

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 10th July, 2018

Present:

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

OP No.153/2017

BETWEEN:

Vatsala Bellary Solar Project Pvt. Ltd.,
Sy.Nos.1513 A/1, 1513 A/2, 1514 B/1A,
Kampli Village, Hosapete Taluk,
Ballari District, Karnataka.

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PETITIONER

[Represented by Law Nexus, Advocates]

AND:

Bangalore Electricity Supply Company Ltd.,
K.R. Circle,
Bangalore-560 001.

..

RESPONDENT

[Represented by Sri Shahbaaz Husain, Advocate]

ORDERS

1) The Petitioner has filed this Petition under Section 86(1) of the Electricity Act, 2003 praying to:

(a) Set aside the direction and communication, issued by the Respondent on 01.08.2017 (ANNEXURE - A);

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- (b) Grant extension of time as per Article 2.5 of the PPA dated 03.07.2015 and confirm the extension of time granted by the Respondent on 02.03.2017;
 - (c) Declare that the Petitioner is entitled to the *Force Majeure* conditions as per Article 8 and consequently is eligible to seek extension of time, as per Article 2 of the PPA;
 - (e) Declare that the Petitioner is entitled to extension of time as per Article 2 of the PPA without imposing damages or changing any conditions in the PPA;
 - (f) Considering the likely delay in passing the order in this Petition to direct the Respondent, to condone any such delay in executing the project; and,
 - (g) Pass such other and further orders as deemed fit.
- 2) The facts of the case, as submitted by the Petitioner, may be summed up, as follows:
- (a) The Government of Karnataka (GoK), to harness the potential of solar resources in the State, had published the solar policy for the period 2011-16 and revised the same to for the period 2014-21, vide Notification dated 22.05.2014, which endeavoured to promote the Solar Energy Projects by land owning farmers, with minimum capacity of 1 MW and maximum capacity of 3 MW per land owning farmers in the State, for sale of power to the ESCOMs at the KERC determined tariff from time to time. In furtherance of the Solar Policy of the GoK, the Karnataka Renewable Energy Development Ltd., the nodal agency, issued a Notification dated

09.10.2014 inviting online applications, for facilitating the development of solar energy in the State of Karnataka by land owning farmers. Based on the same, Shri M. Tulasiram, a farmer [Solar Project Developer (SPD)] was declared as an allottee.

- (b) The SPD executed a Power Purchase Agreement (PPA) dated 03.07.2015 with the Respondent for development of 2 MW Solar Power Project, at Sy.Nos.1513 A/1, 1513 A/2 and 1514 B/1A, at Kampli Village, Hosapete Taluk, Ballari District. As per the PPA, the SPD was entitled to receive a tariff of Rs.8.40 per kWh, based on the Commission's Tariff Order dated 10.10.2013. The Project had to be commissioned within 18 months of signing the PPA (by 02.01.2017). Subsequently, the SPD assigned the rights of establishing the said Project to the present Petitioner, by forming a Special Purpose Vehicle (SPV).
- (c) The Conditions Precedent had to be achieved within 365 days from the date of signing the PPA for which, the Petitioner made payment towards the PPA processing fee, furnished the Bank Guarantee towards performance security and completed all other formalities within the timeline.
- (d) The Petitioner had applied for conversion of land, before the Deputy Commissioner, Ballari on 03.02.2016, along with all necessary documents. In spite of repeated follow-ups, the Petitioner could not obtain the Conversion Order. The conversion was rejected by the Deputy

Commissioner on 01.06.2016, and subsequently, it was granted on 19.12.2016.

- (e) In view of the delay in obtaining the conversion, the Petitioner was unable to initiate actual ground work on the land, inspite of placing various orders for the Project equipment and materials. This delay of over six months derailed the Project commissioning timeline. Further, as enshrined under the PPA, due to delay, solely attributable to the Government machinery, the Petitioner sought for extension of time of the Commercial Operation Date (COD) from the Respondent, vide letters dated 15.06.2016, 6.01.2017 and 06.02.2017. On 02.03.2017, the Respondent, considering the application of the Petitioner, based on *Force Majeure* clauses, allowed extension of time by six months from the scheduled COD, for the commissioning of the Project. On 14.06.2017, the Petitioner (SPV) and the Respondent entered into a Supplemental PPA (SPPA).
- (f) The Petitioner completed the Project and after obtaining the regular Evacuation Approval, commissioned the Project on 02.07.2017. Till the date of commissioning, the Petitioner was not informed that the extension of time had to be approved by the Commission. On 01.08.2017, the Respondent directed the Petitioner to file a petition before this Commission, with all relevant grounds / documents, seeking approval of extension of time for the Project.

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- 3) The grounds urged by the Petitioner, in support of its prayers, may be summarized, as follows:
- (a) On account of delay in getting land Conversion Order, Evacuation Approval, Bay Extension Approval, CEIG Approval, demonetization, etc., which are beyond the control of the parties, the Project could not be commissioned within time and the Respondent, considering the events as the *Force Majeure* Events, has granted extension of time by six months. Article 2.5.6 of the PPA states that, '*As a result of such extension, the scheduled Commissioning Date and the Expiry Date newly determined shall be deemed to be the Scheduled commissioning date and the Expiry Date for the purpose of this Agreement*'. This confirms that, the tariff of Rs.8.40 per kWh, agreed in the PPA, should be paid.
- (b) The conditions set-forth in the PPA do not empower the Commission to vary the conditions, tariff, etc., for the Project.
- (c) The Respondent has failed to take into account that, the Project is under the Solar Policy 2014-21, made to allow the farmers to establish Solar Power Projects, and ought not have kept the application for extension of time, pending.
- 4) Upon issuance of Notice, the Respondent appeared through its learned counsel and filed the Statement of Objections, which may be summarized, as follows:

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- (a) As per the PPA, the Petitioner was supposed to commission the Project by 02.01.2017.
- (b) As the Petitioner was unable to execute the project in a timely manner, a letter was addressed by the Petitioner to the respondent seeking extension of time for commissioning the project and six months' extension was sought under force majeure conditions.
- (c) In the meanwhile, as several requests for extension of scheduled commissioning date were received from solar developers, the GoK issued an order dated 24.11.2016 directing all the ESCOMs to constitute a three member Committee to consider and to dispose the request of SPDs.
- (d) Accordingly, a Committee was constituted by the Respondent to consider the requests for extension of time sought by solar generators under the land owning farmers' category. The Committee held a meeting on 15.2.2017 wherein the causes for the delayed achievement of scheduled commercial operation were considered in respect of 17 generators, including the Petitioner and decision was taken to accord extension of six months to achieve the scheduled commissioning date.
- (e) The Petitioner furnished the documents to the Committee constituted by the Respondent for consideration of its request for extension of time. As per the same, the following information was gathered pertaining to the various reasons assigned for the delayed extension of the project:

Land conversion:

Date of submission of application : 03.02.2016
Date of conversion : 19.12.2016
Delay in getting approval : more than ten months.

KPTCL Evacuation approval (Regular):

Date of submission(of application): 05 .08.2016
Date of approval : 07.09.2016

- (f) The Committee, after detailed discussion and scrutiny of all the documents, finally opined that approval may be accorded for extension of SCOD up to six months of the PPA as there is a delay in issue of approvals by various Government entities.
- (g) On 02.03.2017, the Respondent addressed a letter to the Petitioner informing about the extension of time by six months for achieving the scheduled commercial operation.
- (h) A letter was addressed to the Additional Chief Secretary, Energy Department, GOK for directions regarding extension of SCOD up to six months in respect of SPDs/SPVs who have requested for extension, under farmers category.
- (j) On 16.03.2017, the Commission addressed a letter to all the ESCOMs of the State, in the matter pertaining to extension of time granted to solar generators and informed them not to allow any extension of time beyond the Scheduled Commissioning Date as per the original PPA without obtaining prior opinion of the Commission. Further, vide letter 05.04.2017,

the ESCOMs were directed by the Commission to advise all land owning solar developers / SPVs to approach the Commission and seek approval for extension of time. In furtherance to the same, the Petitioner has filed this Petition.

- (k) The Additional Chief Secretary to Government, Energy Department, GoK, vide letter No.EN67/VSC/2017 dated 25.04.2017, requested the Commission, to consider approval to the extension of the COD by the BESCOM.
- (l) The subject was placed before 82nd Meeting of the Board of Directors of the BESCOM held on 11.05.2017 for evaluation/disposal of the requests of land owning farmers/SPVs for extension of time for the COD under farmers' category. The Board ratified the action taken on the extension, issued by BESCOM, subject to approval of the Commission. The Petitioner's project was commissioned on 02.07.2017.
- (m) In respect of extension of the project duration of already awarded solar power projects, the MNRE, GOI have issued vide letter No. 30/106/2014-15/NSM dated 28.8.2017 addressed to the Principal Secretaries (Power/Energy) State Governments as below:

"Ministry had requested not to give time extension if all the obligations are fulfilled by the concerned State Government authorities/PSUs, etc., in a project. However, if there are delays of any kind on the part of State Government Authorities/PSUs like land allotment, transmission/evacuation facilities, connectivity permission on force majeure, the competent authority in the

State/SEC/NTPC, etc., may consider providing extension of the time duration strictly as per the Contractual Agreement. It is also to be clarified that if in a project equipment/materials have been purchased/ ordered and substantial advances paid as per original completion date, and there is a delay on part of the state organisations regarding land, transmission or any such reasons, the extension of the project may be allowed".

The Respondent has therefore, prayed that the Commission may accord directions in the present petition in the interest of justice.

- 5) We have heard the Counsel for the parties and perused the records. The following issues arise for our consideration:
- (1) Whether the extension of time of six months, granted by the Respondent (BESCOM) to the Petitioner, for achieving the commercial operation of the Project, can be subjected to legal scrutiny by the Commission?
 - (2) Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?
 - (3) What should be the tariff for the Project for the term of the PPA?
 - (4) What Order?
- 6) After considering the submissions made by the Counsel for the parties and the pleadings and other material placed on record, our findings on the above issues are as follows:

- 7) **ISSUE No.1:** *Whether the extension of time of six months, granted by the Respondent (BESCOM) to the Petitioner, for achieving the commercial operation of the Project, can be subjected to legal scrutiny by the Commission?*
- (a) Article 2.5 of the PPA does not specifically stipulate that, any extension of time granted by the BESCOM should be got approved by the Commission. However, Article 2.5.1 of the PPA stipulates the grounds on which alone the time could be extended for achieving the commercial operation. Article 5.1 of the PPA provides for reduction of tariff as a consequence of delay in the commissioning of the Project beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein. Whenever an event affects the quantum of tariff applicable for supply of energy to the Distribution Licensees, we are of the considered opinion that the same should be scrutinized and approved by the Commission. It is a settled law that, this Commission has the exclusive jurisdiction to determine the tariff for supply of electricity by a Generating Company to a Distribution Licensee and it has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which the electricity shall be procured from different agencies through PPAs. Therefore, we hold that, even in the absence of a specific term in the PPA, an event affecting or altering the tariff, already approved in the PPA, should be got approved by this Commission.
- (b) The Petitioner has contended that, once the PPA is executed between the Petitioner and the Respondent, the terms and conditions agreed between the parties would apply. We are unable to accept the

contention of the Petitioner. Although the Respondent has granted extension of time by six months, we need to see, if such extension is strictly as per the terms of the PPA. Any extension of the stipulated time to commission a power project, has a bearing on the tariff payable. The Tariff determination / fixation of price for electricity is not an adversarial proceeding. The consumer, though not a formal party, ultimately pays for the supply of electricity and, therefore, is the most affected party. The Commission is required to safeguard such consumers' interest. While upholding the role of the Commission as a regulator and custodian of the interest of consumers, the Hon'ble Supreme Court, in the case of *All India Power Engineers Federation Ltd v. Sasan Power Ltd.*, reported in (2017) 1 SCC 487, has held that, even if parties to a contract (generating company - seller of energy and distribution licensee - buyer of energy) waive off a certain term affecting the tariff, the Commission, as a custodian of consumer interest has to intervene and exercise its regulatory power. Accordingly, we hold that, the Commission has the mandate and powers to scrutinize the correctness and legality of the extension of time, granted by the Respondent.

- (c) Therefore, we answer Issue No.(1), in the affirmative.
- 8) **ISSUE No. (2):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?*
- (a) It would be useful to extract the relevant clauses of the PPA, before we deal with this issue:

“2.1 Conditions Precedent:

The obligations of BESCO and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.

2.1.1 (i) The SPD shall obtain all permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the Project (hereinafter referred to as “Approvals”):

(ii) The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:

(a) The DPR to BESCO and achieve financial closure and provide a certificate to BESCO from the lead banker to this effect;

(b) All Consents, Clearances and Permits required for supply of power to BESCO as per the terms of this Agreement; and

(c) Power evacuation approval from Karnataka Power Transmission Company Limited or BESCO, as the case may be.

2.1.2 SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and BESCO shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent.

2.1.3 The SPD shall notify BESCO in writing at least once a month on the progress made in satisfying the Conditions Precedent. The date, on which the SPD fulfills any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify BESCO of the same.

2.2 Damages for delay by the SPD

2.2.1 In the event that the SPD does not fulfill any or all of the Conditions Precedent set forth in Clause 2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to BESCO or due to Force Majeure, the SPD shall pay to BESCO damages in an

amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days, BESCO at its discretion may terminate this Agreement

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XXX

XXX

2.3.2 Appropriation of Performance Security

Upon occurrence of delay in commencement of supply of power to BESCO as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, BESCO shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages. Upon such encashment and appropriation from the Performance Security, the SPD shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the SPD shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which BESCO shall be entitled to terminate this Agreement in accordance with Article 9."

"2.5 Extensions of Time

2.5.1 In the event that the SPD is prevented from performing its obligations under Clause 4.1 by the Scheduled Commissioning Date due to:

- (a) Any BESCO Event of Default; or
- (b) Force Majeure Events affecting BESCO; or
- (c) Force Majeure Events affecting the SPD.

2.5.2 The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than 'day for day' basis, to permit the SPD or BESCO through the use of due

diligence, to overcome the effects of the Force Majeure Events affecting the SPD or BESCO, or till such time such Event of Default is rectified by BESCO.

2.5.3 *In case of extension occurring due to reasons specified in clause 2.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6(six) months.*

2.5.6 *As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined date shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement.*

2.5.7 Liquidated damages for delay in commencement of supply of power to BESCOs.

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to BESCO by the scheduled commissioning date, the SPD shall pay to BESCO, liquidated damages for the delay in such commencement of supply of power as follows:

(a) *For the delay up to one month- amount equivalent to 20 % of the performance security.*

(b) *For the delay of more than one month up to three months - amount equivalent to 40 % of the performance security.*

(c) *For the delay of more than three months up to six months - amount equivalent to 100 % of the performance security.*

For avoidance of doubt, in the event of failure to pay the above mentioned damages by the SPD, the BESCO entitled to encash the performance security."

"8.3 Force Majeure Events:

(a) *Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder*

(except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following:

- (i) Acts of God;
- (ii) Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;
- (iii) Strikes, work stoppages, work slowdowns or other labour dispute which affects a Party's ability to perform under this Agreement;
- (iv) Acts of war (whether declared or undeclared), invasion or civil unrest;
- (v) Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the SPD or BESCO of any Law or any of their respective obligations under this Agreement);
- (vi) Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;
- (vii) Fire, Earthquakes, explosions, accidents, landslides;
- (viii) Expropriation and/or compulsory acquisition of the Project in whole or in part;
- (ix) Chemical or radioactive contamination or ionizing radiation; or
- (x) Damage to or breakdown of transmission facilities of either Party;

(b) The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:

- (i) The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;

(ii) *The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.*

(iii) *The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;*

(iv) *The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;*

(v) *In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."*

(b) We note that, under the Article 2.5 of the PPA, extension of time for commissioning the Project can be granted by the Respondent, if the SPD is prevented from performing its obligations due to the BESCOM's 'Event of Default' or *Force Majeure* Events. The *Force Majeure* Events and the requirement of issuing a written notice are mentioned in Article 8.3 of the PPA. Under the said clause, it is also necessary to prove that, the *Force Majeure* Event was not caused by the non-performing party's negligent or intentional acts, errors or omissions. In this backdrop, we need to examine, if the Petitioner or the SPD was, in any manner, negligent in performing its obligations under the PPA.

(c) The PPA is signed by the parties on 03.07.2015. As per Article 2.1 of the said PPA, the Conditions Precedent have to be achieved within 365 days from the date of signing the PPA and the Project has to be commissioned within 18 months from the date of signing the PPA. The achievement of

the Conditions Precedent would include, obtaining of all the approvals by the SPD.

- (d) The SPD applied for conversion of land on 03.02.2016, after a lapse of about 7 months from the effective date of the PPA. No explanation is given for this delay on the part of the SPD. The conversion of land was rejected by the Additional DC, Ballari, on 01.06.2016, based on the report of the Chief Officer, Town Municipal Council, Kampli, on the ground that the land, in question, was in the Agricultural Zone in the Master Plan and cannot be converted for industrial purpose (for establishing Solar Project), unless the Master Plan is altered, to bring the land under Industrial Zone. Thereafter, from the Order of the DC dated 19.12.2016, it can be made out that the proceedings were once again initiated, based on another application by the SPD on 21.06.2016 and the land Conversion Order was passed by the DC, Ballari, on 19.12.2016, based on a "No Objection Report", dated 29.09.2016, for conversion of the land from 'agricultural use' to 'non-agricultural use', issued by the Chief Officer, Town Municipal Council, Kampli. The Order of conversion is passed in about three months, from the date of second application, which is found reasonable, as the process of conversion involves calling for reports from various authorities. Hence, we are unable to accept the contention of the Petitioner that, there was a delay in granting of the approval for conversion of the land. In fact, there is a delay on the part of the SPD in applying for the conversion. When a time line of 365 days is provided in the PPA for getting all approvals, the inordinate delay by the SPD/Petitioner in applying for

such approvals and, thereafter, attributing delay to the authorities cannot be accepted. The Respondent, while granting extension of time, ought to have taken note of this.

- (e) The other grounds urged by the Petitioner are that, due to delay in Evacuation Approval, Bay Extension Approval, CEIG Approval, etc., and demonetisation, which were beyond the control of the parties, the Project could not be commissioned, within the time. We note that the Evacuation Approval was granted on 07.09.2016 in about a month's time from the date of application (05.08.2016). Hence, there is no delay by the KPTCL. In fact, the application for the Evacuation Approval was made by the SPD on 05.08.2016, after more than a year from the date of PPA and no explanation is given for such delay. The other grounds, namely, Bay Extension Approval, CEIG Approval and demonetisation are not substantiated.
- (f) We note that, it is a settled law that, the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under the said clause, is stated to be issued by the Petitioner to the Respondent. None of the reasons or events cited by the Petitioner for delay in commissioning of its Project falls under the *Force Majeure* Events, mentioned in the PPA, as held in the preceding paragraphs. Hence, we consider that, the Petitioner is not entitled to extension of time, as provided in the clauses of the PPA. Consequently, the Petitioner would be liable for payment of

Liquidated Damages, as per Article 2.5.7 of the PPA, for the delay in commencement of supply of power to the BESCOM.

- (g) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. Admittedly the SPD/Petitioner has not achieved the Conditions Precedent within the specified time, as required under Article 2.1 of the PPA. The actual dates, on which they were achieved, have not been furnished or elaborated by the Petitioner. For the same reason, as applicable to 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. 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 required to pay damages for such delay, as per Articles 2.2 and 2.5.7 of the PPA.
- (h) 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*) dated 05.04.2018, has held that, for the delay in achieving Conditions Precedent and commissioning of the Project, the generating company is liable to pay damages stipulated in the PPA.
- (i) Therefore, we answer Issue No.(2), in the negative.

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

(a) Clause 5.1 of the PPA reads as follows:

“5.1 Tariff Payable:

The SPD shall be entitled to receive the tariff of Rs.8.40 per kWh based on the KERC tariff order S/03/1 dated 10.10.2013 in respect of SPD's solar PV projects in terms of this agreement for the period between COD and the expiry date. However, subject to clause 2.5, if there is a delay in commissioning of the project beyond the Scheduled Commissioning Date and during such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects shall be the lower of the following:

i. Rs.8.40/- per kWh

ii Varied tariff applicable as on the date of commercial operation.”

(b) Article 5.1 of the PPA, extracted earlier, 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 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 the 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 to its consumers. The time, ordinarily required to complete 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 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 alternative and expensive sources, leading to higher retail tariff to the consumers, or short supply leading to revenue loss to them, and even to imposition of penalties for not meeting the Renewable Purchase Obligation, fixed by this Commission. The Capital Cost of the Solar Power Plants has been coming down very rapidly, in the recent years, because of advancement in technology and production efficiency, as well as economies of scale, in the backdrop largescale solar capacity addition 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 30.07.2015, then to Rs.4.36 per unit in the Order dated 12.04.2017 and now to Rs.3.05 in the Order dated 18.05.2018.

- (c) The Petitioner is not entitled to the tariff, originally agreed in the PPA at Rs.8.40 per unit, when admittedly, the plant was not commissioned within the stipulated time and is entitled only for the revised tariff as on the date of commissioning of the Plant as per Article 5.1 of the PPA. Further,

admittedly, in the present case, the generic tariff for the Solar Power Plants that was agreed in the PPA, was revised much before the Plant was ready for commissioning. In any case, the Petitioner having voluntarily entered into a PPA, which has a clause providing for revision of the tariff agreed, if there is a delay in commissioning of the Project, within the scheduled period, cannot now wriggle out of such a clause, without valid grounds.

- (d) The PPA provides that, the tariff on the date of commercial operation will be applicable for the Project. The Project is commissioned on 02.07.2017. The Petitioner has not furnished any material particulars of the cost incurred in implementing the Project and the period when investments were actually made. We may safely infer that, the major part of investments have been made, after the receipt of approvals, during the year 2017. As noted earlier, as per the terms and conditions of the PPA, the tariff payable to the SPD/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. 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 1st 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 31st 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 1st 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 1st respondent would be entitled only for lower of the two tariffs...."

The ratio of the Hon'ble Supreme Court's judgment in the above case is applicable to the Petitioner's case, as the PPA envisages a similar situation.

- (e) In the recent 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 said 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."

The ratio of the above judgments of the Hon'ble Supreme Court and of the Hon'ble Appellate Tribunal for Electricity, is applicable to the Petitioner's case. Hence, we hold that, the Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit, for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017, prevalent as on the date of commissioning of the project.

(f) We note that, the Petitioner took the risk of implementation of the Project, after nearly two years from the date of signing of the PPA.

(g) Accordingly, we answer Issue No.(3), as above.

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

For the foregoing reasons, we pass the following:

ORDER

(a) It is declared that, the Petitioner is not entitled to any of the reliefs sought;

- (b) The Petitioner is entitled to a tariff of Rs.4.36 (Rupees Four and Paise Thirty-Six) only per unit, the varied tariff as applicable on the date of commissioning of the Petitioner's plant, as fixed by the Commission in the Order dated 12.04.2017, for the term of the PPA, as per Article 5.1 of the PPA; and,
- (c) The Petitioner is also liable to pay damages, including Liquidated Damages, as provided under Articles 2.2 and 2.5.7 of the PPA.

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

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

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