

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**Appeal No. 96 of 2012**

**Dated 2<sup>nd</sup> January, 2013**

**Coram** : Hon'ble Mr. Justice P.S. Datta, Judicial Member  
Hon'ble Mr. V.J. Talwar, Technical Member

**In the matter of:**

Sunkon Energy Pvt. Ltd.  
43, Community Centre,  
New Friends Colony,  
New Delhi-110025.

...Appellant(s)

Versus

1. Gujarat Electricity Regulatory Commission  
1<sup>st</sup> Floor, Neptune Tower,  
Opposite Nehru Bridge, Ashram Road,  
Ahmedabad – 380 009.
2. Gujarat Urja Vikas Nigam Ltd.  
Race Course, Vadodra – 390007.
3. Gujarat Energy Development Agency,  
4<sup>th</sup> Floor, Block No.11 & 12, Udyog Bhavan,  
Sector-11, Gandhinagar – 382017.
4. Energy and Petrochemicals Department,  
Govt. of Gujarat,  
Gandhinagar – 382017.

...Respondent(s)

**Appeal No. 130 of 2012**

**In the matter of:**

Solar Semi-conductor Power Company (India) Pvt. Ltd.  
Road No.86, Jubilee Hills,Hyderabad-500 033.

...Appellant(s)

Versus

1. Gujarat Electricity Regulatory Commission  
1<sup>st</sup> Floor, Neptune Tower,  
Opposite Nehru Bridge, Ashram Road,  
Ahmedabad – 380 009.
2. Gujarat Urja Vikas Nigam Ltd.  
Race Course, Vadodra – 390007.
3. Gujarat Energy Development Agency,  
4<sup>th</sup> Floor, Block No.11 & 12, Udyog Bhavan,  
Sector-11, Gandhinagar – 382017.
4. Energy and Petrochemicals Department,  
Govt. of Gujarat,  
Gandhinagar – 382017.

...Respondent(s)

Counsel for the Appellant(s) : Mr. Shanti Bhushan, Sr. Advocate and Ms. Ambica Garg in Appeal No. 96 of 2012 and Mr. Vikas Singh, Sr. Advocate, Mr. S. Venkatesh and Ms. Ambica Garg in Appeal No. 130 of 2012.

Counsel for the Respondent(s) : Mr. Sanjay Sen , Ms. Shikha Ohri & Ms. Surbhi Sharma for R-1 in Appeal No. 96 of 2012 and Appeal No. 130 of 2012.

Mr. M.G. Ramachandran,  
Mr. Anand K. Ganesan,  
Ms. Swapna Seshadri &  
Ms Swagatika Sahoo for R-2

## **JUDGMENT**

### **HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER**

1. **Introduction** :- The Appeal no.96 of 2012 and the Appeal no. 130 of 2012 are being disposed of by this common Judgment and Order on the ground that issues of fact and law are almost identical and they arise out of a common order dated 27.1.2012 passed by the Gujarat Electricity Regulatory Commission, the respondent no.1 herein in a batch of 36 petitions filed before the Commission by individual developers praying for extension of control period. The appellant in Appeal no.130 of 2012 also impugnes the order dated 22.2.2012 by which the Commission rejected this appellant's petition praying for extension of the control period on the ground that this appellant also should suffer the same fate as was suffered by 36 developers through the common order dated 27.1.2012. Therefore, the actual impugned order is dated 27.1.2012 which is being discussed herein below in respect of both the Appeals. The appellant no.2, Gujarat Urja Vikas Nigam Ltd. is the principal contesting respondent no.2, while Gujarat Energy Development Agency and the Energy and Petrochemical Department of the Govt. of Gujarat, the respondent no.3 & 4 respectively do not contest. The respondent no.1, Gujarat Electricity Regulatory

Commission also participates in both the Appeals through its learned counsels by supporting the impugned order.

2. **The Facts in Appeal no.96 of 2012 :-**The Govt. of Gujarat made a notification on 6.1.2009 for promotion of solar power generation within the State of Gujarat. After publication of this notification, the appellant, a developer of renewable energy developed a 10 MW Photovoltaic Solar Power Projects in the State of Gujarat. After the energy and petro-chemical department to the Govt. of Gujarat made requisite allotment , the appellant was granted approval for a solar power generation plant. Later, the appellant entered into a Power Purchase Agreement (PPA) with Gujarat Urja Vikas Nigam Ltd., (GUVNL), a deemed trading licensee engaged in the business of procuring power for distribution licensees and the respondent no.1 herein on 29.4.2010. This PPA is based on the Commission's Tariff Order for procurement of power by distribution licensees and others from solar energy projects. The control period commencing from 29.1.2010 was to remain operative for two years. Clause 5.2 of the PPA refers to the Tariff Order which is reproduced below :-

*"5.2 GUVNL shall pay the fixed tariff mentioned hereunder for the period of 25 years for all the Scheduled Energy / Energy injected as certified by monthly SEA by State Load Despatch Centre. The*

*tariff is determined by the Hon'ble Commission vide Tariff Order for solar based power project dated 30.1.2010.*

*Tariff for Photovoltaic project : Rs.15/kWh for first 12 years and thereafter Rs.5 for 13<sup>th</sup> year to 25<sup>th</sup> year.*

*Above tariff shall apply for solar projects commissioned before 31<sup>st</sup> December, 2011. In case, commissioning of Solar Power Project is delayed beyond 31<sup>st</sup> December, 2011, GUVNL shall pay tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, whichever is lower."*

Needless it to say, the project commissioned on or before 28.1.2012 would be eligible to the tariff specified in the Tariff Order. The project as aforesaid was allotted to the appellant by the concerned department of the Govt. of Gujarat. Before allotment of the project, the bidders, the Govt., the project site were not be specified in the PPA as identification and procurement of appropriate land would require more time to which clarification came out from the Govt. that potential site could be specified in the PPA and, if required, change of site can be incorporated in any supplementary PPA. Accordingly, in the PPA, there was mention of a certain village which it was later found was not technically suitable and then land in a different village was purchased after observing all the legal formalities. But again the said site was changed because the appellant was unable to acquire further lands from farmers as a result of which lands at different site was acquired and this entire process consumed certain amount of time. Consequently, supplemental PPA

was entered into on 3.3.2011 regarding change of site. It was on 16.5.2011 when the last piece of land could be acquired.

3. Then, came the problem of "*Jantri*" rates. On 1.4.2011, the Govt. of Gujarat issued a notification revising and increasing by 300 %, the jantri rates in respect of agricultural land but the notification did not relate to revise the Jantri in respect of non-agricultural land for which the registration of conveyance deeds in the matter of acquisition of land by the developer could not be possible. However, on 11.5.2011, the Govt. issued a circular prescribing a provisional mechanism for registration of title deeds in respect of the industrial land. The circular provided that conveyance deeds might be accepted / registered by the concerned authority subject to the conditions that the balance value due to possible revision of Jantri rate in respect of industrial purpose would be paid by the developers upon publication of the notification and until such notification was published, conveyance deeds would be kept pending. The period between 1.4.2011 and 11.5.2011 is a period of 41 days and delay of this period could not be avoided to be lost sight of by the Commission in the impugned order. But, again it was on 10.7.2011 when the conveyance deeds were finally released by the Governmental authority and this contributed to a total delay of 6 to 8 months.

4. Then, came the problem of what is called 'NA permission' meaning permission for conversion of agricultural land into industrial i.e., for non-agricultural purpose. According to the appellant, because of delay in registering sale deeds, the appellant could not be in a position to obtain any permission under the Gharkhed Tenancy Act. In May, 2011, registration of sale deed was complete and then the appellant approached the Collector for permission which was received on 28.7.2011 and on 29.8.2011, the appellant made application to the town planner for approval of lay out plan and such approval came on 15.12.2011. NA permission was applied for 19.12.2011 and it was granted on 23.1.2012.

5. Detailed Project Report (DPR) was finalized in January, 2011. On 26.8.2011, the appellant entered into a service agreement with Moser Baer Solar Ltd. appointing it as a "Contractor" to design, engineer, construct, interconnect and commission the appellant's project and the appellant entered into a Supply Agreement dated 26.8.2011 with Moser Baer Solar Systems Private Ltd. appointing it as a "Supplier" to procure and supply goods and materials for the appellant's project.

6. Yet, due to excessive rainfall at the appellant's site, the appellant's site was flooded and construction had to be stopped for at least 30 days.

7. It is because of all these circumstances that the appellant made a petition before the Commission under Regulation 80 of GERC (Conduct of Business) Regulations, 2004 read with Section 86 of the Electricity Act, 2003 for extension of the control period as is contained in the order dated 21.10.2010 but the Commission rejected the petition on certain grounds which according to the appellant are not tenable in the eye of law.

8. **The grounds of Appeal no. 96 of 2012 are as follows:-**

a) The order of the Commission has jeopardized the appellant financially and it will be extremely difficult to complete the execution of the project for want of adequate funds.

b) The Commission did not take into consideration the grounds on which the appellant has prayed for extension of the control period and the appellant has not prayed that there should be a general order covering all the developers.

- c) The Jantri rate issue was unavoidable and had great impact in the implementation of the project within the control period because there was no Govt. notification of Jantri rate for non-agricultural land and it took long time for issuance of Jantri rate for non-agricultural land and final release of deed of conveyance.
- d) The delay in implementation of the project was beyond the control of the appellant.
- e) The Commission was wrong in holding that extension of control period would amount to amendment of the tariff order dated 29.1.2010.
- f) It was not correct to say that the appellant's petition before the Commission for extension of control period was only after the discussion paper for the next control period was issued. The appellant's project has no connection with or relevance to the discussion paper of the next control period.
- g) The Commission extended the control period to those developers whose commissioning was delayed due to the delay in transmission activity which was attributable to the GETCO.
- h) The circumstances that contributed to the delay in the commissioning of the project are unrelatable to the PPA; and as such the relief of extension of the control period could not be sought by invoking the mechanism under the PPA.
- i) Commission did not appreciate that the appellant had legitimate expectations from the Government that in terms of Clause 21 of the Solar Power Policy the Govt. of Gujarat will facilitate and undertake the necessary approval for procurement of land.

- j) It was overlooked that the appellant already incurred approximately Rs.73.74 crore including advance for equipments/EPC, P & P and had committed to incur most of the balance capital cost required for the project thus totalling an expense of approximately Rs.148.00 crore. The appellant had awarded the EPC Contract and released advance payments under the contract.
- k) The appellant has completed the civil work for entire switch-yard and H/T room for entire 10 MW, civil work for installation of modules was completed by May 2012 and Boundary wall work has been completed. Further, Structure installation work for 5 MW is complete and balance 5 MW shall be completed by June 12, Entire Switch yard electrical equipments for entire 10 MW project are at site, the installation and commissioning was also completed, transformer for entire 10 MW was also installed and commissioned, Inverter from SMA, Germany for first lot of 5 MW, is commissioned at site. Balance 5 MW would be completed by June, 2012, The appellant has achieved partial commissioning of the project as on 28.01.2012 to the tune of 3.34 MW, and the balance 1.66 MW modules would be commissioned by 31.03.2012 and another 5 MW would be completed by June/July 2012.
- l) A lower tariff which will be unworkable as the project will become unviable and the appellant will be made to suffer heavy financial loss.
- m) Para 5 of Order No.2 of 2010 (Tariff Order) restricts the tariff only for Solar Power Generators who commission brand new solar energy plants and equipments during the control period applicable

for this order. The appellant has a Phase II PPA which was signed much later than other Phase I developers. If such is the case, the learned Commission has erred in passing the impugned order as unequals are being treated as equals, as it would have been impossible for such a developer to commission the project in the 'Control Period' specifically when the appellant's project was delayed due to reason beyond its control.

9. **The Reply of GUVNL in Appeal No.96 of 2012:-**The principal contesting respondent no.2, Gujarat Urja Vikas Nigam Ltd. (GUVNL) in its counter-affidavit contends as follows:-

- a) The developers were required to take all necessary steps within the control period to erect and commission the plant. The Tariff Order dated 29.01.2010 did not either expressly or impliedly provide for any possibility of the control period being extended beyond 2 years. On the other hand, the Tariff Order dated 29.1.2010 was specific in regard to the outer date by which the Project should be erected and commissioned and brought into commercial operation.
- b) The Tariff Order dated 29.1.2010 passed by the State Commission providing for the control period was not subject to any conditions such as availability of land, registration of the land, consequences of change in the project site, consequences of change in the design required for the project resultant to the availability of land, flooding, implementation of the project in phases etc..

- c) The PPA cannot be absolutely obliterated because it refers to the Tariff Order dated 29.1.2010 and certain clauses namely definition clauses including Scheduled COD or Scheduled Commercial Operation Date which meant 31.12.2011, Clauses 2.1, 3.1, 4.1, 4.2 are not only relevant but also binding upon the appellant.
- d) The tariff as specified in the Tariff Order dated 29.1.2010 was to be applicable only for the projects commissioned within the control period. If there is a delay in the commissioning of the project i.e. if the commissioning occurs after the control period, the tariff applicable would be *'as determined by the Hon'ble Commission for the Solar Projects effective on such date of commissioning of the project or tariff as determined under the Order dated 29.1.2010, whichever is lower'*.
- e) A combined reading of the PPA and the Tariff Order completely forbids the appellant from seeking extension of the control period.
- f) The appellant, by letter dated 3.1.2011 which was delivered to GUVNL on 15.2.2011, namely, after about 10 months of the PPA submitted a sale deed of the land for new project site and requested GUVNL to execute a Supplemental Power Purchase Agreement for change of location of their project. The appellant requested GUVNL to agree to the change of the location despite being aware that the project had to be commissioned by 28.1.2012 in terms of the Tariff Order dated 29.1.2010.
- g) The appellant delayed signing of supplemental PPA and the appellant finally signed Supplemental PPA on 26<sup>th</sup> April, 2011 confirming the change in location of their solar power project. It

was clearly pointed out to the appellant that the change in location will not entitle the appellant to claim any extension of time.

- h) The appellant by letter dated 26<sup>th</sup> July, 2011 requested the GUVNL to extend the time limit for financial closure from 12 months from the date of signing of the PPA dated 29<sup>th</sup> April, 2010 to 30<sup>th</sup> September, 2011.
- i) Each of the project developers stated before the Commission that it was not taking re-course to Section 86(1) (f) of the Electricity Act, 2003 for adjudication of the disputes including invoking the '*Force Majeure*' clause specified in the PPA entered into with GUVNL.
- j) The State Commission in the order dated 29.1.2010, paragraph 7.2. fixed the control period ending 28.1.2012 taking into account the possibility of a price reduction in future and also taking into account the gestation period for establishing the Project is only 6 months.
- k) The PPA does not provide for any extension of time and further it clearly provides for the consequences of the Power Project being not set up within the control period in Article 5.2
- l) The intention of the developers was to take undue advantage of the tariff determined by the State Commission in the Order dated 29<sup>th</sup> January, 2010 when the developers including the appellant failed to comply with the said order and the terms of the PPA.
- m) In terms of the Government of Gujarat's allocation for solar capacity and Power Purchase Agreement dated 29.4.2010, the project developers were free to acquire private land or land

allocated by Government of Gujarat at the cost and risk of developers.

- n) The change of the project site and the work involved in re-designing of the project on account of the change etc. cannot be a ground for extension of the control period.
- o) Neither the PPA nor the order dated 29<sup>th</sup> January 2010 provides that GUVNL or the Government of Gujarat would make available the land as a condition precedent for implementation of the agreement.
- p) A period of 41 days for announcing the rate of non agricultural land cannot be construed as a major factor to extend the control period. The appellant in fact approached the GUVNL for change of location in the solar plant in January 2011 and after delay executed the Supplemental Agreement only on 26.4.2011 while agreeing that no extension of time will be granted for completion of the project. Therefore, the plea regarding *jantri* rate and land issues were an afterthought and for gaining extra time.
- q) The plea of getting a lower tariff, taking burden or risks of project development etc. does not change the position of the law and the provisions of the PPA entered into by the appellant with GUVNL.
- r) The reliance placed on Clause 21 of the Solar Power Policy of the Government of Gujarat is also incorrect. The responsibility of the State Government was only for facilitation purposes. Article 3 and 4 of PPA fix the responsibility for obtaining all clearances and approvals on the developer.

- s) The State Commission also duly took note of the fact that the project cost of Solar PV Project after passing of the Tariff Order dated 29.1.2010 has substantially reduced.
- t) The State Commission by another order dated 27.1.2012 fixed the tariff for the next tariff period.
- u) It is also relevant to note that many other Solar PV projects developers have proceeded with due diligence and completed their projects within the control period.
- v) If the plea of the appellant is accepted, then the developers delaying the projects will be rewarded for their inefficiencies with the same tariff as the tariff for developers completing the projects in accordance with Tariff Order dated 29.1.2010 and the Power Purchase Agreements.

10. **Rejoinder of the appellant in Appeal No. 96 of 2012:-**

The appellant filed a rejoinder to the reply filed by the GUVNL in the Memorandum of Appeal but the contents of the rejoinder are mostly but reiteration of the contents of the Memorandum of Appeal and we will have occasion to deal with the contents of the rejoinder as we will proceed with the discussion of the merit of the Appeal.

**Appeal No.130 of 2012**

11. **The facts in Appeal no.130 of 2012** are almost the same and identical. However, the facts are summarised as under:-

- a) The Project was allotted to Solar Semiconductor Pvt. Ltd. by the Government of Gujarat on August 1, 2009 subsequent to which Solar Semiconductor Pvt. Ltd. entered into a PPA with the GUVNL on 30 April, 2010. It is submitted that vide letters dated July 05, 2010 and August 25, 2010, Solar Semiconductor Pvt. Ltd. requested the Department of Energy and Petrochemicals that since Solar Semiconductor Pvt. Ltd. is an SEZ and EOU entity facing legal hurdles in executing the project, the Department may permit formation of an SPV, and approve/amend the PPA in favour of the SPV, the appellant herein, to execute the project. Thereafter, after submitting the requisite documents to the GUVNL, the Department of Energy and Petrochemicals vide letter dated October 5, 2010 was pleased to grant the formation of the SPV and directed the GUVNL to amend the PPA. Thereafter the appellant entered into an amended PPA on October 27, 2010.
- b) It is pertinent to mention herein that from the date of application of the appellant the supplemental PPA was signed after a delay of almost 4 months, which was in no way attributable to the appellant.
- c) The project was allotted to the appellant by respondent no.4. It is submitted that during the pre-bid meeting prior to allotment of the projects, the bidders/developers had requested that the project site should not be specified in the PPA, as the identification as well as procurement of the appropriate and would require more time, however, the Government of Gujarat clarified that a 'potential site' could be specified in the PPA and if required, the developers

would be permitted to change the site by executing a supplemental PPA. In view of the same, at the time of signing the PPA with the GUVNL, a potential government site, at *Ajawada Taluk-Tharad, District-Banaskantha* was named in the PPA. Subsequently, the appellant vide letter dated 23.03.2010 requested District Collector to allot the said site.

- d) Subsequently, when the appellant approached the district authorities for procurement of land, the appellant was informed that the Govt of Gujarat had decided not to sell any Government land; therefore the same was refused to the appellant. Thus, the appellant had no other option but to identify a new site for the development of its Project. This was informed to the respondent no.2 (GUVNL) in the letter dated August 9, 2010.
- e) Identification of a new site was a time consuming process as various legal and technical due diligence was required to be carried out for the same. It is pertinent to mention herein that the aforesaid delay caused in land aggregation due to refusal by Govt of Gujarat in selling Govt. land or delay caused due to refusal of land in the Solar Park in no way is attributable to the appellant. However, keeping the timely commissioning of the Project in mind the appellant identified a new land at District *Kutch* and entered into a Supplemental PPA with the respondent no.2 dated 10.5.2011.
- f) The appellant procured adequate land by March-April, 2011. Further, as soon as the appellant proceeded to get the said Conveyance Deeds executed, the Govt of Gujarat vide notification dated April 01, 2011 enhanced the Jantri Rates by 300%. While

enhancing the Jantri rates for agricultural land the Govt. of Gujarat failed to notify Jantri rates for land being used for non-agricultural purposes. The Govt. issued another circular on 11.05.2011 prescribing a provisional mechanism for registration of title deeds with respect to industrial land. It is pertinent to point out that the above-mentioned facts were categorically recognized in the said circular dated 11.5.2011. The Govt. of Gujarat had acknowledged the difficulties being posed on account of the increase in the *Jantri* rates and the uncertainty with respect to the non-agricultural land. Therefore, the Govt. of Gujarat through the said circular prescribed a provisional mechanism for registration of title deeds with respect to industrial land. The said circular provided a provisional mechanism for registration of conveyance deeds for acquiring the land for non-agricultural purposes. Therefore, for no fault on the part of the appellant the land registration process of the appellant's project was further delayed by approximately 6 months due to the Jantri rate issue.

- g) The entire process of identifying the new site, getting into arrangement / MOU/ Agreement to Sell etc. with the land aggregators, undertaking the legal and technical due diligence and the Jantri rate issue has delayed the appellant project by a total of 18 months (April 2010 to October 2011).
- h) The Government of Gujarat Solar Power Policy 2009 (paragraph 14) and Art 4.1(v) of the PPA provided that the transmission line from the switch yard of the Solar Project to the Gujarat Energy Transmission Corporation Limited Substation shall be laid by GETCO and the Project Developer should approach GETCO for this purpose. Instead of taking up these works by themselves as

required under the policy of Govt. of Gujarat and the PPA terms, the GETCO requested the appellant to take up the 12 km of 66 kV D/C line work from the project site up to the proposed substation at Chitrod Village, on their behalf on turnkey basis, vide their letter dated 25.8.2011. In the interest of completing the works early, the appellant has taken up their work on behalf of GETCO and the approval for the contractor was given by GETCO on 20.09.2011. There were many problems of Right of Way, for which GETCO's intervention was essential as GETCO is the licensee and owner of the line.

- i) Excessive rainfall was one of the causes that was responsible for stoppage of construction activities.
- j) The appellant's petition before the Commission was rejected on the grounds that the order dated 27.1.2012 would cover this appellant also.

12. **Grounds of Appeal in Appeal No. 130 of 2012:-**

- a) The Commission failed to exercise its inherent power.
- b) The Commission has wrongly argued that most projects had only 8 to 9 months to commission. However, since the PPA was willingly signed by the petitioners the Commission does not feel that the 'Control Period' should be extended.
- c) That admittedly approximately 300 MW was being commissioned within the 'Control Period'; therefore, the problems faced by the

appellant does not require the 'Control Period' to be extended. This is wrong.

- d) The learned Commission has not accepted the argument that risks were unforeseeable as the Commission wrongly reasoned that all projects involve certain risks and they are considered by the Project Developer before they enter into the PPA, which allocate the risks.
- e) The appellant does have legitimate expectations against the Governmental actions / inactions but the same was not considered.
- f) The learned Commission have already circulated a discussion paper on 1.11.2011 for determining tariff for Solar Projects for the second control period which is to start from 29 January, 2012 and in view of the new Control Period, the present Tariff Order should not be extended. This is not a valid ground of refusal.
- g) That the contention that the appellant has not been able to show that there has been a problem which is industry – wide and spread over the whole State of Gujarat or a major part of the State, necessitating an extension of the 'Control Period' through a general Order cannot be accepted to be a valid ground of refusal.
- h) That the Petitions filed by those developers, whose projects are complete but are not commissioned due to delay in construction of transmission line by GETCO, either by itself or through such developers, have become infructuous as respondent no.2 has admitted to allow those developers the same tariff.

- i) It is also pertinent to mention herein that in spite of numerous difficulties the appellant's project has already spent substantial amounts. It is further pertinent to mention herein that heavy rains at the time have caused dislocation of the construction programme. In spite of all these problems faced, the appellant has completed the works of the 12 km of 66 kV D/C line by 28.1.2012 which is also confirmed by GETCO in its letter dated January 28, 2012 except for the Railway crossing for which GETCO had to obtain permission of Railway Authorities. The Railway crossing work had been since completed on 31.3.2012. However, the GETCO has not commenced the work of erection of 66 kV substation at Chitrod and also the work of 66 kV line from Chitrod to Shivalakha 220 kV Substation till Jan 2012, though the evacuation scheme was finalized long back. Thus, there was perceptible delay and default on the part of the GETCO in commencing the works of evacuation facility. The appellant has also completed erection of 8.683 MW of Solar PV Panels along with Inverters and all the associated equipment and also completed the Switch Yard works by 1<sup>st</sup> Feb 2012. The installation readiness by 1<sup>st</sup> Feb 2012 and permission for charging of 8.683 MW was obtained from the Chief Electrical Inspector vide letter dated 17<sup>th</sup> Feb, 2012. Thus, the Solar Project of 8.683 MW was ready for commissioning by 1<sup>st</sup> Feb, 2012, but could not be commissioned due to the default of GETCO in making the evacuation arrangements as required under the Govt. of Gujarat Policy and the PPA terms. Further, the delay in commissioning the balance capacity is also not attributable to the appellant as the same would not have been commissioned even if it was ready, in the absence of the evacuation arrangements for which GETCO is

responsible. The appellant has subsequently completed erection of another 1.4 MW by 21<sup>st</sup> Feb 2012. The installation readiness by 21<sup>st</sup> Feb, 2012 and permission for charging of another 1.4 MW was obtained from Chief Electrical Inspector vide letter dated 13<sup>th</sup> March, 2012. Subsequently, an additional 2.8 MW was made ready by March 31, 2012 and was likely to complete balance 7.12 MW shortly. The respondent no.3 vide letter dated March 26, 2012 intimated to other respondent no.2 that the project to the extent of 8.68 MW & 1.4 MW was ready for generation as on February 1, 2012 & February 21, 2012 respectively but could not be commissioned for the want of the 66 kV transmission line. It is submitted that the appellant has completed the part of the evacuation system (66 kV line from project site to the proposed 66 kV substation at Chitrod entrusted to it by the GETCO which is also confirmed by GETCO in its letter dated January 28, 2012). The GETCO has made temporary arrangements for connecting the switchyard to the Grid on April 22, 2012 only and thus there was a delay in testing & commissioning of the already erected equipment by around three months due to the non-availability of the evacuation facility which has to be made by GETCO. At the same time we lost revenue for about three months due to this delay.

- j) The Commission has incorrectly not appreciated the fact that the appellant had already incurred approximately Rs.122 crores as on December, 2011 and had committed to incur most of the balance capital cost required for the Project.

13. **Reply of the GUVNL:-** The reply of the GUVNL is the same as in Appeal no. 96 of 2012 and only certain additions are placed below:-

- a) The contention of the appellant that the State Commission has given a deemed extension to all projects / solar project developers which got delayed due to non-availability of the transmission line of GETCO – Gujarat Energy Transmission Corporation Limited but did not give the same to the appellant is devoid of any merit.
- b) The reasons submitted by the appellant for delay in commissioning of solar power project beyond scheduled commercial operation date cannot be ground for extension of control period and non applicability of Liquidated Damages. The appellant cannot take advantage of Article 4.3(3) of the original PPA dated 30.04.2010 in view of the specific provisions contained in the supplemental PPA dated 10.5.2011.
- c) The relaxation allowed by the State Commission to other Solar Developers in the Order dated 27.1.2012 pertained only to those developers who were otherwise fully ready to commission and operate the project before 29.1.2012 and the only reason for delayed commissioning was the delay on the part of GETCO in putting the transmission line / system without there being any reason attributable to the project developers as in the present case.

14. **The Issues :-**

- a) What is the extent and ambit of inherent power?

- b) Whether the Commission was not required to consider the merits and demerits of each appellant's case in their separate perspectives?
- c) Whether Commission should or should not exercise its inherent power in extending the control period on case specific basis?
- d) Whether extension of control period would be justified if the reasons for delay in commissioning were bona fide and beyond the control of the appellants?

15. **GUVNL's Arguments** :-The GUVNL takes us to the following points objecting to the Appeals:-

- a) When the State Commission passed the order dated 29<sup>th</sup> January, 2010, it was conscious that the cost of Solar PV Projects had shown declining trend.
- b) The developers were required to take necessary steps within the control period to complete the construction and commission the project.
- c) The PPA signed by each developer was consistent with the order dated 29.1.2010.
- d) All the developers including the appellants were completely aware of the urgency of the situation and of the time limit which they failed to adhere to for which the GUVNL must not suffer.
- e) The PPA specifically provided that if the project was not commissioned by the specified date, the tariff applicable will be the tariff which will be lower and which will be for the next control period.

- f) The appellants did not take effective steps for commissioning of their projects.
- g) Jantri rate was not an issue at all.
- h) The appellants did not approach beforehand for extension of the control period.
- i) General extension of control period was not warranted.
- j) Section 86 (1)(b) of Electricity Act, 2003 cannot be invoked.

16. The GUVNL refers to the decisions in *“India Thermal Power Limited vs. State of Madhya Pradesh & Ors (2000) 3 SCC 379* and *N.Kamalam (Dead) and Anr. vs. Ayyasamy and Anr. (2001) 7 SCC 503”*.

17. **Commission’s arguments:-**The Commission also filed a written argument but the contents of the written argument are merely reproductions of the relevant paragraphs of the order impugned which we have already reproduced above. It is the theme of the Commission that since the PPA was based on the Tariff Order dated 29.1.2010 and the developer signed the PPA consciously and deliberately and when only after discussion papers were floated in respect of the tariff for the next control period, the developers mostly came with common grounds which cannot be addressed to legally by the Commission by a general dispensation.

18. **Common argument :-** Both Mr. Ramachandran and Mr. Sanjay Sen representing the GUVNL and the Commission respectively focus the central point that the entire motive of the developers in filing petitions before the Commission for extension of control period was to gain higher tariff by spending less expenditure only after it was revealed to them that the cost of the solar projects was lessening down gradually.

19. **Our analysis :-** An integrated approach is necessary covering all the issues. In respect of the Appeal no.130 of 2012, the Commission only passed a 4- paragraph order saying that judgment delivered in connection with batch of other petitions in respect of which one of the petitioners namely the appellant in Appeal no.96 of 2012 was one of the petitioners will cover the decision in respect of the petition of the appellant in Appeal no.130 of 2012. The Commission took up for consideration 36 petitions filed by different renewable energy developers and passed a common order on 27.1.2012. We reproduce below certain paragraphs of the common order in order to appreciate the merit of the Appeals:-

*“11.3 It can be seen from the above that the reasons put forward by the petitioners for extension of control period - though some common factors are there – are project specific. In some cases, there could have been delay due to change of project site. In some cases, there may be delay because of more time taken to obtain NA permission, or permission under the Tenancy Act. In some*

*cases, the project construction could have been affected for a few days because of water logging due to excessive rains. However, one cannot infer that because of these and some of the other factors, most of the projects were affected. If there is an event which is known to have statewide and large-scale ramifications, then only there could be a case for issue of a general order to extend the control period. In fact, the issues raised by the petitioners, as rightly pointed out by the learned Advocate for the respondents, indirectly imply existence of Force Majeure conditions, which can be addressed only within the framework of PPA. There is no justification to issue a general order extending the control period determined in the tariff order of 29 January 2010. In fact, extending the control period will mean an amendment to the above order of the Commission which will require a different procedure and cannot be done based on individual petitions referring to individual project specific problems and issues. In fact, the extensions asked for range from one month to six months. There are also other aspects such as progress of the project and size of the project which vary widely. On the other hand, a number of projects as discussed in the following paragraphs, have already been commissioned or are likely to be commissioned. Hence, it is evident that the petitioners have not been able to establish that the reasons put forward by them can justify an extension of the control period which is a modification of the Tariff Order of 29 46 January 2010, especially when a discussion paper has already been issued for determining the tariff for the next control period.*

*11.4 The argument put forward by the respondents that the relief sought by the petitioners for extension of the control period should be rejected because there is declining trend in the cost of PV module and consequently capital cost of solar PV projects, even though based on fact, becomes redundant in view of the analysis in the preceding paragraph.*

*11.5 An argument which has been made by the petitioners, most of whom have projects of the second phase, is that they got 8–9 months less than those of the first phase. This argument does not have any validity because the petitioners have consciously signed the PPA with all its conditions and keeping in view the control period envisaged in the order dated 29 January 2010 of the Commission.*

*11.6 As regards the issue of delay in construction of evacuation system by GETCO brought out by the petitioners, the learned Advocate for the respondents clarified, as mentioned in para 8.2 above, that the projects which are ready and have contacted GEDA for completion certificate, would be eligible to the tariff determined by the Commission in its order of 29 January 2010, even if the evacuation system is not completed by GETCO, either by itself or through the project developer. To this extent, the petitions of such petitioners become infructuous.*

*[13] Another argument which was put forward by the petitioners is that the capital cost includes equipments and other costs along with the premium for 'risk'. The project developers have consciously taken into account certain risks and incorporated the relevant cost accordingly in the project cost. However, there are some types of risks which cannot be foreseen. The factors such as change in Jantri rate, the Government Resolution fixing norms for land to be used by solar projects etc. could not have been anticipated by the project developers and they cannot take the burden of such risks. The risks that are not foreseeable or not within the control of the developers or have been caused due to policy changes and/or inefficient management of the Government cannot be passed on to the developers. This argument of the petitioners cannot be accepted at all. Every project involves certain risks. The Power Purchase Agreement itself is the mechanism for allocation of risks between the parties to the PPA. There is no logic nor any justification to extend the control period based on this argument.*

*14.2 The above argument does not seem to be convincing. The expectation, if any, of the single project developer, however legitimate, cannot be a ground for a general order extending the control period. It is not the case of the petitioner that certain events universally affected all the project developers in the context of their Legitimate Expectations whereby adversely impacting the projects in all cases. If there are individual problems and issues that are of varied nature and magnitude, those cannot be adequate justification to extend the control period as has been discussed earlier.*

*[16] In view of the above analysis, we decide that the petitioners have not succeeded in making out a case for invoking the inherent power of the Commission to extend the control period determined*

*by the Commission in its Order No. 2 of 2010 dated 29 January 2010. Though they have put forward a number of reasons for the relief they have sought, none of the petitioners including the Association of Solar Power Developers, which has filed a separate petition, has indicated any ground whatsoever which is of universal application either in the State of Gujarat or a major part thereof by which all the projects are affected by such factors. Several projects have been or are likely to be commissioned during the control period itself. The reasons indicated by the petitioners appear to be in the manner of indirectly invoking the Force Majeure clause specified in 53 the PPA, which cannot be addressed by a general order. Hence, all the petitions are dismissed”.*

20. After having heard the learned advocates for the parties and after having perused the annexures to the Memorandum of Appeal, we have thought it appropriate to dwell on mostly on law than on facts in as much as any appreciation of factual points pleaded by the two appellants and then a decision thereon would not be proper for two reasons namely :-

a) Observations on facts may cast reflection on the merit of the other developers whose petitions were consolidatedly considered, and b) appreciation of factual points in respect of one Appeal may not be the same appreciation in respect of the other Appeal because though the grounds of fact have sometimes become common to both, appreciation of grounds has not necessarily to be similar.

21. It is not that the petitions before the Commission were to be dealt with under section 86 (1) (b) of the Electricity Act, 2003. The appellants

prayed for extension of control period for certain factual reasons which may be accepted in respect of one appellant but may not be accepted in respect of the other appellant because, as said above, appreciation of fact may not be universal . Since appreciation of fact commonly urged may not be universal, it does not follow logically that either acceptance or rejection must be universal. Commonality of grounds does not entail commonality of acceptance or of rejection. All the 36 petitions were taken up for consideration but the Commission did not consider the merit of each individual petition but observed that since grounds are common and since events did not have state-wide and large scale ramifications a general extension of control period would not be warranted. This is fundamentally fallacious. Why this is fallacious will be dealt with in the sequel but it is necessary for the present to know the grounds advanced by the appellant in Appeal no.96 of 2012. These are as follows:-

- a) Delay in signing supplemental PPA was caused by GUVNL.
- b) Change in the project site was not due to any default on the part of the appellant.
- c) *Jantri* rate issue would not have occurred if the Govt. had been prompt in its actions.
- d) There was delay in registering deeds of conveyance because of the *Jantri* issue.
- e) If the supplemental PPA had been signed at the time when the appellant had requested the *Jantri* issue would not have attained magnitude.

- f) Non-agricultural permission was inordinately delayed by the Govt.
- g) It is factually wrong and illogical to argue that since having a prospect of lower expenditure, the appellant would gain more by the higher tariff because the Commission did not care to consider that the appellant incurred capital expenditures and made some committed expenditures already before the scheduled date of commissioning of the projects.
- h) Most of the developers who were allotted land in the Solar Park did not face any *Jantri* Rate issue but though the appellant's project was originally a phase-I project, it was pushed to phase-II allocation period due to change in site and for other factors.
- i) The grounds which are available to the GUVNL for liquidated damages against the appellant are the very grounds on which extension of control period was prayed for because the grounds cannot be attributed to the appellant.
- j) The GUVNL is a revenue neutral distribution licensee unlike a private distribution licensee.
- k) The National Tariff Policy and the National Electricity Policy contemplate that the interest of the private investors needs to be protected.
- l) Despite submission of energy bills to the GUVNL from time to time payment was received only in September, 2012 and it contributed to delay in repayment of loan and for which further loan was not available for the balance 5 MW project.

22. In Appeal no.130 of 2012, the contentions of the GUVNL are the same as in Appeal no.96 of 2012 but the appellant in Appeal no.130 of 2012 advances the following grounds which are not exactly the same

and the data in respect of which are not uniformly common to the data in Appeal no.96 of 2012 although the grounds may be common to some extent. However, the appellant in Appeal no.130 of 2012 makes the following points:-

- a) Delay by the GUVNL for approval for legitimate change of the name of project developer by six months.
- b) Failure by the Govt. to allot land to the appellant despite original commitment and the correspondences are undisputed.
- c) Though other developers were allotted lands by the Govt., the present appellant was denied.
- d) The appellant's project was not a Phase-II project which was favourable to other developers.
- e) Jantri rate.
- f) Permission of non-agricultural land.
- g) Failure by the GETCO to build sub-station in timely manner.
- h) If failure by the GETCO came to be a valid ground for extension of the control period, then the grounds not attributable to the appellant required similar treatment because the grounds were the grounds which were attributable legitimately to the Governmental inaction and delay.
- i) The prospective reduction in capital cost and custom duties are not applicable to this appellant and the Commission has generalised the issue.
- j) The parent company, it being a SEZ unit, was not in a position to execute the project due to legal hurdles.

- k) Delay in execution of supplemental PPA was attributable solely to GUVNL.
- l) The appellant was refused land in Solar Park on the ground that it was not a Phase-II project.
- m) It is not that the appellant would at all get the benefit of lower cost relevant to Second Control period since it has either already incurred or made commitments for expenditure during the First Control Period. The expenditure incurred till 30.09.2012 was Rs.88 crore as per the CA Certificate.
- n) It was only when the GUVNL started paying to the appellant against the energy bills from September 2012, the appellant could be able to get the sanction of loan of Rs.42.5 crore enabling the appellant to restart and take up the execution of the Project.

23. To be specific, each appellant merited separate consideration. The ground advanced that if the appellants are given relief then the other developers would jump in is not acceptable because we have already observed that each developer may or may not have experienced genuine problems. Now, the appellant in Appeal no.130 of 2012 was not one of the petitioners in the batch of 36 petitions and its petition was separately considered on a subsequent day by observing that the observation in those batch of petitions would be equally applicable to this appellant. This approach is not legally tenable.

24. The reasoning of the Commission that extending the control period would mean amendment of the Tariff Order is not at all possible to concede to. The Commission, it will be noticed from the impugned order, was conscious that individual petitions referred to individual to project specific problems and issues and some prayed for one month extension, while some prayed for six months extension. The Commission came to the conclusion that unless there would happen a state-wide and large scale ramifications then only there could be a case for issue of a general order to extend the control period. Yet, the Commission said at the same breath that it has inherent power to extend the control period and it was made available when GETCO was at default. The basic premise that unless there is wide and large scale ramifications across the State in respect of the renewable sources of energy there cannot be extension of control period by general order is, to say the least, not a legal approach and such an approach would defeat the very spirit of the law. The GUVNL and the Govt. of Gujarat accepted the proposition that inherent power can be exercised to a genuine problem. In paragraph 10.7 of the order impugned, the Commission has observed "*Even if we do not take into cognizance the above cited decisions of the TNERC, the provisions of Regulation 80 of the Commission's Regulations, Section 151 of the Civil Procedure Code and related decisions of the Hon'ble Supreme Court make it abundantly*

*clear that the Commission has inherent power to issue any order, to meet the end of justice, if it is inconsistent with the relevant provisions of the Regulations/Act. This power is not limited to only procedural matters.”* This observation makes it clear that Commission was dealing with the petitions by virtue of the power expressly given to the Commission by their own Regulations to exercise inherent power. The petitions of the two appellants were not the ones under section 86 (1) (b) of the Electricity Act, 2003. Now, it is not logical to argue that unless there is state-wide large scale ramifications inherent power cannot be exercised. The relevant Regulation of the Commission is exactly identical in language and spirit with section 151 of the CPC. This provision of inherent power does not by itself confer any power but only indicates that there is a power to make an appropriate order as may be necessary to achieve justice and prevent the abuse of the process of law. It has been held by the Hon'ble Supreme Court in *Raj Bahadur Ras Raja Vs. Seth Hiralal, AIR 1962 SC 527*, that the inherent power is not a power given to the Court, it inheres in the Court itself so that by virtue of exercise of such power, justice is rendered. In *Ramji Dayawala Vs. Invest Import (1981) 1 SCC 80*, the Hon'ble Supreme Court held that the discretion vested in the Court is dependent on various circumstances which the Court has to consider and there is no limitation for application of the inherent power. Therefore, each case has to be

decided on its own merit and simply because of the fact that some of the grounds were common to all the petitions the treatment of the alleged common grounds has to be common. While saying so, we are not oblivious of the legal proposition that inherent power cannot be exercised when prohibited or excluded by the statute itself and when there are specific provisions to address the remedy. That is to say, inherent power can be exercised only for the ends of justice. The very exercise of inherent power or non-exercise of inherent power depends upon consideration of specific facts.

25. The argument of the GUVNL and for that matter of the Commission that extension of control period would be prejudicial to the PPA is again not acceptable. Firstly, PPA is not subordinate to the Tariff Order although it is based on that. The provision in the PPA that unless projects are commissioned within the specified period tariff as per the Tariff Order dated 29.1.2010 would not be available does not conflict with exercise of inherent power. If situations having wide scale ramifications warrant exercise of inherent power for extension of control period then also a certain PPA may have some consequences. Liquidated damages are available to the GUVNL only when defaults occur on the part of the developer; but when a situation is seen where circumstances regardless of whether wide scale ramifications across the

State happen or do not happen went beyond the control of a developer then exercise of the inherent power which the Commission does have in their statute may be exercised but each case has to be decided on its own merit. The existence of force-majeure condition definitely comes within the framework of the Power Purchase Agreement but exercise of inherent power is always case-specific and it cannot be equated with force-majeure. Again extension of control period cannot by any stretch of imagination would amount to amendment of the Tariff Order. Amendment of the Tariff Order by virtue of section 62 (4) of the Electricity Act, 2003 was not prayed for. Since in every venture there is allocation of risk, it cannot be said that even if a certain developer experiences hurdles beyond his control, he has to abide by such hurdles. When fact in each case is hotly contested by a counter fact or denial, justice demands that each fact has to be separately dealt with and decided. It is the Commission which is alone competent to scrutinise the merits and demerits of each fact in each of the two Appeals. It is the Commission that has the infrastructure and capability to examine and find as to whether expenditures were made and committed ahead of the date of commissioning of the project so that no unfair advantage is claimed by any developer on the ground of prospective reduction of the capital cost. If the particulars of expenditure if already made or committed during the control period are scrutinised

and the grounds are scrutinised in the perspective of each individual case then possibly it would be clear to the Commission as to whether and in which case a developer comes with clean hands or not.

26. In the result, it is of absolute necessity that the Commission needs to examine the case of each of the two appellants in their respective merits and decide afresh. The basic premise that extension of control period is possible only when there are wide scale ramifications is pregnant with flaws.

27. The Appeals succeed in view of the observations as above and are thus allowed. We remand the matters back to the Commission for rehearing on merit of each individual case and for decision according to law. No cost.

**(V.J. TALWAR)**  
**Technical Member**

**(Justice P.S. DATTA)**  
**Judicial Member**

Reportable/Not reportable

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