

No. N/81/2018

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

**Dated: 13.07.2021**

**Present**

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

**OP No.34/2018**

**BETWEEN:**

Photon Suryakiran Private Limited,  
A Company incorporated under the  
provisions of Companies Act, 2013  
having its office at  
Statesman House, 8<sup>th</sup> Floor,  
Barakhamba Road,  
New Delhi-110 001, India.

**..... PETITIONER**

(Represented by M/s Cyril Amarchand Mangaldas  
by Sri Shridhar Prabhu, Advocate & Ms. Sindhu, Advocate)

**AND:**

Bangalore Electricity Supply Company Limited (BESCOM),  
A Company incorporated under the  
Companies Act, 1956 having its  
Registered Office at  
Corporate Office, K.R. Circle,  
Bengaluru-560 001, India.

**..... RESPONDENT**

(Represented by M/s JUSTLAW Advocates  
by Sri Sriranga, Advocate)

**ORDERS**

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

- a) Declare that the extension of 6 months granted by BESCOM vide letters dated 22.09.2016 and 07.12.2016 is under Article 5.7 of the Power Purchase Agreement (PPA) thereby holding the Scheduled Commissioning Date (SCD) in terms of Article 5.7.4 was 13.01.2017;
- b) Set aside the Respondent's letter dated 26.04.2017 bearing Reference No.BSECOM/ GM (Ele)/ DGM (F&C)/ PP/ BC-39/ 437 unilaterally directing reduction of applicable tariff from Rs.7.05 per unit to Rs.6.51 per unit;
- c) Declare that the Tariff Order dated 10.10.2013 shall be the reference for determining the "KERC applicable tariff" under Article 12.2 of the present PPA;
- d) Direct BESCOM to withdraw the Addendum to the Supplemental PPA (SPPA) which reduces the tariff to Rs.6.51 per unit;
- e) Direct BESCOM to make payments to the petitioner for its energy invoices @ Rs.7.05 per kWh;
- f) Direct BESCOM to pay Rs.5,23,48,920 to the petitioner being the amount outstanding as a result of payments made by BESCOM @ Rs.6.51 per kWh instead of Rs.7.05 per kWh for invoices raised from December 2016 to January 2018;
- g) Pass any or such further orders as may be deemed fit and proper in the facts and circumstances of the case; and
- h) Award costs of the present petition in favour of the petitioner.

2. The material facts urged by the petitioner in support of its prayers may be stated as follows:

a) The Karnataka Renewable Energy Development Limited (KREDL) is a Nodal Agency of the Government of Karnataka (GoK) for facilitating the development of renewable energy in the State. The GoK had resolved to undertake development of 500 MW of solar power energy in the State through private sector participation. Pursuant to it, KREDL had floated Request for Proposal (RfP) dated 30.05.2014 (Annexure-A) for development of Solar PV Power Plant in Karnataka, prescribing the technical and commercial terms and conditions for selection of bidders for the said purpose. The draft PPA was a part of the RfP. A copy of the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power of Distribution Licensees dated 19.01.2005 with amendments, issued by the Ministry of Power, Government of India (GoI), is Annexure-B, of the petition.

b) The KREDL received several proposals and after evaluation of those proposals accepted the bid of a Consortium comprising of M/s Today Green Power Private Limited (Lead Member) and two others for development of 10 MW Solar PV Project in Pavagada taluk, Tumakuru district to supply the energy at Rs.7.05 per unit and issued Letter of Allotment (LoA) dated 19.11.2014 (Annexure-C). The petitioner is the Special Purpose Vehicle (SPV) incorporated by the above said Consortium for development of the project. As per the terms

prescribed in LoA, the petitioner executed the Power Purchase Agreement (PPA) dated 13.01.2015 (Annexure-J) with respondent (BESCOM). However, a copy of the effective, executable and valid PPA, duly approved by the KERC was received by the petitioner after five months i.e., only on 06.06.2015.

- c) In terms of Article 4.1 of the PPA, the petitioner was required to fulfil certain Conditions Precedent within 365 days from the Effective Date, unless such completion was affected by any Force Majeure event or if any of the activities was specifically waived in writing by the respondent (BESCOM). The 'Effective Date' was defined in the PPA as the Date of signing of the PPA. Article 4.2 of the PPA required the petitioner/developer to fulfil certain obligations as provided therein.
- d) Article 4.2.1 of the PPA required the petitioner/developer to make all reasonable endeavours to satisfy the Conditions Precedent within the time stipulated and the respondent (BESCOM) to provide to the petitioner all the reasonable cooperation as might be required to the petitioner for satisfying the Conditions Precedent. Further, Article 6.1.3 of the PPA specified the obligations of the respondent (BESCOM), wherein under sub-clause (b), (c) & (d), the respondent (BESCOM) was obliged to act in a manner which is not violative of any of the provisions of the PPA, to act reasonably while exercising its discretionary power under the PPA and support, cooperate with and facilitate the petitioner in the implementation and operation of the

project in accordance with the provisions of the PPA. Article 4.3 of the PPA provides for recovery of damages for delay by the petitioner in fulfilling the Conditions Precedent. In para 7 (o), (p) & (q) of the petition at pages 23, 24 & 25 it is contended as follows:

*“Para 7 (o) However, despite being well aware that for performing the Conditions Precedent and for raising the funds from financial institutions for achieving financial closure of the Project, the Petitioner shall require an effective executable and a valid agreement duly approved by KERC, BESCOM failed to provide the Petitioner with an effective, executable and a valid PPA in due time and took 144 days to provide it which effectively reduced the time period for completion of Condition Precedent from 365 days to 221 days. The Petitioner understands that in accordance with the Bid Documents, BESCOM was mandated to take prior approval of KERC and thereafter, forward the signed PPA to KERC for adoption of tariff in terms of Section 63 of the Act which was not done. The PPA was sent for KERC's approval only after the PPA was signed by the Petitioner and BESCOM.*

*(p) While the Petitioner was required to fulfil the Conditions Precedent in a time bound manner, without an effective, executable and valid PPA as approved by KERC, the Petitioner was not in a position to initiate any activities towards fulfilling its obligations under the Conditions*

*Precedent as defined in the PPA. More particularly activities related to project financing, land procurement, equipment procurement and other construction related activities could not be completed without receiving the PPA duly approved by the KERC. The Petitioner was provided the effective, executable and valid PPA only on June 06, 2015 i.e., after delay of about 144 days from the date of the signing of the PPA by the Petitioner. This delay in effect left the Petitioner with only 221 days to perform its obligations against the contractually agreed period of 365 days.*

*(q) It is under the aforesaid circumstances that the Petitioner vide its letters dated April 09, 2015, April 27, 2015 and May 06, 2015 raised the aforesaid issue with BESCO and requested them to provide the PPA duly approved by the KERC. Further the Petitioner also requested in its letter dated May 06, 2015 that the effective date of the PPA should be considered as the date on which the original PPA approved by the KERC is received by the Petitioner. Copies of the Letters dated April 09, 2015, April 27, 2015 and May 06, 2015 are annexed herewith and marked as Annexure-H (collectively)."*

e) The petitioner received e-mail dated 25.05.2016 (Annexure-I) from the respondent (BESCO) intimating the approval of the Commission for the PPA subject to incorporating certain corrections/modifications in

the PPA and asking the petitioner to depute the Authorized Signatory to the office of the respondent (BESCOM) to effect the corrections/modifications in the PPA. Thereafter, upon signing the corrected/modified pages on 06.06.2015, the petitioner received the PPA duly approved by the Commission (The copy of the said approved PPA is Annexure-J to the petition).

- f) The petitioner, therefore, requested the respondent (BESCOM) for an extension of six months' time in achieving the Scheduled Commissioning Date (SCD) in terms of 5.7 of the PPA vide letter dated 24.06.2016 (1<sup>st</sup> letter in Annexure-K), on the ground that there was delay of 144 days in getting the approved PPA and due to which the timeline has been affected for setting up of the solar power project. Since the petitioner received no response to its letter dated 24.06.2016, it addressed letters dated 02.08.2016 & 19.08.2016 to the respondent (BESCOM) seeking extension of time and also intimating that it had received extension of time on similar grounds from other distribution licensees namely; HESCOM, MESCOM & GESCOM. After obtaining extension for commissioning from other distribution licensees, the petitioner vide letter dated 09.11.2016 informed Indian Renewable Development Agency (IRDA), the lead lender of the project, that it had obtained extension in Scheduled Commissioning Date from other ESCOMs and that the extension of time from the respondent (BESCOM) was expected to be received soon and IRDA

could extend SCDs accordingly. It is stated that Power Finance Corporation Limited (PFC) was not inclined to commence disbursement of loan amount till all ESCOMs accorded extension of time for commissioning of the project. The respondent (BESCOM) was the last to grant extension of time to the petitioner vide its letter dated 07.12.2016. That the petitioner was faced with the tremendous delays since it was only after the last extension of time granted by the respondent (BESCOM), PFC vide its letter dated 16.12.2016 addressed to M/s IndusInd Bank Limited, agreed to disburse part of the sanctioned loan to the petitioner. The project lenders were not agreeable to disburse any loan amount without the original duly approved PPA, as such, only when all ESCOMs agreed to grant extension for commissioning that PFC released the loan for the project. Hence, all the projects were delayed on account of delay in approval of the PPAs by the State Commission. Copies of the letters dated 24.06.2016, 02.08.2016, 19.08.2016 and letters dated 09.11.2016, 18.11.2016, 08.12.2016 & 16.12.2016 are produced as Annexure-K (collectively).

g) Thereafter, vide letters dated 17.09.2016 & 04.10.2016, the petitioner informed the respondent (BESCOM) of the Force Majeure events existing in the State of Karnataka on account of order passed by the Hon'ble Supreme Court of India, on Cauvery River Water Dispute matter and requested for a further extension of two months' time of



the Scheduled Commissioning Date. Copy of the letters dated 17.09.2016 & 04.10.2016 are Annexure-L of the petition.

- h) The petitioner was shocked to receive letter dated 22.09.2016 (Annexure-M) from the respondent (BESCOM). In the said letter, the respondent (BESCOM) approved extension of four months' time in achieving the SCD. However, the same was accorded under Article 5.8 of the PPA along with demand for payment of Liquidated Damages, subject to other conditions stated therein. The petitioner responded to the said letter dated 22.09.2016 (Annexure-M) vide its letter dated 03.10.2016 (Annexure-N) requesting to reconsider the decision of the respondent (BESCOM) for extension of time. In response to letter dated 03.10.2016 (Annexure-N), the respondent (BESCOM) replied vide letter dated 07.12.2016 (Annexure-O) granting further two months' time on certain conditions stated therein apart from four months' time already granted vide letter dated 22.09.2016 (Annexure-M).
- i) The petitioner commissioned 10 MW project on 13.12.2016. Since there was a change in location of the project which had been approved by KREDL vide its letter dated 17.02.2016, the petitioner requested the respondent (BESCOM) to enter into a SPPA mentioning the newly approved project location vide its letter dated 26.12.2016 and reminder dated 13.01.2017. The Commissioning Certificate dated

15.12.2016, the letter dated 26.12.2016 and reminder dated 13.01.2017 are produced at Annexure-P (collectively).

- j) In the petition at para 7 (z) at page 31, the petitioner has alleged that with no choice and upon receiving no relief from the respondent (BESCOM) on the issue of imposing Liquidated Damages for delay in commissioning of the project, it was compelled to issue the letter dated 24.03.2017 (Annexure-Q) requesting the respondent (BESCOM) to adjust the Liquidated Damages as per PPA clause 5.8 for delay in commissioning of the project from the monthly energy bills and after recovery of the same to ensure the payment of monthly energy bills on due dates itself. Thereafter, the petitioner and the respondent (BESCOM) executed Supplemental PPA dated 12.04.2017 (Annexure-R) incorporating the necessary changes in respect of project location, without altering any other terms of the PPA.
- k) The petitioner raised the monthly invoices for the energy supplied at the rate of Rs.7.05 per unit, however, the invoices were passed by the respondent (BESCOM) at the reduced rate of Rs.6.51 per unit applying Article 12.2 of the PPA for the delay in commissioning of the project. The petitioner stated that the Generic Tariff Order dated 30.07.2015 (Annexure-X) was not applicable for the reduction of the tariff and insisted for payment of the invoices at the rate of Rs.7.05 per unit. The correspondences in this regard taken between 26.04.2017 to 17.10.2017 are produced at Annexures-S to V. Copies of the invoices

raised at Rs.7.05 per unit from January 2017 to January 2018 and the statement showing the differential amount of Rs.5,23,48,920 are produced collectively at Annexure-W.

l) The petitioner has relied upon the following relevant grounds in support of its petition:

(i) The respondent (BESCOM) should have granted extension of time under Article 5.7 of the PPA on account of the delay of 144 days in handing over the duly approved PPA to the petitioner. Despite this, the respondent provided extension under Article 5.8 of the PPA and arbitrarily imposed and collected Liquidated Damages from the monthly energy invoices.

(ii) The Tariff Order dated 30.07.2015 (Annexure-X) determining tariff of Rs.6.51 per unit is applicable for PPAs entered into on or after 01.09.2015 and getting commissioned during the period from 01.09.2015 to 31.03.2018 and for which PPAs have not been entered into prior to 01.09.2015. The present PPA is entered into on 13.01.2015 thereby the Tariff Order dated 30.07.2015 cannot be made applicable. On the other hand, the Tariff Order dated 10.10.2013 (Annexure-D) providing for tariff of Rs.8.40 per unit for PPAs entered into on or after 01.04.2013 and getting commissioned during the period from 01.04.2013 to 31.03.2018, is applicable. Therefore, it is urged that under Article 12.2 of the PPA, the "KERB applicable Tariff" would refer only to Tariff Order dated

10.10.2013 but not to Tariff Order dated 30.07.2015. It is urged that this Commission has taken a similar view of applicability of Tariff Order dated 10.10.2013 in the matter of Azure Sunrise Private Limited Vs. Chamundeshwari Electricity Supply Company Limited (CESC) vide Order dated 14.12.2016 (Annexure-E). Hence, the tariff of Rs.6.51 per unit applied and being enforced by the respondent (BESCOM) is arbitrary and without any basis.

(iii) The tariff discovered and accepted on the basis of the competitive bidding process, cannot be reduced by imposing the prevailing Tariff Order in terms of Article 12.2 of the PPA. The Tariff Order dated 30.07.2015 also specifically lays down that the said Tariff Order is not applicable to projects in respect of which the tariff has been discovered through a competitive bidding process.

(iv) It is urged that KERC's Tariff Order dated 04.09.2017 (Annexure-Y) in respect of Wind Power Projects specifically mandates that "A PPA becomes an enforceable document only after approval of the Commission. Any developer acting on a PPA which is not approved by the Commission will be doing so at his own risk." In view of the aforesaid reason, the petitioner was not in a position to achieve the commissioning of the project within the Scheduled Commissioning Date and any delay in commissioning was solely attributable to the delay in receiving the duly approved PPA. The respondent (BESCOM) was under obligation to get the PPA

approved from KERC and to hand over the same to the petitioner. The petitioner could not have been expected to initiate any acts towards fulfilling its obligation under PPA without effective, executable and valid PPA duly approved by the KERC. Despite the sluggish approach on behalf of the respondent (BESCOM) in processing the approval of the PPA, the petitioner had not lost sight of its obligation under the PPA and continued to perform the same.

- (v) It is urged that the respondent (BESCOM) is estopped from reducing the tariff from Rs.7.05 per unit as quoted by the Consortium, on the ground of reduction in generic tariff in the subsequent Generic Tariff Orders. It is alleged that the Generic Tariff Order for Solar Power Generation dated 10.10.2013 (Annexure-D) approving tariff at Rs.8.40 per unit in respect of Solar PV Power Projects was made applicable for the period from 01.04.2013 to 31.03.2018. The said Order was prevailing at the time of award of the LoA concerned in this case. The petitioner had no reason to believe that the said representation made under the Generic Tariff Order dated 10.10.2013, would be in any manner be changed. Therefore, the tariff quoted at Rs.7.05 per unit could not have been altered by subsequent Generic Tariff Orders for Solar Power Project in any event.

m) For the above reasons, the petitioner has filed the present petition on 02.04.2018 praying for the reliefs as noted above at para 1 of this Order.

3. The respondent (BESCOM) appeared through its counsel and filed the statement of objections. The relevant grounds urged in the statement of objections may be stated as follows:

a) The respondent (BESCOM) has not denied the KREDL floating the RfP for selection of bidders for development of solar power projects, the KREDL receiving several proposals and after evaluation accepting the Consortium of M/s Today Green Power Private Limited (Lead Member) and two others for development of 10 MW Solar PV Project in Pavagada taluk of Tumakuru district and the KREDL issuing the LoA dated 19.11.2014 and the petitioner being SPV incorporated by the said Consortium for development of the project etc., Further, it has not denied the execution of the PPA dated 13.01.2015 between the petitioner and itself and the terms and conditions of the PPA. It has also not denied the several correspondences that had taken place as mentioned in the petition. However, the respondent (BESCOM) has denied the correctness of the contents of several letters issued by the petitioner.

b) On 13.01.2015 the PPA (Annexure-J) was executed between the petitioner and the respondent. The date of execution of the PPA was defined as 'Effective Date' as per Article 3.1 of the PPA. The petitioner was required to commission the project within 18 (eighteen) months

from the Effective Date as per Article 8.5 of the PPA i.e., on or before 12.07.2016. Further, as per Article 4.1 of the PPA, the petitioner was required to achieve the Conditions Precedent within 365 days from Effective Date i.e., on or before 12.01.2016.

c) On 04.05.2015, this Commission communicated the approval of the PPA as per Annexure-R1 subject to incorporation of certain corrections/modifications in the PPA. Thereafter on 25.05.2015, the respondent (BESCOM) intimated the petitioner to incorporate the corrections/modifications suggested by the Commission. It is not denied that the authorized signatory of the petitioner appeared on 06.06.2015 and effected the corrections/modifications and one set of original PPA was handed over to the authorized signatory of the petitioner on 06.06.2015 itself. In this regard, the petitioner sent e-mail dated 27.05.2015 (Annexure-R3) and letter dated 06.06.2015 (Annexure-R4).

d) In furtherance of the request of the petitioner to extend the Scheduled Commissioning Date by six months, on the ground of delay in handing over the original approved PPA, the respondent (BESCOM) vide letter dated 22.09.2016 (Annexure-M) granted four months' time to commission the project subject to payment of Liquidated Damages as per Article 5.8 of the PPA and stating that the tariff would be subject to Article 12.2 of the PPA and that the other terms of the PPA would remain unaltered.

- e) The petitioner commissioned its project on 13.12.2016. The petitioner vide letters dated 26.12.2016 & 13.01.2017 (in Annexure-P collectively) requested the respondent (BESCOM) to execute the Supplemental PPA in view of the change of location of the project to Chitradurga district. The petitioner vide letter dated 24.03.2017 communicated to the respondent (BESCOM) that the Liquidated Damages payable by the petitioner could be deducted from its monthly energy bills and thereafter on 12.04.2017, the SPPA (Annexure-R produced by petitioner) was executed between the petitioner and the respondent (BESCOM).
- f) The SPPA submitted for approval of the Commission was returned on 26.05.2017 directing the parties to incorporate the tariff that was prevailing on the date of commissioning of the project. The copy of the letter dated 26.05.2017 issued this Commission is produced at Annexure-R2. Accordingly, the respondent (BESCOM) vide letters dated 28.06.2017 & 31.08.2017 requested the petitioner to execute an SPPA incorporating the modifications suggested by this Commission. On 05.09.2017, the petitioner requested to furnish the draft copy of the Supplemental PPA and the same was provided on 17.10.2017. In the meantime, the respondent (BESCOM) was paying for the energy supplied at the rate of Rs.6.51 per unit.
- g) The respondent (BESCOM) is in no way concerned with the delay in approval of the PPA. The respondent (BESCOM) cannot be made responsible for the delay in approval of the PPA. The delay in handing



over the PPA can in no manner be sufficient reason for the delayed implementation of the project. It would be of relevance to note that the RfP and bid documents clearly set out the terms of the PPA proposed to be executed with the ESCOMs of Karnataka and the RfP also clearly states that the 'Effective Date' commenced from execution of the PPA, thereby the petitioner was fully aware of the terms and conditions of the PPA. It is also contended that non-receipt of original PPA cannot be considered to be an event of 'Force Majeure' which prevented the petitioner from taking requisite steps to establish its project in the timeframe given. The contention of the petitioner that the extension of time for commissioning the project should have been granted under Article 5.7 of the PPA is incorrect as the delay in approval of the PPA cannot be treated as 'BESCOM's Event of Default'.

- h) The petitioner has not produced any reliable material evidence as to how the riots due to the pronouncement of the judgment in Cauvery River Water Dispute have affected the petitioner in executing the solar power project. Therefore, it is contended that the said ground is in no manner whatsoever be sufficient reason for delayed implementation of the project.
- i) Article 14.5 of the PPA provides that issuance of a Force Majeure notice by the Affected Party within seven days of the occurrence of such event is essential and the petitioner has not issued any notice as contemplated in this Article 14.5 of the PPA. Therefore, the petitioner

cannot claim Force Majeure events alleged by it in the absence of issuance of the notices as contemplated.

- j) The petitioner has failed to achieve the Conditions Precedent within the time stipulated, thereby the petitioner is liable to pay damages for delay in fulfilling Conditions Precedent in terms of Article 4.3 of the PPA. There was delay in commissioning the project consequently in supply of energy, therefore, the petitioner was liable to pay the Liquidated Damages as per Article 5.8 of the PPA. That the respondent (BESCOM) is a public utility and non-receipt of electricity within the stipulated timeframe comes at a price.
- k) That there was delay in commissioning of the project, thereby the petitioner would be entitled to a tariff of Rs.6.51 per unit in terms of the Commission's Generic Tariff Order dated 30.07.2015, which was the order that was applicable at the time when the petitioner commissioned its project. There has been no unilateral modification of tariff as contended by the petitioner, as the terms of the PPA were known to the petitioner. The petitioner has commissioned its project on 13.12.2016 and on this date, the Generic Tariff Order dated 30.07.2015 was prevailing. Therefore, the petitioner's project was liable for reduced tariff of Rs.6.51 per unit.
- l) The averments made by the petitioner that the Generic Tariff Order dated 30.07.2015 was not applicable to the facts of the present case and that the Generic Tariff Order dated 10.10.2013 was applicable in

the event of delay in commissioning the project or determining the 'applicable tariff' as provided in Article 12.2 of the PPA, is denied by the respondent (BESCOM) as incorrect and false.

m) All other averments made by the petitioner in claiming the reliefs prayed by it are denied by the respondent (BESCOM).

4. The petitioner filed rejoinder to the statement of objections of the respondent (BESCOM). In the rejoinder, the petitioner has reiterated the grounds alleged in the petition and denied the contentions urged by the respondent (BESCOM) as untenable.

5. During the pendency of hearing, the respondent (BESCOM) filed the additional statement of objections on 15.12.2020. The additional grounds urged are as follows:

a) Soon after the execution of the PPA on 13.01.2015 (Annexure-J), the respondent (BESCOM) vide letter dated 16.01.2015 (Annexure-R5) along with Bank Demand Draft for Rs.50,000 requested the Commission to approve the PPA. Therefore, there was no delay on its part in forwarding the PPA to the Commission.

b) The petitioner has suppressed the fact that it had twice changed its location of the project and the same has led to delay in commissioning of the project. At the time of issuance of LoA, the petitioner intended to execute the project at Pavagada taluk, Tumakuru district. On 29.09.2015, the petitioner requested for approval of KREDL for change

of project location from Pavagada taluk to Bevur village, Yelaburga taluk, Koppal district. KREDL vide letter dated 06.10.2015 has approved the change of project location to Koppal district. Copy of letter dated 06.10.2015 is produced as Annexure-R6.

c) Thereafter, on 03.02.2016, the petitioner once again requested for approval of KREDL for change of project location from Bevur village, Yelaburga taluk, Koppal district to Varavu village, Nayakanahatti hobli, Challakere taluk, Chitradurga district. On 17.02.2016, the KREDL has approved the change in project location to Chitradurga district. Copy of letter dated 17.02.2016 is produced as Annexure-R7.

d) From the above facts, it is clear that the petitioner has taken one year one month to decide the location of the projection in question. That PPA casts an obligation on the petitioner to find a suitable land for execution of the project having failed to find a suitable land the petitioner in the present case is attributing delays on the respondent (BESCOM) by urging unsubstantiated grounds.

6. The petitioner has filed an interim application on 20.01.2021 requesting this Commission to reject the additional statement of objections filed by the respondent (BESCOM) on 15.12.2020. In support of that application, it is urged that the additional statement of objections is belated and untenable in law and the respondent could not file additional statement of objections without seeking the permission of the Commission, when the

case was posted for arguments. Therefore, the petitioner requested not to consider the additional statement of objections and to reject the same.

7. The respondent filed the objection dated 10.02.2021 before the Commission on 10/12.02.2021 to the interim application dated 20.01.2021 of the petitioner. The gist of the objections are as follows:

a) That the change of location of the project was not placed before the Commission by the petitioner and this fact is essential to decide the question before the Commission and the decision of this Commission in this matter will have implications on the tariff payable, which will in turn be borne by the consumers. Hence, the respondent (BESCOM) had to file the additional statement of objections to bring on records the facts that were essential for the adjudication of the present petition.

b) The contention of the petitioner that the respondent (BESCOM) has been protracting the present proceedings is false and incorrect and on the contrary, the petitioner has been doing so. On perusal of the order sheet of the present case would show that the petitioner has been delaying the proceedings before this Commission by seeking adjournment on more than five occasions when the matter was being posted for final arguments. Finally, on 06.06.2019, the petitioner appeared and sought for time to address the arguments and the Commission adjourned the case for arguments at the request of the petitioner as a last opportunity. Thereafter, the petitioner has sought for time on 04.07.2019, 06.08.2019, 12.09.2019, 22.10.2019 & 16.01.2020,

when the matter was being listed for final hearings. Hence, the allegation that the respondent (BESCOM) has prolonged the proceedings by filing additional statement of objections is untenable and denied.

c) The principle as laid down by the Hon'ble Supreme Court of India, in its judgment dated 13.10.2020 in *Sugandhi & Another Vs. P. Rajkumar*, reported in (2020) 10 SCC 706 is that procedural and technical hurdles should not be allowed to come in the way of the Court, while doing substantial justice and that the Court is required to take appropriate steps to thrash out the underlined truth in every dispute. Therefore, the respondent (BESCOM) contended that there is no prohibition on filing additional statement of objections after the commencement of arguments and the application filed by the petitioner deserves to be rejected.

8. The petitioner filed additional rejoinder on 03.03.2021 to the additional statement of objections filed by the respondent. The relevant grounds urged in the additional rejoinder may be stated as follows:

a) The present additional rejoinder is being filed without prejudice to the contentions taken in the interim application filed by the petitioner requesting to reject the additional statement of objections dated 15.12.2020 by the respondent (BESCOM).

- b) That the petitioner was completely within its rights to re-locate the project at its discretion and there was no prohibition of the same under the tendered document or the PPA. The petitioner was constrained to re-locate the projects due to certain issues faced in obtaining change of land use in respect of the land originally chosen for the project. In fact, in order to avoid delay in commissioning the project, the petitioner opted to re-locate the project to a land located in a solar park. The respondent has baldly made averments in respect of the change of location of the project but has not established that the same has led to any delay whatsoever in commissioning of the project. In fact, the respondent has presumed that the change in location of project led to delay in commissioning the project, but there is absolutely no substantiation in such contentions taken by the respondent.
- c) The allegations made in the additional statement of objections to the effect that the petitioner has concealed the facts in respect of change of location of the project site and that the petitioner has not come before this Commission with clean hands, are denied.
- d) That the petitioner has been following up with the respondent since 16.01.2015, the day on which e-mail dated 16.01.2015 as per Annexure-A (produced with additional rejoinder) was sent for securing the scanned copy of the PPA.

- e) For the above reasons, the petitioner contended that the contents of the additional statement of objections are untenable and are based on conjectures and the same are liable to be rejected outright.
9. We have heard the oral submissions of the learned counsel for the parties. The learned counsel for the petitioner has also filed written submissions along with the citations relied upon, on behalf of the petitioner. The learned counsel for the respondent has filed the copies of authorities with list relied upon by him.
10. From the pleadings and submissions made by the parties, the following issues would arise for our consideration:

Issue No.1: Whether the extension of time granted for six months (four months as per Annexure-M dated 22.09.2016 and two months as per Annexure-O dated 07.12.2016) by the BESCO for commissioning of the project, cannot be reviewed by this Commission?

Issue No.2: If Issue No.1 is held in negative, whether the petitioner has made out a case for extension of six months' or of any other period for commissioning the Project from Scheduled Commissioning of Date?

Issue No.3: Whether the respondent (BESCO) proves that the delay in commissioning of the Solar Power Project in question was entirely due to delay in finalization of the project site?

Issue No.4: Whether the petitioner was liable to pay damages under Article 4.3 of the PPA for not achieving the Conditions Precedent within the time allowed?



Issue No.5: In case of delay in commissioning the Solar Power Project beyond the Scheduled Commissioning Date, whether the said Project is liable for any reduced tariff as provided in Article 12.2 of the PPA?

Issue No.6: Whether the petitioner is liable to pay Liquidated Damages under Article 5.8 of the PPA for delay in supply of energy and if so whether the imposition of entire Liquidated Damages by the respondent is improper?

Issue No.7: To which relief the petitioner is entitled to?

Issue No.8: What Order?

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

12. Issue No.1: Whether the extension of time granted for six months (four months as per Annexure-M dated 22.09.2016 and two months as per Annexure-O dated 07.12.2016) by the BESCO for commissioning of the project, cannot be reviewed by this Commission?

a) The respondent (BESCO) as per letter dated 22.09.2016 (Annexure-M) and another letter dated 07.12.2016 (Annexure-O) had granted four and two months' extension of time for commissioning of the project from the Scheduled Commissioning Date, respectively. The learned counsel for the petitioner submitted that the judgment in Appeal No.340 of 2016 dated 28.02.2020 (Azure Sunrise Private Limited Vs. CESC) of the Hon'ble ATE squarely covered the present issue, holding that the State

Commission cannot review the extension of time already given by the DISCOM. He also pointed out that the provisions of the PPA contained in Article 5.7 relating to Extension of Time and its effect etc., in the present case as well as in Azure Sunrise Private Limited Vs. CESC are in pari-materia. Therefore, he submitted, the finding rendered by the Hon'ble ATE in that case is to be applied in this case and the Commission cannot review the extension of six months' time granted by the respondent (BESCOM).

- b) The learned counsel for the respondent (BESCOM) submitted that the relevant facts in Azure Sunrise Private Limited Vs. CESC and in the present case on this issue are quite different, therefore, the petitioner cannot rely upon Azure Sunrise Private Limited Vs. CESC. Further, he submitted that the Hon'ble ATE in Appeal No.351 of 2018 dated 14.09.2020 between Chennamangathihalli Solar Power Project LLP., Vs. BESCOM and Another, specifically laid down that the Commission has jurisdiction to review the validity of Extension of Time granted by the Distribution Licensees for commissioning of the project, though there was no dispute regarding Extension of Time between the parties. Therefore, he submitted the recent decision of the Hon'ble ATE in Appeal No.351 of 2018 dated 14.09.2020 is to be preferred to that of the decision in Azure Sunrise Private Limited Vs. CESC.
- c) In Azure Sunrise Private Limited Vs. CESC, the Hon'ble ATE at para 8 of its judgment has framed the issue for consideration as follows:

*“Issue No.1: Whether in the facts and circumstances of the case having approved the terms of the PPA, the State Commission is justified in reducing the Extension of Time of 137 days as approved by the Commission/DISCOM to mere 25 days.”*

In para 11.1 while rendering its findings, the Hon'ble ATE has noted that:

*“the main dispute between the generating company and the distribution company revolves around the decision of the State Commission to review the Extension of Time already given by the DISCOM and reduced the same to 25 days against the agreed extension of 137 days.”*

The perusal of the facts in Azure's case would show that CESC had granted Extension of Time of 137 days' subject to approval of the Commission. The Hon'ble ATE has held that the State Commission was not justified in reducing the Extension of Time of 137 days as approved by the CESC to mere 25 days.

d) In the present case, the respondent (BESCOM) granted four months' time in its letter dated 22.09.2016 (Annexure-M) and granted two months' time in its letter dated 07.12.2016 (Annexure-O) subject to the conditions noted therein. The observations and the conditions imposed in the letter dated 22.09.2016 (Annexure-M) are as follows:

*“In this regard, I am directed to state that since the reasons explained for seeking extension are general in nature, request for extension of scheduled commissioning cannot be considered, as per Clause 5.7 of the PPA.*

*However, approval is accorded for extension of Scheduled Commissioning Date by 4 months as per*

*Clause 5.8 of the PPA with payment of Liquidate Damages.*

- *Clause 5.8 shall be applicable, for delay in Scheduled Commissioning Date.*
- *Further attention is drawn towards Article 12.2 of the PPA as per which BESCO will follow the KERC applicable tariff as on date of revised Scheduled Commissioning Date.*
- *All other terms and conditions of the PPA dated 13.01.2015 shall remain unaltered."*

In the letter dated 07.12.2016 (Annexure-O), the observations and the conditions imposed are as follows:

*"Extension for COD for 4 months has already been given vide this office letter cited under reference (2). In this regard, I am directed to state that since the reasons explained for seeking extension are general in nature, request for extension of scheduled commissioning cannot be considered, as per Clause 5.7 of the PPA.*

*However, approval is accorded for extension of Scheduled Commissioning date by further 2 months (apart from 4 months already given) up to 13.01.2017 as per Clause 5.8.1 and 5.8.2 of the PPA with payment of Liquidated Damages.*

- *Clause 5.8 shall be applicable, for delay in Scheduled Commissioning Date.*
- *Further attention is drawn towards Article 12.2 of the PPA as per which BESCO will follow the KERC applicable tariff as on date of revised Scheduled Commissioning Date.*
- *All other terms and conditions of the PPA dated 13.01.2015 shall remain unaltered.*

*You are hereby requested to pay the Liquidated Damages as per PPA Article 5.8.1 and 5.8.2 to this office immediately.*

*Further, the company shall strictly adhere to the extended time line for fulfilling/achieving Commercial Operation Date, failing which necessary action as per PPA will be enforced."*

- e) The only condition imposed by CESC in Azure Sunrise Private Limited Vs. CESC was that the extension of 137 days was subject to the approval of the Commission, however, in the present case the conditions imposed by the respondent (BESCOM) are quite different. In reality the so-called extension of time amounts to rejecting the request of the petitioner for extension of time.
- f) Considering the conditions imposed by the respondent (BESCOM) in the present case while extending the time under Annexure-M and Annexure-O, we are of the considered opinion that the ratio laid down in Azure Sunrise Private Limited Vs. Chamuneshwari Electricity Supply Company Limited cannot be made applicable to the facts of the present case as rightly contended by the respondent counsel.
- g) Now, we shall examine the other contention raised by the learned counsel for the respondent (BESCOM) that the law laid down on Issue No.1 by the Hon'ble ATE in Appeal No.351 of 2018 dated 14.09.2020 between Chennamangathihalli Solar Power Project LL.P, Vs. BESCOM and Another, is to be preferred to the findings given in Azure Sunrise Private Limited Vs. Chamundeshwari Electricity Supply Company

Limited. In Chennamangathihalli case, the provision relating to the Extension of Time provided in the PPA concerned in that case, was almost similar to the provision concerned with the PPA of Azure Sunrise Private Limited Vs. CESC. In Chennamangathihalli case, the respondent (BESCOM) which had entered into PPA with the Solar Developer had granted extension of six months' time to commission the project at the request of the project developer. This Commission had held that the project developer had to independently prove the grounds relevant for Extension of Time under Force Majeure events as provided in PPA though the respondent (BESCOM) had granted extension of six months' time at the request of the project developer. It was contended by the project developer that when the BESCOM had granted Extension of Time as per the terms of the PPA, the Commission has no jurisdiction to interfere with the decision taken by the respondent (BESCOM) in extending the time. The project developer had also led evidence in that case to prove the Force Majeure events urged by it. This Commission on scrutiny of the material on record had held that the Commission has jurisdiction to call upon the project developer to prove the Force Majeure events in spite of DISCOM not disputing that fact and that the project developer had failed to prove the Force Majeure events alleged by it. On consideration of the rival contentions, the Hon'ble ATE at para 6 of Chennamangathihalli case framed the following issues:

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

*Issue No.2: Whether the State Commission has correctly held that there was no force majeure conditions so as to grant extension of time and the Appellants are entitled for reduced tariff applicable for future control periods?”*

h) While answering Issue No.1, the Hon'ble ATE in para 7.11 has held as follows:

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

However, while answering Issue No.2, the Hon'ble ATE has held that the finding of the Commission that the Appellants had failed to establish Force Majeure events was not justified and on re-appreciation of the facts held that the Appellants in that case established the Force Majeure events pleaded by them. The finding on Issue No.2 is purely based on the disputed question of facts. The Hon'ble ATE has found that there was 7-8 months' delay in issuing various approvals and then also made the observation regarding the terms of PPA enabling the distribution

company to grant extension of time. Therefore, the question of law as to whether the Commission has jurisdiction to call upon the developer to produce proper evidence for the scrutiny of the Commission to establish the Force Majeure event relied upon by it, rendered in Issue No.1, would clearly establish that the Commission has the jurisdiction to scrutinize the evidence and to render a finding on the Force Majeure event.

- i) The decision in Chennamangathihalli case, being later in point would prevail over the decision in Azure Sunrise Private Limited Vs. Chamundeshwari Electricity Supply Company Limited on the question whether the State Commission has jurisdiction to call upon the developer to prove the Force Majeure event independently, though there is a term in the PPA authorizing the distribution licensee to grant Extension of Time for commissioning of the project. In this connection, we may also note the decision of the Hon'ble Supreme Court of India in the case of All India Power Engineer Federation & Others Vs. Sasan Power Limited & Others reported in (2017) 1 SCC 487. In the said decision, the Hon'ble Supreme Court has considered the effect of a waiver of a right, by the Distribution Licensee, under the provision of the PPA, which had the effect of adversely affecting the tariff agreed to under the PPA. The principles are state thus:

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



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

*“... If there is any element of public interest involved, the court steps into thwart any waiver which may be contrary to such public interest.” ...” [Paragraph-25]*

In the said case, the question was, ‘whether the waiver of a provision of the PPA by the Distribution Licensee, having an effect to increase the tariff, was valid or not’. It is held that, the increase in the tariff would adversely affect the consumers and thereby, any waiver by the Distribution Licensee, against the terms of the PPA, is invalid. We are of the considered opinion that, the principle stated above would squarely apply to a case, where the Distribution Licensee gives its consent, against the terms of the PPA, in respect of a Force Majeure Event, which has the effect of an increase in the tariff, which in turn, would affect the consumers. Therefore, it becomes the duty of this Commission to scrutinize, as to whether there was a case for the extension of time, for commissioning the Solar Power Project, on the ground of Force Majeure Events.

- j) Therefore, wherever the terms of the PPA provide for reduction in tariff, on occurrence of certain events, the Commission alone has the jurisdiction to pronounce a finding regarding the proof or otherwise of the occurrence of such events. The parties concerned being in

agreement regarding the occurrence of such events, is irrelevant. Therefore, in the present case, the clause in the PPA authorizing the respondent (BESCOM) to extend the time for commissioning of the Project by the petitioner, on the ground of Force Majeure events, is not helpful to the petitioner, as it has the effect of taking away the jurisdiction of the Commission, to determine the applicable tariff. The parties cannot confer or take away the jurisdiction of a Court or Adjudicating Authority. It is only this Commission that has the exclusive jurisdiction to adjudicate upon the existence or otherwise of such an event which affects the tariff. We may also note that the existence of any provision in the PPA authorizing the Distribution Licensee to extend the time where it affects the tariff, in effect amounts to delegation of adjudicatory function to the Distribution Licensee to decide whether a fact relied on by the developer amounts to Force Majeure event or not. Such delegation of adjudicatory function is not valid in law. Therefore, one cannot contend that the decision to extend the time for commissioning of the Solar Power Project under the provision of PPA is not subject to scrutiny by the Commission.

k) For the above reasons, the decision in Chennamangathihalli case is to be followed. Accordingly, Issue No.1 is held in the negative.

13. Issue No.2: If Issue No.1 is held in negative, whether the petitioner has made out a case for extension of six months' or of any other period for commissioning the Project from Scheduled Commissioning of Date?

a) The petitioner has relied upon the following facts for claiming Extension of Time to achieve the Conditions Precedent and Commissioning of the Project:

- (i) delay of 144 days in handing over the PPA executed between the parties approved by KERC; and
- (ii) the unrest and riots caused due to Cauvery River Water Dispute after the Hon'ble Supreme Court of India judgment dated 06.09.2016.

b) In support of the fact regarding delay of 144 days in handing over the PPA after its approval by KERC, the petitioner has relied upon the letters dated 09.04.2015, 27.04.2015, 06.05.2015 produced at Annexure-H and also the letters dated 24.06.2016, 02.08.2016, 19.08.2016 produced at Annexure-K. The letters produced at Annexure-H were written by the petitioner before receiving the PPA executed on its approval. It may be noted that the PPA was received after its approval on 06.06.2015. The letters noted above produced in Annexure-K were addressed to the respondent (BESCOM) after a lapse of more than a year from the date of receipt of the PPA after its approval. The reason stated in the letter dated 24.06.2016 for claiming extension of time is that due to delay in receipt of the PPA after its approval, the whole of the timeline has been affected for setting up of the Solar Power Project. This letters further states that there was difficulty in acquiring possession of the lands required for the project. However, it may be noted that in the pleadings, the petitioner has not relied upon or alleged that there was

difficulty in acquiring the possession of the lands. The other two letters dated 02.08.2016 and 19.08.2016 are only in the nature of reminders to consider the request made by the petitioner in its letter dated 24.06.2016 for extension of six months' time as per Article 5.7 of the PPA. In response to the above letters, the respondent (BESCOM) granted four months' time vide its letter dated 22.09.2016 (Annexure-M) with certain observations and conditions as already noted.

- c) In support of the second fact regarding unrest and riots caused due to order on Cauvery River Water Dispute matter dated 06.09.2016 passed by the Hon'ble Supreme Court of India, the petitioner wrote letters dated 17.09.2016 & 04.10.2016 (produced under Annexure-L). In the 1<sup>st</sup> letter dated 17.09.2016, the request made was to consider extension of one month's time and in the 2<sup>nd</sup> letter, the request made was to consider two months' extension instead of one month's extension as requested in the earlier letter on the ground that the progress of project was hindered.
- d) In the meanwhile, the petitioner wrote letter dated 03.10.2016 (Annexure-N) requesting the respondent (BESCOM) to delete the conditions stated in the letter dated 22.09.2016 (Annexure-M) while granting four months' time. It appears in continuation of the letter dated 03.10.2016 (Annexure-N), the petitioner also sent an e-mail dated 05.12.2016 in this regard. Thereafter, the respondent (BESCOM) extended another two months' time for commissioning of the project again imposing the same conditions to pay Liquidated Damages etc.,

The respondent (BESCOM) has also stated that the extension of time cannot be considered as per Article 5.7 of the PPA and stated that the extension was granted under Article 5.8 of the PPA. The respondent (BESCOM) has not specifically stated as to whether later extension of two months' granted was on the ground of delay in handing over the PPA alone or it had also considered the ground alleged in respect of the unrest and riot caused due to order dated 06.09.2016 passed by the Hon'ble Supreme Court of India, on Cauvery River Water Dispute matter.

e) From the above facts, we have to analyse as to whether the extension of time granted by the respondent (BESCOM) is in accordance with the provisions of Article 5.7 of the PPA. The said Article 5.7 reads as follows:

**5.7 Extension of Time:**

**5.7.1** *In the event that the Developer is prevented from performing its obligations under Clause 5.1 by the Scheduled Commissioning Date due to:*

- a) Any BESCOM Event of Default; or*
- b) Force Majeure Events affecting BESCOM; or*
- c) Force Majeure Events affecting the Developer.*

The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed in Clause 5.7.2 and Clause 5.7.3 for a reasonable period but not less than 'day for day' basis, to permit the Developer or BESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Developer or BESCOM, *or till such time such Event of Default is rectified by BESCOM.*

**5.7.2** *In case of extension occurring due to reasons specified in clause 5.7.1 (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.*

**5.7.3** *In case of extension due to reasons specified in Article 5.7.1 (b) and (c), and if such Force Majeure Event continues even after a maximum period of 3 (three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 16.*

*If the Parties have not agreed, within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 18.*

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

The reading of Article 5.7.1 shows that the Extension of Time in favour of the petitioner for commissioning can be granted due to: (a) Any BESCOM Event of Default; or (b) Force Majeure Events affecting BESCOM; or (c) Force Majeure Events affecting the Developer.

- f) The petitioner claims that the respondent (BESCOM) should have granted extension of time for delay in handing over the PPA under Article 5.7.1 (a) of the PPA, as the delay in approval of the PPA and its delivery after its approval was entirely due to the fault of respondent

(BESCOM). Therefore, according to the petitioner, the extension of time should have been under Article 5.7.1 (a) of the PPA. The respondent (BESCOM), on the other hand contended that the extension of time was granted under Article 5.8 of the PPA, but not under Article 5.7 of the PPA.

- g) On perusal of the different Articles relevant on this point, we are of the opinion that both the parties were not correct in their respective contentions. Article 5.7.1 (a) provides that for any 'BESCOM Event of Default', the 1<sup>st</sup> Respondent (BESCOM) may extend the time up to six months in commissioning the project. 'BESCOM Event of Default', is defined in Article 21.1 of the PPA as 'BESCOM Event of Default' shall have the meaning set-forth in Article 16.2 of the PPA. The Article 16.2 of the PPA reads as follows:

**"Article 16.2 - Termination for BESCOM Event of Default:**

*Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and BESCOM fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 30 (thirty) days, BESCOM shall be deemed to be in default of this Agreement (a "BESCOM Event of Default"), unless the default has occurred solely as a result of any breach of this Agreement by Developer or due to Force Majeure. The defaults referred to herein shall include the following:*

- a) *BESCOM has unreasonably withheld or delayed grant of any approval or permission which the Developer is obliged to seek under this*

*Agreement, and thereby caused or likely to cause Material Adverse Effect;*

*b) BESCOM is in material breach of any of its obligations, under this Agreement and has failed to cure such breach within 90 (Ninety) days of receipt of notice thereof issued by the Developer and which has led to the Project forfeiting the benefits occurring under Applicable Law;*

*c) BESCOM has unlawfully repudiated this Agreement or otherwise expressed its intention not to be bound by this Agreement;*

*d) Any representation made or warranty given by BESCOM under this Agreement has been found to be false or misleading."*

h) The delay in approval of the PPA by the Commission and consequent delay in handing over the PPA cannot be brought under the meaning of 'BESCOM Event of Default' as noted in Article 16.2 of the PPA. Therefore, the extension of time could not have been granted on the ground of 'BESCOM Event of Default' stated in Article 5.7.1 (a) of the PPA.

i) The extension of time could have been granted by the respondent (BESCOM), on the ground of delay in handing over the approved PPA, had the petitioner made out the required ingredients of Force Majeure events affecting the developer. For that purpose, Notification of Force Majeure event as required under Article 14.5 of the PPA is to be issued intimating the commencement and end of Force Majeure event. The consensus on extension of time granted if any should be within 30 days after the Affected Parties' performance has ceased to be



affected by the relevant Force Majeure event. If there was no agreement between parties within that time on the time period by which the SCD is to be extended, the Affected Party has to raise the dispute to be resolved in accordance with Article 18 of the PPA. In the present case, we may accept that the petitioner had issued the notices as required under Article 14.5 of the PPA in respect of delay in handing over PPA, intimating commencement and end of that Force Majeure event. However, the respondent (BESCOM) had not granted any extension of time within 30 days after handing over the signed approved PPA on 06.06.2015, the date on which the approved PPA was handed over. Therefore, in terms of para 2 of Article 5.7.3 of the PPA, the petitioner had to raise the dispute regarding extension of time to be resolved in accordance with Article 18 of the PPA. However, in the present case, the petitioner made the request before the respondent (BESCOM) for extension of time on the ground of delay in handing over the PPA after lapse of more than a year from 06.06.2015. Such a deemed denied request could not have been again entertained by the respondent (BESCOM) for extension of time. Therefore, the respondent (BESCOM) entertaining the request for an extension on the ground of delay in handing over the PPA and extending time to an extent of either four months or six months was against the relevant terms of the PPA.

- j) For the same reasons stated above, the respondent (BESCOM) could not have granted extension of time on the ground of unrest and riots due to Cauvery River Water Dispute. It may be noted that the requests for extension on this ground were made by the petitioner through letter dated 17.09.2016 & 04.10.2016 (Annexure-L). However, the respondent (BESCOM) granted further two months' time in its letter dated 07.12.2016 (Annexure-O). The petitioner had also not stated or issued any notice stating the date on which such unrest and riots were ceased. The extension of time of two months granted by respondent (BESCOM) in its letter dated 07.12.2016 (Annexure-O) also does not specifically refer that the two months' extension was on account of Cauvery River Water Dispute riots.
- k) The respondent (BESCOM) has also not examined as to whether the grounds alleged by the petitioner really prevented the petitioner to any extent in the performance of its obligations under the PPA. Therefore, the grant of so-called extension of time for commissioning the project by the respondent (BESCOM) is not valid and legal.
- l) In the present proceedings before this Commission, the petitioner has relied upon the same two grounds which it had relied upon before respondent (BESCOM). If the petitioner makes out a case of Force Majeure events affecting its performance, the Commission has to grant the extension of time for commissioning of the project. The relevant portion of the meaning of 'Force Majeure' as stated in Article 14.3.1 of the PPA is as follows:

**“14.3.1 A ‘Force Majeure’** means any event or circumstance or combination of events including those stated below which wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.

- a) xxxxxxxx
- b) xxxxxxxx
- c) xxxxxxxx
- d) xxxxxxxx
- e) xxxxxxxx

From the above provision of the Force Majeure Clause stated in the PPA, it can be said that non-receipt of the original approved PPA itself cannot be the ground to claim the Extension of Time on the ground of Force Majeure. It should be shown that the non-availability of the approved original PPA prevented or caused delay to the petitioner in the performance of its obligations under the PPA. Procuring the finance for the project and acquiring the required extent of land for the Project are the material obligations on the part of the developer of the project. The developer is in no way prevented from applying for project finance and for making the initial searches for acquiring the requisite lands for the project, based on the LoA or copy of the PPA before its approval. The prudent developer need not to wait approval of the PPA by the Commission for initiating steps for procuring the Project Finance and for

acquiring the requisite lands for the project. Admittedly, the petitioner was issued LoA dated 19.11.2014 (Annexure-C) stating the material particulars in respect of the allotted project to it. There is no evidence produced by the petitioner that the Financer refused to entertain the application for processing loan application without a signed approved PPA. It is also not averred that the Financer asked to produce the signed approved PPA for final sanction of loan before 06.06.2015.

m) The petitioner in para 7 (o) & (p) of the petition has alleged that for raising the funds from financial institutions, land procurement, equipment procurement and other construction related activities, could not have been commenced without receiving the PPA duly approved by the Commission. The said pleading conveys the meaning that the petitioner had not at all commenced any of the activities towards project financing, land procurement etc., In para 9 (Q) of the petition, the petitioner reiterated that without the approved PPA it could not have been expected to initiate any acts to fulfil its obligations under the PPA. However, at the end of that para, it is stated that *"it is pertinent to note that despite this sluggish approach on the part of BESCO in processing the approval of the PPA, the petitioner had not lost sight of its obligations under the PPA, and continued to perform the same"*. This part of the pleading would show that the petitioner had initiated the preliminary steps towards fulfilling the obligations under the PPA.

n) The petitioner has not given the particulars in the petition of the dates on which it had initiated steps to procure the finance and to search the required extent of lands for the project. On the other hand, the averments in the petition show that the petitioner had not at all commenced any of the activities towards project financing, land procurement etc., and at one place it is stated that the petitioner had not lost sight of its obligation under the PPA and continued to perform the same even in the absence of approved PPA. There is no material evidence produced by the petitioner or the respondent (BESCOM) as to whether a photo copy or a scanned copy of the PPA soon after its execution by the parties, was delivered to the petitioner. The averments in the pleadings of the parties is silent on this fact. However, the facts and circumstances of the case would definitely lead to an inference that the petitioner must have received a photo copy or a scanned copy of the PPA within a short time from the date of execution of the PPA. In the additional rejoinder dated 03.03.2021 of the petitioner at para 10, it is stated *"that the petitioner has been following up with the respondent since January 16, 2015. The e-mail indicating that the petitioner had followed up right from January 16, 2015, is produced herewith as Annexure-A. It is stated that the delay in commissioning of the project is not due to change in land but due to delay in providing the PPA by the respondent."* The e-mail dated 16.01.2015 (Annexure-A filed on 03.03.2021, along with additional

rejoinder) addressed to Sh. Laxman Chavan, (Chief Engineer) / Sh. Ramesh Pawar, (EE), reads thus:

*"We are thankful for the courtesy extended to the undersigned on 14.01.2015 for the signing of the PPA in respect of 20 MW Solar Power Project in the State of Karnataka. As informed by you, we shall receive the executed PPA documents after approval from KERC.*

*However as discussed we shall be highly obliged if you please send us the scanned copy of the PPA agreement for our information and future reference purpose".*

This e-mail is shown to have been sent by one Kunal Mahajan of Photon Suryakiran Private Limited Mob no:8130499784. It is not the case of the petitioner that in response to this e-mail, the scanned copy of the PPA was not sent to it. It appears the procedure followed by the ESCOMs was to issue a scanned copy of the PPA soon after the execution between the parties and to hand over one set of original PPA after its approval by the Commission endorsing such approval of the PPA. The present petition is filed before the Commission on 02.04.2018. In the event the petitioner not having received the photo copy or the scanned copy of the PPA, that fact would have been specifically mentioned in the petition itself. It appears the petitioner not intending to bring that fact on record has not stated the same in the petition. At least in the additional rejoinder filed by the petitioner, it should have been stated that it had not received the scanned copy

of the PPA in spite of making a specific request under the e-mail dated 16.01.2015. The petitioner has not produced any evidence to show that it had applied before the financier only after receipt of the approved PPA on 06.06.2015. At the same time in para 9 (Q) of the petition in the last sentence, the petitioner states that in spite of not getting the approved PPA, it had not lost sight of its obligation under the PPA and continued to perform the same. It appears such statement is made here to suit the case of the petition in the event of the respondent (BESCOM) producing the evidence for having furnished the scanned copy of the PPA soon after its execution.

- o) In the letter dated 24.06.2016 addressed to the respondent (BESCOM) produced in Annexure-K, the petitioner stated that there was delay in identifying the lands and finally the petitioner settled the deal for land and evacuation of power etc., with a private Solar Park i.e., M/s Sagitaur Ventures India Private Limited in Chitradurga district and entered into a sub-lease deed dated 07.01.2016 with Solar Park Developer. Further, the petitioner stated that due to delay in submission of approved PPA and land documents, the petitioner could not get the conditional sanctioned letter from the Financer on 08.01.2016. The letter dated 18.11.2016 issued by Power Finance Corporation (PFC), the Financer to the petitioner (produced in Annexure-K) at Reference (4) shows that the loan was sanctioned under PFC Loan Sanction Letter No.03/22/ Karnataka/ PSPL/ P-06187/ P2717001/Vol-I/ 036161 dated

15.02.2016. Therefore, it is clear that conditional loan sanction was made on 08.01.2016 soon after the petitioner entered into sub-lease deed with the private solar park developer and after fulfilling some conditions, the regular PFC loan was sanctioned on 15.02.2016. The approved PPA was delivered on 06.06.2015 to the petitioner. Therefore, the delay if any, in PFC loan sanction till 15.02.2016, cannot be due to the delay in handing over the PPA, but it should have been due to the delay in finalising the land required for Solar Power Project till 07.01.2016.

p) In the end portion of para 7 (t) of the petition, it is alleged as follows:

*"The extension for commissioning was granted by the DISCOMs on different dates and the Respondent was the last to grant extension to the Petitioner vide its letter dated December 07, 2016. It is respectfully submitted that the Petitioner was faced with tremendous delays since it was only after the last extension by BESCOM was granted that PFC vide its letter dated December 16, 2016 addressed to M/s IndusInd Bank Limited, agreed to disburse a part of the sanctioned loan to the Petitioner. The project lenders were not agreeable to disburse any loan amount without the original duly approved PPA, as such, only when all the DISCOMs (HESCOM, MESCOM, GESCOM and BESCOM) agreed to grant extension for commissioning that PFC released the loan for the Project. Hence the Projects were all delayed on account of delay in approval of the PPAs by State Commission."*

In support of the above averments, the petitioner has produced letter dated 18.11.2016 written by PFC to the petitioner and another letter



dated 16.12.2016 written by PFC to the Manager, M/s IndusInd Bank Limited, New Delhi. Both these letters are produced in Annexure-K. In the letter dated 18.11.2016, PFC has dealt with the request made by the petitioner for insertion of extended commissioning dates of projects, allowed by different ESCOMs including the respondent in the loan papers and rescheduled the earlier terms for repayment and postponed the repayment of loan instalments to the newly extended date of commissioning of the projects. As per Annexure-R7 produced by respondent (BESCOM), it may be noted that the petitioner had executed some other PPAs with the other ESCCOMs apart from the PPA with respondent (BESCOM) for development Solar Power Projects, in different locations. The petitioner had applied for finance with PFC for all the projects. Pursuant to it, the PFC has sanctioned the loan in a single loan account. The other letter dated 16.12.2016 was written by PFC to the Manager of IndusInd Bank Limited, New Delhi, intimating the approval of arranging LoC with the terms and conditions stated therein. Nowhere, in these letters, it is stated that the projects lenders were not agreeable to disburse any loan amount without the production of original duly approved PPA. It is obvious that the petitioner had received original duly approved PPA about one and half years earlier to these letters. It is not the case of the petitioner that it had not produced the original duly approved PPA to the Financer until the extension of time for commissioning of the project by the concerned ESCOMs. Therefore, the averments made above that the project

lenders were not agreeable to disburse any loan amount without the original approved PPA is misleading and false.

- q) Even if it is assumed that the entire allegations of the petitioner are believed to be true, the entire period of 144 days of delay in handing over the PPA cannot be considered as a Force Majeure event. The RfP provides that the PPA executed by the developer and ESCOM would be vetted by KERC. The petitioner also admits that approval of the PPA is essential. The respondent (BESCOM) intimated the approval of PPA vide e-mail dated 25.05.2015 (Annexure-I) and requested the petitioner to appear before it for effecting the corrections/modifications directed by the Commission. The Authorized Signatory subsequently went on 06.06.2015 to attend the corrections/modifications and on the same day, the original PPA with endorsement of its approval by the Commission was handed over. The Commission also requires a reasonable time for scrutiny of the PPA. The delay in approval of the PPA had taken place as the KREDL had not followed some of the procedures before issuing RfP and it had also not submitted the required documents for adopting the tariff discovered in the bid proceedings. Number of corrections were also required in the PPA as noted in the approval letter dated 04.05.2015 (Annexure-R1 produced by the respondent). Therefore, the Commission is of the view that at least 30 days may be considered as the reasonable period for

approving the PPA after its receipt. This 30 days' period cannot be considered as delay in handing over PPA to the petitioner.

- r) In the petition, the averments made in respect of the unrest and riots caused due to Cauvery River Water Dispute are without any required particulars and facts. There is no averment made as to how that event affected the petitioner and prevented the progress of the project work. In the letters dated 17.09.2016 & 04.10.2016 (Annexure-L), the petitioner has stated that all transport vehicles carrying project equipment from Tamil Nadu to Karnataka or coming to Karnataka from any other State through Tamil Nadu were left stranded. But the petitioner has not produced any evidence to establish that it had booked vehicles for transporting any project equipment to the project site and when those vehicles arrived at project site. In the absence of such evidence, the petitioner cannot claim any Force Majeure event on that count for any period. Further in these letters, the petitioner has stated that due to fear and in the absence of proper transport, the working staff was not attending to the site from the commencement of disturbance. It may be noted that the project site was at Challakere taluk in Chitradurga district. The petitioner has not produced any evidence to show that there was no movement of public transport vehicles in and around the project site. Therefore, the Commission is of the view that the petitioner has failed to establish the Force Majeure event alleged by it due to

Cauvery River Water Dispute disturbances. The riots and disturbances elsewhere is not relevant to decide this question/fact.

s) For the above reasons, Issue No.2 is held in negative.

14. Issue No.3: Whether the respondent (BESCOM) proves that the delay in commissioning of the Solar Power Project in question was entirely due to delay in finalization of the project site?

a) Before considering Issue No.3, it is necessary to dispose of the Interlocutory Application (IA) filed by the petitioner requesting to reject the additional statement of objections filed by the respondent (BESCOM). The filing of additional statement of objections is opposed mainly on the grounds that the respondent (BESCOM) had not filed an application for requesting to receive the additional statement of objections and that there was an inordinate delay in filing the same. The respondent (BESCOM) filed objection to IA. The parties are also addressed their submission on this IA. It is true that the additional statement of objections is filed belatedly during the course of argument. It was necessary for the respondent (BESCOM) to file an application seeking permission to file the additional statement of objections. However, the delay in filing the additional statement of objections even during the stage of argument cannot be received if it is required for the purpose of determining the real questions in controversy between the parties. By way of additional statement of objections, the respondent (BESCOM) contended that there was

inordinate delay in identifying the lands required for the project, which really led to delay in commissioning of the project. The petitioner itself stated in its letter dated 24.06.2016 that it had to search and finalise the lands required for project at different places, thereby there was delay in finalising the lands required. The additional statement of objections merely contains those facts. Therefore, we are of the considered view that the additional statement of objections cannot be rejected. Accordingly, the IA filed by the petitioner is to be rejected.

- b) In the additional statement of objections, the respondent (BESCOM) has stated that the petitioner had changed the project location twice and ultimately filed application before KREDL on 03.02.2016 requesting to permit the change of location and accordingly KREDL permitted change of location on 17.02.2016. In support of it, the respondent (BESCOM) has filed Annexure-R7 dated 17.02.2016, the approval issued by the KREDL. In the additional rejoinder, the petitioner has not disputed the change of location of the project and finally identifying the lands at private Solar Power Park in Chitradurga district. The letter dated 24.06.2016 written by the petitioner to the respondent (BESCOM) [produced in Annexure-K] shows that the petitioner had to change the location thrice not merely twice as contended by the respondent (BESCOM) and that finally the required lands were identified in Chitradurga district and a sub-lease deed

dated 07.01.2016 was executed with the private Solar Power Project Developer. Therefore, it is properly established by the respondent (BESCOM) that there was delay in identifying the lands required for the project. Those facts are not disputed by the petitioner.

c) The question is whether such delay in identifying the lands led to delay in commissioning of the Solar Power Project. The petitioner contended that the delay in commissioning the project was due to delay of 144 days in handing over the approved PPA. That contention is found to be not established as noted in Issue No.2. Therefore, we have no hesitation in holding that the delay in commissioning of the project was entirely due to delay in finalising the project site.

d) For the above reasons, we hold Issue No.3 in affirmative.

15. Issue No.4: Whether the petitioner was liable to pay damages under Article 4.3 of the PPA for not achieving the Conditions Precedent within the time allowed?

a) Article 4.3 of the PPA provides for payment of damages by the project developer for the delay in fulfilment of any or all of the Conditions Precedent set-forth in Article 4.2 of the PPA within the period of 365 days as per Article 4.1 of the PPA from the date of execution of the PPA provided the delay has not occurred for any reasons attributable to the respondent (BESCOM) or due to Force Majeure event. In the present case, it is not established that the said

delay had occurred for any reasons attributable to the respondent (BESCOM) or due to Force Majeure event.

b) For the above reasons, we hold Issue No.4 in affirmative.

16. Issue No.5: In case of delay in commissioning the Solar Power Project beyond the Scheduled Commissioning Date, whether the said Project is liable for any reduced tariff as provided in Article 12.2 of the PPA?

a) The relevant provisions in this regard are at Article 12.1 and 12.2 of the PPA which read thus:

**“Article 12: - Applicable Tariff and Sharing of the CDM Benefits**

Article 12.1: *The Developer shall be entitled to receive the Tariff of Rs.7.05/kWh of energy supplied by it to BESCOM in accordance with the terms of this Agreement during the period between COD and the Expiry Date.*

Article 12.2: *Provided further that as a consequence of delay in Commissioning of the Project beyond the Scheduled Commissioning Date, subject to Article 4, if there is a change in KERC applicable Tariff, the changed applicable Tariff for the Project shall be the lower of the following:*

*i) Tariff as in Clause 12.1 above.*

*ii) KERC applicable Tariff as on the Commercial Operation Date.*

Article 12.3: xxxxxx

Article 12.4: xxxxxx

Article 12.5: xxxxxx”.

b) The learned counsel for the petitioner urged the following grounds in support of his contention that the tariff of Rs.7.05 per unit cannot be reduced to Rs.6.51 per unit:

(i) The tariff discovered through competitive bidding process and adopted by the Commission under Section 63 of the Electricity Act, 2003 cannot be varied for any reason.

(ii) Without prejudice to the above, the applicable tariff prevailing at the time of award of the project to the Consortium was “applicable tariff for the project”, as provided in Article 12.2 of the PPA.

(iii) On the principle of estoppel in the prevailing circumstances of the case, the tariff discovered and adopted at Rs.7.05 per unit could not be reduced.

c) Regarding the 1<sup>st</sup> ground:

The tariff discovered and adopted by the Commission pursuant to a competitive bidding process, is subject to the terms and conditions contained in the PPA executed between parties. The PPA itself provides for the lower tariff in certain events as provided in Article 12.2 of the PPA. At the time of signing the PPA or during the bidding process, the petitioner has not raised any objection for introduction of Article 12.2 of the PPA which provides for lower tariff in certain events. There is no term in the guidelines issued by the Central Government under Section 63 of the Electricity Act, 2003 or in the RfP, that in no case the tariff discovered and adopted under Section 63, could not be varied. Section 63, provides that notwithstanding anything contained in Section 62, the



Appropriate Commission shall adopt the tariff, if such tariff is determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. Therefore, this Section provides another mode of determination of tariff apart from the determination of tariff as provided under Section 62. Therefore, this ground cannot be accepted.

d) Regarding the 2<sup>nd</sup> & 3<sup>rd</sup> grounds:

- (i) In support of these grounds, the petitioner has relied upon the Generic Tariff Order dated 10.10.2013 and contended that this Generic Tariff Order was in force for the period from 01.04.2013 to 31.03.2018 and was applicable for the PPAs submitted before Commission in between these dates. The Consortium quoted the tariff of Rs.7.05 per unit, a price significantly lower than the Generic Tariff determined at Rs.8.40 per unit in the Generic Tariff Order dated 10.10.2013. The petitioner had no reason to believe that the agreed tariff would in any manner be changed by subsequent Generic Tariff Orders.
- (ii) The above contention has no legal basis. The competitive bidding is adopted to find out the lowest tariff by allowing competition among different developers. Therefore, in a case where a developer quotes lower tariff than the Generic Tariff prevailing during that period, cannot contend that the tariff discovered under Section 63 cannot be reduced to any amount by a subsequent Generic Tariff Order.

The Commission is empowered to suitably effect a change in the tariff determined earlier and its applicability, if there are substantial change in the circumstances for reducing or enhancing the tariff determined in the earlier Generic Tariff Order. The Commission is empowered and expected to take corrective measures due to any material change in the circumstances affecting the tariff. Therefore, there is no question of applicability of the principle of estoppel or any other reason preventing the Commission from determining a lower tariff, if the circumstances so warrant. Therefore, the Commission has in modification of its Generic Tariff Order dated 10.10.2013 decided to reduce the Generic Tariff applicable to Solar Power Projects in its Generic Tariff Order dated 30.07.2015.

- (iii) The learned counsel for the petitioner further submitted that the Generic Tariff Order dated 30.07.2015 specifically states that the applicability of this Order is for PPAs entered into on or after 01.09.2015 and getting commissioned during the period from 01.09.2015 to 31.03.2018. It is also pointed out that the present PPA was entered into on 13.01.2015 prior to the date of applicability of the said Generic Tariff Order dated 30.07.2015. On the other hand, the learned counsel for the respondent (BESCOM) submitted that “the changed applicable tariff for the project” stated in Article 12.2 of the PPA refers to the applicable tariff determined by the Commission as on COD. Further he submitted that as on COD of the

present project i.e., 13.12.2016, the applicable tariff determined by this Commission was Rs.6.51 per unit as per Generic Tariff Order dated 30.07.2015. We are of the considered view that the contention of the learned counsel for the petitioner cannot be accepted in this regard. The applicability of the Generic Tariff Order is in respect of PPAs entered into by the Developer and ESCOM in between the cut off period stated in the Generic Tariff Order but not for the PPAs entered into between parties as per the terms of bidding process under Section 63. Only in case there is delay in commissioning the project, as provided in Article 12.2 of the PPA, the lower of the tariff discovered or the tariff determined by the Commission as on COD is applicable. For determining the applicable tariff as on the COD one has to rely on the Generic Tariff Order prevailing on the date of COD. In the present case, such Generic Tariff Order prevailing on the date of COD was the Generic Tariff Order dated 30.07.2015.

- (iv) The learned counsel for the petitioner submitted that this Commission while deciding in *OP No.19/2016 on 14.12.2016 between Azure Sunrise Private Limited Vs. CESC* which would be the “KERC applicable tariff as on the Commercial Operation Date” has held that “In the Generic Tariff Order dated 30.07.2015 of this Commission, a tariff of Rs.6.51 per unit for Solar Photo-Voltaic Projects has been determined and this tariff will be applicable to the Projects entering into PPAs on or after 01.09.2015 and getting commissioned during the period from 01.09.2015 to 31.03.2018, for which PPAs have not been

*entered into prior to 01.09.2015. For the earlier period, this Commission by its Tariff Order dated 10.10.2013, had determined the generic tariff for Solar Photo-Voltaic Projects at Rs.8.40 per unit".* Therefore, the learned counsel for the petitioner contended that the PPA of the petition which was entered into on 13.01.2015, prior to 01.09.2015, the Generic Tariff Order dated 30.07.2015 or the rate of Rs.6.51 per unit mentioned therein will not be applicable in the present case, if Article 12.2 of the PPA is enforced. On the other hand, the learned counsel for the respondent (BESCOM) submitted that the above said contention is misconceived and incorrect for the reasons already submitted in earlier paragraphs.

- (v) We have gone through the facts and reasoning stated in OP No.19/2016 between *Azure Sunrise Private Limited Vs. CESC*. In this case, while dealing on Issue No.1, as to *"whether the decision of the Commission conveyed in its letter dated 01.12.2015 addressed to the CESC, intimating to incorporate the reduced tariff of Rs.6.51 per unit in the Supplemental Agreement dated 04.11.2015 and to re-submit the same for approval, is valid?"* This Commission made the general observations as to the applicability of Generic Tariff Orders for the projects entering into PPAs. Nowhere, it is observed or held either on Issue No.1 or in any other Issues that the tariff of Rs.6.51 per unit determined in Generic Tariff Order dated 30.07.2015, is not applicable for the PPAs entered into prior to 01.09.2015, executed

pursuant to competitive bidding process under Section 63 of the Electricity Act, 2003. In OP No.19/2016 CESC had submitted a Supplemental PPA dated 04.11.2015 for the approval of the Commission. The CESC had stated that it granted extension of 137 days for fulfilling the Conditions Precedent and achieving the Commercial Operation of the project, due to delay in handing over the original PPA after its approval by the Commission acting under Article 5.7 of the PPA. While processing the Supplemental PPA, the Office Note concluded that the CESC might be intimated to resubmit the Supplemental PPA duly revising it by incorporating the reduced tariff of Rs.6.51 per unit. This Office Note was relied upon and Commission approved the same and that decision was communicated to CESC. In the meanwhile, the developer had filed OP No.19/2016. During the argument in that case, it was pointed out that the Commission could not have directed to incorporate the reduced tariff of Rs.6.51 per unit. For this purpose, Article 5.7.4 of the PPA was relied upon. This Article states that as a result of extension of time for commissioning of the project, the Scheduled Commissioning Date and the Expiry Date newly determined shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purpose of PPA. That contention of the learned counsel for the petitioner in that case was accepted and it is held that the decision to enter into reduced tariff of Rs.6.51 per unit in the Supplemental PPA was incorrect. However, the Commission has

clearly pointed out while discussing on this issue that proper course was to verify the sufficiency of the reasons for the extension of time granted by CESC. Thereafter, on scrutiny of the evidence, the Commission held that there was no sufficient cause for extending 137 days, but the extension of time could have been only up to 25 days for achieving the COD. The finding on Issue No.1 arrived in OP No.19/2016 cannot be read in isolation without noting the conclusion reached by Commission to the effect that the proper course was to verify the sufficiency of the reasons for extension of time granted by the distribution licensee. The finding on Issue No.1 or the general observations made regarding the applicability of different Generic Tariff Orders for the PPAs to be executed cannot in any way be helpful to the present petitioner to contend that the reduced tariff of Rs.6.51 per unit cannot be applied for the delay in commissioning of the Solar Power Project. Whereas in the instant case extension was granted by the Respondent on 22.09.2016 and 07.12.2016 on condition as stated in the letters at Annexure-M & Annexure-O. Therefore, the finding given in OP No.19/2016 cannot be compared to the case on hand.

e) For the above reasons, Issue No.5 is held in affirmative.

17. Issue No.6: Whether the petitioner is liable to pay Liquidated Damages under Article 5.8 of the PPA for delay in supply of energy and if so whether the imposition of entire Liquidated Damages by the respondent (BESCOM) is improper?

a) The learned counsel for the petitioner submitted whether the claim is for the Liquidated Damages or for Unliquidated Damages, no pecuniary liability arises till the Court or Forum has determined the damages payable to the party complaining the breach of any term of the contract. Therefore, the learned counsel for the petitioner submitted that the respondent (BESCOM) without getting the claim determined towards Liquidated Damages before a competent Commission, can recover the Liquidated Damages agreed to under Article 5.8 of the PPA. In support of his preposition, the learned counsel relied upon the decisions in *Union of India Vs. Raman Iron Foundry Limited* [AIR 1974 SC 1265 at paragraph 9 and *State of Karnataka Vs. Shri Rameshwara Rice Mills (1987) 2 SCC 160* at paragraph 7. The copies of these judgments (published in Manupatra MANU/SC/0005/1974 and in SCC Online respectively) are produced in this case.

b) The learned counsel for the respondent (BESCOM) has not denied the above preposition of law. However, he contented that in a case where there is breach of term of the PPA regarding supply of energy, the distribution licensee has the right to claim the Liquidated Damages without leading any evidence in proof of the actual damages suffered due to the breach of such term. He submitted that in the case of supply of energy to the distribution licensee, it is very difficult to lead any evidence in proof of the actual damages sustained. Therefore, he submitted that the PPA would contain a term regarding payment of

Liquidated Damages pre-determined by the parties, for the breach of any particular term of contract. Further, he submitted that without requiring any evidence, the Commission has to presume the loss caused to the respondent (BESCOM) as agreed in the Liquidated Damages clause. In support of his contention, he relied upon the following decisions:

- (i) Construction and Design Services Vs. DDA [reported in (2015) 14 SCC 263] – para No.14 to 17;
- (ii) Bharat Sanchar Nigam Limited Vs. Reliance Communication Limited [reported in (2011) 1 SCC 394]; para No.47, 48 & 53;
- (iii) Oil and Gas Corporation Vs. Saw Pipes Limited [reported in (2003) 5 SCC 705] – para No.64, 66 to 68;
- (iv) Lanco Kondapali Power Limited Vs. Andhra Pradesh Regulatory Commission and Others [reported in (2015) SCC Online APTEL 140] – para No.51, 53 & 54.
- (v) PTC India Limited Vs. Gujarat Electricity Regulatory Commission (Appeal No.62 of 2013 of Hon'ble ATE, decided on 30.06.2014) – para No.47 & 48.

c) On perusal of the reasons and the findings given in the above decisions, we are of the considered view that the respondent (BESCOM) can claim the Liquidated Damages as per Article 5.8 of the PPA without leading any evidence in proof of loss sustained by it, due to non-supply of energy. In this regard, we may note para No.66 & 68 of the Hon'ble Supreme Court of India, judgment in Oil and Natural Gas Corporation Limited Vs. Saw Pipes Limited reported in (2003) 5 SCC 705 referred above which reads as follows:



Para – 66 “ *In Maula Bux case [(1969) 2 SCC 554, Maula Bux Vs. Union of India]the Court has specifically held that it is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in case of breach of some contracts it may be impossible for the court to assess compensation arising from breach.*”

Para – 68 From the aforesaid discussions, it can be held that:

“ (1) *Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.*

(2) *If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.*

(3) *Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before*

*he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.*

*(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."*

- d) In the case of Lanco Kondapali Power Limited Vs. Andhrda Pradesh Regulatory Commission and Others reported in (2015) SCC Online APTEL 140, referred above, the Hon'ble ATE in para 51 of its judgment has stated that in view of the difficulties in calculating the actual damages suffered by a party due to non-supply of electricity by another party, a pre-calculated Liquidated Damages on pre-estimated basis as agreed between the parties in the PPA for breach of contract, is enforceable.
- e) In this regard, the Commission notes that the summary of the principles stated in para No.43 of the judgment of the Hon'ble Supreme Court of India, reported in (2015) 4 SCC 136 in the case of *Kailash Nath Associates Vs. Delhi Development Authority and Another* is useful. The summary of the principles stated in paragraph 43 of this judgement reads as follows:

*“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:*

*43.1 Where a sum is named in a contract as liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.*

*43.2 Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia Section 73 of the Indian Contract Act, 1872.*

*43.3 Since Section 74 of the Indian Contract Act, 1872 awards reasonable compensation for damage or loss caused by a breach of contract, the damage or loss caused is a sine qua non for the applicability of the section.*

*43.4 The section applies whether a person is a plaintiff or a defendant in a suit.*

*43.5 The sum spoken of may already be paid or be payable in future.*

43.6 *The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensing with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.*

43.7 *Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”*

f) In the case of non-supply of energy by a generator to the distribution licensee, it is not possible to prove the actual damage or loss. Therefore, if the contract provides a genuine pre-estimate of damage or loss, the defaulting party is liable to pay the liquidated damages without proof of actual loss or damage.

g) It may be noted that the interpretation clause in Article 1.2.1 (w) of the PPA provides as follows:

“1.2.1 In this Agreement, unless the context otherwise requires,

(a) to (v) .....

(w) the damages payable by either party to the other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (the “Damages”); and

x) .....”

The petitioner has not produced any material to infer that the Liquidated Damages stated in Article 5.8 of the PPA is in the nature of penalty. On the other hand, the terms of the PPA would show that it is a genuine pre-estimate of the damages payable for non-supply of energy within the specified time.

h) For the above reasons, we hold Issue No.6 in affirmative.

18. Issue No.7: To which relief the petitioner is entitled to?

In view of the above findings, we hold that the petitioner is not entitled to any of the relief prayed for.

19. Issue No.8: What Order?

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

### **ORDER**

The petitioner is not entitled to any of reliefs prayed for in the petition. Accordingly, the necessary consequences under Article 4.3 & Article 5.8 of the PPA shall follow. The respondent (BESCOM) is at liberty to recover damages from the petitioner for delay in achieving the Conditions Precedent and to recover the Liquidated Damages for delay in commencement of supply of power to the respondent (BESCOM).

Sd/-

(SHAMBHU DAYAL MEENA)  
Chairman

Sd/-

(H.M. MANJUNATHA)  
Member

Sd/-

(M.D. RAVI)  
Member