

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI  
(APPELLATE JURISDICTION)**

**APPEAL NO. 340 OF 2016**

**Dated : 28<sup>th</sup> February, 2020**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson  
Hon'ble Mr. S.D. Dubey, Technical Member**

**IN THE MATTER OF:**

**Azure Sunrise Private Limited,**

A company incorporated under  
the provisions of companies  
Act, 1956 having its registered office at  
No. 8, LSC, Madangir, Pushp Vihar,  
New Delhi - 110062

**...Appellant**

**VERSUS**

**1. Chamundeshwari Electricity Supply  
Corporation Limited,**

A Company incorporated and registered  
under the provisions of the Companies Act,  
1956 having its registered office at No. 927,  
L.J. Avenue Commercial Complex,  
New Kantharaj Urs Road, Saraswathipuram,  
Mysuru – 570009, India

**2. Karnataka Electricity Regulatory Commission**

Through the Secretary  
Constituted under the provisions of  
Karnataka Electricity Reforms Act,  
1999 having its office at 6<sup>th</sup> and 7<sup>th</sup> Floor,  
Mahalakshmi Chambers, No. 9/2,  
M.G. Road, Bangalore – 560001, India

**...Respondents**

Counsel for the Appellant (s) : Mr. C. S. Vaidhyanathan, Sr. Adv.  
Mr. Sanjay Sen, Sr. Adv.  
Mr. Buddy A. Ranganadhan

Ms. Anuradha Mukherjee  
Ms. Shikha Tandon  
Mr. Robin Grover  
Ms. Anu Srivastava  
Ms. Shreya Som  
Ms. Samapila Biswal  
Mr. Rahul Chauhan  
Ms. Akriti Gandotra  
Ms. Pallavi Rao  
Ms. Shreya Seth  
Mr. Gyanendra Kumar

Counsel for the Respondent(s) : Ms. Ragima R.  
Mr. Sandeep Grover  
Mr. Pankhuri Bhardwaj  
Mr. Mohit Chadha for R-1

## **J U D G M E N T**

### **PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER**

1. The present Appeal No. 340 of 2016 has been preferred by M/s. Azure Sunrise Private Limited (**Appellant**) against the Impugned Order Dated 14<sup>th</sup> December, 2016 passed by the Karnataka Electricity Regulatory Commission (hereinafter the "**State Commission**") in Petition No. 19/2016 (hereinafter the "**Petition**"), wherein the State Commission has arbitrarily and unjustifiably retrospectively reduced the approved extension of time of 137 days granted by the distribution licensee, Chamundeshwari Electricity Supply Corporation Limited (hereinafter the "**CESCOM**") to only 25 days, after more than 12 months of such extension being granted and acted upon by both the parties and has further recorded that the necessary consequences as per the terms of the PPA (as defined hereinafter) shall follow.
  - 1.1 The 50 MW capacity of solar PV power plant in Rangenahalli Village, Hiriyur Taluk, Chitradurga District, Karnataka is near completion and the Appellant has already invested approximately INR 310 crores till date

and it will be severely hit by huge financial loss.

## **2. FACTS OF THE CASE**

- 2.1 The Appellant, Azure Sunrise Private Limited, is a Special Purpose Vehicle of Azure Power India Private Limited (“**APIPL**”), a generating company as defined in Section 2(28) of the Act. The Appellant is engaged in the business of *inter alia* generation and production of solar energy, electricity and all sources connected therewith, and provides clean and affordable energy to utilities, government and commercial customers across India.
- 2.2 Karnataka Renewable Energy Development Limited (“**KREDL**”), incorporated under the Companies Act, 1956, is a nodal agency of the Government of Karnataka for facilitating the development of renewable energy in the state of Karnataka. KREDL processes all applications received for setting up of renewable energy generating plants and based on their recommendation, the Government of Karnataka approves and grants rights to independent power producers to set up their generation plants in the state. KREDL also monitors progress of various renewable energy projects in the state.
- 2.3 In the year 2014, KREDL resolved to undertake development of 500 MW of solar thermal and/ or solar photovoltaic (PV) power plants in the state of Karnataka (hereinafter the “**Project**”) through private sector participation, which would be responsible for design, finance, engineering, procurement, construction, operation and maintenance of the Project.
- 2.4 Accordingly, KREDL invited proposals by its Request for Proposal (“**RFP**”) dated May 30, 2014 and prescribed the technical and commercial terms and conditions for the selection of Bidders for undertaking development of solar thermal power and/or solar PV power plants in Karnataka.

- 2.5 The competitive bidding process was conducted as per the ‘Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licenses’ dated January 19, 2005 (as amended from time to time) issued by the Ministry of Power, Government of India under Section 63 of the Electricity Act, 2003 (“**Bidding Guidelines**”). The bid documents including the RFP, along with the amendments to it and the draft PPA attached to the RFP (together referred to as the “**Bid Documents**”) issued by KREDL were based on the Standard Bidding Documents as notified by the Ministry of Power pursuant to the Bidding Guidelines. The bidders were expected to submit their bids on the basis of the said Bid Documents.
- 2.6 After evaluation of the proposals received, KREDL accepted the bid of APIPL for development of 50 MW capacity of solar PV power plant and issued the Letter of Award No. KREDL/07/GC/500 MW-LOA/AZPIPL/2014-15/4531 dated November 19, 2014 (“**LOA**”) to APIPL.
- 2.7 It will be worthwhile to mention that apart from the aforesaid, APIPL has executed two more Power Purchase Agreements through other special purpose vehicles with Gulbarga Electricity Supply Company Limited (GESCOM) for development of 40 MW capacity of Solar PV Project and Hubli Electricity Supply Company Limited (HESCOM) for development of 40 MW capacity of Solar PV Project in the same district. Hence, APIPL is at present developing 130 MW capacity Solar PV Projects in the state of Karnataka for the aforesaid DISCOMs, including CESCO.
- 2.8 The Tariff Order for Solar Power Generation dated October 10, 2013 for the period FY 14-18 prevailing at the time of award of the LOA to APIPL set the approved tariff at INR 8.40 per unit in respect of solar PV power plants. The Tariff Order states that the approved tariff would be applicable to solar power generators entering into power purchase

agreements on or after April 1, 2013 and up to March 31, 2018, and further that the Tariff Order is not applicable where the tariff is discovered through bidding process.

- 2.9 In fact, APIPL had been awarded the LOA for the Project, as an outcome of the competitive bidding process, by quoting a price significantly lower (i.e. INR 6.89 per unit) as compared to the tariff determined by State Commission in the Tariff Order (i.e. INR 8.40 per unit). The Appellant had no reason to believe that the said representation made under the Tariff Order upon which the Appellant has acted upon, would be in any manner be retracted by the Respondents.
- 2.10 In terms of Clause 2.1.16 of the RFP, APIPL incorporated the Appellant Company under the provisions of the Companies Act, 1956 as a 'Special Purpose Vehicle' to execute the PPA and implement the Project and supply power there from on long-term basis to CESCO. Further, in terms of Clause 3.4.7 of the RFP, APIPL vide its letter dated December 30, 2014 requested CESCO to accept the Appellant Company as the Developer which shall undertake and perform the obligations and exercise the rights of the Selected Bidder under the LOA, including the obligation to enter into the PPA pursuant to the LOA for executing the Project.
- 2.11 Accordingly, the Appellant and CESCO entered into the PPA on January 2, 2015 for the execution of the Project subject to and on the terms and conditions set forth therein. Two copies of the PPA in original were executed and after signing of the PPA, both the original copies were retained by the Respondent and no original copy was provided to the Appellant as the same was to be sent to the State Commission for approval. Only a scanned copy of the PPA was provided to the Appellant by email on January 2, 2015.

- 2.12 In fact, the PPA provided by the Respondent No. 1 vide its email dated January 2, 2015 was not the effective, executable and valid PPA duly approved by the State Commission. The said PPA had blanks as the date of approval by the State Commission was yet to be received and filled in by the parties.
- 2.13 As part of the Bid Security in line with Clause 3.9 of the RFP, the Appellant furnished three irrevocable and unconditional bank guarantees dated December 8, 2014 for a total amount of INR 5,00,00,000/- (Rupees Five Crores only) towards Performance Security for due and punctual performance of its obligations in terms of and in the manner provided under Article 4.4(a) of the PPA.
- 2.14 Though the Appellant was fully geared to start the Project, on account of unavailability of the original duly approved PPA from the date of signing, the Appellant was not in a position take effective steps and start investing into the Project. While the Appellant was required to fulfil the Conditions Precedent in a time bound manner, however, without an effective, executable and valid PPA as approved by State Commission, the Appellant was not in a position to initiate any activities towards fulfilling its obligations under the Conditions Precedent as defined in the PPA, more particularly activities related to project financing, land procurement, MNRE exemption for material procurement and other construction related activities. The Project had a debt equity ratio of 70:30. Hence funding from lenders was critical to setting up of the Project and achieving COD.
- 2.15 Since the Appellant was unable to take steps without the original duly approved signed PPA, in addition to liasoning with CESCO to provide the same at the earliest, it also wrote to CESCO vide letters dated March 12, 2015 and April 13, 2015 raising the aforesaid issue.

- 2.16 Meanwhile, the Appellant also approached financial institution for loans but could not make any progress without the physical copy of the original duly approved PPA being provided to it. The lenders were not willing to consider and sanction the financing the Project without the duly approved PPA. It is for this reason, the Appellant had, time and again, written to the Respondent for providing the copy of the duly approved signed PPA. One such email dated April 27, 2015 was received from the counsel of IFC requesting for an approved PPA.
- 2.17 However, a copy of the effective, executable and valid PPA, duly approved by State Commission was received by the Appellant only on May 21, 2015.
- 2.18 The relevant provision to the present dispute in the PPA is mentioned in brief hereunder:
- (i) Article 3.1 and Article 20.1 define Effective Date as the date of the execution/ signing of the PPA by both the parties.
  - (ii) Article 4.1 of the PPA, the Appellant was required to fulfil certain conditions precedent 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 CESCO and the commercial operation was to be achieved within 18 months from the date of the PPA.
  - (iii) As such, the Conditions Precedent and COD as per the original PPA were to be achieved before January 1, 2016 and July 1, 2016 respectively.
  - (iv) Article 4.2 of the PPA required the Appellant/ Developer to fulfil certain obligations under the PPA as provided therein. It is pertinent to point out that under Article 4.2.1 of the PPA; CESCO was required to extend all its cooperation as may be required by the Appellant for satisfying the Conditions Precedent.

- (v) Further, Article 6.1.3 of the PPA details the obligations of CESCO, wherein CESCO under sub clause (b); (c) and (d) is obliged to act in a manner which is not violative of any of the provisions of the PPA; to act reasonably while exercising its discretionary power under the PPA and support; co-operate with and facilitate the Developer in the implementation and operation of the Project in accordance with the provisions of the PPA.
- (vi) Under Article 4.3 of the PPA, in the event the Developer (Appellant) does not procure fulfilment of any or all of the Conditions Precedent set forth in Clause 4.2 of the PPA, within 365 days, for no fault of the CESCO or due to Force Majeure, the Developer shall pay to CESCO 0.2% of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent as damages. However, after 30 days the CESCO, on its discretion may terminate the Agreement.
- (vii) Article 14.3.1 (e) recognizes as a Force Majeure event an unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any approval required by the Developer to perform their obligations under the PPA.
- (viii) Article 5.7 of the PPA, provides extension of time due to any CESCO event of Default or Force Majeure Events affecting CESCO or the Developer and states that in the event the Developer is prevented from performing its obligations under 5.1 (Obligations of the Developer) by the Scheduled Commissioning Date, then the Scheduled Commissioning Date and the Expiry date can be deferred. As per Article 5.7.4 the Scheduled Commissioning Date and the Expiry Date, newly determined shall be the Scheduled Commissioning Date and the Expiry date for the purpose of the PPA.

- (ix) Article 12.1 of the PPA, states that the Developer shall be entitled to the Applicable Tariff of INR 6.89/kWh and Article 12.2 states that as a consequence of delay in Commissioning of the Project beyond the Scheduled Commissioning Date, if there is a change in KERC applicable tariff, the changed applicable tariff will be lower than (i) Tariff at in Clause 12.1 or (ii) KERC applicable tariff as on the COD.

2.19 The Appellant understands that in accordance with the Bid Documents, CESCOTM was mandated to take prior approval of State Commission and thereafter, forward the signed PPA to State Commission for adoption of tariff in terms of Section 63 of the Act, which was not done. The PPA was sent for State Commission's approval only after the PPA was signed between the Appellant and CESCOTM.

2.20 The Appellant was provided the effective, executable and valid PPA only on May 21, 2015, i.e. after delay of about 137 days from the date of the signing of the PPA by the Appellant. This delay in effect left the Appellant with only 228 days to perform its obligations against the contractually agreed period of 365 days.

2.21 It is under the aforesaid circumstances that the Appellant *vide* its letters dated March 12, 2015 and April 13, 2015 raised the aforesaid issue with CESCOTM, and *vide* its letter dated April 6, 2015 raised the aforesaid issue with State Commission, and requested the Respondent to provide the Appellant with a copy of the effective, executable and valid PPA, duly approved by State Commission at the earliest as it was unable to process further for financing of the Project. Pursuant to the Appellant's letter dated March 12, 2015, CESCOTM *vide* its letter dated March 24, 2015 stated the following:

- (i) that the original PPA was forwarded to the State Commission *vide* letter dated January 7, 2015,

- (ii) subsequent to which the State Commission had vide letter dated January 14, 2015 requested CESCO to produce the authorization letter wherein KREDL was authorized for calling bids on behalf of CESCO and bidding document;
- (iii) the modifications in the PPA clauses as per KREDL were incorporated and modified sheets were signed on February 19, 2015
- (iv) letter of authorization to KREDL along with corrected PPA was forwarded to State Commission vide letter dated February 21, 2016
- (v) after which the State Commission requested to submit the bidding documents by collecting it from KREDL
- (vi) the bid document were received through email on March 10, 2013 and that they same were being forwarded to the State Commission.
- (vii) the original PPA cannot be handed over before the approval of State Commission.

2.22 The response received from State Commission dated April 13, 2015 to the Appellant's letter dated April 6, 2015 revealed that the delay in the approval of the PPA was solely attributable to CESCO, since the documents/ details requested from CESCO were yet to be received from CESCO for further action. The State Commission in the said letter had requested CESCO to furnish the following documents/ details:

- (i) Whether the standard bidding documents issued by KREDL, while calling tenders, are as per the bidding guidelines & the documents issued by MOP, as required under Section 63 of the Electricity Act, 2003.

- (ii) If so, reference of the bidding guidelines and the bidding documents issued by MOP may be furnished.
- (iii) Present status of the writ petition filed by M/s Reitz India Limited, Hyderabad.

2.23 This was brought to the notice of CESCOTM *vide* the Appellant's email dated April 22, 2015, wherein, the Appellant once again urged CESCOTM to take the necessary action at their end and to furnish the documents/details required by State Commission as per their letter dated April 13, 2015, for their approval of the PPA to make it an effective, executable and valid document. It was also highlighted by the Appellant that on account of the aforesaid delay on the part of CESCOTM in furnishing the effective, executable and valid PPA duly approved by State Commission, the Appellant was facing an impasse with the lenders in financing of the Project, subsequent roadblocks in the implementation of the Project, and was suffering huge losses due to the same.

2.24 It was only then, that CESCOTM belatedly took action and wrote to State Commission on April 23, 2015, finally providing them with the balance information required for obtaining the approval of the PPA from State Commission, which was received only on May 4, 2015, after 137 days of execution of the PPA. CESCOTM in the letter dated April 23, 2015 informed the State Commission that the details whether the standard bidding documents issued by KREDL, while calling tenders, are as per the bidding guidelines & the documents issued by MOP, as required under Section 63 of the Electricity Act, 2003 was not available with CESCOTM and KREDL had to be contacted regarding the same.

2.25 It was on May 12, 2015 that CESCOTM informed the Appellant that it was in receipt of the approval of State Commission to the PPA dated May 4, 2015, which was subject to certain modifications/ corrections and

requested the Appellant to visit its office to give effect to the modified PPA.

- 2.26 Accordingly, certain amendments as suggested by State Commission were executed between the Parties on May 21, 2015.
- 2.27 Therefore, from the date of the execution of the PPA, i.e., on January 02, 2015, till the final approval from State Commission i.e. in May 2015, there was a delay of about 137 days in CESCO being able to get an approval to the PPA, the cause of the delay being solely due to CESCO's acts/ omissions (as stated herein above).
- 2.28 The Appellant had time and again urged the Respondent (*vide* its letters dated March 12, 2015, April 06, 2015, April 13, 2015, April 22, 2015, August 31, 2015 and October 09, 2015) to consider the date of delivery of the executable, effective and valid PPA to be considered as the Effective Date under the PPA, for the purposes of performance of the obligations under the PPA, but to no avail.
- 2.29 Realizing the difficulty being faced by the Developers in initiating and completing its obligation under the PPAs without having an effective, executable and valid PPA duly approved by the State Commission, the new PPA's now being entered into by the licensee/ DISCOMS and approved by the State Commission with other third parties provide the effective date as the date of the approval of the PPA by the State Commission.
- 2.30 The Appellant had approached CESCO *vide* its email dated September 30, 2015 to consider the date of receipt of the PPA, i.e. May 21, 2015, as the Effective Date under the PPA, and to construe the timelines for fulfilment of obligations under the PPA with reference to the same.

- 2.31 On October 21, 2015, State Commission in response directed the Appellant to approach CESCO for extension of time, in terms of Article 5.7 of the PPA.
- 2.32 Meanwhile, CESCO acceded to the request of the Appellant on October 26, 2015 and granted an extension of 137 days to the Appellant for fulfilling the Conditions Precedent and to achieve the COD. Such extension was unqualified, and thus constituted as a waiver in writing by CESCO, in terms of Article 4.1 of the PPA.
- 2.33 CESCO *vide* its letter dated November 11, 2015 also intimated State Commission regarding the said extension granted to the Appellant, and acknowledged that the said extension was given due to the delay in approval and handing over of the original duly approved PPA to the Appellant.
- 2.34 In fact, pursuant to the grant of extension, the Supplemental Agreement dated November 4, 2015 was executed between the Appellant and CESCO to record modification of the timelines under the PPA in fulfilment of the Conditions Precedent and other obligations under the PPA. The Appellant understands that the said Supplemental Agreement dated November 4, 2015 was sent by CESCO to State Commission for its approval.
- 2.35 However, much to the shock and dismay of the Appellant, who had accordingly scheduled the performance of its obligations under the PPA in terms of the aforesaid unqualified grant of extension of time, it received a letter from CESCO on January 27, 2016, bearing a date of December 21, 2015, which in effect sought to penalize the Appellant for no fault of theirs. The said letter stated that State Commission had directed CESCO *vide* its letter dated December 1, 2015 to revise the terms of the PPA and the Supplemental Agreement dated November 4, 2015 to incorporate a revised tariff of INR 6.51 per unit, as against the

applicable tariff of INR 6.89 per unit basis which the Appellant had submitted its bid and the PPA was executed between the Appellant Company and CESCO. The letter dated December 1, 2015 from State Commission has sought to impose such penalty under the garb of Article 12.2 of the PPA.

2.36 While the Appellant was in the process of taking a decision on the way forward in respect of the extreme and unwarranted step taken by the Respondent, CESCO *vide* its letter dated February 23, 2016 took advantage of the direction of State Commission for revision in tariff and tried to shift the burden/ liability of the delay(s) in grant of approval/ handing over of the PPA, which was admittedly attributable to it, upon the Appellant. CESCO has thus retracted from the waiver given to the Appellant, as to extension in time by 137 days, for fulfilling the obligations under the PPA, and has further brazenly put a threat to the Appellant to submit documents relating to the fulfilment of the Conditions Precedent within a period of 7 days, failing which CESCO shall take recourse to Article 4.3 of the PPA i.e. invoke the Performance Bank Guarantees towards its claim for damages and if the delay is more than 30 days from the said date, it may even terminate the PPA.

2.37 The Appellant, through its representatives, has made several attempts to amicably resolve the present dispute, and has sought support and cooperation from CESCO by engaging in meetings with the Managing Director and the Superintending Engineer (Coml), CESCO on February 26, 2016 as well as on March 1, 2016. The Appellant has also *vide* its letter dated February 29, 2016, requested CESCO to withdraw the Letters dated December 21, 2015 and February 23, 2016. The Appellant has time and again highlighted the huge investments and considerable progress which had made by it in the Project, and the detriment that the aforesaid steps would cause to the Appellant as well

as the Project. This has however fallen on deaf ears, as CESCO has been adamant on its decision to invoke the Performance Bank Guarantees.

- 2.38 Given the circumstances and huge investments to the tune of INR 91 crores already made by that time by the Appellant in the Project, the Appellant left with no choice, was coerced into re-executing the Supplemental Agreement dated November 4, 2015 to record reduction of tariff from INR 6.89 per unit to INR 6.51 per unit on March 01, 2016, as directed by State Commission *vide* its letter dated December 1, 2015.
- 2.39 The Appellant was informed in the meeting with the representatives of CESCO on March 1, 2016 that in the event it failed to sign the said agreement on March 1, 2016 reducing the Applicable Tariff to INR 6.51 per unit, CESCO would invoke the Performance Bank Guarantees, given as performance security under the PPA. This left the Appellant with virtually no choice but to give in to the arbitrary demands of CESCO.
- 2.40 The Appellant at this stage was unable seek State Commission's intervention as State Commission, was engaged in public hearings and not holding court till March 10, 2016. The Appellant communicated to CESCO that such act of signing of the said agreement on behalf of the Appellant was under protest and is without prejudice to its remedy to seek redressal of its grievances before State Commission at a later stage. In fact this position has also been recorded by the Appellant *vide* its letters dated March 01, 2016 (recorded before signing of the said agreement and post signing of the said agreement at 4:40 PM, respectively), duly acknowledged by CESCO.
- 2.41 Being aggrieved by the actions and omissions of the State Commission, the Appellant, thereafter filed the Petition before the State Commission challenging the reduction in tariff by CESCO on March 9, 2016. The

Petition came up for hearing before the State Commission on March 31, 2016, when the State Commission was pleased to admit the Petition and issued notice to CESCO/ Respondent No. 1. Despite, the Appellant sending notices on April 5, 2016 and April 24, 2016, CESCO only entered appearance on August 18, 2016. CESCO kept delaying the matter on one pretext or the other and thereafter on filed its response on October 6, 2016.

- 2.42 Thereafter, the State Commission reserved its orders on October 13, 2016 and passed the impugned order on December 14, 2016.
- 2.43 In its reply no contention regarding extension of 137days was raised or disputed by CESCO. The contentions related to the *lis* of tariff which was the issue in the Petition before the State Commission were not at all addressed by CESCO in its reply.
- 2.44 Despite the dispute on reduction of tariff and the pending Petition before the State Commission, the Appellant continued, despite all odds to complete and set up the Project. By its own investments the Appellant achieved the Conditions Precedent by May 12, 2016, against the extended time of May 17, 2016 (as was extended by CESCO on October 26, 2015). Till date the Appellant without any financial assistance has invested INR 310 crores in the Project.
- 2.45 On account of the unilateral revision in tariff from INR 6.89 per unit to INR 6.51 per unit, the lenders of the Appellant (despite the Appellant having reached financial closure on May 12, 2016) have not funded the Project on account of pending issue of unilateral revision/ reduction of the applicable tariff.
- 2.46 After the extension of time of 137 days by the Respondents, the Appellant was to achieve the COD by November 8, 2016 and for this reason the Appellant concluded its arguments before the State

Commission on October 13, 2016 and sought early orders so that it could get financing and set up the Project within the time prescribed.

2.47 However, due to the widespread agitations and violence in Karnataka on account of the Cauvery River Dispute, the Appellants were facing immense hardship and difficulties in carrying out their obligations as per the PPA, due to which CESCO granted a further extension of 30 days. Hence, the extended COD was December 8, 2016.

2.48 Considering the date of COD was fast approaching, the Appellant (after orders were reserved by the State Commission on October 13, 2016) on October 27, 2016, November 3, 2016, November 24, 2016, December 1, 2016, mentioned the matter before the State Commission requesting for orders at the earliest.

2.49 The State Commission, rather than passing the order in the Petition, vide order dated November 3, 2016 sought clarifications/ documents on the following points:

- (i) Whether the Appellant had received a copy of PPA executed on January 2, 2015 prior to its approval by the State Commission?
- (ii) Whether the Appellant 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 2.01.2015?
- (iii) Copies of the monthly progress report regarding fulfilment of the CP, submitted, if any, to CESCO to Azure?

2.50 The Appellant in compliance with the order dated November 3, 2016 passed by the State Commission seeking additional clarifications/ documents filed its clarificatory affidavit on November 10, 2016. However, the Respondent No. 1, on November 10, 2016 sought additional time to file its Memo on the clarification sought and filed the same on November 11, 2016. The Respondent No. 1 along with the said

Memo have filed a letter dated March 25, 2015 from one of the lenders viz. IFC to show that the original duly approved and signed copy of the PPA was not required to get investments for the project. However, the said letter is only a letter of Intent to grant loan to the Appellant. The said letter does not sanction the loan as CESCO/ Respondent No. 1 sought to reply. The letter of intent dated March 25, 2016, at point 5 clearly states that if IFC determines that the Project meets the conditions for the potential investments IFC will negotiate a draft term sheet outlining the principle terms and conditions of the investment. It is respectfully submitted that as the Memo filed by CESCO was filed after the orders were reserved by the State Commission, therefore the Appellant never got an opportunity to reply to the same.

- 2.51 It is to pertinent mention herein that the Appellant had also vide its letter dated December 6, 2016 sought extension of time on account of disruption of work due to the demonetization policy introduced by the government on November 8, 2016. The subsequent severe cash crunch caused delay in the progress of work as the Appellant was unable to pay the wages to its labour and other vendors in the market. The said letter was served on CESCO on December 6, 2016 and the same is pending consideration.
- 2.52 While the Appellant was awaiting the decision of CESCO on its request made vide letter dated December 6, 2016, the Impugned Order was passed by the State Commission on December 14, 2016.
- 2.53 In light of the above, being aggrieved by the Impugned Order of the State Commission, the Appellant has filed the present Appeal before this Tribunal.

**3. Facts in Issue:**

- (i) The Impugned Order has caused a huge adverse financial impact on the Appellant as a result of the illegal exercise of jurisdiction by

the State Commission and the State Commission, after 12 months, retrospectively, after having duly approved extension of time by 137 days reduced the same to 25 days vide the impugned order.

- (ii) The State Commission has not adjudicated on the issue raised by the Appellant in its Petition regarding revision of the tariff by CESCO from INR 6.89 per unit to INR 6.51 per unit, despite extension of 137 days being granted by CESCO & State Commission on account of delay by CESCO in handing over duly approved original PPA to the Appellant but has instead revisited its approval of 137 days extension and adjudicated on the same vide the impugned order. The extension of 137 days was never an issue between the parties.
- (iii) The fact/ issue whether the grant of extension of time of 137 days by CESCO/ Respondent No. 1 was valid or invalid was never before the State Commission as the extension had been approved by the State Commission on the basis of the revision of tariff from INR 6.89 per unit to INR 6.51 per unit.

**4. Question(s) of Law:**

- (i) Whether the Applicable Tariff in a PPA, which is pursuant to a competitive bidding process, can unilaterally and arbitrarily be reduced/ revised without reference to the terms of the PPA?
- (ii) Whether the State Commission can exercise regulatory powers in terms of Section 62 (1) (b) of the Act in cases of tariff discovered under Section 63 of the Act?
- (iii) Whether the State Commission, having approved the terms of the PPA, can sit in judgement on contractual issues already decided by the parties, including circumstances of force majeure and extension of time granted by the DISCOM under the PPA,

particularly, when the same are not the subject matter of any dispute before it?

- (iv) Whether the State Commission once having applied its mind and approved the grant of extension of time of 137 days, can revisit and scrutinize the extension granted and incorporated in the supplemental agreement executed on November 4, 2015 and which has been acted upon by the DISCOM and the Appellant?
- (v) Whether, after receiving the approval of the State Commission to the terms of the PPA, the DISCOMs are obliged to obtain the approval of the State Commission thereafter in all contractual decisions, including those related to extension of time under the PPA?
- (vi) Whether an extension of time, once given by the DISCOM, on which the parties have relied on to invest in and perform the project, can be retrospectively revised by the State Commission to the detriment of the Power Producer?
- (vii) Whether a retrospective revision of the extension of time of 137 days already granted by the DISCOM to 25 days can result in attracting consequences of default when the parties were already relying upon and performing as per the timelines of the extension granted?
- (viii) Whether any extension of time granted by the DISCOM under clause 5.7 of the PPA would automatically result in attracting the consequences of default under clause 12.2 even before the expiry of such extension of time?
- (ix) Whether the State Commission has the *suo moto* powers to override the decisions taken by the DISCOM in matters of extension of time even where such matters have not been raised before the State Commission?

- (x) Whether the State Commission has jurisdiction to decide on an issue which is not subject matter of the petition under Section 86(1)(f) nor is a *lis* between the Discom and the Power Producer?
- (xi) Whether the second Supplemental Agreement dated March 1, 2016 is sustainable in law, considering that the Appellant was made to sign the same by Respondents under coercion?
- (xii) Whether the State Commission was correct in framing issues at the time of passing its judgement without giving notice to the parties of such issues being framed or considered by the State Commission, without hearing the parties on such framing of issues and in violation of the fundamental principles of natural justice?

**5. Ms. Anuradha Mukherjee, learned counsel appearing for the Appellant has filed the following written submissions for our consideration:-**

- 5.1 The State Commission vide the Impugned Order has arbitrarily, unjustifiably and retrospectively reduced the extension of time of 137 days granted by the distribution licensee, Chamundeshwari Electricity Supply Corporation Limited to only 25 days.
- 5.2 The present Appeal is on the face of following facts:
  - (a) The Appellant and CESCO entered into a power purchase agreement on January 02, 2015 for execution of a 50 MW solar PV project. However, the approval from the State Commission was pending and the duly approved signed PPA was received by Appellant only on May 21, 2015, i.e. after 137 days of signing. The State Commission *vide* its letter dated April 13, 2015 acknowledged that the delay was solely attributable to CESCO, since it had failed to supply certain documents/ details.

- (b) The Appellant *vide* letters dated August 31, 2015 and October 09, 2015, requested the State Commission to consider the date of delivery of effective and valid PPA, as the Effective Date for fulfilling the Conditions Precedent and to achieve commissioning. The State Commission in its reply letter dated October 21, 2015, directed the Appellant to approach CESCO for extension of time under Article 5.7 (Extension of Time) of the PPA. Article 5.7 provides for extension of time without any penalty or liquidated damages.
- (c) The CESCO *vide* its letter dated October 26, 2015, granted an extension of 137 days, and a subsequently a Supplemental Agreement dated November 04, 2015 was executed. Therefore, the revised date for completion of the CPs was extended from January 01, 2016 to May 17, 2016 and the COD was extended from July 01, 2016 to November 16, 2016. The Appellant achieved the CPs on May 12, 2016. It is pertinent to mention herein that the Supplemental Agreement did not contemplate any revision of tariff.
- (d) That CESCO wrote to the State Commission and sought approval of the Supplemental Agreement. The Appellant on January 27, 2016, received a letter from CESCO (bearing a date of December 21, 2015) stating that the State Commission has directed CESCO to reduce the tariff to INR 6.51 per unit. CESCO sent another letter dated February 23, 2016, retracting the extension of 137 days. It threatened the Appellant to submit documents relating to the fulfilment of the CPs within a period of 7 days, failing which CESCO will invoke the Performance Bank Guarantees.

- (e) The Appellant, through its representatives, made several attempts to amicably settle the dispute. However, threatened by CESCO, the Appellant on March 01, 2016, under protest re-executed the Supplemental Agreement (“**Supplemental Agreement II**”) to record the reduction of tariff from INR 6.89 to INR 6.51. This is also recorded in Appellant’s letters dated March 01, 2016 sent to CESCO pre-signing and post signing of the Supplemental Agreement II.
- (f) In these circumstances, the Appellant filed the Petition challenging the reduction in tariff by CESCO. However, the State Commission *vide* the Impugned Order instead of only adjudicating on the reduction of tariff, which was the *lis* between the parties, has gone beyond the scope of the challenge and arbitrarily reduced the extension of 137 days to only 25 days. The present Appeal was filed on December 20, 2016, and this Tribunal was pleased to direct the listing of the Appeal on December 21, 2016. That in compliance of the directions of this Tribunal, the Appellant on December 20, 2016, served the Respondents with an advance copy the Appeal. However, at around 7:50 pm, the same day, the Appellant received an email from CESCO, along with a copy of the Default Notice dated December 15, 2016, directing the Appellant to pay Liquidated Damages, amounting to INR 7.5 Crores.

*I.A. NO. 743 OF 2016*

- 5.3 That in view of the Default Notice, the Appellant was therefore, constraint to file I.A. No. 743 of 2016 *inter alia* seeking stay on the operation of the Default Notice. This Tribunal *vide* order dated December 21, 2016 was pleased to direct CESCO to not take any

coercive steps against the Appellant. That the Tribunal vide order March 20, 2017 was pleased to stay the operation of the Default Notice till the disposal of the Appeal.

*I.A No. 703 of 2018*

5.4 The Appellant successfully commissioned the Project on March 26, 2017 and started supplying electricity to CESCO. However, CESCO, while utilising the electricity did not release any payments to the Appellant. The Appellant brought the same to the attention of the Tribunal. However, CESCO, being aware that the Appellant was in dire need of money, put forth an arbitrary and unjustified rate of INR 4.36 per unit. The said proposal of CESCO was contrary to the Supplemental Agreement II, wherein it was agreeable to pay the Appellant at INR 6.51 per unit. The Tribunal, with a view to provide immediate relief to cash crunched Appellant and to ensure some cash flow for day to day operations of the Appellant, *vide* its order dated September 26, 2017 directed CESCO to release payments at the rate of INR 4.36 per unit.

5.5 The Appellant, troubled with this unjustified and arbitrarily rate of INR 4.36 per unit, filed I.A No. 703 of 2018, seeking modification of the order dated September 26, 2017 to the extent of directing CESCO, in the interim, till final disposal of the Appeal, to release payments for the utilised energy at the CESCO's accepted rate of INR 6.51 per unit. The said I.A. No. 703 of 2018 is still pending adjudication.

***The extension of 137 days was due to CESCO'S failure to provide an original duly approved PPA***

5.6 The PPA shared by CESCO *vide* its email dated January 02, 2015 was not the effective, executable and valid PPA duly approved by the State Commission. The Appellant on multiple occasion intimated

CESCOM its inability to process for financing of the Project without effective, executable and valid PPA and requested CESCOM to provide a copy of original duly approved PPA. Furthermore, CESCOM while granting extension *vide* its letter dated October 26, 2015, and November 11, 2015 also recognised that the extension was granted due to delay in approval and handing over of the PPA. This confirms that the CESCOM had applied its mind while granting an extension of 137 days. Therefore, the delay of 137 days was due to reasons solely attributable to CESCOM and the extension was granted after careful consideration and application of mind by the Respondents.

***The Appellant could not have taken any steps in execution of project without original duly approved PPA***

- 5.7 The Appellant was not in position to take any effective steps for execution of the Project without an original duly approved PPA. The Appellant was unable to initiate any activities towards fulfilling its obligations under the Conditions Precedents (as per the PPA) including financing of the Project, land procurement, MNRE exemption for material procurement and other construction related activities. It is also submitted that though Appellant approached the financial institution for loans, lenders were not willing to consider and sanction the Project without the original duly approved PPA. A detailed clarificatory affidavit was filed before the State Commission explaining in detail as to how without a duly approved signed PPA, the Appellant was unable to even commence these basic actions made it impossible for the Appellant to meet the timelines of completion of Condition Precedent and SCOD as provided in the PPA. It is submitted that a duly approved PPA in the hand of a developer is a basic requirement of investment.

It is for this reasons that the new PPAs being approved by the State Commissions clearly provide that the effective date for performance of

the PPA is from the date the approved PPA is received by the generating companies.

Furthermore, KERC, in its order titled, “*Revision of Generic Tariff for Wind Power Projects and mandatory procurement of wind Power through Competitive Bidding*” has clearly stated in Clause 11 (c) that –

*“A PPA becomes an enforceable document only after approval of the Commission. Any developer acting on a PPA which is not approved by the Commission will be doing so at his own risk”*

***State Commission had impliedly approved the extension***

5.8 The Appellant vide its letter dated August 31, 2015 and October 09, 2015 had initially approached the State Commission requesting its intervention. The State Commission in its response letter dated October 21, 2015, itself directed and recommend the Appellant to approach CESCOT for extension of time under Article 5.7 of the PPA. Furthermore, the State Commission in its letter dated December 01, 2015, took note of the extension granted, but erroneously directed CESCOT to reduce the Tariff.

Therefore, the State Commission, having applied its mind on the issue of extension and giving its implied approval to the same, cannot revisit and scrutinise the extension granted.

***There could not have been any revision/reduction of the Applicable Tariff of INR 6.89 per unit under the PPA***

5.9 The applicable tariff as per the PPA, which is decided pursuant to a competitive bidding process and cannot be unilaterally or arbitrarily reduced without reference to the terms of the PPA. ***There is no provision in the PPA or the Supplemental PPA for reduction/revision of the tariff from the bid tariff rate of INR 6.89 per***

***unit (as mentioned in Article 12.1) to INR 6.51 per unit or to INR 4.36 per unit.***

Article 12.1 of the PPA provides that on delay in achieving the commissioning of the Project, the lower of the following should be applicable:

- (a) Tariff as per Article 12.1 ,i.e. 6.89 per unit; or
- (b) State Commission applicable tariff as on COD.

5.10 The Tariff Order applicable in the PPA (for Article 12.2), will be the Tariff Order dated October 10, 2103 ("**October 2013 Tariff Order**"), which determines the tariff at INR 8.40 per unit.

5.11 The October 2013 Tariff Order is applicable to:

- (i) PPAs entered into on or after 01.04.2013; and
- (ii) During the control period of 5 years, i.e. 01.04.2013 to 31.03.2018.

Therefore, even if there is a delay in achieving the scheduled commissioning of the project, there cannot be a change in applicable tariff as provided under Article 12.1 of the PPA, and the applicable tariff rate will be INR 6.89 per unit, i.e. the tariff stipulated in the PPA.

5.12 It was for this particular reason that the State Commission vide its Impugned Order has also confirmed that the Tariff Order dated October 10, 2103, will be applicable to the PPA, since the PPA was executed before September 01, 2015, the date from which the Tariff Order dated July 30, 2015 (i.e. for tariff of INR 6.51 per unit) was made applicable for general solar power PV plants. It is in this view, that the State Commission has recalled the letter dated December 01, 2015 whereby it reduced the tariff under the PPA to INR 6.51 per unit. Therefore, the State Commission retained the PPA tariff of INR 6.89 per unit, since it is lower than the applicable current Tariff of INR 8.40 per unit.

5.13 Furthermore, the payment of invoices at INR 4.36 per unit is also objectionable, as the said tariff would come into effect for projects commissioned on or after April 01, 2017, as per the State Commission Solar Tariff Order dated April 12, 2017. Since the Project was commissioned on March 26, 2017, it is outside the purview of the Solar Tariff Order dated April 12, 2017.

***By granting 25 days extension, the State Commission agrees that an executable PPA is a pre requisite requirement***

5.14 Without prejudice to the above, it is submitted the by reducing the extension of time from 137 days to only 25 days, the State Commission has recognised and accepted that the extension was granted on account of delay in providing the duly approved signed PPA, without which the Appellant would have been unable to commence even the basic actions making it impossible for it to meet the time lines of completion of Conditions Precedent and COD as provided in the PPA.

*Extension of 137 days was never an issue before the State Commission*

5.15 The validity of extension of 137 days was never an issue before the State Commission. The dispute raised by the Appellant before the State Commission was only with respect to unilateral reduction of the contractual tariff by CESCO. It is respectfully submitted that the State Commission erred in unilaterally and arbitrarily framing the issues in the Petition, without giving either of the parties a notice of the framing of issues or without hearing the parties. This is in clear violation of the principle of natural justice.

***A PPA becomes an enforceable document only after approval of the State Commission.***

5.16 In the absence of the approval of the State Commission, the PPA does not become a legally enforceable and binding document before the

parties. Therefore, it was only on May 21, 2015, when the PPA became an effective and valid agreement.

*In the above regard, kindly refer the judgments of:*

- (a) Tamil Nadu Generation and Distribution Corporation Ltd. vs. M/s. Penna Electricity Ltd., 2013 ELR (APTEL) 1196, at paragraphs 22, 23 and 32.
- (b) M/s. Rithwik Energy Generation Private Limited vs. Karnataka Power Transmission Corporation Limited and Ors., 2011 ELR (APTEL) 1651, at paragraphs 10.4 and 10.5.
- (c) Himachal Pradesh State Electricity Board Ltd. vs. Himachal Pradesh Electricity Regulatory Commission and Anr., 2018 ELR (APTEL) 784, at paragraph 11.

***State Commission does not have the jurisdiction to adjudicate on extension of time when there is no change in the Applicable Tariff***

5.17 Admittedly, in the Impugned Order, the State Commission has acknowledged that 'whenever an event effects the quantum of tariff applicable for supply of energy to the Distribution Licensees, we are of the considered opinion that the same should be scrutinised and approved by the Commission'. The State Commission in its Impugned order has claimed that it would have jurisdiction only when there is an impact on the tariff. However, an extension of time granted under Article 5.7 of the PPA does not have an impact on the tariff and therefore, it did not have any jurisdiction to examine the issue of extension of time, already granted by CESC. Without prejudice to the said fact, as the Tariff Order applicable to the present case is the October 2013 Tariff Order, therefore, even if there is a delay in achieving the Conditions Precedent or the SCOD, there shall be no impact on tariff. Additionally, the State Commission does not have the jurisdiction under Section 86(1)

(f) of the Act to decide on an issue of extension which was not a subject matter of the Petition and was not a *lis* between the Appellant and the CESCOT.

***State Commission cannot intervene in contractual decisions between the DISCOMS and generating companies***

5.18 The State Commission, after approving the terms of the PPA, cannot *suo-moto* interfere in all the other contractual decisions between the parties, including the extension of time, which was never in dispute.

*CESCOT cannot claim damages as no loss has been suffered*

5.19 Without prejudice to the above arguments, it is respectfully submitted that existence of loss or injury is indispensable for any claim of liquidated damages stipulated under the contract and aggrieved party can recover damages to the extent of the claim being reasonable compensation for the loss occurred, and not the entire sum laid down as liquidated damages. It is submitted that automatic pecuniary liability does not arise in a contract which contains a clause for liquidated damages. Till the time, it is determined by the court that the party complaining of the breach is entitled to damages as on actual losses, it shall not be granted compensation by the mere presence of a liquidated damages clause in the agreement. Therefore, it is submitted that the CESCOT cannot claim liquidated damages as no loss has been suffered by them, or has been proved by them.

*In the above regard, kindly refer the judgments of:*

- (a) Kailash Nath v. Delhi Development Authority (2015) 4 SCC 136, at paragraphs 33 and 43.
- (b) Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd., AIR 2003 SC 2629, at paragraphs 66 – 70.

**6. Ms. Anuradha Mukherjee, learned counsel appearing for the**

**Appellant (Azure Sunrise Private Limited) has filed the following supplementary written submissions for our consideration:-**

- 6.1 The present supplementary written submissions are being filed pursuant to the written submissions dated December 07, 2018 filed on behalf of Chamundeshwari Electricity Supply Corporation Limited (the “**CESCOM**” and/ or “**Respondent No. 1**”). The Appellant has already filed its written submissions on December 04, 2018, the contents of which may be read as part and parcel of the present supplementary written submissions and the same are not repeated herein for the sake of brevity.

**CESCOM in the written submission has agreed that there was no reduction of tariff by the State Commission in the Impugned Order**

- 6.2 The Karnataka Electricity Regulatory Commission vide its order dated December 14, 2016 passed in Petition No. 19/ 2016 held that the tariff, as prescribed under the Power Purchase Agreement dated January 02, 2015, i.e. INR 6.89 per unit shall be payable. The State Commission in the Impugned Order, while deciding issue no.1, further held that the reason assumed by it for intimating the CESCOM to incorporate the reduced tariff of INR 6.51 per unit in the Supplemental PPA dated March 01, 2016 is ‘incorrect’. The State Commission for this reason, while deciding issue no. 1 in favour of the Appellant, set aside the letter dated December 1, 2015, whereby the reduced tariff of INR 6.51 per unit was imposed.

- 6.3 In view of the said finding of the State Commission in the Impugned Order, CESCOM also in their written submission admits that, the State Commission decided issue no. 1 in favour of the Appellant, thereby holding that the tariff, as agreed under the PPA, i.e. INR 6.89 per unit is payable.

**Extension of 137 days would not constitute as an alteration/ modification of the PPA**

6.4 CESCO has sought reliance on the judgment in the matter of *All India Power Engineers Federation &Ors. v. Sasan Power Limited &Ors.*, to state that any change/ modification/ alteration of the terms of the contract becomes part of the original contract and therefore requires an approval of the State Commission. However, it is pertinent to note that the extension of 137 days granted by CESCO, would not constitute as an alteration/ modification of the PPA but would constitute a waiver of the Appellant's obligation to commission the project within a particular timeframe. It is submitted that CESCO, by giving an extension of 137 days on account of its failure to provide a valid executed PPA, has waived its right to insist on completion of the project as per the timelines of PPA.

6.5 The Supreme Court in the judgment of *All India Power Engineers Federation &Ors. v. Sasan Power Limited &Ors* has further held that any waiver by any of the party to the PPA, which does not have an impact or an increase in tariff, would constitute a waiver under Section 63 of the Indian Contract Act, 1872 instead of alteration or amendment of the PPA under section 62 of the Indian Contract Act, 1872, for which approval from the state commission will not be required to be sought. The Supreme Court further held that the waiver of any legal right, not impacting or increasing the tariff, would allow the parties to dispense with or remit, wholly or partially, the performance of any term of the PPA. Therefore, the CESCO by granting extension of 137 days on account of non-approval of PPA has waived its right to seek commissioning of the project on the date agreed under the PPA.

**Extension of 137 days granted by CESCO was never in dispute before the State Commission**

6.6 The State Commission acted beyond the scope of the subject matter of the Petition while framing the issues in the Petition and deciding on the

issue of extension of 137 days. The issues in the Petition were framed without giving any notice and without hearing either of the parties. Further, the State Commission also erred in framing issue no. 2 and 3, in as much as extension of time was never a matter of dispute between the parties. It is imperative to note that CESCO had allowed Appellant an extension of 137 days and had not approached the State Commission to reduce the same.

- 6.7 Furthermore, the Appellant had prayed for an unconditional extension of 137 days, i.e. without imposition of any reduction in tariff, which had already been granted by CESCO. However, the State Commission, instead of only adjudicating on the issue of unilateral reduction of tariff, which was the primary issue, retrospectively revisited the extension of time of 137 days granted by CESCO and reduced it to 25 days. This *suo-moto* reduction of extension of time from 137 days to 25 days is incorrect and arbitrary, as this was not the subject matter of the Petition.

**CESCO cannot claim damages as no loss has been suffered**

- 6.8 Without prejudice to the above arguments, it is respectfully submitted that existence of loss or injury is indispensable for any claim of liquidated damages stipulated under the contract and aggrieved party can recover damages to the extent of the claim being reasonable compensation for the loss occurred, and not the entire sum laid down as liquidated damages. Furthermore, it is submitted that automatic pecuniary liability does not arise in a contract which contains a clause for liquidated damages. Till the time, it is determined by the court that the party complaining of the breach is entitled to damages as on actual losses, it shall not be granted compensation by the mere presence of a liquidated damages clause in the agreement. Therefore, it is submitted

that the CESCO cannot claim liquidated damages as no loss has been suffered by them, or has been proved by them.

**In the above regard, kindly refer the judgment of:**

(a) Maula Bux v. Union of India, (1969)2 SCC 554.

(b) Kailash Nath v. Delhi Development Authority (2015) 4 SCC 136.

(c) Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd., AIR 2003 SC 2629.

6.9 The Appellant had mentioned and relied on certain tariff orders of the State Commission in its written submissions filed on December 04, 2018, which were inadvertently not annexed to the same. The Appellant is therefore filing the same along with the present supplementary written submissions.

In view of the above reasons, it is humbly submitted that the Tribunal may allow the present Appeal, being Appeal No. 340 of 2016.

**7. Mr. Pankhuri Bhardwaj, learned counsel appearing for the Respondent No. 1/CESCO has filed the following written submissions for our consideration:-**

7.1 The present appeal arises out of the order dated 14 December 2016 passed by the Karnataka Electricity Regulatory Commission in Original Petition No. 19 of 2015. The Commission had framed 3 issues, viz;

1. *Whether the decision of 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 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?*

Vide the Impugned Order, the Ld. Commission decided the issue no. 1 in favour of the Appellant, thereby holding that the tariff, as agreed under the Power Purchase Agreement dated 2 January 2015, i.e. INR 6.89 per unit shall be payable, and the same need not be reduced to INR 6.51 per unit, as previously suggested by the Commission. However, regarding the issues 2 and 3, the Ld. Commission, *inter alia*, held that the Appellant herein was entitled to extension of time of 25 days only for achieving the commercial operation of the project.

- 7.2 In the present Appeal, the Appellant has raised two broad issues during the course of argument, namely (i) whether the Commission was required to decide the issues 2 and 3 when there was no impact on the tariff; and (ii) even otherwise, on merits, since Respondent No. 1 had agreed to grant of extension of 137 days, there was no occasion for Commission to reduce the said extension to 25 days.
- 7.3 At the outset, it is most respectfully submitted that there is no infirmity in the Impugned Order passed by the Commission, for this Tribunal to interfere under the provisions of Electricity Act, 2003 or otherwise. The Ld. Commission has passed the Impugned Order, upon appreciating the issue in question and evidence on record filed by the parties, has consequently reduced the extension from 137 days to 25 days, to fulfil the conditions precedent and commission the project.
- 7.4 The Appellant has failed to set out any case under Section 111 of the Act or otherwise to warrant any consideration by this Tribunal, especially since no further documents or facts have been placed on record in the

present Appeal, beyond what was placed on record before the Ld. Commission.

**COMMISSION HAD JURISDICTION TO ADJUDICATE UPON THE EXTENSION AND/OR INTERVENE IN CONTRACTUAL DECISIONS BETWEEN THE PARTIES**

- 7.5 In the Original Petition No. 19 of 2016 (out of which the present Appeal arise), specific relief was sought regarding extension of time of 137 days, from 2 January 2015 for fulfilling its obligations under PPA, without imposition of any reduction in tariff. Therefore, it does not lie in the Appellant's mouth to now contend that the Ld. Commission should not have gone into this issue. A perusal of the prayer sought shows that the Commission was invited by the Appellant to give a finding on this issue.
- 7.6 Even otherwise, it is well settled that any change/modification of /to the terms and conditions in the original contract becomes a part of the original contract. The judgment in *All India Power Engineer Federation and Others vs Sasan Power Limited and Others: (2017) 1 SCC 487*, can be referred to in this regard. Likewise, it is well settled position of law that any change/amendment to the power purchase agreement, which has otherwise been approved by the regulatory commission, has to be approved by the commission to that extent, to make it binding on the parties. Thus, for any change in the PPA, by way of extension or otherwise, it was mandated upon the parties to have it approved by the Ld. Commission.
- 7.7 Further, the Commission, in the Impugned Order, has held the wide ambit of power and functions vested under Section 86 (1) (b) of the Act, which is not just restricted to tariff regulation but extends to regulate the procurement process by the distribution licensees, which has to be construed harmoniously with the object of the Act. It was in light of such wide powers/functions of regulatory commissions vested under the Act,

that the Ld. Commission held the said issue in affirmative, which warrants no interference whatsoever, by this Tribunal.

***CESCOM DID NOT APPROVE THE EXTENSION OF 137 DAYS***

- 7.8 The extension of 137 days was not accepted/ approved by CESCOM, as alleged. Rather, CESCOM had expressly stated that the approval was conditional and such extension shall be subject to approval of the Ld. Commission. The letter dated 26 October 2015 is self explanatory in this regard.
- 7.9 This fact is also corroborated by the execution of supplemental agreement dated 04 November 2015, incorporating the conditional approval of CESCOM, which was placed before the Ld. Commission on 11 November 2015, for approval. The fact that the supplemental agreement is required to be approved by the Commission or Commission's jurisdiction to approve the extension was never raised by the Appellant, at that juncture. In view of the same, the Appellant is now estopped from raising such erroneous objections, when it had already consented to seeking Commission's approval to the supplemental agreement.
- 7.10 On merits, the Ld. Commission has noted that the question of extension of time on ground of force majeure would arise only if it is established the delay in approval or not handing over the original PPA delayed the financial closure/disbursement of loan amount by the financier. The Commission has accordingly given the benefit from the letter dated 27 April 2015, when one of the financiers, for the first time, sought explanation on approval of the PPA. Consequently, the extension was reduced to 25 days for the period from 27 April 2015 to 21 May 2015, i.e. the date of approval of PPA. It may also be noted that any change in the PPA eventually affects the interest of the consumers and hence the

Ld. Commission, being a regulatory body, has all the powers to approve such change/modification.

7.11 Even otherwise, Appellant's contention that the Ld. Commission had impliedly consented to the grant of 137 days (as mentioned in the written submissions) is baseless and unfounded.

7.12 The Appellant's contention that the grant of 137 days was never disputed by CESCO before the Ld. Commission, is also factually incorrect and patently contrary to the records of the case. A bare perusal of the statement of objections filed before the Ld. Commission makes it amply clear that CESCO's extension was conditional and was subject to the final decision of the Commission.

7.13 Interestingly, the Appellant, for the very first time, sought extension to fulfil Conditions Precedent and commissioning of project vide letter dated 31 August 2015, after about 3 months from obtaining approval to PPA on 21 May 2015. The bare fact that the Appellant failed to take any steps pending approval coupled with such belated request made for extension, shows that it is the Appellant which has miserably failed in taking steps/initiatives for effective implementation of the project and is now shifting the burden/responsibility on CESCO, for its own default/omissions.

***CESCO IS NOT RESPONSIBLE FOR THE DELAY CAUSED IN OBTAINING APPROVAL BY COMMISSION***

7.14 The delay in approving the PPA by the Commission was procedural and not due to the omission/default of CESCO, as projected before this Tribunal.

7.15 CESCO vide letter dated 23 April 2015 informed the Commission that the Karnataka Renewable Energy Development Limited (KREDL) was the appointed nodal agency by the Government of Karnataka for allocation of solar power projects in the state, and as such any

information sought by CESCO can be provided only by KREDL and not CESCO.

- 7.16 This fact is also documented in the statement of objections filed before the Ld. Commission, which was considered and set out in the Impugned Order by the Commission while reducing the extension from 137 days to 25 days.

***NON-RECIPT OF EXECUTED PPA DID NOT PREVENT APPELLANT FROM TAKING BONAFIDE STEPS TOWARDS EFFECTIVE IMPLEMENTATION OF THE PROJECT***

- 7.17 The Appellant's contention qua non-receipt of the executed/approved version of the PPA resultantly prevented the Appellant from initiating steps towards land procurements, financing, MNRE exemption for material procurement and other construction related activities, is merely an excuse to erroneously shift the burden on CESCO to justify 137 days' extension.
- 7.18 It is a matter of record, and admittedly so, the Appellant has failed to adduce any documents/materials on record showing *bona fide* efforts were taken by the Appellant, pending approval of PPA by the Ld. Commission. The Ld. Commission at para (h) of the Impugned Order records that the Appellant has failed to set out particulars of dates when it had initiated steps to procure the finance of the project, and that the pleadings in this respect are very evasive and vague.
- 7.19 It is also a matter of record that the Appellant vide order dated 3 November 2016, was provided another opportunity by the Ld. Commission to set out its case for 137 days extension, and submit relevant documents in this regard. The Appellant has admittedly not placed anything on record to show if, at all, any efforts were made by the Appellant, pending approval of PPA.

7.20 It may also be noted that time was the essence of the PPA and despite having complete knowledge about it, the Appellant made request for extension after over 3 months from the approval, which clearly is an afterthought by the Appellant.

***PPA TO BECOME ENFORCEABLE/ BINDING ONLY UPON THE APPROVAL OF COMMISSION, WAS NEVER AN ISSUE BEFORE THE COMMISSION OR THIS TRIBUNAL***

7.21 It may be clarified that the PPA to become enforceable or binding only upon the approval of the Ld. Commission, was never an issue before the Ld. Commission or before this Tribunal, and that the judgments relied/contentions raised by the Appellant in this regard (in the written submissions) have no bearing whatsoever, to the present appeal at hand.

7.22 Without prejudice, the judgments referred/relied upon by the Appellant in this regard are irrelevant and inapplicable to the present case, deserving no consideration by this Tribunal.

***CONDUCT OF APPELLANT DISENTITLES THE APPELLANT TO ANY RELIEF***

7.23 Without prejudice to merits and the contentions raised by the Appellant, it is a matter of record that even with grant of 137 days' extension, the Appellant ought to have commissioned the project in November, 2016, when the project was actually commissioned in March, 2017, resulting in further delay in implementing the project.

Thus, in light of the facts of the present case as well as in view of the foregoing submissions, it is respectfully submitted that the present Appeal deserves no interference by this Tribunal, and hence be dismissed, with costs.

8. We have heard the learned counsel appearing for the Appellant and learned counsel for the Answering Respondent at considerable length of time. We have gone through their written submissions and also taken note of the relevant material available on records. Based on the pleadings and submissions of the parties, the following issue emerges in the Appeal for our consideration:

- *Whether in the facts and circumstances of the case having approved the terms of the PPA, the State Commission is justified in reducing the extension of time of 137 days as approved by the Commission/Discom to mere 25 days?*

9. **Our Consideration and Findings**

9.1 Learned counsel for the Appellant submitted that the State Commission vide its Impugned Order has arbitrarily, unjustifiably and retrospectively reduced the extension of time of 137 days granted by the distribution licensee viz Chamundeshwari Electricity Supply Corporation Limited (**CESCOM**) to only 25 days. It is not in dispute that the Appellant and CESCOM entered into a power purchase agreement on 2<sup>nd</sup> January, 2015 for execution of a 50 MW solar PV project. However, the approval from the State Commission was pending and the duly approved signed PPA was received by Appellant only on May 21, 2015, i.e. after 137 days of time. Learned counsel for the Appellant vehemently submitted that the State Commission *vide* its letter dated 13<sup>th</sup> April, 2015 acknowledged that the delay was solely attributable to CESCOM, since it has failed to submit certain documents/details.

9.2 Learned counsel further contended that the Appellant *vide* its letters dated 31<sup>st</sup> August, 2015 and 9<sup>th</sup> October, 2015, requested the State Commission to consider the date of delivery of effective and valid PPA, as the Effective Date for fulfilling the Conditions Precedent and to

achieve COD. However, the State Commission vide its letter dated 21<sup>st</sup> October, 2015, directed the Appellant to approach CESCO for extension of time under Article 5.7 of the PPA which provides for extension of time without any penalty or liquidated damages. Subsequently, the CESCO granted an extension of 137 days vide its letter dated 26<sup>th</sup> October, 2015 and thereafter a Supplemental Agreement was executed on 4<sup>th</sup> November, 2015. Accordingly, the revised date for completion of the conditions precedent was extended from 1<sup>st</sup> January, 2016 to 17<sup>th</sup> May, 2016 and the COD was extended from 1<sup>st</sup> July, 2016 to 16<sup>th</sup> November, 2016. The Appellant achieved the conditions precedent on 12<sup>th</sup> May, 2016.

- 9.3 Learned counsel was quick to submit that the Supplemental Agreement did not contemplate any revision of tariff. To utter shock of the Appellant it received a letter from CESCO on January 27, 2016 stating that the State Commission has directed CESCO to reduce the tariff to INR 6.51 per unit. The CESCO sent another letter dated 23<sup>rd</sup> February, 2016 retracting the extension of 137 days and also threatened the Appellant to submit documents relating to the fulfilment of the conditions precedent within a period of 7 days failing which Discom will invoke the performance guarantees.
- 9.4 It is the contention of the Appellant that it had made several attempts to amicably settle the dispute. However, threatened by CESCO, the Appellant on 1<sup>st</sup> March, 2016 re-executed the second Supplemental Agreement under protest to record the reduction of tariff from INR 6.89 to INR 6.51. Under the circumstances, the Appellant filed the Petition challenging the reduction in tariff by CESCO. However, the State Commission instead of only adjudicating on the reduction of tariff being the only dispute between the parties has gone beyond the scope of the

challenge and arbitrarily reduced the extension of 137 days to only 25 days.

- 9.5 The present Appeal was filed on 20<sup>th</sup> December, 2016 and during the pendency of Appeal, the CESCOTM issued a Default Notice dated 15<sup>th</sup> December, 2016, directing the Appellant to pay Liquidated Damages amounting to INR 7.5 Crores.

Advancing his arguments, further, the learned counsel for the Appellant emphasized that the Appellant was not in a position to take any effective steps for the execution of the project without an original duly approved PPA, which is the basic requirement for investment.

- 9.6 Furthermore, KERC, in its order titled, *“Revision of Generic Tariff for Wind Power Projects and mandatory procurement of wind Power through Competitive Bidding”* has clearly stated in Clause 11 (c) that –

*“A PPA becomes an enforceable document only after approval of the Commission. Any developer acting on a PPA which is not approved by the Commission will be doing so at his own risk”*

- 9.7 Learned counsel further submitted that despite acknowledging and directing the Appellant to approach CESCOTM for extension of time under Article 5.7 of the PPA vide its letter dated 21<sup>st</sup> October, 2015 and also taking note of the extension granted in its letter dated 1<sup>st</sup> December, 2015, the State Commission has erroneously directed CESCOTM to reduce the tariff.

- 9.8 Learned counsel pointed out that the applicable tariff has been decided pursuant to a competitive bidding process and hence cannot be unilaterally or arbitrarily reduced without reference to the terms of the PPA. There is no provision in the PPA or the Supplemental PPA for reduction/revision of the tariff from the bid tariff rate of INR 6.89 per unit

(as mentioned in Article 12.1) to INR 6.51 per unit or to INR 4.36 per unit.

9.9 Learned counsel further submitted that the Impugned Order passed by the State Commission is unsustainable because of the following reasons.

- (i) By granting 25 days extension, the State Commission agrees that an original/executable PPA is a pre requisite requirement.
- (ii) A PPA becomes an enforceable document only after approval of the Commission.
- (iii) State Commission does not have the jurisdiction to adjudicate on extension of time when there is no change in the Applicable Tariff.
- (iv) The State Commission cannot intervene in the contractual decisions between two parties i.e. generating company and the DISCOMS.
- (v) The extension of 137 days was given by the CESCO due to its failure to provide an original duly approved PPA without which the Appellant could not have taken any steps in the execution of the project.

9.10 To emphasise his contentions learned counsel for the Appellant placed reliance on the following judgements:

- (i) Tamil Nadu Generation and Distribution Corporation Ltd. vs. M/s. Penna Electricity Ltd., 2013 ELR (APTEL) 1196, at paragraphs 22, 23 and 32.
- (ii) M/s. Rithwik Energy Generation Private Limited vs. Karnataka Power Transmission Corporation Limited and Ors., 2011 ELR (APTEL) 1651, at paragraphs 10.4 and 10.5.

- (iii) Himachal Pradesh State Electricity Board Ltd. vs. Himachal Pradesh Electricity Regulatory Commission and Anr., 2018 ELR (APTEL) 784, at paragraph 11.
- (iv) Kailash Nath v. Delhi Development Authority (2015) 4 SCC 136, at paragraphs 33 and 43.
- (v) Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd., AIR 2003 SC 2629, at paragraphs 66 – 70.

10.1 **Per Contra**, learned counsel appearing for the Respondent CESC submitted that while deciding the Petition No. 19 of 2015, the State Commission had framed 3 issues viz.

- (i) *Whether the decision of 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?*
- (ii) *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?*
- (iii) *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?*

10.2 Learned counsel for the Respondent CESC further contended that while passing the Impugned Order, the State Commission decided the Issue No.1 in favour of the Appellant, thereby holding that the tariff, as agreed under the PPA dated 02.01.2015 i.e. INR 6.89 per unit shall be payable.

However, regarding the issues 2 and 3, the Commission, *inter alia*, decided that the Appellant was entitled to extension of time of only 25 days for achieving the commercial operation of the project instead of 137 days as approved by the CESC/Commission earlier.

10.3 Learned counsel for the Respondent CESC/Commission vehemently submitted that there are two broad issues raised by the Appellant, namely:

- (i) Whether the Commission was required to decide the issues 2 and 3 when there was no impact on the tariff; and
- (ii) Even otherwise, on merits, since CESC/Commission had agreed to grant the extension of 137 days, there was no occasion for Commission to reduce the said extension to mere 25 days.

10.4 Learned counsel for the Answering Respondent was quick to submit that the State Commission had jurisdiction to adjudicate upon the extension and/or intervene in the contractual decisions between the parties.

10.5 Learned counsel emphasized that any change/modification of/ to the terms and conditions in the original contract becomes a part of the original contract. To fortify his arguments, the learned counsel relied upon the judgement of the Apex Court in ***All India Power Engineers Federation and Others vs Sasan Power Limited and Others: (2017) 1 SCC 487.***

10.6 Learned counsel submitted that it is a well settled position of law that any change/ amendment to the power purchase agreement, which has otherwise been approved by the regulatory commission, has to be approved by the commission to that extent, to make it binding on the parties.

10.7 Further, the Commission, in the Impugned Order, has held the wide ambit of powers and functions vested under Section 86 (1) (b) of the Act, which is not just restricted to tariff regulations but extends to regulate the procurement process by the distribution licensees, which has to be

construed harmoniously with the object of the Act. The learned counsel further contended that the extension of 137 days was not accepted/ approved by CESCO, as alleged and rather, CESCO had expressly stated that the approval was conditional and such extension shall be subject to approval of the State Commission.

- 10.8 Learned counsel submitted that this fact is also corroborated by the execution of supplemental agreement dated 04 November 2015, incorporating the conditional approval of CESCO, which was supplementally placed before the Commission on 11 November 2015, for approval. The fact that the Commission's jurisdiction to approve the extension was never raised by the Appellant, at that juncture and In view of the same, the Appellant is estopped from raising such objections now.
- 10.9 Learned counsel further submitted that on merits the State Commission noted that the question of extension of time on ground of force majeure would arise only if it is established that the delay in handing over the original PPA has delayed the financial closure and after analysing the documents placed before the Commission it gave an extension up to 25 days for the period from 27<sup>th</sup> April, 2015 to 21<sup>st</sup> May, 2015. Even otherwise, the Appellant's contention that the Commission had impliedly consented that the grant of 137 days was never disputed by CESCO before the Commission, is factually incorrect and patently contrary to the records of the case.
- 10.10 Learned counsel for the Respondent Discom contended that the CESCO is not responsible for the delay or any pending approval by the Commission and also the non-receipt of executed PPA did not prevent the Appellant from taking bonafide steps towards effective implementation of the project. Advancing his arguments further, learned counsel for the Respondent CESCO clarified that the PPA shall become enforceable or binding only upon the approval of the State

Commission and this was never an issue before the Commission or before this Tribunal and as such the various judgments relied by the Appellant in its written submissions have no bearing whatsoever to the present appeal in hand.

10.11 Learned counsel reiterated that the Appellant ought to have commissioned the project in November, 2016, but could commission the project only in March, 2017. Learned counsel summed up his submissions to emphasize that in view of the foregoing submissions, the present Appeal deserves no interference by this Tribunal, and hence be dismissed, with costs.

## **11. OUR FINDINGS**

11.1 We have carefully gone through the submission of the parties and also taken note of various judgements relied upon by the Appellant as well as the Respondent Discom. The main dispute between the generating company and the distribution company (CESCOM) revolves around the decision of the State Commission to review the extension of time already given by the Discom and reduced the same to 25 days against the agreed extension of 137 days.

11.2 It is the contention of the Appellant that Despite signing the PPA on 02.01.2015 the Appellant was provided the valid and approved PPA only on May 21, 2015, i.e. after the delay of about 137 days. It is relevant to note that CESCOM in view of such a delay in handing over the executable and enforceable PPA to the Appellant, granted an extension of 137 days under Article 5.7 of PPA. In this regard, we also note that in view of the prevailing situation, the State Commission itself vide its letter dated 13.04.2015 in response to the Appellant's letter dated 06.04.2015 stated that the delay in the approval of the PPA was solely attributable to CESCOM since the required documents and details were not received by it from CESCOM for further action.

- 11.3 While going through the Impugned Order of the State Commission, it is noticed that the Commission itself has held that its decision conveyed vide letter dated 01.12.2015 addressed to the CESC, “*intimating to incorporate the reduced tariff of Rs. 6.51 per unit in the Supplemental Agreement dated 4.11.2015 was erroneous and not valid in law. However, the Commission intervened in the extension of time and reduced the same to 25 days from the granted extension of 137 days*”.
- 11.4 The facts and circumstances of the case placed before the State Commission and the adjudication done by the Commission are in contravention to each other and there is a reason to emerge that neither reduction in extension of time nor the reduction in tariff was justified.
- 11.5 To strengthen his arguments, learned counsel for the Answering Respondent has placed reliance on the judgement of the Hon’ble Supreme Court in *All India Power Engineers Federation & Ors. v. Sasan Power Limited & Ors.*, to state that any change/ modification/ alteration of the terms and conditions of the contract becomes part of the original contract and therefore requires an approval of the State Commission and the Commission in its regulatory role has to review the matter which has been rightly done by the State Commission by reducing the extension of time from 137 days to 25 days.
- 11.6 We have perused the relevant portion of the above judgement relied upon by the learned counsel for the Answering Respondent and note that the said judgement is distinguishable to the facts of the case in hand due to the fact that the said case was pertaining to a deviation in carrying out the commissioning test at MCR as defined in the PPA whereas in the instant case the extension of time has been granted by CESCO under the relevant clause of the PPA approved by the State Commission. In the case of *All India Power Engineers Federation &*

*Ors. v. Sasan Power Limited & Ors.*, there was a clear impact on the tariff to be borne by the beneficiaries and in turn, consumers whereas in the present case the terms of tariff were not disturbed beyond the scope of approved PPA.

11.7 In view of the above facts, we are of the opinion that the decision of State Commission to reduce the extended time and tariff alongwith imposition of liquidated damages is not sustainable in the eyes of law and hence the Impugned Order deserves to be set aside.

### **ORDER**

For the forgoing reasons as stated supra, we are of the considered view that the issues raised in the instant Appeal No. 340 of 2016 have merits and accordingly the Appeal is allowed. The Impugned Order dated 14.12.2016 passed by the Karnataka Electricity Regulatory Commission in the Petition No. 19 of 2016 is hereby set aside to the extent challenged in the Appeal.

No order as to costs.

Pronounced in the Open Court on this **28<sup>th</sup> February, 2020.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

**REPORTABLE / ~~NON-REPORTABLE~~**

mkj