

No. N/358/2017

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

Dated: 23.03.2021

Present

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

OP No.188/2017.

BETWEEN:

Cambria Solar Private Limited,
A Company Registered under the
Provisions of the Companies Act, 2013
Having its Office at Apartment No.1,
Above Andhra Bank, Hagari Bommanahalli,
Ballari District-583 212,
(Represented by its Director)

... PETITIONER

[Petitioner represented by Sri Shridhar Prabhu,
Navayana Law Offices, Advocates]

AND:

- 1) Gulbarga Electricity Supply Company Limited,
A Company Registered under the provisions of
Companies Act, 1956 having its Registered
Office at Station Road,
Kalaburgi.
(Represented by its Managing Director)
- 2) Bengaluru Electricity Supply Company Limited,
A Company Registered under the provisions
of the Indian Companies Act, 1956 having
its Registered Office at K.R. Circle,
Bengaluru-560 001.
(Represented by its Managing Director)

3) Karnataka Power Transmission Corporation Limited,
A Company Registered under the provisions
of the Indian Companies Act, 1956 having
its Registered Office at K.G. Road,
K.G. Road, Bengaluru-560 009.

(Represented by its Managing Director)

4) The State of Karnataka,
Department of Energy,
Room No.236, 2nd Floor,
Vikasa soudha,
Dr. B.R. Ambedkar Veedhi,
Bengaluru-560 001.

(Represented by its Additional Chief Secretary)

5) Karnataka Renewable Energy Development Limited,
A Company Registered under the provisions
of the Indian Companies Act, 1956 having
its Registered Office at No. 39, 'Shanthi Gruha"
Bharat Scout and Guides Building, Palace Road,
Bengaluru-560 001.

(Represented by its Managing Director)

.... **RESPONDENTS**

[Respondent-1 & Respondent-4 represented
by Sri G.S. Kannur, Senior Advocate;
Respondent-3 represented by Sri Shabhaaz
Hussain, Advocate;
Respondent-5 represented by Sri Rakshith Jois,
Advocate]

ORDER

1. This is a petition filed under Section 86 (1) (f) of the Electricity Act, 2003

praying for the following reliefs to:

a) Approve the extension granted by the Respondent to new
Scheduled Commercial Operation Date (SCOD) as agreed
between the parties in terms of BESCO's letter dated 02.03.2017
(Annexure-P1);

- b) Direct the Respondent to make payment for the delivered energy under the PPA at the rate of Rs.8.40 per unit from the Commercial Operation Date of the Petitioner's project for the entire term of the Power Purchase Agreement Initialed on 07.07.2015 and approved by the Commission vide letter dated 26.08.20015, and executed thereafter; (Annexure-P2);
- c) Pass such other and incidental orders, including an order as to costs, as may be deemed appropriate under the facts and circumstances of the present case.

2. The brief facts set out in the petition are as under:

- a) As per Solar Policy 2014-21, the Karnataka Renewable Energy Development Limited (KREDL) is the Nodal Agency for implementations of Solar Power Projects including the Land-owning Farmers' SRTPV Scheme. One Mr. Gangaraju, the land owning farmer, applied for the allotment of a Solar Project under the said Scheme and the said proposal for 3 MW was accepted and project was allotted in favour of the said Mr. Gangaraju vide KREDL's allotment letter dated 17.03.2015 (Annexure-P3).
- b) The Board of Directors of Bangalore Electricity Supply Company Limited (BESCOM) in their meeting held on 25.07.2015 agreed and gave consent for purchase of Solar Power from the aforesaid project. Thereafter the project proponent requested BESCOM vide its letter dated 21.05.2015 to facilitate the signing of a Power Purchase Agreement (PPA) and the PPA dated 07.07.2015 (Annexure-P2) was

signed by Mr. Gangaraju and BESCO on 07.07.2015. Subsequently, the Commission has conferred its approval to the PPA vide letter dated 26.08.2015.

- c) As per law a PPA is initialed and then sent for approval and only pursuant to the final approval granted by the Commission, the PPA can be finally executed. Thus, the PPA initialed on 07.07.2015 has been executed subsequent to 26.08.2015. This is evident from the fact that in Page No.4 of the PPA there is a specific mention of the Commission's Order dated 26.08.2015. Thus, it can be easily inferred that the PPA has been executed subsequent to 26.08.2015.
- d) As per the definition clause in the PPA the "Effective Date" is defined to mean the date of signing of the PPA by the parties. Further, as per Article 4.1 (c) of PPA, the Scheduled Date of Completion (SDC) and the Commercial Operate (CO) has to be achieved within 18 months from the effective date. In Article 4 of the PPA the effective date is not written in capital letter. Hence, it is slightly ambiguous as to whether the effective date mentioned in definition clause of the PPA is same as the effective date under Article 4. Further, the Commissioning of the project can be extended subject to certain terms and conditions as stipulated under Article 2.5 of the PPA. The power to extend the time for commissioning has been vested on BESCO. There is a mention

about the Liquidated Damages (LD) for the delay in commencement of supply of power.

- e) As per Article 12 of the PPA, the project proponent has the irrevocable right to form a Special Purpose Vehicle (SPV) at any time after the execution of the PPA, under intimation to BESCO. Accordingly, the Petitioner Company was incorporated as a SPV after following the due process of law. The documentary evidence regarding the formation of a SPV was submitted to BESCO on 01.09.2016 by requesting for assignment of the project in favour the SPV and the Petitioner herein. Once the Petitioner took over the rights and obligations from the original allottee, a Supplemental Agreement came to be initialed between the Petitioner and BESCO on 28.10.2016 (Annexure-P4). This Supplemental PPA (SPPA) was approved by the Commission vide its letter dated 21.11.2016.
- f) That the Executive Engineer of KPTCL generated a Feasibility Report on the status of provision of Evacuation for the project. In this Feasibility Report, it was clearly mentioned *inter alia* that the proposed evacuation of 3 MW solar power is feasible only after the completion of additional 8 MVA, 66/11 KV power transformer-II work at Moregere Sub-station and by extending 11 KV Bus and Bay under self-execution basis, and that 11 KV load may be reshuffled after commissioning of additional 8 MVA 66/11 KV power transformer.

g) The Petitioner requested the Respondent through letter dated 29.11.2016(Annexure-P6) stating as follows:

- i. The Petitioner has applied for the Bay allocation from KPTCL and that the Petitioner has not received the Bay allotment due to augmentation of the transformer at 66/11 KV Moregere Sub-station.
- ii. According to the Feasibility Report, the Petitioner cannot evacuate the power generated due to lesser capacity of the transformer and the sub-station overload.
- iii. KPTCL official had informed the Petitioner that it will take 3-4 months, after which the Petitioner will take about 2 months to lay the bay and make metering arrangements.
- iv. Delay due to non-grant of Non-Agricultural permission;
- v. The impact of demonetization and consequent labour unrest.

With these requests the Petitioner sought for an extension of 06 (six) months from 06.01.2017, which the Petitioner then perceived to be the SCOD as per the PPA.

h) Thereafter, Karnataka Power Transmission Corporation Limited (KPTCL) has granted Regular Evacuation Approval to the Petitioner by its letter dated 06.12.2016 (Annexure-P7) for construction of 11 KV Overhead Line along with allied equipment as per the specific technical specification to be approved by KPTCL.

- i) On 09.01.2017, (Annexure-P8) the Petitioner has submitted yet another letter to BESCOM reminding the request for extension of SCOD.
- j) Further to the request letters cited supra, the Petitioner submitted yet another (reminder) letter dated 18.01.2017 (Annexure-P9) requesting for the time extension.
- k) Subsequently, on 07.02.2017 (Annexure-P10), the Petitioner sent yet another reminder letter placing on record the documents requisitioned by BESCOM viz., Feasibility Report on Non-availability of Substation and Non-Agricultural Conversion application made on 01.02.2016.
- l) Considering the representations submitted by the Petitioner on 29.11.2016, 09.01.2017, 18.01.2017 & 07.02.2017 BESCOM granted an extension of 06 (Six) months from the Scheduled Commissioning Date as per the PPA subject to the extension of the Bank Guarantee vide letter dated 02.03.2017 (Annexure-P1).
- m) The Chief Electrical Inspector to the Government of Karnataka (CEIG) has granted safety approval in favour of the Petitioner's project by its letter dated 01.07.2017 (Annexure-P11).
- n) After the grant of CEIG's approval, KPTCL has granted a provisional interconnection approval by its letter dated 04.07.2017 (Annexure-P12).
- o) The KPTCL, by its letter dated 30.06.2017 (Annexure-P14), has issued a communication stating that the construction of the Terminal Bay has

been completed and ready for commissioning as per the Work Completion Report dated 24.06.2017.

p) Subsequently, GESCOM has issued a Commissioning Certificate to certify the commissioning of the Petitioner's project on 05.07.2017 vide Commissioning Certificate dated 21.07.2017 (Annexure-P13).

q) There has been enormous delay in granting permission, sanctions and approval by the Respondents despite diligent follow up by the Petitioner. A statement containing the details about the date of application made by the Petitioner for the grant of approval by the concerned authorities is produced (Annexure-P15).

r) After the commissioning of the project, the Petitioner has raised invoices based on the Joint Meter Reading in Form-B. However, not even a single invoice has been honored by BESCO, thereby violating the terms of the PPA.

3. Apart from the above the petitioner urged the following grounds:

a) The non-payment of invoices raised as per the PPA terms is illegal, untenable and opposed to law.

b) The PPA executed between the parties clearly provides that the Petitioner is entitled to a tariff of Rs.8.40 per unit. There exists a specific provision in the PPA for extension of time subject to certain terms and conditions, which includes the Force Majeure Events. The Petitioner

having completed the project within the timelines indicted under the PPA is entitled to the tariff as per the PPA.

- c) The Petitioner should be given benefit of doubt on account of the fact that 'Effective Date' used in a particular clause of PPA is not written in the capital letters as is written in the Definition Clause. Hence, it is ambiguous as to whether both are same.
- d) The PPA initialled on 07.07.2015 has been executed on or subsequent to 26.08.2015. Hence, even if the 'Effective Date' and Effective Date are to be deemed as same, the COD as per the PPA is to be construed as 18 months from 26.08.2015 viz., 25.02.2017. In fact, the Petitioner was always ready before February, 2017 to commission to the project. However, as indicated in the Feasibility Report, the evacuation infrastructure was not ready with KPTCL. Hence, there was a legitimate delay for COD. In fact, the marginal delay, if any, was on account of the Force Majeure Events and is below 06 (Six) months. This is within the framework of the PPA and hence, the tariff as per the PPA is to be allowed.
- e) The Petitioner is entitled to the tariff of Rs.8.40 per unit as mentioned in the PPA. In all, the Commission has passed three Generic Tariff Orders in respect of Solar Power Projects viz.; tariff orders dated 10.10.2013, 30.07.2015, & 12.04.2017. In tariff order dated 30.07.2015 (passed in modification of an earlier tariff order), it is clearly held that in respect

of the projects that are commissioned during the period from 01.09.2015 to 31.03.2018 for which, the PPAs have been entered into and submitted to the commission prior to 01.09.2015 for its approval, the tariff as per the said agreements shall be applicable.

f) Even the latest tariff order dated 12.04.2017 has been made applicable to only the new grid connected solar project entering into PPA on or after 01.04.2017 but before 01.04.2018 and also those which are commissioned during the period from 01.04.2017 to 31.03.2018 for which PPAs have not been entered into, prior to 01.04.2017. Hence the latest tariff order also does not revise the tariff of Petitioner's project. Consequently, the Petitioner is entitled to the tariff of Rs.8.40 per unit as agreed to under the PPA. However, without prejudice to its rights and contentions in the present petition the Petitioner is prepared to receive a sum of Rs.6.51 per unit as an ad hoc tariff pending final adjudication of the present petition on merits.

g) The PPA executed between the parties not only provides for the time period within which the Scheduled Commercial Operation Date (SCOD) has to be achieved, but also provides for the right of the Respondent procurer to grant extension. This power has been given by the Commission itself since the PPA was approved by this Commission. Accordingly, the Petitioner has commissioned the

project within the mutually agreed commercial operation date. Hence, the Petitioner is entitled to tariff as per the PPA.

h) The project of the Petitioner has experienced several hurdles which can be safely termed as the Force Majeure events within the meaning of Article 8 of the PPA and this has been adequately and repeatedly represented before the Respondent by the Petitioner. The pleas of the Petitioner have been considered and accepted. The entire basis for the grant of extension has been the due consideration of the representation of the Petitioner.

i) The extension granted validly to the Petitioner was given legal force and become effective upon achievement of SCOD especially under circumstances wherein extension requested was before expiry of original SCOD, granted under terms of PPA was not affected in violation of any other regulation and well within act of valid extension with consent of the Petitioner.

4. In response to the notice, the Respondent 1-5 appeared through their Counsels and filed Statement of Objections.

5. The Respondent No.1 & 5 have admitted execution of the documents by the Petitioner and the Respondent No.2. Further contended that there is no prayer against them. Hence, requested for dismissal of petition against them.

6. The gist of the Statement of Objections of the Respondent No.2 is as under:

- a) The Petitioner was unable to execute the project in a timely manner, a letter was addressed by the Petitioner to the Respondent seeking for extension of time for commissioning the project and 6 (Six) months extension was sought under Force Majeure conditions.
- b) Several requests for extension of schedule commissioning date were received from solar developers, the Government of Karnataka was pleased to issue an order dated 24.11.2016 (Annexure-R1) directing all the ESCOMS to constitute a 3-Member Committee to consider and dispose the request of farmers/developers. In furtherance to the said direction, a Committee was constituted by the Respondent-2 to consider the requests for extension sought for by 1MW to 3MW solar generators under the land-owning farmer category. The said Committee was pleased to hold a meeting on 15.02.2017 wherein the causes for the delay achievement of scheduled commercial operation were considered in respect of 17 generators, including the Petitioner and decision was taken to accord extension of 6 (Six) months to achieve Scheduled Commissioning Date.
- c) The Petitioner furnished documents to the Committee constituted by the Respondent-2 for consideration of its request for extension of time. As per the documents furnished, the following information was gathered pertaining to the various reasons assigned for the delay in execution of the project;

1. Land Conversion.
 - i. Date of Submission: 25.08.2016
 - ii. Date of conversion: 27.09.2016
 - iii. Delay in getting approval :1 month
2. KPTCL Evacuation Approval (Regular)
 - i. Date of Submission of application: 21.09.2016
 - ii. Date of approval: 06.12.2016
 - iii. Delay in getting approval: nearly 3 months.

Finally, the committee, after detailed discussions and scrutiny of all the documents, opined that approval may be accorded for extension of SCOD upto 6 (six) months considering Article 2.5 of the PPA as there is a delay in issue of approvals by various Government entities.

- d) On 02.03.2017, the Respondent addressed a letter to the Petitioner informing it about the extension of time by 6 (Six) months for achieving Scheduled Commercial Operation.
- e) A letter was addressed to Additional Chief Secretary, GoK for kind perusal and directions regarding extension of SCOD upto 6 (six) months in respect of SPDs/SPVs who have requested for extension, under farmers' category.
- f) Thereafter, on 16.03.2017, the Commission addressed a letter to all the ESCOMs informing/stating that of the State, in the matter pertaining to extension of time granted to solar generators, the ESCOMs not to allow any extension of time beyond the scheduled commissioning, if any, as per the original PPA without obtaining prior opinion of the Commission.

Further, vide letter dated 05.04.2017, the ESCOMs were directed by the Commission to advise all land owner solar developers/SPVs to approach the Commission and seek for approval of the extension of time. In furtherance to the same, the Petitioner has filed this petition.

- g) Furthermore, ACS vide letter No. EN 67 VSC 2017 dated 25.04.2017 (Annexure-R3) addressed to the KERC has stated that the Energy Department, GoK has recommended the approvals accorded in respect of extensions of COD by BESCO for (Six) months from the date of SCOD as per PPA clause 2.5 & Article 8.
- h) The Subject was placed before 82nd Meeting of the Board of Directors of BESCO held on 11.05.2017 for Evaluation/disposal of the requests of land owning farmers/SPVs for Extension of time for COD in respect of 1 to 3 MWs Solar Power Plants in Karnataka, under Farmers Category. Board has ratified the actions taken on the extensions issued by BESCO subject to approval of KERC.
7. The gist of the Statement of Objections of the Respondent No.3 is as under:
- a) That it is wrong to suggest that no power was evacuated from the petitioner. On the contrary, the evacuated power was synchronized on PTR-1 till PTR-2 got commissioned. Subsequent to the commissioning of PTR-2 the load was reshuffled and shifted to PTR-2 on 26.10.2017. Wherefore the inference of the petitioner that no power could be evacuated till commissioning of PTR-2 is erroneous and false.

- b) The averment of the Petitioner that KPTCL officials had informed the petitioner that it will take 3-4 months after which the petitioner will take two months to lay the bay and make metering arrangement is false imaginary as no such communication was made by this Respondent.
- c) The Executive Engineer, (Ele.), MWD, KPTCL, Ballari, reported vide letter dated 24.06.2017 that the work of construction of 1 No. of Terminal Bay at 66 /11 kV Moregere Sub-station for proposed 2 MW Solar plant is completed and ready for commissioning. The same matter was communicated by the Superintending Engineer (Ele.), TR Works, KPTCL, Munirabad to the Chief Engineer (Electrical), TZ, KPTCL, Kalaburagi, vide letter dated 30.06.2017. It is important to highlight that the work was carried out under self-execution basis. Hence, the delay in execution of work is purely attributable to the Petitioner and the Respondent cannot be blamed for the same. The bay work was completed by the Petitioner only in February 2017 and the delay is purely attributable to the Petitioner.
- d) The Petitioner has falsely attempted to shift the blame on the Respondent-3 for its delay in commissioning of the project.
- e) The PTR-2 was commissioned on 26.10.2017, but the load of the Petitioner was taken on PTR-1 after the completion of the 11 kV Bay work by the Petitioner. The Work Completion Report of 3 MW project of the Petitioner was submitted only on 28.06.2017.

f) Therefore, there is no delay by the Respondent-3 as the loads were taken on PTR-1 till PTR-2 was commissioned. Hence, requested for dismissal of the petition.

8. The Respondent No.4 filed the Statement of Objection admitting the floating of RfP, issuance of letter of allotment, execution of PPA, approval of PPA by the Commission, that the present Petitioner is the SPV of original bidder Shri Gangaraju, the correspondence between Chief Engineer and the Petitioner, extension of time given by the BESCOM, execution of SPPA between the Petitioner and made the following submissions:

a) Respondent-4 contended that the Petitioner has not achieved commissioning of the project within SCOD. The PPA does not make a distinction between marginal and other delay. It only contemplates revision of tariff in the event of delay along with Liquidated Damages. Admittedly, the Petitioner has delayed the execution of the project for reason which does not fall under the Force Majeure events as far as BESCOM is concerned.

b) The contentions of the Petitioner is totally mis-conceived and untenable. The Petitioner was aware right from the beginning as mentioned in all the guidelines and the Government Orders that the tariff fixed by the KERC would be applicable. Since the tariff had changed, the Petitioner cannot claim earlier tariff.

c) All other statements which are not specifically denied are hereby denied as false and no averment in the petition is admitted.

d) Hence, Respondent-4 prays that the petition be dismissed in the interest of justice and equity.

9. We have heard the learned Counsels for the parties. The learned Advocate for the Petitioner also filed written arguments.

10. From the rival contentions and the submissions made by the parties, the following Issues arise for our consideration:

Issue No.1: Whether the Petitioner proves that the PPA initialled on 07.07.2015 has been executed subsequent to 26.08.2015 and is there any ambiguity as to whether the Effective Date defined in the PPA and the Effective Date mentioned in Article 4?

Issue No.2: Whether the Petitioner proves that the extension granted by the Respondent-2 revising the SCOD as agreed between the parties in terms of BESCO's letter dated 02.03.2017 deserves to be approved?

Issue No.3: Whether the Petitioner is entitled for tariff at the rate of Rs.8.40 per unit from the Commercial Operation Date of Petitioner's project for the entire term of the PPA dated 07.07.2015?

Issue No.4: Whether the Respondent proves that due to inaction of the Petitioner there was a delay in commissioning the project?

Issue No.5: What Order?

11. **Issue No.1:** Whether the Petitioner proves that the PPA initialled on 07.07.2015 has been executed subsequent to 26.08.2015 and is there any ambiguity as to whether the Effective Date defined in the PPA and the Effective Date mentioned in Article 4?

- a) It is the contention of the Petitioner that in Article 4 of the PPA, the effective date is not written in capital letter. Hence, it is slightly ambiguous as to whether the Effective Date mentioned in definition clause of PPA is same as effective date under Article 4.
- b) As per definition clause 1.1 (xii) effective date is defined as: "Effective Date" shall mean date of signing of this Agreement by the parties.
- c) It is not in dispute that PPA has been executed on 07.07.2015. At page 4 of the PPA the Commission approval letter has been inserted in the blank space left out. It appears that it was written after approval of the PPA by the Commission. In our opinion effective date means the date of signing of the Agreement by the parties i.e., 07.07.2015. Therefore, we are unable to accept the contention of learned Advocate for the Petitioner that, in view of specific mention of the Commission's order dated 26.08.2015 at page 4 of the PPA, the effective date is 26.08.2015.

- d) The Petitioner at para 5 of the Petition has stated that is the definition clause in the PPA, Effective Date is defined to mean the date of signing of the PPA by the parties. As per clause 4.1 (c), the SPD have to achieve Scheduled Date of Completion and the Commercial Operation (CO) within 18 months from the effective date. However, Article 4 of the PPA, effective date is not written in capital letters. Hence, it is slightly ambiguous as to whether effective date defined in the PPA and the effective date mentioned in Article 4 is one and the same.
- e) As per Article 4.1 (c) of the PPA, "SPD shall achieve Scheduled Date of Completion and the Commercial Operation within 18 months from the effective date. Merely on the fact that the Effective Date is not written in capital letters, will not change the meaning of effective date. Therefore, there is no force in the contention of learned Advocate for the Petitioner that there is ambiguity regarding the Effective Date as defined in the PPA and as mentioned in the Article-4. It is quite clear, understandable and convey the same meaning and there is no scope for ambiguity.
- f) Hence, we answer Issue No.1 in negative.

12. **Issue No.2:** Whether the Petitioner proves that the extension granted by the Respondent-2 revising the Scheduled Commercial Operation Date (SCOD) as agreed between the parties in terms of BESCO's letter dated 02.03.2017 deserves to be approved?

- a) It is not in dispute that one Mr. Gangaraju is successful bidder as his bid has been accepted by KRDEL, and subsequently issued allotment letter and Letter of Award, executed the PPA, SPPA, Extension of SCOD by the BESCO and the Petitioner is the SPV of Mr. Gangaraju.
- b) It is the case of the Petitioner that due to delay in approvals by the Government authorities, there was delay in SCOD. After considering government letter regarding grant of extension of time, a 3-member Committee constituted and on the recommendation of the Committee, the Respondent BESCO has extended SCOD for six months in terms of PPA.
- c) According to Respondent-2, there was a delay of nearly three months for issue of regular evacuation approval by the KPTCL.
- d) The learned Advocate for the Petitioner has contended that in view of terms of PPA, BESCO has extended SCOD after considering relevant facts, circumstances, recommendation of the 3-Member Committee and therefore, extension granted by the Respondent-2 is within the scope of the PPA.

e) Article 2.5 of the PPA deals with the circumstances under which extension of time for commissioning the project shall be granted.

Article 2.5 of the PPA reads as under:

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

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

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

2.5.4 In case of extension due to reasons specified in Article 2.5.1 (b) and (c), and if such Force Majeure Event continues even after a maximum period of 3(three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 9.

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

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

f) The learned Advocate for the Respondent-2 rely upon Government of Karnataka letter dated 24.11.2016 Annexure-R1 & Proceedings of the 3-member committee meeting held on 15.02.2017. The Government of Karnataka, vide its letter dated 24.11.2016 addressed to all the Managing Directors of ESCOMs with a direction to take a decision regarding extension of time in accordance with law. The extract of the letter is as under:

ಕರ್ನಾಟಕ ಸರ್ಕಾರ

ಸಂಖ್ಯೆ: ಇಎನ್ ೭೫ ವಿಎಸ್ಸಿ ೨೦೧೬

ಕರ್ನಾಟಕ ಸರ್ಕಾರದ ಸಚಿವಾಲಯ,
ವಿಕಾಸ ಸೌಧ,
ಬೆಂಗಳೂರು, ದಿನಾಂಕ:೨೪.೧೧.೨೦೧೬.

ಇಂದ

ಸರ್ಕಾರದ ಅಪರ ಮುಖ್ಯ ಕಾರ್ಯದರ್ಶಿಗಳು,
ಇಂಧನ ಇಲಾಖೆ, ವಿಕಾಸ ಸೌಧ,
ಬೆಂಗಳೂರು.

ಇವರಿಗೆ

ವ್ಯವಸ್ಥಾಪಕ ನಿರ್ದೇಶಕರು,
ಬೆಂಗಳೂರು/ಹೆಂಗಳೂರು/ಮೆಂಗಳೂರು/ಜೆಂಗಳೂರು/ಸೆಂಗಳೂರು.

ಮಾನ್ಯರೇ,

ವಿಷಯ: ಭೂಮಾಲೀಕತ್ವವುಳ್ಳ ರೈತರ ಮೂಲಕ ೧ ರಿಂದ ೩ ಮೆ.ವ್ಯಾ.
ಸಾಮರ್ಥ್ಯದ ವಿಕೇಂದ್ರೀಕೃತ ಸೌರ ವಿದ್ಯುತ್ ಉತ್ಪಾದನೆ
ಯೋಜನೆಗಳ ಅನುಷ್ಠಾನ ಕುರಿತು.
ಉಲ್ಲೇಖ: ಮಾನ್ಯ ಇಂಧನ ಸಚಿವರ ಟಿಪ್ಪಣಿ ಸಂಖ್ಯೆ: ಇಂಸ/ಕ/೧೦೬೭/
೨೦೧೬-೧೭ದಿನಾಂಕ:೧೮.೧೧.೨೦೧೬.

ಮೇಲ್ಕಂಡ ವಿಷಯಕ್ಕೆ ಸಂಬಂಧಿಸಿದಂತೆ, ಉಲ್ಲೇಖ ಪತ್ರದ ಪ್ರತಿಯನ್ನು ಇದರೊಂದಿಗೆ ಲಗತ್ತಿಸಿದೆ. ಸದರಿ ಪತ್ರದಲ್ಲಿ ಭೂಮಾಲೀಕತ್ವವುಳ್ಳ ರೈತರಿಗೆ ಹಂಚಿಕೆಯಾಗಿರುವ ೧ ರಿಂದ ೩ ಮೆ.ವ್ಯಾ. ಸಾಮರ್ಥ್ಯದ ಸೌರ ವಿದ್ಯುತ್ ಉತ್ಪಾದನೆ ಯೋಜನೆಗಳ ಅನುಷ್ಠಾನ ವಿಳಂಬವಾಗುತ್ತಿರುವ ಬಗ್ಗೆ ಮಾನ್ಯ ಇಂಧನ ಸಚಿವರು ಉಲ್ಲೇಖಿಸುತ್ತಾ, ಸದರಿ ಯೋಜನೆಗಳ ಅನುಷ್ಠಾನಕ್ಕೆ ವಿದ್ಯುತ್ ಖರೀದಿ ಒಪ್ಪಂದದ ಕಲಂ ೨.೫ ರಡಿಯಲ್ಲಿ ಕಾಲಾವಧಿ ವಿಸ್ತರಣೆಗೆ ಅವಕಾಶವಿದ್ದು, ಇದಕ್ಕೆ ಸಂಬಂಧಿಸಿದಂತೆ ನಿಯಮಾನುಸಾರ ಸೂಕ್ತ ಕ್ರಮ ಕೈಗೊಳ್ಳುವಂತೆ ಸೂಚಿಸಿರುತ್ತಾರೆ.

ಈ ಹಿನ್ನೆಲೆಯಲ್ಲಿ, ಭೂಮಾಲೀಕತ್ವವುಳ್ಳ ರೈತರ ಮೂಲಕ ೧ ರಿಂದ ೩ ಮೆ. ವ್ಯಾ. ಸಾಮರ್ಥ್ಯದ ವಿಕೇಂದ್ರೀಕೃತ ಸೌರ ವಿದ್ಯುತ್ ಉತ್ಪಾದನೆ ಯೋಜನೆಯಡಿ ಕಾಲಾವಕಾಶ ವಿಸ್ತರಣೆಗೆ ಸ್ವೀಕೃತಿಯಾದ ಮನವಿಗಳನ್ನು ವಿಲೇವಾರಿಗೊಳಿಸುವುದಕ್ಕೆ ಸಂಬಂಧಿಸಿದಂತೆ ಈ ಕೆಳಕಂಡಂತೆ ನಿಯಮಾನುಸಾರ ಪರಿಶೀಲಿಸಿ ಕ್ರಮ ಕೈಗೊಳ್ಳುವಂತೆ ತಮಗೆ ತಿಳಿಸಲು ನಿರ್ದೇಶಿತನಾಗಿದ್ದೇನೆ.

ವಿದ್ಯುತ್ ಖರೀದಿ ಒಪ್ಪಂದದ ಆರ್ಟಿಕಲ್ ೨.೫ ನ್ನು ಅರ್ಟಿಕಲ್ ೮ರೊಂದಿಗೆ ಓದಿಕೊಂಡು, ವಿದ್ಯುತ್ ವಿತರಣಾ ಕಂಪನಿಗಳ ವ್ಯಾಪ್ತಿಯಲ್ಲಿ ಕಾಲಾವಧಿ ವಿಸ್ತರಣೆಗೆ ಸಂಬಂಧಿಸಿದಂತೆ ಸ್ವೀಕೃತಿಯಾದ ಮನವಿಗಳನ್ನು ಪರಿಶೀಲಿಸಲು ೩ ಸದಸ್ಯರ ಸಮಿತಿಯನ್ನು ರಚಿಸುವುದು.

ಸ್ವೀಕೃತಿಯಾದ ಮನವಿಯು ವಿದ್ಯುತ್ ಖರೀದಿ ಒಪ್ಪಂದದ ಆರ್ಟಿಕಲ್ ೮ ರಲ್ಲಿರುವ ಷರತ್ತುಗಳನ್ನು ಪೂರೈಸಿರುವ ಬಗ್ಗೆ ಖಾತ್ರಿಪಡಿಸಿಕೊಳ್ಳುವುದು.

ವಿದ್ಯುತ್ ಖರೀದಿ ಒಪ್ಪಂದದ ಆರ್ಟಿಕಲ್ ೨.೫ ಮತ್ತು ಆರ್ಟಿಕಲ್ ೮ ರಡಿ ಕಾಲಾವಕಾಶ ವಿಸ್ತರಣೆ ಕೋರಿ ಸ್ವೀಕೃತಿಯಾದ ಮನವಿಗಳನ್ನು ೧೫ ದಿನಗಳೊಳಗೆ ವಿಲೇವಾರಿಗೊಳಿಸುವುದು.

(ಅ.ಮು.ಕಾ.ರವರಿಂದ)

ತಮ್ಮ ವಿಶ್ವಾಸಿ,
ಸಹಿ/-

(ಎ.ಎ.ಚಪ್ಪರಬಂದ್)

ಸರ್ಕಾರದ ಅಧೀನ ಕಾರ್ಯದರ್ಶಿ
ಇಂಧನ ಇಲಾಖೆ ಫೋನ್:೨೨೦೩೪೬೭೪

- g) In pursuance of the direction of Government, a 3-Members Committee was constituted. After examining the facts and circumstances of various case. including the case of this Petitioner decided to accord approval for extension of SCOD up to 6months for the following farmers/SPDs considering as per PPA clause 2.5 and article 8, as there is a delay in issue of approvals by various Government entities and Government delay can be considered as 'BESCOM (Government entity) event of default'.
- h) The learned Advocate for the Respondent-2 relying upon the letter dated 25.04.2017 (AnnexureR-3) from Additional Chief Secretary, Energy Department, Bengaluru addressed to Secretary, KERC, Bengaluru, wherein the Government requested the Commission to consider approval for extension of COD of Solar Power Project of capacity 1 to 3 MW under land owning farmers' category.

- i) It is evident from the above letter that due to the reasons specified in Article 2.5 of PPA, the Schedule Commissioning Date could be extended up to 6 (Six) months and as a result of such extension, the newly determined Scheduled Commissioning Date and Expiry date shall be deemed to be the Scheduled Commissioning Date.
- j) Article 8.3 of PPA deals with force Majeure Events. The sub-clause (vi) of the aforesaid Articles envisages the event and circumstances where neither party is responsible or liable for failure in performance of its obligations due to inability despite complying with all legal requirements of obtaining legal approvals. In view of these provisions of the PPA, we are of the opinion that delay in receiving various approvals and clearances from the Government and its instrumentalities which were beyond the control of the Petitioner should also be treated as an event of Force Majeure under Sub-clause (vi) of Article 8.3 which has directly and severely affected the execution of solar projects. To be more specific, if the approval for land conversion is received on 27.09.2016, it become extremely difficult to achieve COD on 07.01.2017 as envisaged under the PPA. Moreover, the grant of extension of SCOD was accorded by the Government of Karnataka and, in turn, by the Respondent-2 BESCO after complying with the due procedures and applying its diligence and prudence under the four corners of the PPA.

- k) The learned Advocate for the Petitioner contended that obtaining evacuation approval and land conversion order were clearly beyond the control of the Petitioner and the Petitioner was entitled to benefit of the extension of time on these counts.
- l) In the Technical Report and the Statement of Objections of Respondent-2, it is mentioned that there was a delay of one month in land conversion. But this appears to be in-correct for the reason that the Petitioner in Annexures-P8 & P9 contended that it has filed an application before the Deputy Commissioner, Ballari District, Ballari on 01.02.2016. This fact is supported by Annexure-A produced by the Petitioner along with the written arguments. Annexure-A clearly shows that the Petitioner applied on 01.02.2016 for conversion of land to the Deputy Commissioner, Ballari District, Ballari, and land conversion order on 27.09.2016 (Annexure-B), issued by the Deputy Commissioner. Therefore, there is no force in the arguments of learned Advocate for the Respondent that there is no delay in land conversion on the part of Deputy Commissioner, Ballari District, Ballari.
- m) The Commission noted that the Petitioner filed an application to the Deputy Commissioner, Ballari District, Ballari on 01.02.2016 for conversion of land bearing Sy. No. 320/D5, 321A & 321B measuring 15 acres and 23 guntas of Gaddikere Village, Hagari Bommanahalli Taluk, Ballari District for non-agricultural purpose. (Annexure-A produced along with written arguments). The Deputy Commissioner, Ballari

District, Ballari issued order of conversion on 27.09.2016 (Annexure-B produced along with the written arguments) i.e., after lapse of nearly more than 7 months.

n) It appears from Annexure-P8, that the Petitioner applied for power evacuation on 27.09.2016. The KPTCL gave approval for Regular Evacuation Scheme on 06.12.2016 after lapse more than two months. The Respondent-2 in his Statement of Objections admitted that there was a delay of nearly three months. Three-man Technical Committee was also held that there was delay of nearly three months in granting Regular Evacuation approval by the KPTCL. Therefore, there is much force in the arguments of learned Advocate for the Petitioner that there was delay in getting land conversion order from Deputy Commissioner Ballari, District Ballari and Regular Evacuation Approval from KPTCL. Moreover, the Respondents have not denied these facts and in turn, the Advocate for Respondent-2 supports the case of the Petitioner.

o) In pursuance of the provision of Article 2.5 of PPA the Respondent-2 granted the extension of time by six months as per PPA and it is well settled law that the parties are bound by the terms and conditions of the contract i.e., PPA. Therefore, we are of the opinion that the Respondent-2 (BESCOM), after considering 'Force Majeure' events as stipulated in PPA, has rightly extended and the Petitioner has

commissioned the project on 05.07.2017 (Annexure-P13) within the extended time.

p) We have gone through the relevant material on the issue placed before us and carefully considered the submission of learned Counsels for both the parties. Subsequent to completion of various scrutiny formalities, the PPA signed on 07.07.2015 which provided a guaranteed tariff of Rs.8.40 kWh on completion period of 18 months. The said PPA was approved by the Commission on 26.08.2015. As per guidelines issued by the Government of Karnataka, a number of Approvals/clearances/ sanctions were required in the process of setting up of Solar Project such as financial closures, approval for conversion of land from the Agricultural purpose to non-Agricultural purpose to be used for setting up of a Solar Power Project, approval for grid connectivity, approval from Chief Electrical Inspector for charging of the line, permission to purchase or lease the land etc. While going through the matrix of various dates/events, it is pertinent to notice that the approval from the Government instrumentalities was received by the Petitioner, after lapse of considerable time which in turn became the impediments in timely commissioning of Solar Project. For instance, the land conversion order was issued by the concerned authorities only on 27.09.2016 (Annexure-B) Tentative Power Evacuation Approval came to be granted on 27.10.2016 and

Regular Evacuation Scheme approval was granted on 06.12.2016. With these events/dates, and also taking into consideration of substantial investment on the project for implementation of the project it become almost certain that COD of project cannot be achieved as per the schedule.

q) In view of above facts and anticipated delay in COD, the Petitioner apprised the 2nd Respondent and requested for extension of COD as admissible under the PPA. According to it, total completion period of 18 months from the 'Effective Date' was provided considering all the activities including various approvals, procurement of equipment, installation and the final safety clearance from Chief Electrical Inspector for charging line etc. It is noticed by us that in receiving approval from Government instrumentalities for Tentative/ Regular Scheme Approvals, acquisition of land, conversion of land from Agricultural to non-Agricultural etc., the Petitioner not only faced severe difficulties but also considerable delay. Considering these facts and also taking into consideration of substantial investment on the project for implementation, the Respondent-2 granted extension time by 6 months.

r) The learned Advocate for the Petitioner relied on the ruling of the Hon'ble Appellate Tribunal for Electricity in Appeal No.351 of 2018

between Chennamangathihalli Solar Power Project LL.P. Vs BESCO and Others held at para 8.15 as under:

“ In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the first Respondent was justified in extending COD up to six months as per the relevant provision (clause 2.5) of the PPA. Besides, it is also crystal clear that the approvals/clearances from various Govt. instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in commissioning of the solar projects. As these approvals were beyond the control of the Appellants, the State Govt. and first Respondent have rightly considered them as an event of force majeure and accordingly granted approval for COD extension”.

- s) In view of the principles laid down by the Hon'ble APTEL in a recent judgment cited, above and we are also relying on the above judgment in view of the facts are quite similar to the instant case. In view of the extension of time granted by the BESCO (Respondent-2), holding that the Petitioner has fulfilled the conditions of PPA and extended time, we are of the opinion that the circumstances and events narrated by the Petitioner in the petition are 'Force Majeure' events and they are not under the reasonable control of the Petitioner. Therefore, the Petitioner has proved that events or circumstances alleged by it amounts to 'Force Majeure'

events entitling for extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date.

t) Hence, we answer Issue No.2 in the affirmative.

13. **Issue No.3:** Whether the Petitioner is entitled for tariff at the rate of Rs.8.40 per unit from the Commercial Operation Date of Petitioner's project for entire term of the PPA dated 07.07.2015?

a) The learned Advocate for the Petitioner argued that the Petitioner is entitle for tariff at the rate of 8.40 per unit from the Commercial Operation date till the entire term of PPA dated 07.07.2015, for the reason that the Petitioner has implemented the project within the extended time and due to Force Majeure Event it could not commission the project within the 18 months from the effective date.

b) We have already held Issue No.2 in the affirmative. The PPA signed on 07.07.2015 provide for a guaranteed tariff of Rs.8.40 per unit and Respondent-2 (BESCOM) has extended time for 6 months and the Petitioner has commissioned the project on 05.07.2017 (Annexure-P13) within the extended time. Therefore, we are of the opinion that the Petitioner is entitled for the agreed tariff of Rs.8.40 per unit as per Article 5.1 of the PPA.

c) In view of the principles lay down by the Hon'ble APTLE in its order dated 14.09.2020 in appeal No.351 of 2018, we are of the opinion that the Petitioner is entitled for tariff of Rs.8.40 per unit.

d) Hence, we answer Issue No. 3 in the affirmative.

14. **Issue No.4:** Whether the Respondent proves that due to inaction of the Petitioner there was a delay in commissioning the project?

a) The Respondent has taken a plea that due to inaction on the part of Petitioner there was a delay in commissioning the project.

b) While discussing Issue No.3, we have held that the delay in conversion of land from Agricultural to non-Agricultural and delay in evacuation approval were not under the control of the Petitioner and it amounts to Force Majeure Event as defined under Article 8.3 (vi) of the PPA. Hence, at the cost of repetition, we would like to reiterate that the Petitioner is not at fault in obtaining approvals/orders of the Government instrumentalities on time and it is due to delay on the part of Government instrumentalities the Petitioner cannot commission the project, within the SCOD as provided in PPA.

c) It is pertinent to note that Respondent-2 & 3 have not produced any evidence to demonstrate that the Petitioner is at fault in obtaining orders/approvals from the Government instrumentalities. Hence, we are unable to accept, the contentions of the learned Advocate for the Respondent-1 & 2 that the Petitioner is at fault in obtaining various approvals from the Government Authorities.

d) Hence, we answer Issue No.4 in the negative.

15. **Issue No.5:** What Order?

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

ORDER

- a) Petition is allowed.
- b) The Petitioner is entitled for a tariff of Rs.8.40 per unit as per Article 5.1 of the PPA:

sd/-

(SHAMBHU DAYAL MEENA)
Chairman

sd/-

(H.M. MANJUNATHA)
Member

sd/-

(M.D. RAVI)
Member