

No.: N/24/16

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

**Dated : 14<sup>th</sup> December 2016**

**Present:**

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

**O P No. 19 / 2016**

**BETWEEN:**

Azure Sunrise Private Limited,  
No.8, LSC, Madangir,  
Pushp Vihar,  
New Delhi – 110 062.

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**PETITIONER**

*[Represented by Cyril Amarchand Mangaldas, Advocates]*

**AND:**

1) Chamundershwari Electricity Supply Corporation Limited,  
No.29, Kaveri Grameena Bank Road,  
Vijayanagar, 2<sup>nd</sup> Stage,  
Mysuru – 570 019.

2) Karnataka Electricity Regulatory Commission,  
No.9/2, 6<sup>th</sup> & 7<sup>th</sup> Floors, Mahalaxmi Chambers,  
M.G. Road,  
Bengaluru-560 001.

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**RESPONDENTS**

*[Respondent-1 represented by Indus Law, Advocates]*

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**ORDERS**

- 1) In the above Petition, the Petitioner has prayed for the following reliefs:
- (a) To set aside the Supplemental Agreement dated March 01, 2016 signed between the Petitioner and CESCO;
  - (b) To set aside the Respondents' letters December 01, 2015 bearing reference No.KERC/S/F-31/Vol-37/15-16/1471 and December 31, 2015 bearing reference No.CESC/TL/COM/RA2/T/110B/2015-16/14160 unilaterally directing reduction of applicable Tariff from Rs.6.89 per unit to Rs.6.51 per unit;
  - (c) To set aside CESCO's letter dated February 23, 2016 bearing reference No. CESC/TL/COM/RA2/T/110B/2015-16/8623-25 in effect withdrawing the extension of time already granted to the Petitioner;
  - (d) To restrain CESCO from taking any action against the Petitioner in terms of Article 4.3 of the PPA, including invoking and/or encashing the Performance Bank Guarantees dated December 08, 2014, bearing Bank Guarantee No.034641BG0000102; 034641BG0000103 and 034641BG0000104 for a total amount of ₹5,00,00,000 (Rupees Five Crores only);
  - (e) To direct Respondent No.2 to approve the Supplemental Agreement dated November 04, 2015 executed between the Petitioner and Respondent No.1;
  - (f) To declare the Effective Date under the PPA as May 21, 2015, being the date of receipt of approval of KERC of the PPA without imposition of any reduction in tariff at which the Petitioner is required to supply energy to the Petitioner;

**Or in the alternative**

To grant extension of time of 137 days effective from January 02, 2016 to the Petitioner for fulfilling its obligations under the PPA without imposition of any reduction in tariff at which the Petitioner is required to supply energy to the Petitioner;

- (g) To direct CESCO to continue with the Applicable Tariff of Rs.6.89 per unit as prescribed under the PPA;
  - (h) To restrain CESCO from imposing any penalty / damages under the PPA;
  - (i) To pass any such further orders as may be deemed fit and proper in the facts and circumstances of the case; and
  - (j) To award costs of the present Petition to the Petitioner.
- 2) During the course of the hearings, the learned counsel for the 1<sup>st</sup> Respondent - Chamundeshwari Electricity Supply Corporation Limited (CESC) contended that, some portions of the pleadings in the Petition relating to the 2<sup>nd</sup> Respondent - Karnataka Electricity Regulatory Commission (Commission) would amount to casting aspersions on this Commission and it was not fair on the part of the Petitioner to make such remarks against this Commission and also contended that, the Petitioner could not have filed this Petition with a prayer for a direction to this Commission to approve the Supplemental Power Purchase Agreement (PPA) dated 4.11.2015 and to set aside the letter dated 1.12.2015 issued by this Commission. In reply, the learned Senior counsel for the Petitioner submitted that, he would instruct the Petitioner to suitably amend the Petition to delete the remarks which might tend to casting aspersions against this Commission. Thereafter, the Petitioner has filed the amended Petition deleting Respondent No.2 in the Cause Title and deleting certain portions of the pleadings which were contended to be casting aspersions

against this Commission. After going through the Petition, we are of the view that the objectionable words and phrases in the Petition, which were pointed out by the learned counsel for the CESC, need not be considered as remarks amounting to casting aspersions on this Commission. It appears that, in the legal parlance, the usage of such words and phrases are not uncommon. However, we are of the opinion that, the Petitioner could have been a little more civil and polite in making out its grievances against this Commission as it has appeared before this Commission seeking redressal.

- 3) 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) as the Nodal Agency of the Distribution Licensees of the State of Karnataka for procuring renewable energy including Solar energy, had floated 'Request For Proposal'(RFP) dated 30.5.2014 for development of a 500 MW of Solar Thermal and/or Solar Photo Voltaic Power Plants through Private Sector participation. The draft PPA was a part of the Request for Proposal (RFP).
  - (b) After evaluation of the proposals received, the KREDL accepted the bid of Azure Power India Private Limited (APIPL) for development of a 50 MW capacity Solar PV Plant (Project) in Rangenhalli Village, Hiriyur Taluk,

Chitradurga District and issued a Letter of Award (LoA) dated 19.11.2014 (ANNEXURE – C). The Petitioner is the Special Purpose Vehicle (SPV) of the APIPL for development of the Project. As per the terms of the RFP, the Petitioner executed the PPA dated 2.1.2015 (ANNEXURE – M) with the CESC. It may be noted that, apart from the aforesaid Project, the APIPL was allotted two more Projects at different locations and the PPAs have been executed with Gulbarga Electricity Supply Company Limited (GESCOM) for development of a 40 MW capacity Solar PV Plant and with Hubli Electricity Supply Company Limited (HESCOM) for development of a 40 MW capacity Solar PV Plant in the Chitradurga District by two other SPVs of the APIPL. The Petitioner and other SPVs also furnished the Bank Guarantees as required under the RFP.

- (c) Article 4 of the PPA dated 2.1.2015 relates to Conditions Precedent for the Developer. Article 4.1 reads thus :

*“Save and except as expressly provided in Articles 4, 14, 18, 20 or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4 (the “**Conditions Precedent**”) by the Developer within 365 (Three Hundred and Sixty Five) days from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by CESC, Mysuru.”*

- (d) Article 4.2 of the PPA dated 2.1.2015 enumerates the various Conditions Precedent to be satisfied by the Developer and for providing proof of

achievement of the Conditions Precedent. 'Effective Date' is defined in the PPA as the date of execution of the PPA between the Petitioner and the CESC. Article 14 of the PPA deals with Force Majeure events and the consequences thereof.

- (e) The CESC sent the PPA dated 2.1.2015 to this Commission for approval. The PPA was approved and the communication of approval was sent to the CESC by this Commission, by letter dated 4.5.2015. The said approval was subject to certain modifications being incorporated in the PPA by the parties concerned. The CESC in turn intimated the Petitioner to appear before it for carrying out the modifications indicated by this Commission. Accordingly, the Petitioner visited the Office of the CESC on 21.5.2015 and the modifications were incorporated in the PPA. On the same day, one set of the original PPA dated 2.1.2015, containing the modifications effected, was handed over to the Petitioner by the CESC. It may be noted that, the PPA dated 2.1.2015 (ANNEXURE – M), though it contains the modifications indicted by this Commission, does not make out that the said modifications were, in fact, effected on 21.5.2015.
- (f) In the meanwhile, the Petitioner by letter dated 12.3.2015 requested the CESC to furnish the original PPA at the earliest, since the setting up of the Solar Power Project was a time-bound obligation and that, due to non-receipt of the original PPA, the Petitioner was not able to process further for financing the Project and requested to consider the date of handing

over of the original PPA as the 'Effective Date'. A similar request was also made to this Commission by the Petitioner, by letter dated 6.4.2015. By letter dated 24.3.2015, the CESC replied to the letter dated 12.3.2015 of the Petitioner, stating that, the approval of the PPA was pending before this Commission and the original PPA could not be handed over to the Petitioner before obtaining the approval of this Commission. It is further stated that the 'Effective Date' as per the definition is the date of signing of the PPA. By letter dated 13.4.2015, the Commission had also replied to the Petitioner stating that, certain documents requested to be furnished, had not been received from the Office of the CESC and therefore approval of the PPA was pending. By e-mail dated 22.4.2015, the Petitioner had requested the CESC to expedite furnishing of the documents required by this Commission. The Petitioner again wrote a letter dated 22.4.2015 to the CESC requesting to furnish the requisite documents to this Commission and to expedite the delivery of the original PPA to it. In this letter, the Petitioner also stated that the entire process of financing the Project has got paralyzed for non-furnishing of the original PPA to the bankers. Thereafter, the CESC by letter dated 23.4.2015 had furnished its reply regarding the documents sought by this Commission. Thereafter, this Commission approved the PPA and communicated the same to the CESC by letter dated 4.5.2015, subject to effecting certain corrections / modifications in the PPA.

(g) The APIPL by letters dated 31.8.2015 and 9.10.2015 requested this Commission to consider the date of receipt of the approved PPA as the 'Effective Date' in respect of its Projects under three different PPAs. In these letters, it was stated that, since there was delay in handing over the original PPAs relating to its three Projects, the financial closures were being delayed. By reply dated 21.10.2015, this Commission intimated the Petitioner that, if required, the Petitioner may approach the CESC for extension of time on the grounds provided in Article 5.7 of the PPA. Pursuant to it, by e-mail dated 30.9.2015, the Petitioner requested the CESC for extension of time by six months, as per Article 5.7 of the PPA, for the financial closure and the commercial operation of the Project. The relevant portion of the e-mail dated 30.9.2015 sent by the Petitioner in this regard reads thus :

*"Ref.: 1. Letter of Azure dated 31<sup>st</sup> August 2015 to KERC for extension of time.  
2. Letter No.KERC/S.F-31/Vol-39/15-16/1047 from KERC dated 18.09.2015.*

**SUB.: EXTENSION OF TIME AS PER CLAUSE NO.5.7 OF PPA**

*Dear Sir,*

*Please refer our several communications regarding extension of time for financial closure and SCOD due to delay in receiving PPA. We have requested KERC for their intervention in this regard vice reference (1) (enclosed herewith). In reply to that, vide reference (2) (enclosed herewith), KERC has highlighted the clause No.5.7 of PPA. Clause 5.7 refers to the "Extension of Time" and Clause 5.7.2 says that the SCOD can be extended to 6 months.*

*I would also like to draw your attention here is that because of delay in receiving the executed PPA we were not able to initiate land procurement, project financing, MNRE exemption certificate for material procurement and many other construction activity. After receiving the executed PPA we have initiated our land acquisition, project financing and other said & required activities which we should start long back if we would have got the executed and complete PPA on time.*

*Please also note that the size of the project is not small, it is big size project that also requires sufficient time to execute and commission.*

*Keeping the above points in mind and referring Clause 5.7 of PPA, as suggested by KERC, requesting you to please grant us the extension of 6 months as per Clause 5.7 of PPA for Financial Closure and SCOD.*

*Thanking you,*

CC: **1. KERC**

*(We Thank you for your valuable guidance and agreeing to accept our genuine request in regards to extension of time and support needed to promote investment in renewable energy in the State of Karnataka.)"*

(Here itself, it may be noted that this Commission had not accepted the request of the petitioner to consider the date of receipt of PPA as the effective date as against the date of signing of the PPA. This Commission had simply directed the petitioner that, if required, to approach CESC for extension of time on the grounds provided in Article 5.7 of the PPA).

- (h) In response to the e-mail dated 30.9.2015 requesting for extension of time, the CESC by letter dated 26.10.2015 replied as follows :

*"Inviting reference to the above, considering your request vide letter cited in reference and duly exercising the provisions of Article 20.4.1 of the PPA which has already been approved by the Hon'ble Commission, I am directed to convey the approval of CESC Mysore as following:*

- 1. Time for fulfilling the Conditions Precedent in full as per Article-4 is extended for a period of 137 days, i.e., upto 17.05.2016. (The number of days taken for approval of PPA.)*
- 2. There is no change in the effective date which remains as 02.01.2015.*
- 3. Time for achieving Commercial Operation is extended for a period of 137 days, i.e., upto 08.11.2016. (The number of days taken for approval of PPA.)*
- 4. This extension of time granted for fulfilling conditions precedent is final and will not be revised under any circumstances.*

*You are requested to execute a Supplemental Agreement to effect the above changes on or before 04.11.2015 on a stamp paper of value Rs.200/- in triplicate. The Supplemental Agreement shall be got approved by Honorable KERC. Draft Supplemental Agreement will be mailed to your email-ID."*

- (j) Thereafter, a Supplemental PPA dated 4.11.2015 was executed by the Petitioner and the CESC, incorporating the extension of 137 days for complying with the Conditions Precedent and commercial operation. By letter dated 11.11.2015, the CESC sent this Supplemental PPA to this Commission for approval.

- (k) Upon receipt of the letter dated 11.11.2015 along with the Supplemental PPA dated 4.11.2015, this Commission by letter dated 1.12.2015 directed the CESC to re-submit the Supplemental PPA after incorporating the tariff of Rs. 6.51 per unit as per the terms specified under Article 12.2 of the PPA. The CESC in turn intimated the Petitioner, by letter dated 21.12.2015, for incorporating the reduced tariff of Rs.6.51 per unit as against the tariff of Rs. 6.89 per unit agreed in the PPA. The CESC again addressed letter dated 21.12.2015 to the Petitioner, stating that, as the Petitioner did not turn up to incorporate the reduced tariff of Rs. 6.51 per unit in the Supplemental PPA as directed by this Commission, the dates for fulfilment of the Conditions Precedent and commercial operation shall remain as originally mentioned in the PPA dated 2.1.2015. Further, the CESC stated that, the time for fulfilment of the Conditions Precedent would expire on 1.1.2016 and asked the Petitioner to submit all the documents in proof of the achievement of the Conditions Precedent within seven days, failing which, action would be taken as per article 4.3 of the PPA for recovery of damages for not fulfilling the Conditions Precedent. The Petitioner made a request to the CESC, by letter dated 29.2.2016 not to insist on the reduction of the tariff. A copy of that letter was also marked to the Secretary of this Commission. This letter dated 29.2.2016 was received by the CESC on 1.3.2016 and it appears, as the CESC was not in a position to fulfill the request of the Petitioner, another Supplemental PPA was executed on 1.3.2016 incorporating the extension of 137 days for achieving the Conditions Precedent and commercial operation, as

agreed earlier and also incorporating the reduced tariff as indicated by this Commission. Thereafter, on the same day, the Petitioner made a representation to the CESC, that the subsequent Supplemental PPA dated 1.3.2016 incorporating the reduced tariff was obtained under coercion and without the free consent and it will seek appropriate remedies under law. The Petitioner has filed the present Petition before this Commission on 10.3.2016.

- (I) That the PPA duly approved by this Commission was required for achieving the financial closure, acquiring legal possession of the required extent of land for the Project and fulfilling other Conditions Precedent stated in the PPA, but the CESC failed to provide the duly approved PPA to the Petitioner, in time. That the delay of 137 days from the 'Effective Date' in handing over the approved PPA to the Petitioner, was an inordinate delay on the part of the CESC, as it did not furnish the replies to the queries raised by this Commission, at an early date. That the Petitioner understood, that in accordance with the terms of the Bid documents, the CESC was mandated to take prior approval of the Commission and thereafter forward the signed PPA to the Commission for adoption of the tariff in terms of Section 63 of the Electricity Act. 2003, which was not done and that, the PPA was sent for the Commission's approval, only after the PPA was signed between the Petitioner and the CESC.

- (m) That while the Petitioner required to fulfil the Conditions Precedent in a time-bound manner, without an executable and valid PPA approved by this Commission, 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 the activities relating to the Project financing, land procurement, MNRE exemption for material procurement and other construction-related activities. The delay of 137 days in handing over the approved PPA from the date of signing of the PPA left the Petitioner with only 228 days to perform the Conditions Precedent against the agreed period of 365 days.
- (n) That the Petitioner has time and again urged the CESC as well as this Commission through various letters, to consider 21.5.2015, i.e., the date on which the approved PPA was handed over to it, as the 'Effective Date' under the PPA, for the purpose of carrying out its obligations under the PPA. That the extension of time of 137 days granted by the CESC to the Petitioner for fulfilling the Conditions Precedent to achieve the commissioning of the Project, was unquestionable. That Article 5.7.4 of the PPA provides that, as a result of granting of extension of time, the Scheduled Commissioning Date and the Expiry Date newly determined, shall be deemed to be Scheduled Commissioning Date and Expiry Date for the purpose of the PPA. And therefore, the question of invoking Article 12.2 of the PPA did not arise. In that event, this Commission directing the CESC to re-submit the Supplemental PPA dated 4.11.2015 after

- incorporating the reduced tariff of Rs.6.51 per unit as against the tariff of Rs.6.89 per unit agreed in the PPA, was not justified.
- (p) That the circumstances under which the Petitioner executed the Supplemental PPA dated 1.3.2016 reducing the tariff, would clearly establish that, the said Supplemental PPA was executed by the Petitioner under duress, therefore the same is unenforceable.
- (q) For the above reasons, the Petitioner has filed the present Petition.
- 4) The CESC has appeared through its counsel and filed its Statement of Objections. The main grounds urged by the CESC in its Statement of Objections may be stated as follows :
- (a) The execution of the PPA dated 2.1.2015 and thereafter inclusion of certain amendments to the different clauses of the PPA as directed by this Commission while intimating the approval of the PPA and handing over of one set of the original PPA to the Petitioner on 21.5.2015, are not denied. The various letters written by the Petitioner to the CESC and its replies to the Petitioner, are also not denied.
- (b) The granting of extension of 137 days for achieving the Conditions Precedent and commercial operation of the Project, is not denied, but it is contended that the same was subject to certain conditions. Pursuant

to the extension of time, the execution of the Supplemental PPA dated 4.11.2015, is not disputed. It is stated that, this Supplemental PPA was placed before this Commission for approval and this Commission, by letter dated 1.12.2015, directed the CESC to incorporate the reduced tariff in the Supplemental PPA and to re-submit the same for its approval. Further, that subsequently, a fresh Supplemental PPA date 1.3.2016 was executed. However, it is contended that, the CESC's letter dated 6.10.2015 would show that the said extension of time was subject to execution of a Supplemental PPA and the said Supplemental PPA being approved by this Commission. Further, that the Petitioner has accepted the extension of time based on these conditions and has voluntarily executed the Supplemental PPA dated 4.11.2015.

(c) The CESC has denied that, the subsequent Supplemental PPA dated 1.3.2016 was executed by the Petitioner under coercion. It is contended that, as per the letter dated 1.12.2015 of this Commission to incorporate the reduced tariff in the Supplemental PPA, the CESC had written a letter dated 21.12.2015 to the Petitioner communicating the instructions of this Commission and that, as there was no response, the CESC was justified in issuing the letter dated 23.2.2016.

(d) It is contended that, there was no valid ground which could attract invalidation of the Supplemental PPA dated 1.3.2016. Further, that in any event, the revised Supplemental PPA dated 1.3.2016 was pursuant to the

conditional approval granted by this Commission to incorporate the reduced tariff and that the Petitioner accepted the same and did not question the said approval of the Commission and the said approval became final and the Petitioner has also withdrawn the prayer made in the Petition questioning the said approval. Therefore, it is contended that, without the said conditional approval of the Commission being set aside in an appropriate proceeding, the question of assailing the revised Supplemental PPA dated 1.3.2016 does not arise.

- (e) That the Petitioner, with its eyes open, had executed the PPA, knowing fully well that it would receive the original PPA, only after the approval of this Commission and that the process of approval would take some time and that there was no time limit, nor was there any assurance of such time limit for getting the approval of this Commission.
- (f) It is denied that, there was delay in replying to the queries raised by this Commission before approval of the PPA and that the delay in approval of the PPA was due to the default of the CESC in complying with the queries raised by this Commission.
- (g) It is contended that, the queries raised by this Commission should have been addressed to the KREDL and not to the CESC, as the KREDL was the competent authority to furnish the required documents and to answer the queries. Therefore, it is contended that the CESC was not at fault for

- the delay, if any, in obtaining the approval of the PPA from the Commission.
- (h) It is denied that there was any breach of obligations in providing necessary assistance to the Petitioner, as stated in Articles 4.2.1 and 6.1.3 of the PPA. It is denied that, the Bid documents mandated the CESC to take prior approval of the draft PPA from this Commission. Therefore, the CESC has prayed for dismissal of the Petition.
- 5) After hearing the parties, the case was reserved for orders. On perusal of the records and the rival contentions, this Commission felt that, certain clarifications / documents on the following points were required from the parties:
- (1) Whether the Petitioner had received a copy of the PPA executed on 2.1.2015 prior to its approval by the Commission? If so, on what date?
  - (2) Whether the Petitioner could have initiated steps towards fulfilment of its obligations specified under the Conditions Precedent, such as project financing, land procurement, etc., on the basis of such copy of the PPA dated 2.1.2015?
  - (3) Copies of the Monthly Progress Reports with regard to fulfilment of the Conditions Precedent submitted, if any, to the CESC by the Petitioner.

6) Thereafter, the parties have filed their say and produced certain documents on the clarifications / documents sought for by this Commission.

7) **Petitioner's Response to the Clarifications :**

(a) Reg. Clarification (1) above :

(1) It is stated that, after signing two sets of the original PPA on 2.1.2015. both the sets were retained by the CESC and a scanned copy of the signed PPA was sent by e-mail to the Petitioner by the CESC on 2.1.2015 itself.

(2) The Petitioner has stated in paragraph 2(e) of its Affidavit that, it had made efforts to initiate its obligations with respect to fulfillment of the Conditions Precedent, however, without the physical copy of the signed Agreement / original approved PPA, the activities required could not be undertaken and the Petitioner-Company was not in a position to take any effective steps or make any substantial progress towards its commitments.

(b) Reg. Clarification (2) above :

(1) The Petitioner has stated that, it was unable to take any effective steps towards fulfilment of the Conditions Precedent till it received the

original PPA on 21.5.2015. The lenders were not willing to consider and sanction the loan to the Petitioner for financing the Project due to unavailability of the approved PPA. One such e-mail dated 27.4.2015 was received from the learned counsel of the International Finance Corporation (IFC) requesting for the approved PPA. Only after 21.5.2015, the lenders started considering the Petitioner's request for finance. The first draft Terms Sheet from the IFC (one of the lenders) was received only on 13.7.2015. (The Petitioner has stated in its Affidavit that, a copy of the e-mail of the IFC along with the draft Terms Sheet is annexed with its Affidavit and marked as ANNEXURE – P3. However, along with ANNEXURE – P3, the draft Terms Sheet has not been produced.) That none of the lenders was ready to engage with the Petitioner without the duly approved signed PPA.

(2) That the Petitioner started with due diligence of title for acquisition of the land for the Project after 2.1.2015, however the steps for acquisition of land for the Project could take place only after 21.5.2015. The first Memorandum of Understanding (MoU) for the land was executed on 5.9.2015 and thereafter the Petitioner started purchasing the land for the Project.

(3) That the delay in receiving the approved PPA delayed every step of the Project, as the Petitioner was unable to purchase the land, apply for the conversion of the land use or prepare the Feasibility Construction

Plan, etc., which resulted in delay in sanction of the loan and disbursement by the lenders.

(4) That the Petitioner went ahead with the preliminary activities, such as applying for Service Tax registration on 14.1.2015, for Import/Export Code on 29.4.2015, for Evacuation Approval on 27.4.2015 and conducting preliminary Land Survey and title document collection and scrutiny.

(c) Reg. Clarification 5(3) above :

(1) The Petitioner has produced the Monthly Progress Report at ANNEXURE – P8 (collectively) to the Affidavit .

8) **CESC's Response to the Clarifications** :

(a) Reg. Clarification 5(1) above :

It is stated by the CESC that, the signed copy of the PPA dated 2.1.2015 was scanned and sent to the Petitioner by e-mail dated 2.1.2015 itself.

(b) Reg. Clarification 5(2) above :

It is stated that, the Petitioner could have initiated steps towards fulfillment of the Conditions Precedent, including procurement of loans,

on the basis of the signed PPA. A copy of the letter dated 25.3.2015 issued by the IFC is produced.

(c) Reg. Clarification 5(3) above :

It is stated that, the Progress Reports submitted by the Petitioner are produced.

9) After considering the submissions made by the learned counsel for the parties and the material placed on record, the following issues would arise for our consideration:

- (1) Whether the decision of the Commission conveyed in its letter dated 1.12.2015 addressed to the CESC, intimating to incorporate the reduced tariff of Rs.6.51 per unit in the Supplemental Agreement dated 4.11.2015 and to re-submit the same for approval, is valid?
- (2) Whether the extension of time of 137 days granted by the CESC to the Petitioner for achieving the Conditions Precedent and commercial operation of the Project, can be subjected to legal scrutiny by this Commission?
- (3) If Issue No.2 is answered in the affirmative, whether the Petitioner has made out a case for extension of time of 137 days for achieving the Conditions Precedent and commercial operation of the Project?
- (4) What Order?

- 10) After considering the submissions made by the learned counsel for the parties and the material placed on record, our findings on the above issues are as follows:
- 11) **ISSUE No.(1):** *Whether the decision of the Commission conveyed in its letter dated 1.12.2015 addressed to the CESC, intimating to incorporate the reduced tariff of Rs.6.51 per unit in the Supplemental Agreement dated 4.11.2015 and to re-submit the same for approval, is valid?*
- (a) The CESC vide letter dated 11.11.2015 submitted a Supplemental PPA dated 4.11.2015, requesting to communicate approval. In support of its request, it was stated that, the CESC, Mysuru, considering the delay in approval and handing over of the original PPA and utilizing the provisions of the PPA, granted extension of 137 days for fulfilling the Conditions Precedent and achieving the Commercial Operation. The Supplemental PPA was also submitted, incorporating the necessary changes. The request for approval of the Supplemental PPA was processed in File No.F-31/Vol.37 by the Commission. The Commission's Office, while processing the Supplemental PPA, noted that, on a similar issue of extension of time in the case of one M/s. Raghu Infra Pvt Ltd., this Commission had opined that, if the commissioning of the Project was delayed, the tariff would be governed by Article 12.2 of the PPA. It was further noted by the Commission's Office that, the commissioning of the Project would be delayed in the present case and the applicable tariff as on the

Commercial Operation Date (COD) would be Rs.6.51 per unit, as against the agreed tariff of Rs.6.89 per unit. The Office Note concluded that, the CESC might be intimated to re-submit the Supplemental PPA, duly revising it by incorporating the reduced tariff of Rs.6.51 per unit. This Office Note was relied upon and the Commission took a decision to approve the Office Note by circulating the file for consideration of its Members and Chairman. That decision was communicated to the CESC by the Commission, by letter dated 1.12.2015.

- (b) In the present case, the PPA is dated 2.1.2015. The Conditions Precedent were required to be achieved within 365 days from the date of the PPA and the commercial operation was to be achieved within 18 months from the date of the PPA. That means, the Conditions Precedent and the commercial operation should have been achieved before 1.1.2016 and 1.7.2016, respectively, as per the terms originally agreed in the PPA. After granting extension of time of 137 days by the CESC for achieving the Conditions Precedent and the commercial operation, the revised dates would be 17.5.2016 and 8.11.2016, respectively, as stated in the Supplemental PPA dated 4.11.2015.
- (c) In the generic Tariff Order dated 30.7.2015 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 1.9.2015 and getting commissioned during the period from 1.9.2015 to

31.3.2018, for which PPAs have not been entered into prior to 1.9.2015. 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. On consideration of the submissions made by the learned senior counsel for the Petitioner and the provisions contained in Article 5.7.4 of the PPA, we are of the considered view that the decision taken by this Commission in its File No.F-31/Vol.37 to direct the CESC to incorporate the reduced tariff of Rs.6.51 per unit in the Supplemental PPA, was incorrect. We have also found that, the facts in M/s. Raghu Infra Pvt. Ltd., referred to above, were not similar to the facts in the present case. The present issue was not involved in M/s. Raghu Infra Pvt. Ltd. It appears that the Commission was persuaded by the Office Note to the effect that, a decision was already taken in the case of M/s. Raghu Infra Pvt. Ltd., wherein a similar issue was involved. Therefore, the reason assumed by this Commission for intimating the CESC to incorporate the educed tariff of Rs.6.51 per unit in the Supplemental PPA, is incorrect. Therefore, the intimation sent to the CESC on the basis of such a decision through this Commission's letter dated 1.12.2015, is to be recalled. The proper course was to verify the sufficiency of the reasons for the extension of time. For the above reasons, we answer Issue No.(1) in the negative.

- 12) **ISSUE No.(2):** *Whether the extension of time of 137 days granted by the CESC to the Petitioner for achieving the Conditions*

*Precedent and commercial operation of the Project, can be subjected to legal scrutiny by this Commission?*

Article 5.7 of the PPA does not specifically stipulate that, any extension of time granted by the CESC should be got approved by the Commission. However, Article 5.7.1 of the PPA stipulates the grounds on which alone the time could be extended for achieving the Conditions Precedent and commercial operation. Article 12.2 of the PPA provides for reduction of tariff as a consequence of delay in the commissioning of the Project beyond the Scheduled Commissioning date, subject to certain terms and conditions stated therein. Whenever an event affects the quantum of tariff applicable for supply of energy to the Distribution Licensees, we are of the considered opinion that the same should be scrutinized and approved by the Commission. The Commission has the exclusive jurisdiction to determine the tariff for supply of electricity by a Generating Company to a Distribution Licensee and it has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which electricity shall be procured from different agencies through PPAs. Therefore, we hold that, even in the absence of a specific term in the PPA, any event affecting or altering the tariff already approved in the PPA should be got approved by this Commission. The CESC has also specifically intimated the Petitioner that, the extension of time granted was subject to the approval of the Commission. Therefore, we answer Issue No.(2) in the affirmative.

- 13) **ISSUE No.(3):** *If Issue No.2 is answered in the affirmative, whether the Petitioner has made out a case for extension of time of 137 days for achieving the Conditions Precedent and commercial operation of the Project?*
- (a) The pleadings of the parties would show that, initially the PPA (ANNEXURE-M) was executed on 2.1.2015. Thereafter, certain amendments were effected by the parties in the PPA on 8.1.2015 as suggested by the KREDL and on 21.5.2015 as instructed by the Commission. The nature of the amendments effected in the PPA as per the KREDL's suggestions could not be ascertained, as no material is available on record in this regard. The parties to the PPA have not mentioned any dates on the amended pages of the PPA, after carrying out the said amendments. It is not the contention of the Petitioner that, the amended clauses of the PPA had, in any way, affected its rights. It is also not in dispute that, the original PPA was handed over to the Petitioner by the CESC on 21.5.2015. The pleadings of the parties in the case did not reflect the fact that, the scanned copy of the signed PPA dated 2.1.2015 was received by the Petitioner from the CESC by e-mail on 2.1.2015 itself. But, this fact came to light only when the Commission specifically sought for the same. Therefore, it is now an admitted fact that, on 2.1.2015 itself, the Petitioner had received by e-mail the scanned copy of the signed PPA dated 2.1.2015.

- (b) For the first time, the Petitioner made a representation dated 12.3.2015 to the CESC, stating that the Petitioner was yet to receive the original PPA and due to non-availability of the original PPA, the Petitioner was not able to process further the financing for the Project and that the original PPA was the prime document for the lenders, therefore the CESC was requested to hand over the original PPA at the earliest and to consider the date of handing over of the original PPA as the 'Effective Date' of the PPA. A similar request was made to this Commission by the Petitioner, by letter dated 6.4.2015. Subsequently also, the Petitioner requested the CESC and this Commission to treat the date of handing over of the original approved PPA to it as the 'Effective Date'. This Commission intimated the Petitioner to approach the CESC for extension of time under article 5.7 of the PPA. Pursuant to it, on the representation of the Petitioner, the CESC has granted extension of time of 137 days to the Petitioner for achieving the Conditions Precedent and commercial operation. Therefore, the question that arises for consideration is, whether the Petitioner has made out a case for extension of time of 137 days for achieving the Conditions Precedent and commercial operation.
- (c) Article 5.7.1 of the PPA relating to extension of time reads thus :

*"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 CESC, Mysuru Event of Default; or*

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

- (d) Article 16.2 of the PPA stipulates the various Events of Default on the part of the CESC. Article 16.2 would make it clear that, the various Events of Defaults mentioned therein do not include the event of delay, if any, on the part of the CESC in answering the queries raised by this Commission before approval of the PPA. Hence, under Article 5.7.1 (a) of the PPA, the extension of time cannot be sought for. We also note that, Article 5.7.1(b) of the PPA, viz., 'Force Majeure Events affecting CESC, Mysuru', is also obviously not applicable.

- (e) Article 5.7.1(c) of the PPA provides for extension of time on the ground of 'Force Majeure Events affecting the Developer'. The relevant portion of the meaning of 'Force Majeure' as stated in Article 14.3.1 of the PPA reads thus:

*"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)	XXX	XXX	XXX
(b)	XXX	XXX	XXX
(c)	XXX	XXX	XXX
(d)	XXX	XXX	XXX
(e)	XXX	XXX	XXX “

- (f) Article 14.4 of the PPA stipulates the events of Force Majeure exclusions. Article 14.5 provides for the necessity of giving notice of the Force Majeure events to the other party. Article 14.6 provides for the Duty to Perform and Duty to Mitigate in the event of a Force Majeure by the Affected Party. Article 14.7 provides for the relief available for a Force Majeure event.
- (g) From the above provisions of the Force Majeure clauses stated in the PPA, it is clear that, non-receipt of the original PPA, or its approval by the Commission, itself cannot be a 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 possession of 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 the Project Finance before the Financier and for making the initial searches for acquiring the requisite lands for the Project, based on the scanned copy of the signed PPA already available with it. A prudent Developer need not wait approval of the PPA by this Commission for initiating steps for procuring the Project Finance and acquiring the requisite lands for the Project. Admittedly, in the present case, the KREDL had issued the LoA dated 19.11.2014 allotting the Project to the Petitioner and admittedly, a scanned copy of the PPA dated 2.1.2015 was handed over to the Petitioner on 2.1.2015 itself.

- (h) The Petitioner has not given in the Petition the particulars of the dates on which it had initiated steps to procure the finance for the Project. The pleadings of the Petitioner in this regard are very evasive and vague. The Petitioner states that, since no copy of the approved PPA was provided to the Petitioner (except the scanned copy received by the Petitioner by e-mail), the Petitioner was unable to take any effective steps towards the fulfilment of the Conditions Precedent, till it received the same on 21.5.2015. The Petitioner also states that, due to non-availability of the duly approved signed PPA, the lenders were also not willing to consider and sanction loan to the Petitioner for financing its Project. Further, that it was only after the Petitioner received a copy of the approved signed PPA on 21.5.2015, the lenders started considering the request of the Petitioner for finance. None of these facts stated by the Petitioner is

supported by any letter / communication issued by the Financier. The Petitioner has produced an e-mail dated 27.4.2015 pertaining to 'IFC Financing – Azure, Karnataka', in which a request was made to upload the additional documents / information for further processing of the loan. One such information sought was, confirmation on approval of the PPA by this Commission. This e-mail would show that, the Petitioner had approached the IFC for Project Finance much earlier to 27.4.2015. The CESC has produced a copy of the letter dated 25.3.2015 issued by the IFC to all the Projects relating to the APIPL in Karnataka, intimating the 'in principle' approval, on certain terms and conditions. A reading of this letter would show that, the Petitioner had approached the IFC for Project Finance much earlier to 25.3.2015. The Petitioner in its Affidavit dated 10.11.2016 has stated that, it had made efforts to fulfil its obligations with respect to the Conditions Precedent upon receipt of the scanned copy of the signed PPA dated 2.1.2015. It was necessary for the Petitioner to disclose the progress achieved on the various dates with regard to the procurement of finance for its Project from different Financiers. However, the Petitioner has not disclosed these particulars relating to the Project Finance.

- (j) The Petitioner has produced copies of the loan applications for the Project Finance made to the Rural Electrification Corporation (REC) on 1.10.2015 and to the PTC India Financial Services Limited (PFC) on 15.10.2015. The delay in applying for the loans before these Financiers is

- not explained by the Petitioner. Therefore, we are of the considered view that, the Petitioner has failed to establish that it was wholly or partly prevented from initiating steps for securing the finance till the receipt of the original PPA on 21.5.2015.
- (k) The Petitioner in its Affidavit has stated that, regarding the procurement of lands, it had initiated steps soon after the receipt of the scanned copy of the signed PPA dated 2.1.2015 and it could enter into an MoU on 5.9.2015 with its Vendors. Therefore, considering the facts as a whole, we are of the considered view that the Petitioner has failed to establish that the delay in receipt of the original PPA resulted in the delay in every step of the Project.
- (l) The Petitioner has taken another contention that, it was not under a legal obligation to initiate steps towards fulfilment of the Conditions Precedent until and unless it received the approval of the Commission for the PPA executed between the parties. This contention is not wholly correct. Usually, the tariff discovered under a transparent bidding process as provided under Section 63 of the Electricity Act, 2003, shall be adopted by the Commission, if the bidding is in accordance with the guidelines issued by the Central Government. We note that the MNRE, Government of India, has published ' Guidelines for Tariff based Competitive Bidding Process for Grid connected Power Projects based on Renewable Energy Sources' in December 2012. During scrutiny of the PPAs, it was found that

KREDL had not followed these guidelines on some material procedural aspects. Therefore, there were correspondences between the Commission and distribution licensees and KREDL. After getting rectified the irregularities, the Commission had to approve the PPAs. We also found that the Draft PPA published with RFP also required certain necessary modifications. Therefore, there was some delay in approving the PPA. There would always be some time gap for adoption of the tariff and the approval of the PPA, from the date of submission of the papers till such orders are passed. It may be true that, the Developer is not expected to invest considerable amounts towards the preliminary works for the establishment of its Project. The amounts to be spent for approaching the Financier requesting for the grant of Project Finance and for applying for several other authorities for various permissions / licences and for searching of land for the Project etc., would be negligible. The rights and liabilities of the parties would relate back to the date of the PPA on its approval. Therefore, this contention of the Petitioner cannot be accepted.

- (m) The question of extension of time on the ground of Force Majeure would arise, only if it is established that, the delay in approval or not handing over the original PPA had delayed the financial closure or the disbursement of the loan amount to the Petitioner by the Financier. At best, in the present case, 27.4.2015 may be taken as the date on which, for the first time, the Petitioner's Financier requested to communicate the

confirmation of approval of the PPA. As on that date, the PPA was not yet approved. Therefore, this date may be taken as the date from which the delay is taken to have been commenced, for further processing of the Project Finance. For the above reasons, the period from 27.4.2015 to 21.5.2015 (25 days) could have been extended for achieving the Conditions Precedent and commercial operation. There was no ground or reason for the CESC to extend the time by 137 days to Petitioner for achieving the Conditions Precedent and commercial operation of the Project. Therefore, we answer Issue No.(3) in the negative, by holding that, at best, the extension of time could have been granted from 27.4.2015 to 21.5.2015(25 days).

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

- (a) The Petitioner in its Affidavit dated 10.11.2016 has stated that, the direction to incorporate a reduced tariff in the Supplemental PPA has resulted in non-disbursal of funds by the lenders. The Petitioner has also produced a letter dated 3.11.2016 issued by the CESC granting extension of time for one more month for achievement of the COD on the ground of the Force majeure event stated therein. However, these facts were not in issue at the time of the hearing of the case and no supporting, acceptable evidence has been placed on record. Therefore, we do not wish to consider the merits of these grounds in this Order.

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(b) As noted above, the Petitioner is found entitled to extension of time of 25 (twenty five) days only for achieving the commercial operation of the Project.

(c) For the foregoing reasons, we pass the following Order:

**ORDER**

The petitioner is entitled to extension of time of 25 (twenty five) days only for achieving the Commercial operation of the project. Accordingly, necessary consequences as per the terms of the PPA shall follow.

Sd/-

(M.K. SHANKARALINGE GOWDA)  
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)  
MEMBER

Sd/-

(D.B. MANIVAL RAJU)  
MEMBER