

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

**Dated : 9<sup>th</sup> November, 2018**

**Present:**

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

**OP No. 140 /2017**

**BETWEEN :**

Welspun Renewables Energy Private Limited,  
Hubtown Solaris, 4<sup>th</sup> floor, 406,  
N.S.Phadke Marg,  
Andheri East West Flyover,  
Mumbai-400 069.

.. **PETITIONER**

*[Represented by Navayana Law offices, Advocates]*

**AND :**

- 1) Bangalore Electricity Supply Company Limited,  
Corporate Office,  
K.R Circle,  
Bengaluru-560 001.
- 2) Karnataka Renewable Energy Development Limited,  
No.39, Shantigruha,  
Bharat Scouts and Guides Building,  
Palace Road,  
Bengaluru-560 001.

- 3) Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan,  
K.G.Road,  
Bengaluru-560 009.

.. **RESPONDENTS**

*[Respondent-1 represented by Shetty & Hegde Associates, Advocates,  
Respondent-2 represented by Shri. G.S. Kannur, Advocate,  
Respondent-3 represented by Justlaw Advocates]*

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### **ORDERS**

- 1) The Petitioner has filed the Petition, under Section 62 read with Sections 64 and 86(1) of the Electricity Supply Act, 2003, praying to:
- (a) Pass an order declaring that the Petitioner is entitled to the tariff of Rs.7.01 per unit for the energy supplied by the Petitioner to the 1<sup>st</sup> Respondent, during the period between the COD and the expiry Date as adopted by this Commission under Section 63 of the Electricity Act 2003, by conferring its statutory approval;
  - (b) Declare and deem that, the Effective Date, as per the Power Purchase Agreement as 4.5.2015 or any date, thereafter;
  - (c) Pass an Order, to split the PPA to two separate PPAs for the 16 MW and 34 MW projects, which are constructed and commissioned at two different locations, evacuating power to two separate Sub-stations;
  - (d) Pass an Order, approving the Supplementary PPA dated 15.7.2016, executed between Petitioner and 1<sup>st</sup> Respondent;
  - (e) Declare that, the Petitioner is not liable to any liquidated damages to the 1<sup>st</sup> Respondent, in view of achievement of the COD within 18 months, from the Effective Date, under the PPA; and consequently,

**Alternatively,**

- (a) Condone the delay, in achieving the COD that occurred purely due to Force Majeure Events and not attributable to the acts or omissions on the part of the Petitioner;
  - (b) Pass an Order, declaring that the Petitioner is entitled to the tariff of Rs.7.01 per unit for the energy supplied by the Petitioner to the 1<sup>st</sup> Respondent during the period between the COD and the Expiry Date;
  - (c) Pass an Order, to split the PPA to two separate PPAs for the 16 MW and 34 MW projects, which are constructed and commissioned at two different locations, evacuating power to two separate sub-stations;
  - (d) Pass an Order, approving the Supplementary PPA dated 15.7.2015 executed between Petitioner and 1<sup>st</sup> Respondent;
  - (e) Declare that the Petitioner is not liable to pay any liquidated damages to the 1<sup>st</sup> Respondent in view of achievement of the COD within 18 months, from the Effective Date, under the PPA; and consequently,
  - (f) Pass such other and incidental orders including an order as to costs, as may be deemed appropriate under the facts and circumstances of the present case.
- 2) The facts of the case, as submitted and the grounds urged,, in support of its prayers, by the Petitioner may be summed up as follows:

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- (a) Pursuant to 2<sup>nd</sup> Respondent the Karnataka Renewable Energy Development Limited (KREDL), inviting Request for Proposal (RfP), the Petitioner participated in the bid and was issued a letter of award dated 19.11.2014 by the KREDL for development of 50 MW capacity Solar PV Project at Kustagi Taluk, Koppal District. Subsequently, the Petitioner requested KREDL to accept Welspun Solar Kannada Pvt.Ltd, (SPV) as the entity, which shall undertake to perform the obligations under the LoA. Accordingly, the SPV entered into a PPA with the 1<sup>st</sup> Respondent on 14.1.2015 for the development of the Project, with the effective tariff at Rs.7.01 per unit. The Effective Date of the PPA was the date of its execution by both parties, as per the Article 3.1 of the PPA.
- (b) As per the prevailing procedure followed in the State, the PPA, initialled on 14.1.2015 by the Petitioner, was sent to 1<sup>st</sup> Respondent for initialling and onward submission to the Commission for approval. The 1<sup>st</sup> Respondent after initialling the PPA submitted it for approval and the Commission accorded its approval, vide letter dated 4.5.2015. The tariff was also approved, as per Section 63 of the Electricity Act, 2003.
- (c) Such approval was duly documented in the PPA and the final version of the PPA was executed by the parties. Though, as per law and principles of natural justice, the 'Effective Date' of the PPA can be any time after 4.5.2015, the Petitioner for the purpose of the present Petition assumes it to be 4.5.2015. Without valid PPA, no project activity can be taken up and hence 4.5.2015 should be considered as the 'Effective Date', which is also

accepted as the 'effective date' by the KREDL and the State Government.

- (d) The Petitioner had identified lands for 50 MW project at Rampura Village, Chitradurga District and started purchasing the same, but was forced to look for alternative land, as on enquiry with the KPTCL it was informed that 16 MW evacuation only is possible at Rampura sub-station. Because of such evacuation constraints, the Petitioner approached the 2<sup>nd</sup> Respondent on 18.5.2015 with a fresh proposal for splitting of the location and the PPA to 16 MW and 34 MW, for which approval was granted by the 2<sup>nd</sup> Respondent on 4.7.2015. The PPA dated 14.1.2015 was amended by way of supplemental PPA dated 15.7.2015, due to change of location and the Petitioner undertaking the responsibility of project implementation, instead of the SPV.
- (e) The 16 MW project was commissioned on 16.4.2016 despite constraints of approval of location change, land acquisition, delay in evacuation approval and bay allocation, unprecedented heavy rains during October to December 2015 and obstruction to transmission line construction by local villagers.
- (f) In spite of various constraints faced during its implementation, the construction of 34 MW project was completed by mid-June, 2016 and the Chief Electrical Inspector to Government, accorded Work Completion and Safety Certificate, for the Project on 20.6.2016. Based on the Work

Completion Report issued by Executive Engineer, (Elect), Chitradurga of the KPTCL on 22.6.2016, the 3<sup>rd</sup> Respondent issued a Provisional Interconnection Approval, by its letter dated 13.7.2016. Thereafter, the 3<sup>rd</sup> Respondent granted commissioning certificate in respect of 34 MW project on 14.7.2016.

- (g) The transmission line was completed after paying necessary compensation for RoW, as per norms and settlements. During the charging of the transmission line on 14.7.2016, fault occurred due to trees coming close to line during heavy winds and, therefore, charging of line to inject power from the Solar Project to the grid was kept on hold, to complete cutting/trimming of trees. However, some villagers continued to obstruct any attempt to cut/trim the trees seeking heavy compensation in spite of help from District Administration and the Police deployment. Because of the deteriorated situation, which turned into serious law and order issue, the line could be energised and power flow started on 27.8.2016 after commissioning of all 34 MW inverters at the project leading to delay of 44 days in injection of power, from the plant after its commissioning on 14.7.2016. The second circuit of the transmission line which is a standby line to the first line could not be charged due to objection by a villager to trim of trees, on his land and could be charged only on 17.11.2016, which impacted evacuation of power from the project.

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- (h) In spite of the commissioning of the project on 14.7.2016, there was a delay in injecting the power to the Delivery Point on 27.8.2016, which was not the Petitioner's fault but due to *Force Majeure* Events. However, as the effective date has to be taken as on or after 4.5.2015, the Petitioner has achieved the CoD well within the prescribed time line.
- (j) In the subsequent bid by the KREDL for 1200 MW Solar Projects, the 'Effective Date' has been taken as the date of approval of PPA by this Commission and therefore, as without a valid PPA, no Project activity can be taken up, the Effective Date of the Petitioner's Project should be considered as 4.5.2015. The Petitioner has raised invoices for the months of August and September 2016 at the tariff rate of Rs.7.01 per unit, but the 1<sup>st</sup> Respondent has unilaterally altered the tariff to Rs.6.51 per unit, which was accepted by the Petitioner under protest. Further, the Petitioner requested 1<sup>st</sup> Respondent, by its letter dated 14.11.2016 not to penalise it for the delay attributable to various reasons, which were beyond the control of the Petitioner.
- (k) The Petitioner, by a series of letters dated 9.12.2016 to 06.03.2017, submitted to the 1<sup>st</sup> Respondent and other authorities has explained in detail the facts of project execution, including the force majeure events faced. In response to 1<sup>st</sup> Respondent's letter seeking details of synchronisation of the 34 MW solar project and the delay in charging, the 3<sup>rd</sup> Respondent furnished a detailed factual report. The Petitioner finally represented the difficulties to the Additional Chief Secretary to the

Government of Karnataka, and requested him to advise the 1<sup>st</sup> Respondent to approve the Delay in the SCOD. The 1<sup>st</sup> Respondent in its meeting of the Board of Directors, held on 11.5.2017 has granted approval for extension of CoD subject to further approval of the Commission.

- (l) Eventhough the Licensee has approved the time extension, the Commission is the ultimate authority to approve the tariff and condone the delay, in the Project execution caused, among other things, due to force majeure events. However, instead of approaching the Commission for clarity on the tariff, the 1<sup>st</sup> Respondent has unilaterally started deducting the tariff.
- (m) The tariff discovered through competitive bidding under Section 63 of the Electricity Act 2003, and applied to the project is specifically mentioned as per Article 12.1 as Rs.7.01 per unit, which is valid for the term of the PPA and there is no provision, under the PPA, to revise the tariff by any party. Therefore, the 1<sup>st</sup> Respondent's action in revising the tariff to Rs.6.51 per unit is highly unjust, illegal and ultra-vires the PPA. Further, as this tariff of Rs.7.01 per unit is not determined by the Commission under Section 62 of the Electricity Act 2003, but adopted under Section 63, it cannot be revised by any of the parties or the Commission.
- (n) There is no delay in achieving the CoD and, even if it is presumed there is delay, there is no provision under PPA to revise the tariff for delay in the CoD beyond 18 months' time schedule agreed under the PPA. The PPA



provides for applicable tariff as at the time of the CoD, which is the same as the tariff agreed under the PPA. As per the PPA the effective date is when both the parties execute the PPA, which happened subsequent to 4.5.2015. As the Effective Date is to be deemed, as any date on or after 4.5.2015, the Petitioner is not defaulter, on any of the terms or timelines under the PPA. The PPA becomes legally enforceable, only upon approval by the Commission and the draft of the PPA initialled on 14.1.2015 is not a legal enforceable document and cannot be deemed as executed PPA, which in most of the cases may vary from the final version of the PPA, approved by the Commission.

- (p) Even if 14.1.2015 is to be construed as effective date, the marginal delay in achieving the CoD because of force majeure event, cannot be a ground for unilateral revision of tariff. The tariff of Rs.6.51 per unit, determined by the Commission in its order dated 30.7.2015, is not applicable to the Projects, whose tariff is discovered through competitive bidding process. Further, the Commission has amply clarified in such order, passed in modification of the order dated 10.10.2013, that the tariff determined in the orders dated 10.10.2013 and 30.7.2015, is not applicable to the Projects, in respect of which tariff is discovered through competitive bidding process.
- (q) The Respondents should not be allowed to levy liquidated damages, as no loss or hardship has ever occurred to the Respondents, due to a marginal delay of 2 days in COD.

- 3) On issuance of notice, the Respondents appeared through their counsel and filed their statements of objections.
- 4) The objections of the 1<sup>st</sup> Respondent as per its statement dated 11.1.2018, may be stated, as follows:
  - (a) The Petitioner has commissioned its 16 MW plant on 16.4.2016, as certified by the KPTCL authorities. However, the KPTCL authorities in the letter dated 14.7.2016, have certified that the terminal bays and controlling equipment at 66/11 kV MUSS at Ramanathpura pertaining to evacuation of 34 MW solar power project of the Petitioner were idle charged, without any mention of commissioning of the solar plant.
  - (b) Pursuant to the direction of the Commission to revise the tariff at Rs.6.51 per unit if there is delay in commissioning of any of the Petitioner's project beyond 31.7.2016, when its approval was sought for the Supplementary PPA dated 05.07.2015 clarification was sought from the concerned Executive Engineer. In his report, the Executive Engineer of the KPTCL stated that the Petitioner could not supply power from 14.7.2016, mainly due to the opposition of farmers for cutting of the trees obstructing the transmission lines and the Petitioner is injecting power through 1<sup>st</sup> circuit to 66/11 kV Ramanathapura Station on 27.8.2016 and in the 1<sup>st</sup> circuit, 34 MW power sent on 18.9.2016. That energy is exported in the 2<sup>nd</sup> circuit on

28.11.2016 and the Petitioner has injected the total 50 MW capacity on 28.11.2016.

- (c) The Board of Directors of the 1<sup>st</sup> Respondent, in its meeting held on 11.05.2017, resolved to submit proposal for extension of the SCOD, in respect of the Petitioner's 34 MW plant, to the Commission. However, as per the directives of the Commission, the Petitioner has filed the petition with relevant grounds and documents for justifying the claims for extension of time under *force majeure clause*.
- (d) The 1<sup>st</sup> Respondent has prayed the Commission to accord direction in the interest of justice.
- 5) The 2<sup>nd</sup> Respondent has submitted that, it is for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to counter the averments made by the Petitioner and it has no role to play in the petition. It has, therefore, sought for dismissal of the Petition as against it.
- 6) The Objections of the 3<sup>rd</sup> Respondent may be stated as follows:
- (a) The contentions of the Petitioner that it was constrained to change the original project location due to non-availability of interconnection facility by the KPTCL (3<sup>rd</sup> Respondent) and there was delay by the 3<sup>rd</sup> Respondent, in granting evacuation and bay allocation approvals are vague and bald statements, without being substantiated. The allegations are denied and it is an attempt to camouflage the inabilities of the Petitioner.

- (b) No communication has been issued, stating that interconnection facility is not available in the Petitioner's original Project location. The Petitioner in its letter dated 15.5.2015 had informed that it is splitting the project into two different locations, due to difficulty in arranging suitable land and therefore, its averment that it was forced to split the project because of KPTCL communicating that it could evacuate power only to the extent of 16 MW from Rampura Sub-station, is not tenable.
- (c) In furtherance to the Petitioner's letter dated 17.7.2015, requesting to grant evacuation approval, the Petitioner was directed on 05.08.2015 to pay the processing fee towards evacuation scheme approval, which the Petitioner paid on 11.08.2015 and tentative evacuation approval, under self-execution basis was granted on 1.9.2015 for the 50 MW solar power project. The Petitioner communicated its acceptance for the tentative evacuation scheme on 8.9.2015 and the regular evacuation scheme approval was granted on 3.10.2015. Thus, there is no delay in granting evacuation approval and it has been given, within a reasonable time.
- (d) The Petitioner's averment that it could not inject power from the date of the SCOD because of the *Force Majeure* Event of opposition of farmers for cutting of the trees that was obstructing transmission lines is not correct, as it is not a *Force Majeure* Event, as per Article 14 of the PPA. Even otherwise, the Petitioner has not followed the procedure contemplated, under the PPA, in the event of a force majeure circumstance. The claim

of force majeure event raised for the first time in the present proceedings is not permissible and untenable.

- (e) The Petitioner was required to construct dedicated transmission line, connecting its plant to the Sub-station, as per the tentative and regular evacuation approvals granted, which is in line with obligation cast on a generator, under Section 10 of the Electricity Act, 2003. The Petitioner having failed to fulfill its obligations cannot, attribute the failure to the 3<sup>rd</sup> Respondent.
- (f) As per Article 5.3 of the PPA, the Petitioner was required to obtain all information with regard to interconnection facilities as it is reasonably necessary to enable it to design, install and operate all interconnection plant and apparatus on the developers' side of the delivery point to enable delivery of electricity. Further, as per Article 5.4 of the PPA, the Petitioner was responsible for power evacuation, from its plant to the nearest delivery point. Therefore, the Petitioner's averment, with regard to the alleged cause for the delayed execution, etc., to claim higher tariff, is not tenable.
- (g) The Petitioner was allocated land for construction of two nos., of 66 kV terminal bays on 19.11.2015, pursuant to its request made on 3.10.2015. Further, the Petitioner's claim for taking 4.5.2015, as the Effective Date, is untenable and contrary to the agreed terms. The reference to other bids, called for by the 2<sup>nd</sup> Respondent, has no bearing on the present case.

- (h) The averments of the Petitioner that, due to unprecedented rain, obstruction by local villagers, etc., are not substantiated and, therefore, denied. The claim of the Petitioner that its project was commissioned on 14.7.2016, as per the certificate, is denied as the certificate only states that the 66 kV terminal bays and controlling equipment at MUSS, were 'idle charged and stood OK'. The plant is said to be commissioned, only when it starts injecting power and the Petitioner is injecting total capacity power only from 28.11.2016.
- (j) The claim of the Petitioner that it could not inject power from 14.7.2016, due to opposition from farmers for cutting of the trees obstructing the transmission lines, is untenable and denied and, it is not within the knowledge of the Respondent. It was the responsibility of Petitioner, to keep the interconnection facility ready for evacuation of power and the Petitioner has not resolved the right of way problems in timely manner.
- (k) The Petitioner's claim that there was no delay, in achieving the COD is untenable and denied and further, such claim is contrary to the Petitioner's own admission in the Petition that there was delay, in power evacuation because of objections by the villagers for cutting the trees.
- 7) Subsequently, the 1<sup>st</sup> Respondent filed additional statement of objections, the gist of which may be stated, as follows:

- (a) The 1<sup>st</sup> Respondent has made payments at the rate of Rs.6.51 to the Petitioner towards the energy supplied in the month of August, 2016 from its 34 MW plant, for which a bill had been raised in September, 2016, as there was delay in commissioning of the plant. The Petitioner, vide letter dated 14.11.2016, informed that with respect to its 34 MW solar power plant it would accept payment of Rs.6.51 under protest. Further, on 14.11.2016, the Petitioner informed that with respect to its 16 MW solar plant it was accepting payment at Rs.6.51 under protest and that its 16 MW and 34 MW Solar Projects, being different Projects approved by the KREDL, it has commissioned 16 MW solar power Project, within the stipulated time period indicated in the PPA and thereby, lower tariff of Rs.6.51, is not applicable to it.
- (b) The 1<sup>st</sup> Respondent has acted strictly, in terms of the PPA dated 14.1.2015, which stipulates the time frame within which the Petitioner was required to commission the project. Further, from the definition of COD, as in the PPA, it is clear that the Project is said to be commissioned, only when it starts injecting power. Power was not injected from the 34 MW plant, within the stipulated time frame i.e., on or before 13.7.2016 and the Petitioner started injecting total capacity power only from 28.11.2016. The Petitioner has not produced any document to indicate that its plant achieved COD, prior to 28.11.2016 and there is no question of deemed commissioning of the project on 14.7.2016.

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- (c) Article 12 of the PPA clearly states that in the event of delayed execution of the project the Petitioner would be entitled only to a tariff of Rs.6.51, in terms of the Commission's order dated 30.7.2015. There has been no unilateral modification of the tariff as contended by the Petitioner because, the terms of the PPA were known to the Petitioner at the time when Request for Proposal (RFP) was published by the 2<sup>nd</sup> Respondent. The Petitioner after accepting all the terms of the PPA in toto, cannot now contend that the tariff derived by bid route, under Section 63, cannot be modified. The claim of the Petitioner that it could not inject power from the date of its SCOD because of opposition from farmers to cutting of trees that were obstructing transmission lines, which according to the Petitioner is a *Force Majeure* Event, is not tenable as it does not constitute *Force Majeure*, under Article 14 of the PPA. Even otherwise, the Petitioner has not followed the procedure contemplated, under the contract in the event of *Force Majeure* circumstances.
- (d) As per Articles 5.3 and 5.4 of the PPA the Petitioner was required to obtain all information with regard to interconnection facilities and was responsible for power evacuation from the power project to the nearest delivery point. The Petitioner is attempting to take advantage of its own wrong, in failing to fulfil its obligations under the PPA, by claiming a higher tariff, which is not permitted under law.
- (e) As per Article 5.8.1 of the PPA, the Petitioner is required to pay Liquidated Damages for the delay in commencement of supply of power, within the



SCOD and the Petitioner being, admittedly, unable to do so, cannot seek waiver of the Liquidated Damages and other penalties.

- (f) As per Article 3.1 of the PPA, the Effective Date is the date on which parties execute the PPA and the Petitioner being aware of the terms of the PPA, prior to executing the same cannot seek a different interpretation, and thereby alter the terms of the PPA, to suit its needs. The Commission, while examining this issue in OP No.02/2017, has held in its order dated 17.10.2017 that effective date is the date of execution of the PPA. The Petitioner's claim that the Commission does not have the power to alter the tariff determined by the way of bidding is not tenable as, if the Petitioner's contention is accepted, there would be no adverse consequences for delayed execution of project. Even otherwise, the tariff payable, for power should be commensurate with the rates, payable at the time of commissioning and any other interpretation would be illogical.
- (g) The Petitioner's claim that in the 82<sup>nd</sup> Board Meeting of Directors of the 1<sup>st</sup> Respondent, the Petitioner was given extension of time, to achieve COD is untenable, as in the meeting it was only resolved that the proposal for extension of time to the Petitioner could be submitted before the Commission for approval.
- 8)(a) The Petitioner had filed an application for rejection/dismissal of the additional statement of objections, filed by the 1<sup>st</sup> Respondent on the ground that it was not filed with the leave of the Commission and there is

no provision under Regulations to file such statement against 1<sup>st</sup> Respondent's own earlier statement of objections. That such statements cannot be allowed to be filed when the pleadings are complete and the Petitioner has already concluded its arguments. The Petitioner had therefore, sought for rejection of the additional statement of objections dated 12.4.2018, filed by the 1<sup>st</sup> Respondent.

- (b) In response to the Petitioner's objections to the additional statement of objections filed by it, the 1<sup>st</sup> Respondent has contended that it was filed to substantiate the objections, filed earlier on 11.1.2018 in response to the clarifications sought by the Commission with regard to the stand taken by the 1<sup>st</sup> Respondent on several issues, involved in the case. That the Commission has the discretion to accept the additional statement of objections and there is no impediment to file additional statement of objections, till the matter is reserved for orders/judgment. That the Petitioner's claim that the 1<sup>st</sup> Respondent has taken a contradictory stand in the additional statement of objections is denied, as it only substantiates the earlier objections, filed.
- (c) With regard to the issue of the 1<sup>st</sup> Respondent, having filed additional statement of objections and the Petitioner seeking its rejection, as being not permitted under law and being contradictory to the earlier statement of objections, filed by the 1<sup>st</sup> Respondent, we find that there are no contradictory statements by the 1<sup>st</sup> Respondent from its earlier statement, as alleged by the Petitioner. In any case we find that the additional

objections of the 1<sup>st</sup> Respondent only reiterate the stand taken by the 3<sup>rd</sup> Respondent, to which the Petitioner has submitted its rebuttal. Hence, we reject the Petitioner's application for rejection of the additional statement of objections, filed by the 1<sup>st</sup> Respondent.

- 9)(a) One of the prayers made by the Petitioner is to approve the SPPA dated 15.07.2015 (ANNEXURE-P3), entered into between the 1<sup>st</sup> Respondent (BESCOM) and the Petitioner, to modify the PPA dated 14.01.2015, entered into between the 1<sup>st</sup> Respondent (BESCOM) and 'M/s. Welspun Solar Kannada Private Limited', the Special Purpose Vehicle (SPV), formed by the Petitioner for developing the 50 MW capacity Solar Power Project. In effect, the SPPA dated 15.07.2015 is executed to evidence the transfer of the Solar Power Project from the SPV to the Petitioner. The Petitioner, a Single Business Entity, was awarded the 50 MW capacity Solar Power Project, as per the Letter of Award (LoA) dated 19.11.2014, and in accordance with the terms of the Request for Proposal (RfP), the Petitioner, in turn, permitted and incorporated the SPV, to develop the Solar Power Project and to enter into the PPA. Accordingly, the SPV has executed the PPA dated 14.01.2015.
- (b) The Petitioner has not made clear, in its pleadings, as to whether the legal relationship of the Petitioner and the SPV is that of a Principal and an Agent, or as to whether the Solar Power Project vests in the SPV, after its formation and execution of the PPA with the 1<sup>st</sup> Respondent (BESCOM). The recitals in the SPPA, would show that the SPV had requested to transfer

the PPA to the Petitioner. A mere request by the SPV, to transfer the Solar Power Project, in favour of the Petitioner, may not be sufficient, unless the same is evidenced by proper legal documents. The Petitioner has not produced any such legal document. Therefore, for the present, we do not approve of the SPPA dated 15.07.2015 (ANNEXURE-P3). The Petitioner is at liberty to produce proper documents, to establish the transfer of the Solar Power Project to it, for getting the SPPA approved by this Commission. We proceed further, to consider the other issues, assuming that the Petitioner would produce such legal documents to evidence the vesting of the Solar Power Project in it.

10) We have heard the learned counsel for the parties and perused the material placed on record. The following issues would arise, for our consideration:

(1) Whether the Petitioner's 50 MW Solar Power Plant, split into 16 MW and 34 MW Projects and established at two different locations, can be treated as, separate and distinct Power Projects, as prayed by the Petitioner?

(2) Whether the Petitioner has made out a case for deferment or extension of the scheduled Commissioning Date of its Project?

(3) What should be the tariff, for the term of the PPA?

(4) What orders?

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- 11) After considering the submissions, made by the learned counsel for the parties and the pleadings and other material placed on record, our findings on the above issues are as follows:
- 12) **ISSUE No. (1):** *Whether the Petitioner's 50 MW Solar Power Plant, split into 16 MW and 34 MW Projects and established at two different locations, can be treated as, separate and distinct Power Projects, as prayed by the Petitioner?*
- (a) The Petitioner was awarded a 50 MW capacity Solar PV Project in Kushtagi Taluk, Koppal District as per the LoA dated 19.11.2014. It cannot be disputed that, subsequently, the 2<sup>nd</sup> Respondent (KREDL), on 04.07.2015, permitted the shifting of location for establishing the Solar Power Project to two different places, viz., with a capacity of 16 MW at Rajpur Village, Chitradurga District, and with a capacity of 34 MW at Kodihalli Village, Chitradurga District. The terms of the RfP allowed for such shifting of the location of the Solar Power Project. The Solar Power Project developed at two different places may be treated as two different Units of the 50 MW capacity Solar Power Project, originally allotted, and there is no necessity to treat them as separate and distinct Solar Power Projects, as prayed for by the Petitioner. Thus, there would be no necessity of executing two separate PPAs for the 16 MW capacity and 34 MW capacity Solar Power Projects.
- (b) For the above reasons, we answer Issue No.(1), accordingly.

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- 13) **ISSUE No.(2):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Project?*
- (a) As already noted, the Petitioner was permitted to establish the 50 MW Solar Power Project, at two different locations – one consisting of 16 Mw Capacity and the other consisting of 34 MW capacity. Admittedly, the 16 MW capacity Solar Power Project was commissioned on 16.04.2016, well within the Scheduled Commissioning Date.
- (b) The other contention of the Petitioner is that, the PPA in question (ANNEXURE-P2), was executed on a date after 04.05.2015 and, therefore, the 'Effective Date' should be considered as 04.05.2015, the day on which the approval of the PPA was communicated. The Petitioner has stated, in its Petition that, as per the prevailing procedure followed in the State of Karnataka, a PPA is only initialled by the parties and thereafter, it would be submitted to this Commission, for approval and subsequent to the approval by this Commission of the initialled PPA, the parties would execute the PPA. Further, it has stated that, the initialled PPA dated 14.01.2015 was submitted to this Commission,] for approval, and this Commission communicated the approval of the PPA, in the letter dated 04.05.2015,] and, thereafter, both the parties have executed the PPA (ANNEXURE-P2). The Petitioner contends that, though the PPA (ANNEXURE-P2) was dated 14.01.2015, as a matter of fact, it was executed on 04.05.2015, after receiving the communication of the approval of the initialled PPA. Therefore, the Petitioner has made a prayer, to declare

that, the 'Effective Date' of the PPA is deemed to be 04.05.2015. The Respondents 1 and 3 have denied the above contention of the Petitioner. They have specifically contended that, the PPA has been executed on 14.01.2015, which should be considered as the 'Effective Date', as per the terms of the PPA, and the Project should be commissioned within 18 months from 14.01.2015. The Commission notes that, there is no such procedure, in the State of Karnataka, as stated by the Petition, for approval of a PPA. A PPA, executed between a Generator and a Distribution Licensee, would be submitted for approval of the Commission, and after following due procedure and scrutiny of the terms of the PPA, this Commission approves the PPA, subject to any modification, if required. Subsequently, those modifications, if ordered, would be carried out in the PPA, by way of executing a Supplemental PPA. But, there is no procedure to execute a fresh PPA, after communication of the approval of the PPA. The terms and conditions in a PPA, would become binding from the date of the PPA itself and the approval of the PPA, with or without modifications, would be effective from the date of the PPA. In the PPA dated 14.01.2015 (ANNEXURE-P2), there is a mention that, the Commission has conveyed its approval to this PPA, by its letter dated 04.05.2015. The PPAs are prepared in two or three sets and it appears, one set of the PPA, would be handed over to the Generator, after receipt of the communication of the approval of the PPA, duly recording, therein, the fact of the approval of the PPA. Therefore, the contention of the Petitioner that the PPA (ANNEXURE-P2) is deemed to have been executed on or after 04.05.2015, cannot be accepted.

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- (c) Thus, the Unit of 34 MW capacity Solar Power Project, cannot be taken as commissioned within the Scheduled Commissioning Date. The Petitioner has claimed an extension of time for commissioning of this Unit, under the *Force Majeure* clause of the PPA. Therefore, we may examine, whether the Petitioner has established its claim for extension of time for the above-mentioned 34 MW capacity Unit.
- (d) The Petitioner has urged that the Effective Date of the PPA, entered into by it with the 1<sup>st</sup> Respondent, in respect of its 50 MW Solar Power Project should be taken as the date of its approval by the Commission. The Respondents have contended that such claim is contrary to clauses of the PPA, which define the effective date to be the date of signing of the PPA by the parties. They have also contended that the definition of effective date of the PPA, in the later PPAs, cannot be made applicable to the Petitioner's case, as sought by the Petitioner. We note that the RfP does not provide for any change in the definition of effective date of PPA and also that while the effective date in the later PPAs was defined as the date of approval of the PPA by the Commission, the time allowed for commissioning the Solar Power Projects, was set at 12 months, from the Effective Date, as compared to 18 months specified in the earlier PPAs. Hence, we find no merit in the Petitioner's claim regarding the effective date of the PPA. We also note that the Petitioner has not cited or elaborated the activities that were adversely affected, in the absence of the Commission's approval to the PPA.



- (e) The Petitioner has relied upon the Commissioning Certificate dated 14.07.2016 (ANNEXURE-P6), to contend that the 34 MW capacity Unit of the Solar Power Project was commissioned on 14.07.2016. A perusal of the said Commissioning Certificate does not disclose that the 34 MW capacity Unit of the Solar Power Project was commissioned on 14.07.2016. This Certificate simply states that '*... two numbers of 66 kV Terminal Bays along with controlling equipments at 66/11 kV MUSS, Ranganathapura are idle charged & stood ok on 14.07.2016 ...*'. Further, it states that '*.... two numbers of bulk tariff metering (34 MW) bays at 66/11 kV MUSS Ranganathapur bearing RR No.: RGNPWRE-26 & RGNPWRE-27 are charged at 66 kV voltage level ...*'. One can see that, this Commissioning Certificate (ANNEXURE-P6), would only evidence that the electrical plants, connected to the dedicated line of 66 kV at the terminal bays, along with two bulk tariff meters, were charged and found to be in order. Therefore, this Commissioning Certificate does not establish the commissioning of the 34 MW capacity Unit of the Solar Power Project.
- (f) The Petitioner has claimed that the commissioning of its project within the scheduled commissioning date, as agreed in the PPA was delayed because of delay in evacuation approval and bay allocation, unprecedented rains, obstruction to transmission line construction by local villagers. The 3<sup>rd</sup> Respondent has denied the alleged delay in evacuation approval and bay allocation. The 3<sup>rd</sup> Respondent has given the details of dates of the Petitioner's applications and grant of approval/allocation. We find that there is no delay on the part of the 3<sup>rd</sup> Respondent, in granting

evacuation approval and allocation of land for construction of bays and that time taken for such processes appears reasonable. On the other hand, we find that the Petitioner delayed in applying to the KPTCL for evacuation approval and allocation of land for bay, because of its own decision to change the location of its solar power plant, owing to its failure to purchase adequate land.

- (g) The Petitioner's claim of unprecedented rains delaying its Project implementation, is not substantiated and in any, case as noted earlier, the project implementation was delayed, mainly because of the Petitioner's own decision to shift the location of its project.
- (h) As regards Petitioner's claim of obstruction by local villagers to construction of transmission line is concerned, we find that such claim is not substantiated. Further, admittedly the commencement of construction of the transmission line by the Petitioner, was delayed, the reasons for which have not been explained by the Petitioner. Had the Petitioner commenced construction of transmission line immediately after grant of necessary approval by the KPTCL, the transmission line could have been constructed much earlier, even with minor delays, due to external factors. Further, we note that it was the obligation of the Petitioner to arrange for inter connection facility within the time line stipulated in the PPA. We may note here that the Petitioner participated in the bidding proceedings for development of 500 MW solar power energy, in the State through power sector participation, which commenced on 30.5.2014 with

the issue of 'Request for Proposal' by the KREDL. It is reasonable to expect that participants like the Petitioner, would have had adequate knowledge and expertise to plan and arrange for implementing the different stages/aspects of the projects within the timelines envisaged in the Request for Proposal, and the bidding documents by adopting prudent business practices. The Petitioner has not revealed its action plan and demonstrated its earnestness in implementing it.

- (j) It is a settled law that the force majeure clause in the PPA has to be strictly interpreted. We note that no Notice, as contemplated under Article 14.5 of the PPA is stated to have been issued by the Petitioner to the 1<sup>st</sup> Respondent describing the particulars of the *Force Majeure* Event, as soon as possible, after its occurrence. The letters statedly written by the Petitioner to the 1<sup>st</sup> Respondent, giving details of project execution, cannot be taken as Notices issued under Article 14.5 of the PPA and the Petitioner's submission that as the Respondents, were aware of the force majeure circumstances, there was no requirement of issue of such Notice, is not acceptable. Further, we have noted that none of the reasons or events cited by the Petitioner for the delay in commissioning of its Projects, falls under *Force Majeure* Events, as mentioned in the PPA.
- (k) The claim of the Petitioner that the 1<sup>st</sup> Respondent in its 82<sup>nd</sup> meeting of the Board of Directors held on 11.5.2017, granted approval for extension of COD, is denied by the 1<sup>st</sup> Respondent. Further, the 1<sup>st</sup> Respondent has produced a copy of the minutes/proceedings of the 83<sup>rd</sup> Meeting of the

Board of Directors of the BESCO (1<sup>st</sup> Respondent), held on 7.9.2017, according to which the resolution in its earlier meeting held on 11.5.2017, insofar as the Petitioner's case is concerned, has been amended to state that the Board has approved submission of proposal for extension of the SCOD to the commissioning with its recommendation. Thus, there is no extension of time for achieving commissioning of the Petitioner's project, by the 1<sup>st</sup> Respondent. In any case, as we have held, on this issue in other cases, as per the ratio of the Hon'ble Supreme Court's judgment, in the case of All India Power Engineers Federation Ltd. vs. Sasan Power Ltd, reported in (2017) 15 CC 487, the Commission has the exclusive jurisdiction to consider the validity of extension time, for commissioning of a project, when it affects the tariff payable to a generating company, ultimately passed on to the consumers.

- (l) Hence, we consider that the Petitioner is not entitled to extension of time for commissioning its plant beyond the SCOD, as provided in the relevant clauses of the PPA. Consequently, the Petitioner would be liable for payment of liquidity damages, as per Article 5.8 of the PPA.
  
- (m) We have held that the Petitioner is not entitled to the extension of time to commission its Project. Admittedly, the Petitioner has not achieved the "Conditions Precedent" within the specified time as required under Article 4.1 of the PPA. The actual dates, on which they were achieved, have not been furnished. For the same reason, as applicable the rejection of the Petitioner's claim for extension of time for achieving SCOD, any claim of

the Petitioner, for extension of time for achieving Conditions Precedent, is liable to be rejected. The Petitioner's claim that the 1<sup>st</sup> Respondent has waived the consequences of delay in achieving "Conditions Precedent" are not substantiated and rejected.

- (n) Thus, we hold that for not complying with the timelines, as mentioned in the PPA for "Conditions Precedent" and commissioning of the project, the Petitioner is liable to pay damages for such delay, as per Articles 4.3 and 5.8 of the PPA.
- (p) The Hon'ble Supreme Court of India, in Civil Appeal No. 3600 of 2018 (*M.P.Power Management Company Ltd. Vs Renew Clean Energy Pvt. Ltd., and another*), decided on 05.04.2018 has held that, for the delay in achieving the Conditions Precedent and commissioning the Project, the generating company is liable to pay damages, stipulated in the PPA. Therefore, we do not find any merit in the Petitioner's argument that such damages cannot be levied, for the delay caused, as it has no cost implication on the 1<sup>st</sup> Respondent.
- (q) The judgments of the Hon'ble Supreme Court, in the case of *Gujarat Urja Vikas Nigam Ltd. vs. ACME Solar Technologies (Gujarat) Pvt.Ltd., & others, M.P.Power Management Co., Ltd. vs. Renew Clean Energy Pvt.Ltd., and another and other cases*, cited by the Petitioner, to support its claims, would not apply to the facts of the Petitioner's case.

(r) Therefore, we answer issue No.2 ,in the negative, so far as the Petitioner's 34 MW capacity Solar Power Project is concerned.

14) **ISSUE No. (3):** *What should be the tariff, for the term of the PPA?*

(a) It is not in dispute that the 16 MW capacity Unit of the Solar Power Project, was commissioned on 16.04.2016, well within the Scheduled Commissioning Date. The 1<sup>st</sup> Respondent (BESCOM) has relied upon the letter dated 13.07.2016 of this Commission, to contend that the tariff for the 16 MW capacity Unit of the Solar Power Project, should also be reduced, as the 34 MW capacity Unit of the Solar Power Project was commissioned beyond the Scheduled Commissioning Date. The letter dated 13.07.2016 of this Commission does not stipulate that the applicable tariff should be Rs.6.51 per unit for the entire 50 MW capacity Solar Power Project, in case of delay, in commissioning of any of the Units at the two different place. The contention of the 1<sup>st</sup> Respondent (BESCOM) that the date of commissioning of the last unit, should be considered, as the date of commissioning of the entire Solar Power Project, cannot be accepted, as the Petitioner was permitted to establish the Solar Power Project at two different locations. None of the terms of the PPA, would support the contention of the 1<sup>st</sup> Respondent (BESCOM). Therefore, we are of the considered opinion that this Unit of 16 MW capacity Solar Power Project, should be governed by the tariff at Rs.7.01 per unit, as agreed to in the PPA.

(b) Article 12.2 of the PPA reads as follows:

*“12.2 Provided further that as a consequence of delay in Commissioning of the Project beyond the Scheduled Commissioning Date, subject to Article 4, if there is a change in KERC applicable Tariff, the changed applicable Tariff for the Project shall be the lower of the following:*

- i. Tariff at in Clause 12.1 above.*
- ii. KERC applicable tariff as on the Commercial Operation Date.”*

(c) The above clause 12.2 of the PPA, provides for reduction of tariff as a consequence of delay, in commissioning of the Solar Power Project beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated, therein. This is in view of the fact that, this Commission periodically determines generic tariff for supply of electricity generated from various sources, to the Distribution Licensees, based on, among other parameters, mainly the Capital Cost of the generating plant. Such generic tariff is made available for a period normally longer than a year called as 'Control Period', during which the generating plants get implemented and commissioned, at the normative Capital Cost, adopted in the generic Tariff Order, generally after execution of a PPA with a Distribution Licensee. Such PPA also has a clause, stipulating the time within which the power supply should commence, so that the Distribution licensee can plan further supply of energy to its consumers. The time ordinarily required to complete the various pre-commissioning activities which, in respect of megawatt scale Solar Power Plants is taken as, between 12 months to 18 months. Any delay or failure in the

commencement of the power supply, within the agreed date, would disrupt the operation of the Distribution Licensees, like the Respondent, which could also result in their power procurement from the alternative expensive sources, leading to a higher retail tariff to the consumers or short supply of power, leading to revenue loss to them and even to imposition of penalties for not meeting the Renewable Purchase Obligation (RPO), fixed by this Commission. The Capital Cost of the Solar Power Plants has been coming down, rapidly, in the recent years, because of the advancement in technology and production efficiency, as well as the economies of scale, because of largescale solar capacity additions across the globe. Thus, the generic tariff for megawatt scale Solar Power Plants, which was fixed at Rs.14.50 per unit in the Commission's Order dated 13.07.2010, has been successively reduced to Rs.8.40 per unit in the Commission's Order dated 10.10.2013, Rs.6.51 per unit in the Order dated 30.07.2015, then to Rs.4.36 per unit in the Commission's Order dated 12.04.2017 and now to Rs.3.05 per unit in the Order dated 18.05.2018.

- (d) The Petitioner could not commission the Project, for certain reasons and events, which we have held to be not falling under the *Force Majeure* clause in the PPA, that could have entitled the Petitioner to seek extension of the commissioning date, agreed to in the PPA.
- (e) Article 12.2 of the PPA provides that the tariff, on the date of the commercial operation, would be applicable for the Project. As we have



held in similar cases, in view of the relevant clauses and the definition of the COD in the PPA, the commissioning of solar project or achieving commercial operation, would mean injection of the power generated from the solar power project into the grid. Therefore, the Petitioner's claim that there was no delay in commissioning of the project, but only in injection of power and thereby, the tariff applicable to the Project, as agreed in the PPA is not affected, is not acceptable. Admittedly, power from the Petitioner's 50 MW Solar Power Project was injected into the grid only on 27.08.2016 through one of the double circuit transmission line.

- (f) The Petitioner has not furnished any material particulars of the cost incurred in implementing the Project and the period when investments were actually made. From the Petitioner's claim that the alternative location of its 34 MW Project was approved by the 1<sup>st</sup> Respondent only on 04.07.2015, we may safely infer that, the major part of investments have been made only after July, 2015. In any case, as noted earlier, as per the terms and conditions of the PPA, the tariff payable to the Petitioner is not based on the capital cost incurred by the SPD/Petitioner, in Project implementation, but the tariff as per the relevant clauses of the PPA.
- (g) The Hon'ble Supreme Court of India, in Civil Appeal No. 1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided on 02.02.2016 has held, as follows:

*"31. Apart from that both the Respondent No 2 and the appellate tribunal failed to notice and the 1<sup>st</sup> Respondent*

conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA: -

*'In case, commissioning of solar Power Project is delayed beyond 31<sup>st</sup> December 2011, GUVNL shall pay the 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.**'*

*The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first Respondent not being able to commence the generation of electricity within the "control period" stipulated in the 1<sup>st</sup> tariff order. It is also visualised that for the subsequent control period, the tariffs payable to PROJECTS/ power producers (similarly situated as the first Respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1<sup>st</sup> Respondent would be entitled only for lower of the two tariffs...."*

- (h) In the decision of the Hon'ble Appellate Tribunal for Electricity in Appeal No. 221/2016 and others dated 07.05.2018 (Savitha Oil Technologies Ltd vs KERC & another), it has been held that the tariff, as on the COD, is applicable for a project and the tariff should not be linked to the date of signing or approval of the PPA. The relevant portions of the judgment are extracted below:

*"xi. Further, it is a settled practice under the Section 62 of the Act that tariff determination process under various regulations for a new project begins from the COD of the said project as per extant regulations of the control period where COD of the project takes place. Subsequently, the tariff of such project is adjusted based on regulations/orders of the subsequent control period and it*

*is not linked to the date of signing/approval of the PPA. If the PPA is approved at a later date or in other control period the tariff is applicable from the COD date as per prevalent regulation at that time.*

.....

*xiv. In the present case too after carefully considering the provisions of the Act, 2004 Regulations, 2005 Order, 2009 Order, earlier judgement of this Tribunal and keeping in view the interest of the consumers it would be correct to draw a conclusion that the tariff applicable to the Appellants' WPPs would be as per the 2005 Order during which COD of the WPP has happened. The same corollary is applicable to other WPPs having COD is in some other control period."*

- (j) The ratio of the above judgments of the Hon'ble Supreme Court and the Hon'ble Appellate Tribunal for Electricity is applicable to the Petitioner's case.
  - (k) Hence, in the circumstances and on the facts of the case, we hold that the Petitioner's 34 MW capacity Unit of the Solar Power Project, should be governed by the tariff of Rs.6.51 (Rupees Six and Paise Fifty One) only per unit, for the term of the PPA, as per the Generic Tariff Order dated 30.07.2015.
  - (l) Accordingly, we answer Issue No.(3), as above.
- 15) **ISSUE No.(4):** *What Order?*

For the foregoing reasons, we pass the following:

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**ORDER**

- (a) The Petitioner shall produce the relevant documents, to establish the transfer of the 50 MW capacity Solar Power Project, from M/s. Welspun Solar Kannada Private Limited, to it for obtaining the approval of this Commission for the SPPA dated 15.07.2015 (ANNEXURE-P3 to the Petition), within 4 (four) weeks from the date of this Order;
- (b) The Petitioner is entitled, for the energy supplied from its respective Units of the Solar Power Project, the tariff at rate of:
- (i) Rs.7.01 (Rupees Seven and Paise One) only per unit, for its 16 MW capacity Unit of the Solar Power Project;
- (ii) Rs.6.51 (Rupees Six and Paise Fifty One) only per unit, for its 34 MW capacity Unit of the Solar Power Project;
- for a period of 25 (twenty five) years from the respective Commercial Operation Dates;
- (c) The Petitioner is liable to pay Liquidated Damages for the delay in commencement of the supply of power to the 1<sup>st</sup> Respondent (BESCOM), from its 34 MW capacity Unit of the Solar Power Project, as per Article 5.8 of the PPA;

(d) The 1<sup>st</sup> Respondent (BESCOM) shall pay to the Petitioner, the differential amount of the tariff, for the energy supplied from the 16 MW capacity Unit of the Solar Power Project, within 6 (six) weeks from the date of this Order. In default, the 1<sup>st</sup> Respondent (BESCOM) shall pay interest at the rate of 9 (nine) percent per annum on the differential amount due, from the date of default till the date of its realization; and,

(e) The Petitioner is not entitled to any other relief, sought for, in the Petition.

Sd/-  
(M.K. SHANKARALINGE GOWDA)  
CHAIRMAN

Sd/-  
(H.D. ARUN KUMAR)  
MEMBER

Sd/-  
(D.B. MANIVAL RAJU)  
MEMBER