Addendum dated 11.4.2016 to the LoA as the revised LoAs and that the execution of the PPA was to be done within 60 days from the date of receipt of the revised LoA, cannot be rejected. It may be said that, such ambiguous term in the LoA, leading to confusion in ascertaining the time within which the PPA is to be executed, itself is a sufficient ground for extending the time for executing the PPA. Therefore, we answer Issue No.(2) in the affirmative.

- 11) **ISSUE No.(3)** : *Whether the present Petitions are maintainable?*

The Respondents have contended that, the grounds required for review of the communication dated 14.10.2016 issued by this Commission, insofar as it relates to altering the 'Effective Date' of the Solar Projects, are not made out by the Petitioner. They have also contended that, a Review Petition is maintainable only on the limited grounds as stated in Order XLVII Rules 1 of the Code of Civil Procedure,

and those grounds have not been made out by the Petitioner. The Petitioner was not heard by this Commission before sending the communication dated 14.10.2016, altering the 'Effective Date' mentioned in the PPAs. As already noted, the real grievance of the Petitioner is regarding the condition contained in the Official Memorandum dated 27.5.2016 curtailing the period for commissioning the Solar Projects. The Petitioner had pleaded the required grounds for challenging the validity of the condition stated in the said Official Memorandum dated 27.5.2016. Therefore, the present Review Petitions may be considered as Original Petitions, though the grounds for review of the communication dated 14.10.2016 are not made out. At best, the Petitioner may be required to pay the difference amount in the Fee payable for filing an Original Petition and a Review Petition. Such difference of fee is `10,000/- per Original Petition. Therefore, we answer Issue No.(3) in the affirmative.

12) **ISSUE No.(4)** : *What Order?*

For the foregoing reasons, we pass the following :

ORDER

- (a) It is declared that, the latter part of the Official Memorandum dated 27.5.2016 issued by the 2nd Respondent (KREDL) to the effect that:

“(ii) For the developers who are signing the PPA availing this time extension, the commercial

operation date ('Commercial Operation Date')/'COD') for the Project shall be achieved by the Developer within 12 (twelve) months from 25.05.2016"

is invalid and not binding on the Petitioner in these Petitions;

- (b) Consequently, the direction given by this Commission in its communication dated 14.10.2016, insofar as it relates to altering the 'Effective Date' as '25.5.2016' in Articles 3.1, 8.5 and 21.1 of the PPAs, stands withdrawn;
- (c) Consequently, the changes effected in the Supplemental PPAs pertaining to the 'Effective Date' in Articles 3.1, 8.5 and 21.1 of the PPAs, pursuant to this Commission's communication dated 14.10.2016, stands cancelled, and the said terms shall remain as they were in the PPAs;
- (d) The Petitioner shall pay the deficit Fee of `10,000/- (Rupees Ten Thousand) only in each of these Petitions, within 3 (three) weeks from the date of this Order. If the Petitioner fails to pay the said deficit Fee, the Petitions shall stand rejected; and
- (e) The original Order shall be kept in RP No.14/2016 and copies thereof be kept in the other connected cases.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER