

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI
(APPELLATE JURISDICTION)**

**APPEAL NO. 115 OF 2020
&
APPEAL NO. 116 OF 2020**

Dated: 12th April, 2022

**Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

WALWHAN RENEWABLE ENERGY LIMITED

(Formerly known as Welspun Renewable Energy Private Limited)

Having its Office at:

C/o The Tata Power Company Limited
Corporate Centre B, 34 Tukaram Road, Carnac Bunder,
Mumbai - 400 069

...Appellant

-Versus-

1. Karnataka Electricity Regulatory Commission,

Through its Secretary,
912, 6&7th Floor, Mahalakshmi Chambers,
Mahatma Gandhi Road,
Bengaluru, Karnataka- 560001

2. Bangalore Electricity Supply Company Limited,

Through its Managing Director,
K.R. Circle, Bengaluru – 560001

3. Karnataka Renewable Energy Development Limited,

Through its Managing Director,
Having its Registered Office at
#39, "Shanthigruha"
Bharath Scouts & Guides Building,
Palace Road, Bengaluru - 560 001

4. Karnataka Power Transmission Corporation Limited,

Through its Managing Director,
28, Race Course Road,
Bengaluru – 560009

...Respondents

Counsel for the Appellant (s) : Mr. Buddy A. Ranganadhan
Mr. Deepak Khurana
Mr. Abhishek Bansal
Mr. Tejasv Anand
Mr. Vineet Tayal
Ms. Nishtha Wadhwa
Mr. Ashwini Kumar Tak
Mr. Geet Ahuja

Counsel for the Respondent (s) : Mr. S. Sriranga Subbanna, Sr. Adv.
Ms. Sumana Naganand
Mr. Balaji Srinivasan
Ms. Medha M. Puranik
Ms. Pallavi Sen Gupta
Ms. Aishwarya Choudhary
Ms. Garima Jain
Ms. Deepthi CR
Ms. Anini Debbarmann
Mr. Sanjay Reddy
Ms. Gayatri Sriram for R-2&4

Mr. Nithin Saravanan
Mr. M.V. Charati
Ms. Latha S.S.
Ms. Arunima Singh
Ms. Ridhima Malhotra
Ms. Priyadarshini
Mr. Murugesh for R-3

J U D G M E N T

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. This matter was taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The captioned Appeals namely Appeal no. 115 of 2020 (in short "Appeal 115") and Appeal no. 116 of 2020 (in short "Appeal 116") have been filed by the same Appellant i.e. M/s. Walwhan Renewable Energy Limited, against the Orders dated 27.11.2018 ("Impugned Order 1") and 09.11.2018 ("Impugned Order 2") passed by the Karnataka Electricity Regulatory Commission (in short the "KERC" or "State Commission" or "Respondent Commission") in OP No. 141/2017 and OP No. 140/2017. By way of the impugned orders, the Respondent Commission, Respondent no. 1 in both the captioned appeals rejected to treat the effective date for the PPA relating to the Appellant's 50 MW Project as being on or after the date of approval of the said PPA by the Commission and also rejected the submission of the Appellant to treat the period of delay in achieving COD as not being attributable to the Appellant herein, for being a force majeure event.

The two captioned appeals are similar in nature filed by the same Appellant i.e. M/s Walwhan Renewable Energy Limited against the same Respondents and having same grievance against the orders passed by the Respondent Commission. As such the two appeals are taken up together.

Parties

3. The Appellant, is a company incorporated under the Companies Act, 1956. The name of the Appellant has been changed from 'Welspun

Renewables Energy Private Limited’ to ‘Walwhan Renewable Energy Limited’.

4. Respondent No. 1, Karnataka Electricity Regulatory Commission, is the Electricity Regulatory Commission for the State of Karnataka exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

5. Respondent No. 2- Bangalore Electricity Supply Company Limited is a distribution licensee operating in the State of Karnataka and is Government of Karnataka undertaking. Respondent No. 3- Karnataka Renewable Energy Development Limited (KREDL) is the Nodal Agency of the Government of Karnataka for implementation of Solar Power Project in the State of Karnataka. Respondent No. 4- Karnataka Power Transmission Corporation Limited, is the Intra State Transmission Licensee in the State of Karnataka.

Facts of the case in brief

6. The factual matrix of both the appeals is virtually common. Respondent No. 3, the Karnataka Renewable Energy Development Limited (**KREDL**), had invited proposals by its Request for Proposal (RfP) for setting up Solar Power Projects in the State of Karnataka on 30th May 2014.

7. The Appellant participated in the bid and after evaluation, KREDL issued a Letter of Award vide letter dated 19th November, 2014 in favour of the Appellant for development of two projects of capacity of 50 MW each of Solar PV Project at Kushtagi Taluk, Koppal District.

8. It was proposed by the Appellant that the projects will be developed through Welspun Solar Kannada Private Limited (“Special Purpose Vehicle - hereinafter referred to as the “**SPV**”) in accordance with the terms of the RfP,

and therefore, requested Respondent No. 3 to accept the SPV as the entity which shall undertake to perform the obligations under the LOA.

9. Pursuant thereto, the SPV entered into separate Power Purchase Agreements (“PPAs”), both dated 14th January 2015 with Respondent for the development of a Projects with the effective tariff at the rate of Rs. 7.09 and Rs. 7.01 per unit for the two projects.

10. As per Article 3.1 of the PPA, the Agreement shall come into effect from the date of its execution by both the Parties and such date shall be referred to as the **Effective Date**. However, as per the prevailing procedure followed in the State of Karnataka, a PPA is initialed by the generator and sent to Distribution Licensee for the initialing and for onward submission to KERC for approval.

11. It is submitted that the both the PPAs were initialed by the Appellant on 14th January, 2015 and were sent to Respondent No. 2 for initialing and onward submission to Respondent Commission for approval. The Respondent Commission accorded its approval vide its letter No. KERC/S/F-31/Vol-51/15-16/172 dated 04th May 2015 and consequently approved the tariff as per section 63 of the Electricity Act, 2003. The Respondent no. 2 conveyed the approval of the Respondent Commission to the Appellant thereafter.

12. Once this approval was accorded, the date and reference number of the approval letter was duly documented. Pursuant to the communication of Respondent No. 2 to the Appellant conveying the approval of the Respondent Commission, the parties executed the final version of the PPA.

13. During the course of commissioning, the Appellant faced certain difficulties resulting into time over run, however which were beyond his control and therefore, requested for extension of SCOD (Schedule Date of Commissioning) which was duly recommended to the Respondent Commission by the Distribution Licensee.

14. The Respondent Commission vide the impugned orders rejected the prayers of the Appellant and reduced the tariff as agreed in the PPA due to delay in the commissioning schedule, and hence the two captioned Appeals.

15. The Appellant submitted that, as per law and principles of natural justice, the Effective Date under the PPA can be anytime after 04th May, 2015, the date after which the Respondent no. 2 conveyed the approval of the PPA. However, for the purposes of the present proceedings 04th May, 2015 is to be assumed (without admitting) as the Effective Date.

16. The main contention of the Appellant was that the delay in commissioning of the project was due to certain force majeure events which were beyond its control and therefore, is duly entitled to extension of the time and hence the appeals.

Our Analysis and Observations

17. It may be seen that the two Appeals are similar in nature except the competitively bid price discovered in the two captioned appeals i.e. Rs. 7.09 per kWh in Appeal 115 and Rs. 7.01 per kWh in Appeal 116, and the date of commissioning in the two projects. Therefore, the first captioned Appeal is considered for examining the issue.

18. The main issue of contention is whether the Appellant is entitled for extension of the SCOD (Schedule Commissioning Date) under the circumstances as examined and recommended by the Respondent No. 2, the Distribution Licensee or the power procurer through its Board. Similar issues have already been examined and decided by this Tribunal and the present issue is duly covered by the judgments passed.

19. Therefore, before we peruse the submissions made by the Appellant and the Respondents, it is important to note certain Judgments which shall be relied upon.

20. This Tribunal vide judgment dated 14.09.2020 in Appeal No. 351 of 2020 (Chennamangathihalli Solar Power Project & ors. vs Bangalore Electricity Supply Company Limited) has held that once COD extension is agreed under the signed PPA between the parties and after applying, due diligence in the matter, the State Commission ought to have considered the same and approve so as to meet the ends of justice. The relevant extract of the judgment is as placed below:

“Summary of Findings:-

9.1 Having regard to the deliberations and our analysis, as stated supra, we are of the opinion that there was nothing wrong on the part of KERC to suo motto interfere in the matter. As being a State Regulator, it has jurisdiction to look into affairs of ESCOMS in purchase and supply of powers in the larger interest of consumers. However, as the COD extension was granted under the signed PPA between the parties and after applying, due diligence in the matter considering all prevailing facts and matrix of events, the State Commission ought to have considered the same and approved so

as to meet the ends of justice. Needless to mention that the PPA' Terms & Conditions were duly approved by the State Commission which crystallised the rights of the parties.

9.2 The findings of the State Commission in the impugned order clearly reflect that it has ignored the vital material placed before it such as statement of objections filed by first Respondent, recommendations of State Govt. dated 23.06.2017 and communication of MNRE, Govt. of India dated 28.07.2017 regarding grant of COD extension to the solar power developers. Further, it is mandate upon the State Commission to promote co-generation and generation of power from renewable sources of energy, however, in the present case, the State Commission has suo motto interfered for the ultimate loss to RE developers who are land owning farmers and had participated in the programme of the Govt. for solar power development. In fact, the entire solar project is structured on the basis of assured tariff as per Article 5.1 of the PPA being an incentivised tariff and financial institutions have advanced loans on the basis of the assured tariff as per PPA.

9.3 In the light of above, we hold that the impugned order dated 04.09.2018 passed by the State Commission is not justified in the eyes of law and hence liable to be set aside.”

21. Further, in the judgment passed by this Tribunal in Appeal No. 340 of 2016 (Azure Sunrise Private Limited v. Chamundeshwari Electricity Supply Corporation Limited & Anr.), it was held that:

“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 CESCOT 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.”

22. Further, on 14.07.2021, in Appeal No. 360 of 2019-SEI Aditi Power Private Limited & Ors. v. Karnataka Electricity Regulatory Commission & Ors., this Hon’ble Tribunal has held that:

“99. Therefore, if we take the date of extension of SCOD, which was unequivocally accepted by the Respondent BESCO, the SCOD get extended till 17.09.2016 by mutual consent of the parties which is legitimate and legal in terms of Article 5.7.3 of the PPA. Therefore, we opine that the Respondent Commission erred in opining that BESCO had no authority to extend SCOD.”

23. From the above it can be seen that once extension is granted by the procurer on the proposal of extension by the developer under the contractual terms of the PPA, the Commission is bound to except the extension.

24. Further, the date of approval of the PPA by the State Commission has to be the effective date of the PPA.

25. The Appellant submitted date -wise chronology of events which has been noted and deliberated. The important issues emerging from the Appeal are:

a) Whether the effective date under the PPA is the date on which it is signed by the parties or the date on which the PPA is approved by the Respondent Commission?

b) Whether the Respondent Commission is bound to accept the extension of SCOD once it is agreed to by the signatories in compliance with the terms and conditions of the PPA?

26. The role of the Respondent Distribution Licensee is also in question as it has changed its stand during the hearing before the State Commission as against its earlier decision for considering and accepting the request of the Appellant for the extension of SCOD.

Effective Date

27. The Appellant submitted that Article 3.1 of the PPA, the Agreement shall come into effect from the date of its execution by both the Parties and such date shall be referred to as the Effective Date. As per the prevailing procedure followed in the State of Karnataka, a PPA is initialed by the

generator and sent to Distribution Licensee for the initialing and for onward submission to the Ld. KERC. It is submitted that the PPA was initialed on 14th January, 2015 by the Appellant and was sent to Respondent No. 2 for initialing and onward submission to Respondent No. 1 Commission for approval.

28. Further submitted that even otherwise, without an approved PPA, no project activity can be taken up and hence 04th May 2015 has to be considered as Effective Date. It is submitted that Karnataka Renewable Energy Development Limited (**KREDL**) and Government of Karnataka has considered the date of approval of the PPA by Respondent Commission as the Zero date for the projects in the subsequent bids.

29. It may be seen that Article 3.1 of the PPA provides that the Agreement shall come into effect from the date of its execution by both the Parties and such date shall be referred to as the Effective Date. It is pertinent to note here that in the instant case, if the effective date is the date on which it is signed by the contracting parties, then no terms and conditions of the PPA can be altered without the consent of all the parties. That shall make the role of the State Commission as redundant except for adoption of tariff.

30. On the contrary, the Respondent no. 2 insisted on and submitted that the date on which it has been initially signed and indicated there in, shall be taken as the effective date. We decline to accept such an argument. From the above cited judgments of this Tribunal, it has again and again reiterated that the effective date shall be date on which the PPA is approved by the State Commission as only from that date it is made effective for execution.

31. This Tribunal in judgement dated 12.08.2021 in Hukkeri Solar Power Project LL.P. & Anr. v. Hubli Electricity Supply Company Limited & Anr., Appeal No. 342 of 2018, has held that:

“72. Though according to the terms of PPA, the effective date for implementing the PPA is the date of signing of the PPA between SPD and HESCOM, this Tribunal in various Appeals has opined that the effective date has to be the date on which the PPA is approved and not when the PPA was executed between the parties, since PPA becomes implementable only when it is approved. Therefore, since the PPA in this case was approved on 20.07.2015, the effective date would be by or before 20.01.2017. In terms of PPA, the total timeline to commission the solar project would be 18 months from 20.07.2015 i.e., by or before 20.01.2017.”

32. Our attention was invited towards the definition of execution by the Appellant submitting that:

“18. The word ‘execution’ as per dictionaries including Black’s Law Dictionary means ‘the completion, fulfilment, or perfecting anything, or carrying it into operation’. Pertinently, with respect to a contract, the performance of all acts necessary to render a contract complete as an instrument, conveys the concept that nothing remains to be done to make a complete and effective contract.”

33. In M.V. Shankar Bhat & Anr. vs. Claude Pinto since (deceased) by L. RS. & Ors. (2007) SC, the Hon’ble Supreme Court has held that:

“32. When an agreement is entered into subject to ratification by others, a concluded contract is not arrived at. Whenever ratification by some other persons who are not parties to the agreement is required, such a clause must be held to be a condition precedent for coming to force of a concluded contract.”

34. Therefore, the effective for any agreement is the date at which it is made operation. We, therefore, accepts the contention of the Appellant that the effective date under the PPA is the date on which the PPA is approved by the Commission.

Extension of SCOD

35. We are not going into the merits of various force majeure events occurred in acquisition of land and during the construction of the project inter-alia its operation as these have been carefully examined by the Board of Directors of the Distribution Company and its recommendations were submitted to the State Commission for approval as per the prevailing practice. Some of the events which have resulted into the delay are as quoted herein:

- (a) Delay in approval of PPA
- (b) Delay in Land Acquisition at Kushtagi Taluks.
- (c) Delay in Evacuation approval and Bay allocation.
- (d) Delay in Interconnection Approval:
- (e) Delay in Normalization of Transmission Line after fault

36. In case the above force majeure events have been considered by the distribution company and recommended for the approval of the State Commission, then there cannot be any dispute that the events which have been claimed by the Appellant as force majeure events have been agreed to by the distribution company, the contracting party in the PPA.

37. It was submitted by the Appellant that against the invoices for the supply of power submitted by it on 06.08.2016, the Respondent No. 2 instead of paying the above said invoices at the tariff rate of Rs.7.09 per unit in accordance with PPA, unilaterally altered the Tariff at the rate of Rs.6.51 per unit. Alongside, Respondent No. 2 also raised a claim for liquidated damages alleging delay in achieving condition precedent.

38. Further, submitted that the payment made by the Respondent no. 2 was accepted as the *ad hoc* payment at Rs.6.51 per unit under protest vide its letter dated 14th November 2016 and requested Respondent not to penalize for the delay not attributed to the Appellant and being beyond its control. The said request was further reiterated vide letter dated 21st November 2016. Finally, the Appellant vide its letter dated 24.04.2017 approached the Additional Chief Secretary Government of Karnataka representing its difficulties and requesting him to advise Respondent No. 2 to approve the delay in SCOD.

39. The Board of Directors of BESCO, Respondent no. 2, in the meeting held on 11th May, 2017 (being its 82nd Meeting), after considering the relevant facts & material accorded its “*in-principal approval*” for “*extension of COD... under Force Majeure clause*” subject to further approval of Respondent No. 1 Commission. The relevant extract of the said meeting is as under:

“M/s Welspun Renewables Energy Private Limited have requested vide letter no. WREPL/ BESCO/ 34MW/ 50MW/ COMM/15122016 dated: 10.12017 for the extension of COD as the delay is not attributable to them:

(a) Delay in approval of PPA

- (b) Delay in Land Acquisition at Kushtagi Taluks.*
- (c) Delay in Evacuation approval and Bay allocation.*
- (d) Delay in Interconnection Approval:*
- (e) Delay in Normalization of Transmission Line after fault*

Board perused the PPA clauses and all the annexures to agenda. Further noted that Commercial Operation Date (COD) shall mean the actual commissioning date of respective units of power project whereupon the developer starts injecting power from the power project to the delivery point. Board noted the force majeure events which are the reasons attributable for delay and the grounds under which SPD/SPV requested for extension of COD. Board also noted the directions of KERC vide letter No. KERC/S/F31/Vol-All/16-17 dated 05.04.2017. However further noted that force majeure clauses and MD, BESCO explained that, even though there is delay, the same is not the part of approved PPA. The subject was discussed at length. After a detailed discussion the following resolutions were passed in this context:

"RESOLVED THAT, for the reasons explained, 'in-principle' approval be and is hereby accorded for extension of COD considering delay of 4 months IS days (upto 28.11,2016) in respect of project 16MW capacity at Rajapura, Chitradurga District and 34MW capacity at KodihaUi Village, Chitradiirga District under Force Majeure clause subject to further approval of Hon'ble KERC."

"RESOLVED FURTHER THAT, "in principle" approval be and is hereby accorded for extension of COD (upto 13.07.2016) considering the delay of 4 days in respect 50 MW power project at

Bydareddyhalli, Challakere Taluk, Chitradurga District under Force Majeure' clause subject to further approval of Hon'ble KERC."

"RESOLVED FURTHER THAT, Director (Tech) BESCO/GM(PP), BESCO be and is hereby authorized to submit the proposal to Hon'ble KERC with the in-principle approval/recommendation of the Board."

40. Contrary to above, the Respondent submitted that the Board of Directors during the 83rd meeting held on 07.09.2017, modified its earlier decision and resolved that the request of the Appellant for extension would be submitted before the State Commission. It is submitted that the Respondent has never granted blanket extension after recognizing the alleged force majeure events affecting the Appellant. And, therefore the decision taken during the 82nd meeting may be considered as modified.

41. On being asked about the decision taken during the 83rd meeting, again reiterated that force majeure events have not been recommended and only the proposal has been forwarded to the State Commission. Accordingly, the minutes of the 83rd were perused. For reference are quoted here:

"RESOLVED THAT, for the reasons explained, approval be and is hereby accorded to submit the proposal for extension of SCOD (upto 28.11.2016) to Hon'ble KERC with the recommendation of the Board in respect of project 16MW capacity at Rajapura, Chitradurga District' and 34MW capacity at Kodihalli village, Chitradurga District.

"RESOLVED FURTHER THAT, approval be and is hereby accorded to submit proposal for extension of SCOD (upto 17.07.2016) to Hon'ble KERC with the recommendation of the Board in respect of

50 MW Solar Power Project at Bydareddyhalli, Challakere Taluk, Chitradurga District.

"RESOLVED FURTHER THAT, Director (Tech) BESCO/ GM(PP), BESCO be and is hereby authorized to submit the proposal for extension of SCOD to Hon'ble KERC with the recommendation of the Board."

42. On perusing the minutes, we raised the following points:

- i. What did the Board mean by meaning of 'recommendation'?
- ii. What exactly has been recommended and if it is the proposal of the Appellant then is it not the force majeure events?

43. However, Respondent no. 2 preferred not to reply further and submitted that the written submission may be considered in addition to the oral submissions already made.

44. It is clear that the Board of Directors recommended the proposal submitted by the Appellant which included reasons for the occurrence of force majeure events. There cannot be two meaning to it as recommendation is made only when a proposal is accepted. The meaning of 'recommendation' as per Collins dictionary is "the act of recommending, or calling attention to, a person or thing as suited to some purpose". It is clear that the recommendation made by the Board once the Board is satisfied that the proposal is acceptable.

45. Therefore, in our opinion the Distribution Company, Respondent no. 2, has acknowledged the proposal of the Appellant in terms of the delay on account of events which were beyond the control of the Appellant and

subsequently, recommended it for the approval of the State Commission. As such, the Appeal is allowed.

Role of Distribution Licensee- Respondent no. 2

46. We are inclined to add here that the approach and stand adopted by the 2nd Respondent BESCO cannot be appreciated nor expected to the extent that decision of the Board of Directors is not an admission of force majeure event happening, but only an information to the Respondent Commission bringing all facts for its consideration, which is contrary to minutes of the Board meetings placed before us.

47. The Board of Directors during the 82nd meeting, after examining the proposal of the Appellant, carefully and diligently, in principle approved the proposal and accorded extension of COD. For the sake of emphasis, the relevant extract of the decision is reproduced here:

“-----Board noted the force majeure events which are the reasons attributable for delay and the grounds under which SPD/SPV requested for extension of COD.

RESOLVED FURTHER THAT, "in principle" approval be and is hereby accorded for extension of COD (upto 13.07.2016) considering the delay of 4 days in respect 50 MW power project at Bydareddyhalli, Challakere Taluk, Chitradurga District under Force Majeure' clause subject to further approval of Hon'ble KERC."

48. Further, the minutes of the meeting were revised during the 83rd meeting wherein the relevant decision taken during the 82nd meeting was modified/ replaced by-

"RESOLVED FURTHER THAT, approval be and is hereby accorded to submit proposal for extension of SCOD (upto 17.07.2016) to Hon'ble KERC with the recommendation of the Board in respect of 50 MW Solar Power Project at Bydareddyhalli, Challakere Taluk, Chitradurga District."

49. There is a change in the stand whereby the in-principle approval accorded by the Board during the 82nd meeting was changed to submission of the proposal to the State Commission with recommendation to the proposal.

50. However, during the hearing before us, the stand further changed through oral submission that the proposal of the Appellant was only forwarded to the State Commission its approval without any comments.

51. We strongly condemn such an act, they cannot approbate and reprobate at the same time. The principles of estoppel clearly bar such an action on the part of the Respondent no. 2, BESCO. The Respondent Commission, a neutral entity, was expected to analyse the facts as placed on record. But we note that it has totally ignored the change of stand from time to time by BESCO.

52. The other issue brought before us is that the project in the first captioned appeal was commissioned on 13.07.2016, the scheduled commissioning date. The Commissioning Certificate dated 13.07.2016 issued by Respondent No. 4-KPTCL, the Govt company, certifies commissioning on 13.07.2016. However, the power injection into the grid started from 17.07.2016, which is after the SCOD.

53. This issue is irrelevant at this stage considering that the BESCO through its Board of Directors considered the proposal of the Appellant and

recommended the extension of SCOD. On the perusal of the minutes of the 82nd and 83rd Board meeting, it cannot be denied that the Board of Directors have agreed and recommended the proposal of the Appellant for extension of the SCOD.

54. We are of the opinion that once the Distribution Licensee has accorded in principle approval and/ or recommended the proposal of the Appellant for the extension of the SCOD after diligently examining it under the contractual terms and conditions of the PPA, the State Commission is bound to accept the same.

ORDER

For foregoing reasons as stated supra, we are of the considered view that the Appeals have merit and are allowed. The impugned order dated 27.11.2018 in OP No. 141/2017 and order dated 09.11.2018 in OP No. 140/2017 passed by the Karnataka Electricity Regulatory Commission are hereby set aside.

We issue the following directions to be complied within two months from the date of this judgment:

- (i) The tariff for the project of the Appellant in the first captioned Appeal, OP No. 141/2017, shall be Rs. 7.09 per unit (kWh) of energy and Rs. 7.01 per unit (kWh) in the second captioned Appeal, OP No. 140/2017, in terms of the PPA.
- (ii) Any notice or claim for liquidated damages is set aside.
- (iii) Respondent No. 2 is directed to refund the amounts withheld by him or not paid, if any, in accordance with the tariff as decided above.
- (iv) The Appellants are entitled for carrying cost on the amounts delayed and so also on the amounts withheld.

Needless to mention that pending IAs if any shall stand disposed of.
No order as to costs.

Pronounced in the Virtual Court on this 12th Day of April, 2022.

(Sandesh Kumar Sharma)

Technical Member

(Justice R.K. Gauba)

Officiating Chairperson

REPORTABLE / NON-REPORTABLE

pr/mkj