

N/129/2017

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**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**  
**No.16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560052**

**Dated 29.05.2020**

**Present:**

Sri Shambhu Dayal Meena	:Chairman
Sri H.M. Manjunath	:Member
Sri M.D. Ravi	:Member

**O.P. NO.63/2017**

**BETWEEN:**

Messrs Red Earth Green Energy Private Limited,  
Kalpatharu Complex, Palya Gate,  
NH- 17, Devanahalli,  
Bengaluru-562110.

Represented by Authorised Signatory

..... **PETITIONER**

(Represented by M/s Crest Law Partners, Advocates)

**AND:**

1. The Karnataka Power Transmission Corporation Limited  
Cauvery Bhawan,  
Bengaluru- 560 001.  
[Represented by its Managing Director]

2. Hubli Electricity Supply Company Limited,  
Navanagar, P.B. Road,  
Hubbali-580 029.

Represented by its Managing Director

(R-1 represented by M/s Just Law, Advocates)

(R-2 represented by M/s Indus Law, Advocates) ....**RESPONDENTS**

**ORDERS**

1. The petition is filed by the petitioner under Section 86 (1) (f) of the Electricity Act,2003 Praying the Commission for the following reliefs;

(a) Approve the extension of time granted by the Respondent No.2 herein by a Letter dated 04.02.2017 produced herewith as Annexure—K, and

(b) Pass such other or further orders as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case, in the ends of justice.

2. The factual matrix in brief as narrated in the petition paras is hereunder: –

a. The petitioner Company incorporated under the Companies Act, 2013, has established a solar power plant with capacity of 1MWat Athani Rural village of Belagavi district.

b. The said solar power project was allotted to one Mr. Prakash BhimaraoSindagi, Solar Power Developer/(SPD) by the Karnataka Renewable Energy Development Limited/(KREDL) under the Solar Policy of the Government of Karnataka and in compliance of Government Order bearing No. EN 62 VSC 2014, dated 26.08.2014. KREDL had issued a Letter of Award dated 16.03.2015 bearing No. KREDL/07/LAND OWNERS-189/2015/REG.No.256/796

with an instruction to execute the PPA with HESCOM within 120 days. The said SPD and the HESCOM entered into the Power Purchase Agreement (PPA) (Annexure A), dated 24.06.2015.

- c. The said solar power project was under segment 1, category 1 of the Solar Power Policy 2014-21 of the Government of Karnataka. It was to promote solar energy projects preferably by land owning farmers with a minimum capacity of 1 MWp and maximum capacity of 3 MWp per land owning farmer in the State for sale of power to ESCOMs. As per Article 12.11(i) of the PPA, the SPD formed a Special Purpose Vehicle (SPV), under intimation to the HESCOM and as per Assignment Deed dated 16.06.2016 M/s. Red Earth Green Energy Private Limited, the Company/petitioner, took over all the rights, responsibilities, obligations, liabilities, etc., of the SPD for valid consideration. Accordingly, the Supplemental PPA dated 16.06.2016 (Annexure-B), was entered into between the petitioner and the HESCOM.
- d. As per Article 1.1 (xiv) of the PPA, the effective date would be 24.06.2015, the date of signing the PPA and as per Article [1.1 (xxxi) the scheduled commissioning date would be 24.12.2016/18 months from the effective date and it was not achieved due to delays not attributable or within in the control of the petitioner.

- e. The petitioner requested on 09.06.2016 for approval of evacuation. The KPTCL initiated action on 09.08.2016 by addressing a letter to HESCOM to process petitioner's application for evacuation (Annexure-C). On 29.08.2016, the HESCOM's Nodal Officer was directed to report on feasibility of evacuating 1 MWp from the petitioner's power plant to the existing 33/11 KV MUSS Sankonatti. It was opined that it was better to evacuate solar power to the existing 220/110/11KV R/S Athani rather than 33/11 KV MUSS Sankonatti. (Annexure- D). Accordingly, the petitioner signed an addendum to the PPA on 29.09.2016 as for effecting the change of evacuation point from Sankonatti to Athani. (Annexure-E).
- f. The petitioner paid the demanded additional amount Rs.57,500 towards evacuation of power from Athani Sub-station on 7.10.2016 (Annexure -F). KPTCL granted the tentative evacuation approval to the petitioner, on 16.11.2016 (Annexure G), stating that after acceptance of the scheme by the petitioner, the same will be regularized and the Regular evacuation scheme will be conveyed. Thus, there was a delay of about 5 months in granting evacuation approval by the Respondents.
- g. The petitioner had to use switchgear under specification, for commissioning the plant and hence placed the order on

22.10.2016 but it was delivered only on 07.01.2017 with a delay of about 3 months(Annexure H).

- h. The petitioner could not commence the generation from the plant within the SCOD due to change in power evacuation from SankonattiSub-station to Athani Sub-station and hence, the request of the petitioner vide letter dated 09.12.2016 (Annexure J) to extend the SCOD by 6 months was granted by HESCOM, vide letter dated 04.02.2017 as per clause 2.5 and Article 8 of PPA (Annexure K).
- i. The petitioner requested by a letter dated 25.01.2017 (Annexure L) to synchronize the plant and start evacuation of power by utilizing a spare bay available at Athanisub station to meet the deadline and the said permission was granted on 08.02.2017 by the 1<sup>st</sup> Respondent (Annexure M).
- j. The petitioner commissioned the plant on 27.03.2017(Annexure N), after the evacuation lines were set which resulted in delay of 3 months from SCOD.
- k. The delay was solely due to the delay in obtaining NOC/Approvals from authorities and change of evacuation to Athani Receiving station from Sankonatti Sub-station.

l. On 13.04.2017, HESCOM informed to the petitioner to approach the Commission for seeking approval to the extension of time for the SCOD granted by the HESCOM (Annexure-P), in view of the clarification issued by the Commission dated 05.04.2017. Hence, this petition is filed.

m. The grounds urged by the petitioner are:

- (i) A combined reading of the provisions of the PPA at Articles 2.5, 2.5.1, to 2.5.7, Article 8.3 (i) to (x), (b) (i) to (v), clearly shows that the delay in commissioning of the plant was due to the reasons beyond the control of the petitioner.
- (ii) The petitioner requested for evacuation approval on 09.06.2016 and the same was granted on 16.11.2016 due to the change in evacuation point from Sankonatti to Athani. Thus, there is a delay of about 5 months.
- (iii) Though HESCOM granted extension of 6 months' time, the petitioner commenced the operation within 3 months on 27.03.2017 itself. The petitioner was diligent in its operation and in reporting compliances in time, but could not achieve the SCOD, due to change of evacuation point which are not within its control. The Respondent-2 extended the SCOD considering the delay in obtaining legal approvals as a 'Force Majeure' event

under clause 8.3 (a) (vi) of the PPA, vide letter of extension of SCOD dated 04.02.2017.

(iv) Though the petitioner was assigned the project by the SPD after a year of signing of PPA, it was diligent in obtaining all the legal requirements and tried to commission the plant within the SCOD. If not for the issue of change in evacuation point to Athani, the petitioner was ready to commence the operation of the plant on time.

3. The Advocate for petitioner has submitted an affidavit dated 20.11.2018, sworn by Sri Prakash BhimaraoSindagi (SPD) wherein, he has deposed that he had filed an application on 25.02.2016 in the Deputy Commissioner's Office, along with relevant documents and a copy of amendment to Karnataka Land Revenue (Amendment) Act,2015, seeking deemed conversion of land. Even after waiting for two months and regular follow up on the progress, no action was taken in the D.C's office. Therefore, he again approached the D.C's Office, and was informed to submit a fresh application for conversion along with clearances from various Departments such as; Irrigation, PWD, HESCOM and other Local Bodies. In last week of April 2016, he was informed that the application for land conversion has to be submitted on-line only. Thus, he applied once again for conversion of land on 27.04.2016 to the Deputy Commissioner (Annexure-X). Finally, his application was processed by the D.C's Office and Additional D.C. wrote a letter dated 17.5.2016 to

the Tahsildar, Athani asking to submit a report with respect to deemed conversion of land. In turn, the Tahsildar, Athani submitted his report on 24.05.2016 and Deputy Commissioner, Belagavi issued conversion order on 24.06.2016, after collecting the fee (Annexure-S). As this process took considerable time, it delayed in applying loan to the financial institutions and project could not go on as per planned time schedule.

4. Upon issuance of Notice, the Respondents appeared through their Counsel. The 1<sup>st</sup> Respondent/KPTCL has filed the objections denying the allegations as untenable. The gist of the objections is as follows:

- a. The petitioner has not prayed any relief against the KPTCL, but has made several bald allegations, and having failed in its obligations, because of its own wrongs, does not deserve to get the reliefs as prayed for and hence the petition is liable to be dismissed.
- b. The petitioner who was aware of the terms and conditions of the PPA being unable to complete the project within the time frame, is seeking approval for the extension of SCOD granted by HESCOM, contending that the delay was because of force majeure event, namely change in the receiving substation from Sankonatti to Athani Sub-station.
- c. The petitioner has failed to achieve the conditions precedent within 365 days from the Effective Date due to its own belated actions. The



petitioner sought evacuation approval on 09.06.2016 (Annexure R1), with a delay of one year after execution of PPA. The said request was received by KPTCL on 13.06.2016. This delay of one year has not been explained by the petitioner.

- d. The petitioner requested for evacuation of power from 33/11KV Sankonatti on 09.06.2016. All applications for evacuation of power from 33/11KV substations have to be processed by the concerned ESCOM. Therefore, KPTCL vide its letter dated 16.06.2016 forwarded the petitioner's application to HESCOM and again vide letter dated 09.08.2016 reminded to process the petitioner's application, informing to collect necessary documents directly from the applicant.
- e. On 29.08.2016, the Assistant Executive Engineer (El.), Athani after spot inspection opined that, since the petitioner's plant is situated far away from 33/11KV MUSS Sankonatti, it would be appropriate to evacuate power from Athani Sub-station and accordingly, on 29.09.2016, an Addendum to PPA was executed incorporating the change in receiving station from Sankonatti to Athani.
- f. In response to HESCOM's letter dated 04.10.2016, on 07.10.2016, the KPTCL directed the petitioner to pay necessary fee for processing and after the petitioner made payment on 07.10.2016, the KPTCL granted tentative evacuation approval on 16.11.2016. On 18.11.2016, the petitioner accepted the tentative evacuation approval.

- g. The KPTCL has acted diligently to facilitate evacuation of power from the petitioner's plant. The petitioner has failed to act in a bona fide manner towards obligation under Article 4.1(e) of the PPA, to execute the project in a timely manner through prudent utility practices. The delay can only be attributed to the petitioner.
- h. The petitioner placed purchase order for switch gear under specification on 22.10.2016, with delay of nearly 16 months after executing the PPA.
- i. The petitioner was responsible for identifying suitable substation and carrying out evacuation assessment study with respect to connectivity of the project to the grid, so as to meet the timelines for commissioning of the project and failed in performing its obligations. It is settled law that a party cannot take advantage of its own wrong. The petitioner cannot prevent the covenants of the contract being enforced.
- j. The Respondent No. 2/HESCOM has not filed the objection statement but filed an affidavit on 1.8.2019, the gist of which is as follows:
  - (i) the petitioner being unable to commission the project on time, requested for extension of time by a period of 6 months. As per the GoK letter vide EN/75/VSC/2016 dated 24.11.2016, the HESCOM formed a Committee and the said committee considered the request of the petitioner for the following reasons:

- With respect to the land conversion, the date of submission of application was 27.04.2016 and the date of conversion was 23.06.2016.
  - With respect to the tentative Evacuation Approval, the application was submitted on 07.10.2016, the date of approval of the KPTCL was 16.11.2016.
  - With respect to the Regular Evacuation Approval, the date of submission of acceptance was 18.11.2016 and the date of approval was 19.11.2016.
- (ii) After discussions and scrutiny of all the reports sought from the respective Executive Engineers (El.), O & M Divisions, the Committee decided to accord approval for extension up to six months from the date of SCOD clearly mentioning that all other terms and conditions of the PPA shall remain unaltered.
- (iii) As per the letter dated 16.03.2017 of the Commission, the Respondent advised the petitioner to file a petition before the Commission with all relevant grounds / documents for seeking approval for the extension of the Commissioning Date. The HESCOM has requested the Commission to consider the above facts and pass appropriate orders.

5.From the rival contentions and pleadings and the documents produced by the parties and also submissions made by them, the following issues arise for our consideration:

Issue No.1: Whether the petitioner has established sufficient grounds for approval to the extension of Scheduled Commercial Operation Date in its favour as granted by the HESCOM on 4.2.2017?

Issue No.2: If issue No.1, is held either in affirmative or negative, what should be the consequences?

Issue No.3: What Order?

After considering the submissions of the parties and the pleadings on record, our findings on the above Issues are as follows:

6.Issue No.1: Whether the petitioner has established sufficient grounds for approval to the extension of Scheduled Commercial Operation Date in its favour as granted by the HESCOM on 4.2.2017?

6(a)Before proceeding to consider this issue, we may note that relevant part of the Articles of the PPA dated 24.06.2015, which deals with various provisions: -

Article 1.1(xiv) "*Effective Date*" shall mean date of signing of this Agreement by the parties.

Article 1.1 (viii) "*Commercial Operation Date*" with respect to the project shall mean the date on which the project is available for commercial operation as certified by HESCOM/ KPTCL as the case may be.

Article 1.1 (xxxi) "Scheduled Commissioning Date" shall mean 18 (Eighteen) months from the effective date.

Article 2 – Conditions Precedent:

Article 2 -says that the obligations of HESCOM and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.

Article 2.1.1(i)The SPD shall obtain all permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the project.

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

(a)The DPR to HESCOM and achieve financial closure and provide a certificate to HESCOM from the lead banker to this effect.

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

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

Article 2.1.2 -SPD shall make all reasonable endeavours to satisfy the Conditions Precedent within the time specified and HESCOM shall provide to the SPD all reasonable

cooperation as may be required to the SPD for satisfying the Conditions Precedent.

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

Article 2.2 – Damages for delay by the SPD;

Article 2.2.1 - In the event that the SPD does not fulfil any or all of the Conditions Precedent set forth in Clause 2.1 within the period of 365 days and the delay has not been occurred for any reasons attributable to HESCOM or due to Force Majeure. The SPD shall pay to HESCOM damages in on amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfilment of such Condition Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days. HESCOM at its discretion may terminate this Agreement.

Article 2.5 -Extensions of Time:

Article 2.5.1-In the event that the SPD is prevented from performing its obligations under Clause 4.1 by the Scheduled Commissioning Date due to:

- (a) Any HESCOM Event of Default; or
- (b) Force Majeure Events affecting HESOM; or
- (c) Force Majeure Events affecting the SPD.

*Article 2.5.2-The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than 'day for day' basis, to permit the SPD or HESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or HESCOM, or till such time such Event of Default is rectified by HESCOM.*

*Article 2.5.3- In case of extension occurring due to reasons specified in clause 2.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (six) months.*

*Article 2.5.4 -In case of extension due to reasons specified in Article 2.5 (b) and (c), and if such Force Majeure Event continues even after a maximum period of 3 (three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 9.*

*Article 2.5.5 -If the Parties have not agreed. Within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 10.*

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

*Article 2.5.7 -Liquidated damages for delay in commencement of supply of power to HESCOM:*

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

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

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

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

*Article-4.1(a) The SPD shall construct the Project, the interconnection facilities and metering arrangements at the point of delivery of power as approved by STU/ HESCOM.*

*(b) The SPD shall undertaking by itself or by any other person acting on its behalf, as its own cost, construction/up-gradation of (a)the Interconnection facilities, (b) the transmission lines; and (c) metering arrangements with protective gear as per the specification and requirements of STU/HESCOM, as notified to the SPD.*



(c) The SPD shall achieve schedule date of completion and commercial operation within 18 months from the effective date.

Article 5.1 of the PPA, which provides for the applicability of the tariff, reads thus:

"5.1 Tariff payable:

The SPD shall be entitled to receive the Tariff of Rs.8.40 (Rs. Eight Paise Forty only) per kWh based on the KERC tariff order S/03/1 dated 10.10.2013 in respect of SPD's solar PV projects in terms of the agreement for the period between COD and the Expiry Date. However, subject to Clause 2.5, if there is a delay in commissioning of the project beyond the Scheduled Commissioning Date and during such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects shall be lower of the following:

(i) Rs.8.40/- per kWh;

(ii) Varied tariff applicable as on the date of commercial Operation."

Article- 8.1 - Force Majeure Events:

Article 8.2. - envisages that an Affected party means HESCOM or the SPD whose performance has been affected by an event of Force Majeure.

Article 8.3 (a) Neither party shall be responsible or liable for a deemed in breach hereof because of any delay or failure in the performance of its obligations to pay money due prior to occurrence of Force Majeure events under this Agreement or

*failure to meet milestone dates due to any event or circumstances beyond the reasonable control of the following;*

*Xxx*

*Xxx*

*Xxx*

*(vi) Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal approvals;*

*Article 8.4 – envisages exclusion provisions a party's obligation due to a Force Majeure events.*

*Article 10.3: Dispute Resolution:*

*10.3.1- If any dispute is not settled amicably under clause 10.2 the same shall be referred by any of the parties to the KERC for dispute resolution in accordance with the provisions of the Electricity Act, 2003.*

6 (b) It is noted that KREDL issued a Letter of Award dated 16.3.2015 to Sri Prakash Bhimarao Sindagi with instructions to execute the Power Purchase Agreement with HESCOM within 120 days. Sri Prakash Sindagi executed the PPA on 24.6.2015 with HESCOM (Annexure-A). He took about a year to find out a Special Purpose Vehicle (SPV) to execute the project. As per Article 12.11 (i) of PPA, the SPD has an irrevocable right to form a SPV at any point of time after the date of execution of PPA under intimation to the HESCOM. The SPV, a company, M/s. Red Earth Green Energy Private Limited, was formed with the object of construction, maintaining and operating the solar power project and this Company took over all the rights responsibilities, obligations, liabilities of the SPD for valid consideration, and entered into a Supplemental PPA with HESCOM

on 16.06.2016. This act of Sri Prakash BhimaraoSindagi (SPD) would show that he took about one-year period to find the SPV, even though, he was well aware of the fact that the project has to be commenced within 18 months' period and that the Conditions Precedent have to be achieved within 365 days from the signing of PPA. He has not notified HESCOM in writing at least once a month on the progress made in satisfying the Conditions Precedent as mandated under Article 2.1.3 of the PPA. Hence, he has failed to adhere to the Prudent Utility Practices as envisaged under the provisions of the PPA. The SPD cannot shift his responsibility towards Respondents stating that they did not accord the required approvals in time, and this caused delayed in commissioning of the project.

6 (c) Allegations are made by the petitioner that the Respondent No.1/ KPTCL has taken lot of time in providing the temporary power evacuation approval and regular evacuation approval to its plant which resulted in delay in commencement of its plant. A letter dated 09.06.2016 was written by Sri Prakash B Sindagi to the Chief Engineer, KPTCL requesting to provide a feasibility report to evacuate the power from the proposed solar power plant through 220/110/11 kV power sub-station near Athani(Annexure-R1). We note here that the petitioner and the Respondent-1 have mentioned in their respective pleadings that initially evacuation was sought from Sankonatti Sub-station. However, the application dated 09.06.2016 produced as Annexure R-1 reveals that the request for evacuation was made from Athani Sub-station. Anyhow, the date of the application is 09.06.2016 and this is not disputed. This shows that the SPD made the application to KPTCL for seeking evacuation approval only on 09.06.2016 i.e., after one-year period, after the execution of PPA. This delay has not been explained by the petitioner. It would be appropriate to analyse the sequence of events to examine as to whether there was any inordinate delay on the part of KPTCL to give approval for evacuation of power.

- i) On 09.06.2016, the petitioner made application for evacuation of power, which was received in the office of KPTCL on 13.06.2016.
  - ii) On 16.06.2016, KPTCL forwarded the application to HESCOM with a request to process the application after collecting the requisite fee directly from the petitioner.
  - iii) On 29.08.2016, Assistant Executive Engineer, Athani, conducted the inspection and opined that since the petitioner's plant is situated far away from 33/11KV MUSS Sankonatti, it would be appropriate for the petitioner to evacuate power from Athani Sub-Station.
  - iv) Thereafter, an Addendum to PPA was executed on 29.09.2016 incorporating change in receiving station from Sankonatti to Athani.
  - v) In response to HESCOM's letter dated 04.10.2016, the KPTCL directed the petitioner on 07.10.2016 to pay necessary fee for processing its request to evacuation of power.
  - vi) On 16.11.2016, KPTCL granted tentative evacuation approval and the petitioner accepted the tentative approval on 18.11.2016.
- 6 (d) From the above facts, it is very clear that KPTCL, has not delayed in giving evacuation approval and facilitated the petitioner in issuing necessary approvals within a reasonable time. Article 4.1(b) casts obligation on the petitioner to construct / up-grade of the

interconnection facilities and transmission lines and operate and maintain the project in accordance with the Prudent Utility Practices as mandated under Article 4.1(e) of the PPA. It is also a fact that the petitioner has made an application for evacuation of power after lapse of about one year and failed to act to execute the project in timely manner. Therefore, we are of the opinion that any delay in commissioning of the solar power plant can only be attributed to the petitioner.

- 6(e) It is contended by the petitioner that there was delay in obtaining Switchgear from Mysore Electrical Industries Limited (MEI) which has also resulted in delay of commissioning its project. It is noted that the Petitioner has placed purchase Order for switchgear to MEI on 22.10.2016, nearly 16 months after executing the PPA (Annexure- H). It is observed that as per Article 4.1(b) of the PPA, it is the obligation of the SPD/Petitioner to procure metering arrangements with protective gear as per specifications and requirements of KPTCL. Therefore, the allegations made against MEI are not tenable.
- 6 (f) It is contended by the SPD in his affidavit that the Deputy Commissioner's Office did not give clear information regarding the procedure to apply for land conversion and no action was taken on his application submitted on 25.2.2016; that the Deputy Commissioner's office took four months to give land conversion permission and hence, he could not able to apply to financial institutions for sanctioning of loan to his project, which has caused delay in commissioning of the plant along with other reasons.
- 6(g) It is noted that the all the documents were not attached to the application of the SPD dated 25.02.2016 addressed to the Deputy Commissioner, Belagavi District requesting for conversion of the agricultural land. It appears that without documents, the application

was not processed. Hence, another application was submitted by the petitioner on 27.04.2016, which was received in D.C's Office on 05.05.2016 (Annexure-X). On 17.05.2016, the Additional Deputy Commissioner, Belagavi has sent a letter to Tahsildar, Athani along with relevant documents to conduct spot inspection, and verify certain aspects mentioned in the letter and send his report within 3 days (Annexure Z). On 24.05.2016, the Tahsildar, Athani sent his report along with recommendations for conversion of land. On 30.05.2016, Additional Deputy Commissioner, Belagavi wrote a letter to Sri Prakash B Sindagi and others stating that in the column No.11 of RTC of the said land has been shown as mortgaged to the Scheduled Castes & Scheduled Tribes Development Corporation, therefore, a certificate as to whether it violates the provisions of the Karnataka Scheduled Castes And Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act,1978 has to be furnished from SC& ST Development Corporation within 3 days. After examination of the report received from the Tahsildar, Athani, Assistant Commissioner, Chikkodi Sub-division and concerned authorities, the Deputy Commissioner, Belagavi issued the land conversion order on 24.06.2016 (Annexure-S).

6 (h) It could be seen from the above, that after a lapse of about a year from the date of signing of the PPA, the SPD has applied for conversion of agricultural land to the Deputy Commissioner's Office. The SPD has alleged that the D.C. Office took two months' time. It could be seen from the records that the land conversion Order was issued within 2 months' time and there was no inordinate delay on the part of Revenue Department in granting land conversion order as alleged by the SPD/petitioner. The Deputy Commissioner has to examine various provisions of the Karnataka Land Revenue Act, the Karnataka Land Reforms Act and Rules made thereunder and to get concurrence from various departments before issuing the land conversion order. It is the

responsibility of the SPD/ petitioner to obtain all clearances and approvals, whether statutory or otherwise as required to execute the project as mandated under the Clause 2.1.1(i) of the PPA in order to achieve the Conditions Precedent. Therefore, we are of considered view that delay in issuing land conversion order cannot be attributable to Revenue Department. In view of above reasons, we are of the opinion that the petitioner has failed to prove grounds made out above, for seeking of 6 months' time extension of SCOD as granted by the Respondent No.2.

- 6 (i) Allegations are made by the petitioner that the solar power plant could not be commissioned within the scheduled commissioning date, only due to delay caused by various authorities in issuing permissions and legal approvals and therefore, the delay caused in obtaining evacuation approval from KPTCL and land conversion approval from the Deputy Commissioner, have to be considered as "Force Majeure Events" under Clause 8.3 of the PPA.
- 6 (j) It is evident that the SPD had applied for power evacuation approval to KPTCL after lapse of one year's period from the date of execution of PPA for evacuating 1MW solar power at Sankonatti 33/11 KV MUSS, which was subsequently found to be 7.5 Kms away from the proposed solar power plant and there was corridor problem for construction of 11 KV lines from the point of proposed solar plant to existing 33/11 KV MUSS Sankonatti. Therefore, the Assistant Executive Engineer, 33 KV Station & Lines, Athani had opined that it is better to evacuate solar power to the existing 220/110/11kv Receiving Station Athani rather than 33/11kv MUSS Santkonatti. The SPD had not taken the timely action to place order for procurement of Bay Control Unit with relay panel under 61850 protocol and Switchgear (Annexures-L &H). It is essential that before issuing evacuation approval, KPTCL requires technical scrutiny of the proposal

in conformity with Electricity Grid Code and fulfilment of Technical Specifications of KPTCL. Moreover, when a time line of 365 days is provided in the PPA for getting all approvals, the delay by the petitioner, in applying and in performing other obligations on its part and thereafter, attributing the delay to the authorities does not fall under Force Majeure Clause of Article 8.3 of the PPA as claimed by the petitioner. Hence, it is not acceptable.

- 6 (k) It may be seen from the proceedings of the Technical Committee Meeting held on 12.01.2017 under the Chairmanship of Technical Director, HESCOM, wherein 23 proposals including the petitioner were considered for extension of time on the basis of requests made by the solar power developers stating that they did not receive the required approvals in time from HESCOM and KPTCL, therefore, extension of 6 months is to be granted to complete their projects. The Technical Committee perused the relevant files and field reports received from concerned Executive Engineer, O& M Division and came to a conclusion that there is need to invoke the provisions of Article 2.5 and Article 8 of the PPA and finally decided to extend 6month time from the date of Scheduled Commercial Operation Date, as provided under Article 2.5.3 of the PPA. It could be observed from the aforesaid proceedings, which would show that Technical Committee did not go into the details as to whether the Developers have complied with the provisions of Article 2 of the PPA and fulfilled the Conditions Precedent within 365 days and also whether the developers notified HESCOM in writing on the progress made in satisfying the Conditions Precedent as per terms and conditions of PPA. Whether failures to meet the milestone dates have occurred due to any event or circumstances which were found to be beyond the reasonable control of the developers, was not examined. It is evident from the proceedings of the Technical Committee that no specific findings made on the non-performance of obligations on the part of KPTCL, MEI and Revenue Department which



caused inordinate delay in giving technical and legal approval. Moreover, the Technical Committee has recommended the extension of time which varies from 20 days to 120days. In the present case, it was recommended for 105 days (Serial Number 14 of the proceeding, Document No-1). In view of above, an inference can be drawn that the Technical Committee has recommended the extension of time for commissioning of the petitioner's project in a routine manner without examining the legal implication on higher tariff payable to the petitioner and in turn which would affect adversely to the consumers. On the basis of recommendation of the technical committee, the General Manager (Tech) HESCOM has issued a letter dated 04.02.2017 to Sri Prakash Sindagi (SPD) stating that keeping in view of provisions of clause 2.5 and Article 8 of the PPA, the time extension was allowed for 6 months from the date of Scheduled Commercial Date for completion of 1 MW solar power project, however, the other terms and condition of PPA will remain unaltered.

6 (l) In view of above, we are of the considered opinion that the petitioner has failed to establish the grounds including Force Majeure Events on which it got 6 months' extension from the date of Schedule Commercial Operation Date from the General Manager(Tech)HESCOM vide his letter dated 04.02.2017. Therefore, the grounds made in the Main Petition and grounds made in Affidavit dated 20.11.2018 submitted by Sri Prakash BhimaraoSindagi (SPD) are not tenable and liable to be rejected.

6 (m) In view of above stated reasons, we hold Issue No.1 in Negative.

7. Issue No.2:If Issue No.1 is held either in affirmative or in negative, what should be the consequences?

i) Issue No.1 is held in negative and thereby the petitioner is not entitled to extension of time as granted by the HESCOM /

Respondent No.2. It may be noted that in the event that the SPD does not fulfil any or all of the Conditions Precedent set forth in Clause 2.1 within 365 days and delay has not occurred for any reasons attributable to HESCOM or due to Force Majeure, the SPD would be liable for payment of damages under Article 2.2.1 and for payment of liquidated damages for delay in commencement of supply of power to HESCOM under Article 2.5.7 of the PPA respectively. Further, as a consequence of delay in commissioning of the project beyond the Scheduled Commercial Operation Date, the solar power project would be liable for lower tariff, if any, as provided in Article 5.1 of the PPA dated 24.06.2015. In the present case, it was found that the petitioner has failed to establish the "Force Majeure Events" to claim the extension of time for achieving the Conditions Precedent or Scheduled Commercial Operation Date. The Solar power Project was commissioned on 27.03.2017 as against 24.12.2016, the Scheduled Commissioning Date. The tariff agreed in the Original PPA is Rs.8.40 per KWh. The Applicable KERC Tariff is Rs.6.51 per KWh as on Commercial Operation Date i.e., 27.03.2017 is Rs.6.51 per KWh as determined by the KERC vide Tariff Order dated 30.07.2015. It could be seen from the Supplemental PPA dated 16.06.2016, wherein only few additional Clauses were added and other Clauses remained same, this fact was also mentioned by the General Manager(Tech) HESCOM in his Letter dated 04.02.2017(Annexure-K). It means the petitioner would be entitled to get varied tariff as on the date of commercial operation as per Article 5.1(ii) of the PPA dated 24.06.2015.

- ii) It may be appropriate to mention that this Commission has observed that in certain instances, ESCOMs have granted extension of time to achieve commercial operation date of the solar projects

from the original agreed scheduled commissioning date without altering the terms and conditions of the PPA. Therefore, this Commission had written a Letter No. KERC/S/F-31/Vol-AS/16-17, dated 16.03.2017 to the Managing Director of all ESCOMs stating that the extension of time by ESCOMs without altering the terms of the Original PPA will have impact on the Tariff payable by the ESCOMs, the Commission has the jurisdiction of legal scrutiny of validity of the extension of time granted. The solar power are expected to be completed in time bound manner in order to ensure that not only the anticipated solar power generator accrues to the grid to meet the planned demand but also to ensure that the capital cost of the developer is as per assumption made for calculating the Tariff and any extension of time will have far reaching tariff implication affecting the end consumers in view of rapid changes in the market conditions of photovoltaic plants, resulting in substantial reduction in their cost. Extension should not be considered as a routine exercise except under extra-ordinary conditions to be proved by the project developer within the scope of the PPA. Therefore, all ESCOMs were informed, not allow any extension of time beyond the Scheduled Commissioning Date, if any, as per the PPA without obtaining prior opinion of this Commission.

- iii) It may be noted that Article 2.5 of the PPA empowers the Respondent/ HESCOM to grant the extension of time for commissioning of the solar project of the petitioner, on the ground of Force Majeure events, but it should be proved by the petitioner with documentary evidence under the provisions of Article 8 of the PPA. It is not in dispute that, if the commissioning of the Solar Power Project does not take place within the specified time, the SPD would be entitled to a lower tariff, applicable as on the date of the commercial operation of the Project. Therefore, the indiscriminate

extension of time, on the purported ground of a *Force Majeure* Event, affects the tariff, payable under the PPA, for the energy supplied. In the present case, as per the term of the PPA, the Project was required to be commissioned, on or before 24.12.2016, however, the Project was commissioned at a later date i.e. 27.03.2017. It is also not in dispute that, the tariff payable for the Solar Power Projects was reduced during the subsequent Control Period. Therefore, the Respondent (HESCOM), accepting or consenting the *Force Majeure* Events, claimed by the Petitioners on insufficient grounds or otherwise, would affect the tariff payable under the PPA, which in turn, would affect the interest of the consumers. In such an event, the Commission has a duty to intervene and satisfy itself, as to whether the claim of the Petitioners for the extension of time, on the ground of the *Force Majeure* Events, is properly met or not, irrespective of the satisfaction of the Respondent /HESCOM on the said fact.

iv)The above view that we have taken, is based on the principles stated in the judgment rendered by the Hon'ble Supreme Court of India, in the case of *All India Power Engineer Federation and Others –Vs- Sasan Power Limited and 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 would adversely affect the tariff agreed to under the PPA. The principles are stated thus:

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

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

Further, it is held that:

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

In the 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 case would squarely apply to this 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.

- (v) This Commission has the exclusive jurisdiction to determine the tariff for supply of electricity by a Generating Company to a Distribution Licensee, as per the provisions of Sections 61 to 64 of the Electricity Act, 2003 and the relevant Regulations framed,

thereunder. Generating Company is prohibited from recovering a price or charge exceeding the tariff determined by the Commission. 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 (HESCOM) to extend the time for commissioning of the Project by the Petitioners, on the ground of *Force Majeure* Events, is contrary to the provisions of the Electricity Act, 2003, 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 in existence or otherwise of such an event which affect the tariff.

- (vi) In view of above, we are of the opinion that the petitioner has failed to establish the grounds on which it got approval to the of extension of time of Scheduled Commercial Operation Date from HESCOM vide letter dated 04.02.2017 and it is also established that HESCOM has extended time extension in routine manner without justifying its action. Therefore, the letter dated 04.02.2017 issued by the General Manager (Tech) HESCOM is liable to be set aside. This solar power project ought to have commissioned on 24.12.2016, but has commissioned on 27.03.2017, therefore, it is entitled to get reduced tariff of Rs.6.51 per Kwh, tariff applicable as on the date of commercial operation as per Clause of 5.1 of the PPA dated 24.06.2015 as determined by the KERC vide Tariff Order dated 30.07.2015.

(vii) We rely upon the Judgement of Hon'ble Supreme Court of India, in Civil Appeal No.1220 of 2015 in Gujarat Urja Vikas Nigam Limited vs. EMCO Limited and another, decided on 02.02.2016, wherein it has held as follows:

"31. Apart from that both the Respondent No.2 and the Appellate Tribunal failed to notice that the 1<sup>st</sup> Respondent conveniently ignored one crucial condition of PPA contained in the last sentence of Para 5.2 of the PPA: -

"In case, Commissioning of Solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by the Hon'ble GERC for solar power project effective on the date of commissioning of solar power project of above mentioned tariff **whichever is lower.**"

(viii) Therefore, we are of the opinion that the petitioner is entitled to reduced rate of Rs.6.51 per Kwh.

#### 8.Issue No.3:What Order?

For the foregoing reasons, we pass the following:

#### **ORDER**

- a) The Extension of time granted by Respondent No.2 dated 04.02.2017 at Annexure-K is hereby set aside;
- b) The petitioner is entitled to a reduced tariff of Rs.6.51 per KWh for energy supplied to the 2<sup>nd</sup> Respondent/ HESCOM from the Commercial Operation Date during the term of PPA; and

c) The Petitioner is liable for payment of liquidated damages for delay in commencement of supply of power to the 2<sup>nd</sup> Respondent as per provisions of Articles 2.2 and 2.5.7 of the PPA.

sd/-  
(SHAMBHU DAYAL MEENA)  
Chairman

sd/-  
( H.M.MANJUNATHA)  
Member

sd/-  
(M.D.RAVI)  
Member



