

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 11th September, 2018

Present:

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

OP No.67/2017

BETWEEN:

- 1) Shivapur Solar Power Project LL.P.,
BC 109, Davidson,
Camp : Belagavi – 590 001.

[Represented by Shri Vinayak M. Puranik, Authorized Representative]

- 2) Shri Siddapa F. Tigadi,
Navalgatti village,
Bailahongal Taluk,
Belagavi.

..

PETITIONERS

[Represented by Manmohan, P.N. Associates, Advocates]

[Note: Petitioner No.2 is impleaded, as per Order dated 26.10.2017 on his Application]

AND:

Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.

[Represented by Indus Law, Advocates]

Karnataka Electricity Regulatory Commission,
Mahalaxmi Chambers,
6th & 7th Floors, M.G. Road,
Bengaluru – 560 001.

.. **RESPONDENTS**

**[Note: Respondent-KERC is deleted, as per Memo dated 29.06.2017
of Petitioner No.1]**

ORDERS

- 1) This Petition is filed under Section 86(1)(b) of the Electricity Act, 2003, seeking extension of time for the commercial operation of the Solar Power Project.
- 2) The issues that would arise for our consideration, in the present Petition are, as follows:
 - (1) Whether the Petitioners have proved the *Force Majeure* Events, relied upon by them, to claim exclusion of the delayed period in commissioning of their Solar Power Project?
 - (2) Whether this Commission has jurisdiction to call upon the Petitioners to prove the *Force Majeure* Events, relied upon by them, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, in spite of the Respondent admitting or not denying the occurrence of such *Force Majeure* Events?
 - (3) What should be the tariff for the Project, for the term of the PPA?
 - (4) What Order?

-
- 3) The learned counsel for the 2nd Petitioner argued that, the Commission has no jurisdiction to call upon the Petitioners to file a Petition before it, for proving the *Force Majeure* Events. In support of his argument, the learned counsel for the 2nd Petitioner, has relied upon the different clauses of the Power Purchase Agreement (PPA) dated 30.06.2015, entered into between the Petitioners and the Respondent [Hubli Electricity Supply Company Limited (HESCOM)]. He has also relied upon different decisions, in this regard. We shall first consider the jurisdictional issue.
- 4) For appreciating the jurisdictional issue raised by the learned counsel for the 2nd Petitioner, the following relevant clauses in the PPA and the material facts, may be noted:
- (a) The 2nd Petitioner, who is one of the farmers, was selected for developing a 3 MW Solar Power Project, on his land at Murgod Village, Saundatti Taluk, Belagavi District and for selling the power generated by the Project to the Respondent (HESCOM), as per the Guidelines, issued for selecting the land owning farmers, under the State Solar Policy 2014-2021. In this regard, the 2nd Petitioner [(Solar Project Developer (SPD)] and the Respondent (HESCOM) have entered into a PPA dated 30.06.2015. The said PPA was approved by this Commission on 20.07.2015. The 1st Petitioner is a Special Purpose Vehicle (SPV), formed to establish and maintain the Solar Power Project, in terms of Article 12.11 of the PPA. The PPA provides that the Project shall be

commissioned on or before 31.12.2016 i.e., 18 (eighteen) months from the date of the PPA.

- (b) Article 5.1 of the PPA, which provides for the applicability of the tariff, reads thus:

“5.1 Tariff payable:

The SPD shall be entitled to receive the Tariff of Rs.8.40 (Rs. Eight Paise Forty only) 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 the 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 lower of the following:

- (i) Rs.8.40/- per kWh;*
- (ii) Varied tariff applicable as on the date of commercial operation.”*

Article 2.5 of the PPA, which provides for the extension of time to perform its obligations, reads thus:

“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 HESCOM Event of Default; or*
- (b) Force Majeure Events affecting HESCOM; 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 HESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or HESCOM, or till such time such Event of Default is rectified by HESCOM.*
- 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.*
- 2.5.4** *In case of extension due to reasons specified in Article 2.5 (b) and (c), and if such Force Majeure Event continues even after a maximum period of 3 (three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 9.*
- 2.5.5** *If the Parties have not agreed. Within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 10.*
- 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."*

Article 10.3, which provides for the dispute resolution, reads thus:

“10.3 Dispute Resolution:

10.3.1 If any dispute is not settled amicably under clause 10.2, the same shall be referred by any of the parties to the KERC for dispute resolution in accordance with the provisions of the Electricity Act, 2003.”

- (c) The Petitioners were required to commission the Solar Power Project on or before 31.12.2016, to claim the tariff of Rs.8.40 per unit, for the energy supplied. If there was a delay in commissioning of the Project, beyond 31.12.2016, the tariff applicable was the 'Varied Tariff', as determined by this Commission, prevailing as on the Commercial Operation Date (COD). However, in case, the Petitioners were prevented from commissioning the Project, within the time, due to the *Force Majeure* Events affecting them, the commissioning date would be deferred for a reasonable period, required to overcome the effects of such *Force Majeure* Events. Article 2.5.5 of the PPA implies that, the Respondent (HESCOM) has the discretion to agree on the time period, by which, the commissioning date could be extended on the ground of the *Force Majeure* Events, affecting the Petitioners. Article 2.5.6 of the PPA, provides that, as a result of such extension of time, the commissioning date is deemed to have been extended.
- (d) The 2nd Petitioner submitted a letter dated 03.12.2016 to the Respondent (HESCOM), requesting for extension of time, for commissioning of the Solar

Power Project, by 6 (six) months, stating that, there was an inordinate delay in getting the approval of the Evacuation Line and the 11 kV Bay allotment and that there was a delay in granting of conversion of the 'Agricultural' land for 'Non-Agricultural' purposes. Thereafter, the Respondent (HESCOM) intimated, in the letter dated 04.02.2017 (Exhibit 34), that the extension of time was allowed, for 6 (six) months from the Scheduled Commercial Operation Date (SCOD), for completion of the Solar Power Project in question and that all the other terms and conditions of the PPA, would remain unaltered.

- (e) This Commission, by letter dated 16.03.2017, directed all the Electricity Supply Companies (ESCOMs), in the State, not to allow any extension of time, beyond the SCOD, without obtaining the prior permission of the Commission, in respect of the Solar Power Projects. Subsequently, this Commission, by letter dated 05.04.2017, directed all the ESCOMs to advise the SPDs / SPVs concerned of the Solar Power Projects, to file a Petition before this Commission, with all the relevant grounds and supporting documents, for seeking approval of any extension of the Commissioning Date, granted by the ESCOMs. Accordingly, the Respondent (HESCOM), in the letter dated 13.04.2017, directed the Petitioners to file the necessary Petition, before this Commission, for obtaining the approval of the Commission, for the extension of time granted by it, for achieving the SCOD. Thereafter, the 1st Petitioner has filed this Petition, before this Commission.

-
- 5) Upon Notice, the Respondent (HESCOM) appeared through its counsel. Though the case was adjourned, on many occasions, at the request of the Respondent (HESCOM) to file its Statement of Objections, the Respondent (HESCOM) has not filed the same. The Petitioners concluded their arguments. Finally, the learned counsel for the Respondent (HESCOM) submitted that it would not specifically object to the pleas raised by the Petitioners and that the Respondent (HESCOM) would abide by the Orders of this Commission. Therefore, the arguments of the Respondent were taken as 'concluded'. The written arguments were also filed, on behalf of the Petitioners.
- 6) After considering the submissions of the Petitioners and the evidence on record, our findings on Issue No.(2) are, as follows:
- 7) **ISSUE No.(2):** *Whether this Commission has jurisdiction to call upon the Petitioners to prove the Force Majeure Events, relied upon by them, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondent admitting or not denying the occurrence of such Force Majeure Events?*
- (a) The learned counsel for the 2nd Petitioner submitted that, the arguments submitted in OP No.65/2017, a connected case, may be adopted in this case also. We have passed a reasoned Order and given our findings on the above Issue in OP No.65/2017 and held that this Commission has the exclusive jurisdiction to consider the validity of the extension of time, when it affects the tariff payable to a generating company, ultimately passed

on to consumers. The same reasoning and findings would apply to this case also.

(b) Therefore, we answer Issue No.(2), in the affirmative.

8) We shall now discuss Issue Nos.(1), (3) and (4) below.

9) **ISSUE No.(1):** *Whether the Petitioners have proved the Force Majeure Events, relied upon by them, to claim exclusion of the delayed period in commissioning of their Solar Power Project?*

(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 HESCOM 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 HESCOM and achieve financial closure and provide a certificate to HESCOM from the lead banker to this effect;

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

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

2.1.2 SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and HESCOM 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 HESCOM 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 HESCOM 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 HESCOM or due to Force Majeure, the SPD shall pay to HESCOM 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, HESCOM at its discretion may terminate this Agreement

XXX

XXX

XXX

2.3.2 Appropriation of Performance Security

Upon occurrence of delay in commencement of supply of power to HESCOM as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, HESCOM 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 HESCOM shall be entitled to terminate this Agreement in accordance with Article 9."

"2.5 Extensions of Time

XXX

XXX

XXX

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

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to HESCOM by the scheduled commissioning date, the SPD shall pay to HESCOM, 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 HESCOM 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 HESCOM 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, the extension of time for commissioning the Project can be granted, if the SPD is prevented from performing its obligations, due to the HESCOM's 'Event of Default' or the *Force Majeure* Events. It is the case of the Petitioners that, the Project was delayed, due to factors beyond their control and hence, the same have to be treated as the *Force Majeure* Events. The *Force Majeure* Events and the requirement of issuance of 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 Petitioners, in any manner, were negligent in performing the obligations

under the PPA and have complied with the requirements of Article 8.3 of the PPA.

- (c) The PPA is signed by the parties on 30.06.2015. As per Article 2.1 of the said PPA, the Conditions Precedent had to be achieved within 365 days from the date of signing the PPA and as per Article 4.1, the Project had to be commissioned, within 18 months from the date of signing of the PPA. The achievement of the Conditions Precedent, would include obtaining of all the approvals by the SPD. The Petitioners' claim that, the delay in handing over a copy of the PPA, after communication of the Commission's approval on 20.07.2015, the delay in grant of approvals for conversion of the land, approval for evacuation of the power, the CEIG approval, have caused the delay in implementing the Project. The recitals in the PPA would reveal that, the parties have signed the PPA and the copies of the same were delivered on the date of execution of the PPA. A signed copy of the PPA would be sufficient, to proceed with the preliminary works, for implementation of the Project. The approval of the PPA, by the Commission, has no bearing on the initial obligations of the SPD, such as, applying for approvals, loans, etc. The Petitioners have not produced any documents to show that, any of its applications for approval, loans, etc., was rejected or delayed, on this count. Therefore, we are unable to accept that, the time taken for approval of the PPA is a *Force Majeure* Event, causing delay in the commissioning of the Project. The provisions of the PPA, do not provide for exclusion of the time taken for approval of the PPA, in counting the period available for

commissioning the Project. Hence, the time taken in the regulatory process, for the approval of the PPA, cannot be termed as 'delay'. In any case, as noted earlier, it is not shown that the absence of the approved PPA, prevented the SPD from taking any step / action, to implement the Project.

- (d) The SPD applied for the conversion of land on 15.12.2015, after a lapse of more than five months, from the Effective Date of the PPA. The explanation given for this delay, on the part of the SPD is that, certain documents, like encumbrance certificate, RTC, 7 & 7A certificates, Mutation, Akarband, PT sheet, in respect of the land, had to be obtained from the various authorities and eventhough a request was made to the concerned authorities on 25.07.2015 (as mentioned in the Memo dated 27.03.2018), the same were given in August, October and December, 2015, with a delay of 128 days. The 1st Petitioner has produced the copies of the said documents, on 29.08.2017. But, the Petitioner has not produced the copies of applications, filed before the concerned authorities, to prove the dates of filing of the applications. On a close scrutiny of the documents, it is found that, the applications for the documents were made on different dates, but not on 25.07.2015, as mentioned in the Memo dated 27.3.2018, and the documents were issued on the date of the application or within a few days of the application, as could be seen from the seals affixed on the documents, by the concerned authorities, containing the date of application, the date of payment of fee and the date of providing the copies. Therefore, the allegation that, there was a delay by the authorities, to provide the

documents, sought for by the Petitioner, cannot be accepted. Consequently, the explanation that, the delay caused by the authorities, in providing the above documents, resulted in the delay in applying for the land conversion, before the Deputy Commissioner, cannot be accepted. The land conversion charges were paid by the 2nd Petitioner on 11.03.2016. The land conversion Order was passed by the Deputy Commissioner, Belagavi on 11.04.2016, within a reasonable time of 4 months, from the date of application and within a month, after receipt of the conversion charges. 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, which affected the Project implementation. In fact, there is delay, on the part of the SPD, in applying for the conversion, and we note that the Petitioner has failed to produce the correct information about the dates, before the Commission and in fact, tried to mislead us, as stated above.

- (e) It is stated by the Petitioners that, the SPV was formed and the Project was assigned to the SPV on 03.03.2016. That, a Supplemental PPA (SPPA) was executed between the parties on 06.08.2016 and sent to the Commission for approval and the approval was granted by the Commission on 07.10.2016, after a delay of two months. We note that, the SPPA was sent to the Commission, by the Respondent, vide its letter dated 24.09.2016 and the approval was communicated, by letter dated 07.10.2016. This period cannot be termed as 'delay'. It is stated that, this has caused delay in disbursement of the loan. It is mentioned, in the written arguments, filed on

9.11.2017 that, inspite of the delay in disbursement of the loan, the 1st Petitioner started the procurement process from 18.06.2016 from its own funds and commenced the civil and land development work from 09.08.2016, infusing its capital, without waiting for the bank to release the fund. It is also stated that, when the Commission granted approval to the SPPA on 07.10.2016, the Project was almost ready. Therefore, it can be stated that, the Project was not delayed, due to the time taken for approval of the SPPA, but due to the belated assignment of the Project to the SPV and the delay caused in executing the consequential SPPA and seeking its approval from the Commission.

- (f) The 2nd Petitioner applied for the evacuation approval to the Karnataka Power Transmission Corporation Limited (KPTCL) on 20.10.2015, after about four months, from the date of the PPA. No explanation is given for this delay by the Petitioner. The tentative evacuation approval was granted on 31.05.2016. It cannot be made out when the Petitioner accepted the conditions in the tentative evacuation approval and requested for the regular evacuation approval. The regular evacuation approval was granted on 05.08.2016. The 1st Petitioner has alleged that, the KPTCL caused a delay of about 9 months, in granting the evacuation approval. The KPTCL has not been arrayed as a Respondent. The Petitioner, after receipt of the tentative evacuation approval, has to give acceptance letter, accepting the conditions mentioned in the tentative evacuation approval. It cannot be made out, as to when this acceptance was given and what corresponded

between the parties, thereafter. Therefore, the Petitioners have not proved, beyond doubt, that the delay was solely attributable to the KPTCL. When a time line of 365 days is provided in the PPA for getting all the approvals, the delay by the Petitioners, in applying for such approvals and in performing other acts, necessary on their part and thereafter, attributing the delay to the authorities, cannot be accepted.

- (g) We note that, it was the obligation on the part of the Petitioners to acquire land for the terminal bay near the sub-station, as per the evacuation approval. However, the Respondent, vide letter dated 12.01.2017, has intimated to the 1st Petitioner to pay certain lease charges and spared the land at the sub-station for setting up of a 11 kV terminal bay for evacuation of power, acceding to the request of the Petitioner. It could, therefore, be inferred that, early acquisition of the land by the Petitioners would have hastened the process of creation of the evacuation infrastructure.
- (h) It is also the allegation of the 1st Petitioner that, the breaker was provided by the MEI, after a delay of more than three months, from the date of placing the Order. It is stated that, the bay estimation was received on 05.08.2016 and the Purchase Order for the breaker was placed on 08.11.2016, but the same was delivered on 23.02.2017, after payment of the necessary charges. It is stated that, the usual period of delivery is 10 to 12 weeks, from the date of Purchase Order. It is also stated that, the breakers have to be tailor-made, based on the drawing submitted, tested and certified by the TAQC and

thereafter, despatched. Considering the inordinate delay, by the Petitioners, in placing the Purchase Order and the later various steps involved, the period, from 08.11.2016 to 23.02.2017, cannot be termed as 'delay'.

- (j) It is also alleged that, the inspection of the Project by the CEIG and the grant of the safety approval, was delayed, from 07.12.2016 to 28.03.2017. The CEIG is not made a party to the Petition. The various steps involved in granting the approval, date-wise, are mentioned in the written arguments, filed by the 1st Petitioner on 09.11.2017, as follows:

"In between procurement of breaker and its receipt, there is another procedure to be followed in obtaining the CIEG approval as under. Such approval cannot be sought in advance:

CEIG Approval	
Drawings submitted by us	7/Dec/2016
Approval received for drawings	26/Dec/2016
Submission of completion report with B1 test certificates by us.	20/Feb/2017
Details for delay between submission of B1 report	
(a) B1 form and test certificates verification from 20.02.2017 to 14.03.2017.	
(b) CIEG inspection call received on 15.3.2017, Plant inspected on 17.03.2017.	
(3) Observation letter issued 20.03.2017, Compliance given on 21.03.2017.	
(4) DCEI recommended to ACEI on 22.03.2017.	
(5) ACEI recommended to issue Safety Approval on 24.03.2017.	

(6) CIEG approval received on 28.03.2017, 30.03.017 applied for Synch approval at Hubli same day received.	
Issued Plant Safety Approval for commissioning the Project.	30/Mar/2017
Plant commissioned.	31/Mar/2017

The above delay is solely attributable to CIEG approving authority and beyond the control of the Petitioner. This is despite knowing the fact that the project is in advance stage and that any further delay will jeopardise the project."

We do not find any delay, in grant of approval, considering the sequence of dates mentioned by the Petitioner and note that, there is no explanation for the belated submission of the drawings/completion report by the Petitioner.

- (k) The Project was granted synchronisation approval on 30.03.2017 and commissioned on 31.03.2017, after the grant of the safety approval.
- (l) It is a settled law that, the *Force Majeure* clause in the PPA, has to be strictly interpreted. No notice, as contemplated under the clause, is stated to have been issued by the Petitioners, to the Respondent. None of the reasons or events, cited by the Petitioners for the 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 1st 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 the Liquidated Damages, as per Article 2.5.7 of the PPA.

- (m) We have held that, the 1st 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. For the same reason, as applicable to rejection of the Petitioners' claim for extension of time for achieving SCOD, any claim of the Petitioners 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 1st Petitioner is required to pay damages for such delay, as per Articles 2.2 and 2.5.7 of the PPA.
- (n) 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.
- (p) Therefore, we answer Issue No.(1), in the negative.
- 10) **ISSUE No.(3):** *What should be the tariff for the Project, for the term of the PPA?*
- (a) 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 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, 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 (HESCOM), 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, very rapidly, in the recent years, because of the advancement in technology and production efficiency, as well as the economies of scale, in the backdrop of 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 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 Order dated 12.04.2017 and Rs.3.05 per unit in the Order dated 18.05.2018.

- (b) The 1st 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.
- (c) It is stated, in the written arguments filed by 2nd Petitioner on 09.11.2017, that the 2nd Petitioner was looking for an investor and thereafter, the SPV was formed on 04.02.2016. It is also mentioned in the Petition, in Paragraph 9, that the Deed of Assignment was signed on 03.03.2016. It is mentioned in Paragraph-11 of the Petition, that after signing the Deed of Assignment, the 1st Petitioner started the Project development works on the site, which includes land levelling, fencing, obtaining of the necessary approvals and sanctions such as, conversion of the land, evacuation line and loan sanctions. In the Written arguments dated 09.11.2017, it is stated that, the Purchase Order for construction of the 11 kV transmission line was made on 18.06.2016. The Agreement for purchase of Solar modules was entered into on 09.09.2016, the Purchase Order for MMS was made on 17.09.2016, the

Purchase Order for inverter was made on 08.10.2016, the Purchase Order for transformer was made on 29.10.2016, the Purchase Order for breaker was made on 05.11.2016 and for the cables on 10.11.2016. The Solar Panels would have been procured, much later. Therefore, it can be stated that, the normative Capital Cost of the Solar Power Plant, when the Petitioner took effective steps to procure the capital equipment for its Project, was lower than the normative cost of the Solar Power Plants, assumed in the Generic Tariff Order dated 10.10.2013. Thus, the 1st Petitioner is not entitled to the tariff, as per the Generic Tariff Order dated 10.10.2013, originally agreed to in the PPA, when admittedly, the Solar Power Plant was not commissioned, within the stipulated time and it is entitled only for the revised tariff, as on the date of commissioning of the Plant, as per Article 5.1 of the PPA. The Petitioners having voluntarily entered into a PPA, which has a clause providing for revision of the tariff agreed to, if there is a delay in commissioning of the Project, cannot now wriggle out of such a clause, without valid grounds. As per the terms of the PPA, the tariff payable to the SPD / Petitioner, is not based on the Capital Cost incurred by the SPD/Petitioner in the Project implementation, but the tariff is as per the relevant clauses of the PPA.

- (d) Article 5.1 of the PPA provides that, the tariff on the date of commercial operation would be applicable for the Project. Article 2.5.7 of the PPA provides for payment of damages, if the commencement of supply of power is not made by the Scheduled Commercial Operation Date (SCOD). We note that the Project is statedly commissioned on 31.03.2017, late in the

evening, and there is no proof of injection of the energy, on the said date. The load survey data of March, 2017 and April, 2017 were directed to be produced, to show that the energy was injected on 31.03.2017. However, the same is not produced and it can be inferred that, at best, the energy was injected into the Grid during April, 2017. In the additional Memo of facts, dated 12.12.2017, the 1st Petitioner has stated that, the Project was ready for commissioning on 24.03.2017, but the CEIG approval was granted on 28.03.2017. 29.03.2017 was a holiday, on account of Ugadi and the interconnection approval was sought for and provided on 30.03.2017. The Petitioner has stated that, the Respondent informed that the pre-commissioning and synchronisation, would be done on 31.03.2017. After the tests, the Project was commissioned at 4.30 p.m. on 31.03.2017 and it is stated that the delay, from 24.03.2017 to 31.3.2017, was not attributable to the Petitioners. This cannot be accepted, as the allotment letter dated 16.03.2015, issued by the KREDL and the terms of the PPA, provide that, it is the responsibility of the allottee, to procure all the approvals and commission the Plant, within 18 months from the date of PPA.

- (e) It is also stated by the 1st Petitioner, in the Additional Memo of Facts dated 12.12.2017, that there was less generation, as the Project was commissioned at 4.30 p.m., on 31.03.2017. The Minutes of the meeting, relating to the synchronisation of the Plant dated 31.3.2017 mentions, as follows:

“Below mentioned representatives of HESCOM along with M/s SSPP staff visited the Solar Power plant and 33/11 kV sub-station Murgoda on 31.03.2017. In 33 KV substation initially test charged the 11 KV line from 33 KV station of M/s SSPP on 31.03.2017 at 4.12 p.m, M/s SSSP line test synchronisation of 34 KW out of 3 MW capacity with HESCOM grid at 4.30 p.m and noticed the Import energy to a tune of 17 Kwh (Units) in tariff main and check ETV meter in 33 KV Substation Muragod.”.

(f) We note that, when the meter constant of the meter is 20000, it cannot technically record the injection of 17 units. The least injection that can be recorded is 200 units. Therefore, the above document cannot be believed. The bill raised for injection of any energy on 31.03.2017 is also not produced, to prove the injection of energy on 31.03.2017.

(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 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 a 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...."

- (h) In the Order dated 29.05.2018, in OP No.28/2018 (Aikyam Holdings Pvt. Ltd.- Vs- BESCO and another), relating to a Wind Project, the Commission, has distinguished between 'Commissioning' and 'Commercial Operation' of a Project, as follows:

"(b) Under the PPA, there is no definition of 'Commission / Commissioning of Project'. However, it is not in dispute that the words 'Commissioning' and 'Commercial Operation' are one and the same, when there is commissioning of the Project subsequent to the execution of the PPA. 'Commissioning / Commercial Operation' of the Project would imply the injection of the energy into the State Grid, in pursuance of some commercial transactions, either with a Distribution Licensee or with a third party availing Open Access. The above view of the Commission is supported by various definitions and the clauses in the PPA, as noted above.

(c) Article 5.1 of the PPA provides that, the BESCO shall, for the Delivered Energy, pay for the term of the PPA from the Commercial Operation Date (COD) to the Company at the rate of Rs.4.50 per unit without any escalation. This liability would arise from the COD for the Delivered Energy. Therefore, one could infer that, without there being the energy delivered, there cannot be any Commercial Operation of the Project. Article 9.1 of the PPA provides for the term of the PPA,

which states that, the term of the PPA would be for a period of twenty (20) years from the COD, unless terminated earlier. The term of the PPA should begin from the time when the energy is delivered from the Project, for the purpose of counting the period of completion of the term.

(d) The Commissioning Certificate issued by the authorities concerned (ANNEXURE-5 to the Petition) and the connected papers may, at best, evidence that the Wind Power Project of the Petitioner was interconnected to the Grid System on 28.03.2017. The veracity of the Commissioning Certificate could be accepted, provided there is injection of energy into the Grid, soon after the interconnection of the generator with the Grid. Therefore, it could be said that, the Commissioning Certificate does not prove the Commercial Operation of the Project, which requires actual injection of power into the Grid as on 28.03.2017. In the absence of any valid explanation for non-injection of energy into the Grid, the inference that could be drawn is that, all the facilities for the interconnection had not been provided. This is the reason why the Petitioner has pleaded at Paragraph-4 of the Petition that, 'Commercial Operation' does not contemplate the actual generation of power or delivery of power into Grid system. For the above reasons, we are of the considered view that, the actual injection of the energy into the Grid is an essential ingredient for claiming the 'Commercial Operation' of the Project at a particular time and date.

(e) Therefore, the learned counsel for the Petitioner has mainly contended that, in the present case, there was injection of 511 units of energy into the Grid between 23:03:25 hours and 23:18:28 hours on 28.03.2017. The learned counsel for the Petitioner has pointed out that, the Meter at the Delivery Point has a multiplying constant of 1,50,000, thereby, the meagre 511 units of energy injected into the Grid by the Wind Power Project of the Petitioner could not be recorded in the Meter at the Delivery Point. The Petitioner has not produced the generation details from 29.03.2017 to 31.03.2017. The non-production of such evidence would lead to an inference that, from 29.03.2017 to 31.03.2017, there was no generation from the Petitioner's Wind Power Project. The Commissioning

Certificate produced by the Petitioner would only show that the Project was interconnected to the Grid on 28.03.2017 without stating anything with regard to the actual injection of energy into the Grid. The Commission notes that, the possibility of the Meter at the Generation Point recording the generation of certain units of power, by connecting it to some load, without there being any interconnection to the Grid, cannot be ruled out. Assuming that 511 units of energy was injected into the dedicated transmission line, admittedly, the quantum of Delivered Energy at the Delivery Point was 'nil', as recorded in the Meter at the Delivery Point. As noted above, even at the Generation Point, there was no generation of energy during the period, from 29.03.2017 to 31.03.2017. The Petitioner has not stated the reason as to why there could not be any generation of energy during this period. Therefore, we hold that, the 'Commercial Operation' has not taken place on or before 31.03.2017, as far as the Petitioner's Project is concerned. It is noted that, during the period from April, 2017 to June, 2017, there was injection of energy into the Grid. On the date of conclusion of the arguments, the Petitioner was asked to produce the extract of the Log Book, to ascertain the date from which the injection of energy had commenced in April, 2017. But, the Petitioner has not, so far, produced any such extract of the Log Book. Therefore, it could be inferred that, even during the beginning of April, 2017 also, there was no injection of energy into the Grid.

(f) We may note here that, the meaning of the word 'commissioning', as could be made out from the contents of the 'Commissioning Certificate', is only 'interconnection / synchronization of the Plant with the Grid, after following the Technical / Safety requirements'. The meaning of the word 'commissioning', as used in the various Generic Tariff Orders, is 'commercial operation of the Plant by injecting energy into the Grid, after interconnection with the Grid'."

- (j) The terms of the PPA in the case on hand, though, a Solar Power Project, are similar. Therefore, the above decision, read with the decision of the Hon'ble

Supreme Court in EMCO case, insofar as the requirement of injection of energy into the Grid on the date of commissioning of the Plant, is concerned, holds good in this case also.

(k) Hence, in the circumstances and on the facts of the case, we hold that, the Petitioners' 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.

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

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

For the foregoing reasons, we pass the following:

ORDER

(a) It is declared that the Petitioners are not entitled to any of the reliefs, sought for, in the Petition;

(b) The Petitioners are 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 Petitioners' 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 Petitioners are also liable to pay 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