

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

Dated : 14th June, 2018

Present:

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

OP No. 183/2017

BETWEEN:

Blister Solar Energy Private Limited,
No.35/2, Park Manor Building,
Park Road, Tasker Town,
Bengaluru – 560 051.

..

PETITIONER

[Represented by Navayana Law Offices, Advocates]

AND:

Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.

..

RESPONDENT

[Represented by Shri Shabaaz Husain, Advocate]

ORDERS

- 1) In this Petition, filed under Section 62, read with Sections 64 and 86(1)(f) of the Electricity Act, 2003, the Petitioner has prayed for:

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- (a) Approval of the extension granted by the Respondent to the new Scheduled Commissioning Date (SCD) viz., 01.07.2017 vide its letter dated 02.03.2017 (produced as ANNEXURE-P1 to the Petition); and,
- (b) Direction to the Respondent, to make payment for the energy under the Power Purchase Agreement (PPA) dated 02.07.2015 (produced as ANNEXURE-P3 to the Petition) and the Supplemental Agreement dated 14.10.2016 (produced as ANNEXURE - P7 to the Petition), at the rate of ₹8.40 per unit, from the Commercial Operation Date (COD) of the Petitioner's Project, for the entire term of the PPA.
- 2) The material facts, stated by the Petitioner in the Petition, in support of its prayers, may be stated, as follows:
- (a) The Karnataka Renewable Energy Development Limited (KREDL), which is the Nodal Agency for implementation of Renewable Energy (Solar Power) Projects in the State of Karnataka, issued a letter dated 17.03.2015, in favour of Shri Krishna Naik (Solar Project Developer/SPD) and allotted 2 MW capacity Solar Power Project, to be commissioned at Sy.Nos.20, 21 and 24, Thumulu Village, Madhugiri Taluk, Tumakuru District, under Segment-1, Category-01 of the Solar Policy of the Government of Karnataka, in compliance of the Government Order dated 26.08.2014, and instructed him to execute a PPA with the Respondent, under the Farmers' Scheme, subject to certain terms and conditions.

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- (b) Based on the above allocation letter, Shri Krishna Naik initialled the PPA dated 02.07.2015 with the Respondent and this PPA was approved by this Commission, vide letter dated 26.08.2015.
- (c) In the said PPA, the 'Effective Date' is defined as the date of signing of the PPA, and the SCD is defined as '18 months from the Effective Date'. Thus, the Project Proponent was supposed to commission the Project by 25.02.2017. (Here itself we may note that the Petitioner has assumed the date of approval of the PPA as the 'Effective Date'.)
- (d) The Petitioner had initiated steps to procure approval for conversion of the land for the Project, from the Deputy Commissioner and for allied permissions even before the execution of the Supplemental PPA. The permission for usage of the land for non-agricultural purpose was granted on 14.09.2016 and, the regular Evacuation Approval was granted only on 19.09.2016.
- (e) As the Line Estimate Approval was not received, the Petitioner issued a letter dated 26.10.2016 to the Respondent, representing the *Force Majeure* Events and sought for time extension for execution of the Project (Here itself we may note such letter was of the SPD and not the Petitioner-SPV).
- (f) The Petitioner had placed Purchase Orders on 02.11.2016 with Mysore Electrical Industries Limited for supply of MEI make 11 kV 350 MVA outdoor Single Feeder- Panels and Annunciator Panel.

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- (g) The Project work was further slowed down from November, 2016 onwards, on account of the demonetization decision, by the Central Government.
- (h) In the meanwhile, the Petitioner, the Special Purpose Vehicle (SPV), stepped into the shoes of Shri Krishna Naik (SPD) and consequently, a Supplemental Agreement dated 14.10.2016 (Supplemental PPA) was executed and the said Supplemental PPA was approved by this Commission on 14.11.2016.
- (j) Another detailed representation, containing the Project progress and difficulties and *Force Majeure* Events encountered by the Petitioner was represented before the Respondent, vide letter dated 02.12.2016. In the said representation, various issues, such as delay in allotting permission towards town planning NOC, NA conversion, bay allotment, estimation & construction approval, etc., by various Government Departments and delay due to self-funding route, was also indicated.
- (k) The Respondent, by letter dated 02.03.2017, considering the *Force Majeure* Events and other circumstances narrated by the Petitioner, approved the extension of time for the SCD by 6 (six) months to the Petitioner's Project.
- (l) Thereafter, the Provisional Interconnection Approval was granted by letter dated 24.06.2017 and the Project was commissioned on 28.06.2017, within the extended time.

- 3) The grounds, urged by the Petitioner in support of its prayers, may be summarized as follows:
- (a) The Petitioner is entitled to the tariff of Rs.8.40 per unit as mentioned in the PPA. In all, this Commission has passed three Generic Tariff Orders in respect of the Solar Power Projects viz., Tariff Orders dated 10.10.2013, 30.07.2015 and 12.04.2017. In the Generic Tariff Order dated 30.07.2015 (passed in modification of the earlier Tariff Order), it is clearly held that, in respect of the Projects that are commissioned during the period from 01.09.2015 to 31.03.2018, for which the PPAs have been entered into and submitted to the Commission, prior to 01.09.2015 for approval, the tariff as per the said agreements shall be applicable.
- (b) The latest Generic Tariff Order dated 12.04.2017, has been made applicable to only, the new grid connected Solar Projects entering into PPAs on or after 01.04.2017, but before 01.04.2018 and also those Projects which are commissioned during the period from 01.04.2017 to 31.03.2018, for which the PPAs have not been entered into, prior 01.04.2017. Hence, the latest Generic Tariff Order also does not revise the tariff of the Petitioner's Project. Consequently, the Petitioner is entitled to the tariff of Rs.8.40 per unit, as agreed to under the PPA.
- (c) The PPA, executed between the parties, not only provides for the time period within which the Scheduled Commercial Operation Date (SCOD) has to be achieved, but also provides for the right of the Respondent to grant extension of time. Accordingly, the Petitioner has commissioned

the Project within the mutually agreed COD. Hence, the Petitioner is entitled to the tariff as per the PPA.

- (d) The Project of the Petitioner has experienced several hurdles, which can be termed as *Force Majeure* Events, within the meaning of Article 8 of the PPA and this has been adequately and repeatedly represented before the Respondent by the Petitioner. The pleas of the Petitioner have been considered and accepted by the Respondent.
- (e) The extension of time to the Petitioner was given the legal force and would become effective upon the achievement of the SCOD, especially under the circumstances wherein extension requested, was before the expiry of the original SCOD, granted under the terms of the PPA was not in the violation of any other Regulation and was with the consent of the Petitioner. That the extension of time was granted as per Clause 2.5.6 of the PPA dated 02.07.2015 and as a result of such extension, the SCD and the Expiry Date newly determined shall be deemed to be the SCD and Expiry Date for the purposes of the Agreement dated 02.07.2015. That, hence, the Respondent is not entitled for any Liquidated Damages without adjudication by the Commission.
- (f) The extension of time granted by the Respondent by letter dated 02.03.2017 does not mention about altering the tariff and specifically clarifies that, all other terms and conditions of the PPA remain unaltered. Hence, the Petitioner is entitled for the tariff, agreed in the PPA dated 02.07.2015, at the rate of Rs.8.40 per unit.

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- (g) The time period provided in the Supplemental PPA, including the provision of extension of SCD for completion of the Project, cannot be interfered with in this case, as it was due to natural cause or for unavoidable reasons beyond the control of the Petitioner and the Respondent, legitimately extended the SCD, well-supported by the official report as to the nature of cause for the delay, considering it as an exceptionally special case and provided reasonable period of extension.
- (h) The Petitioner has commissioned the Project well within the time period permitted by the Respondent. Further, all the aspects of delay, genuine difficulties, experienced by the Petitioner have been considered by the Respondent and hence, the Petitioner is entitled to the tariff, as per the PPA.
- 4) Upon Notice, the Respondent has appeared through its learned counsel and filed its Statement of Objections, the gist of which is as follows:
- (a) As per the PPA dated 02.07.2015, the generator was required to commission the Plant within 18 months from the date of execution of the PPA. Hence, the Petitioner was supposed to commission the project by 01.01.2017.
- (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 by 6 months for commissioning the Project under *Force*

Majeure conditions. In the interregnum, as several requests for extension of SCD were received from the Solar Developers, the Government of Karnataka was pleased to issue an Order dated 24.11.2016, directing all the Electricity Supply Companies (ESCOMs) to constitute a 3-Member Committee to consider and dispose of the request of the farmers / developers.

- (c) In furtherance to the said direction, a Committee was constituted by this Respondent to consider the requests for extension sought for by 1 MW to 3 MW Solar Generators under the land-owning farmer category. The said Committee held a meeting on 15.02.2017, wherein the causes for the delayed achievement of the Scheduled Commercial Operation were considered in respect of 17 Generators, including the Petitioner and a decision was taken to accord extension of 6 months to achieve the SCD.
- (d) The Petitioner had furnished the documents to the Committee constituted by the Respondent, for consideration of the request for extension of time. As per the same, the following information was gathered pertaining to the various reasons assigned for the delayed execution of the Project:
- (i) LAND CONVERSION
 - (1) Date of submission of application: 04.01.2016.
 - (2) Date of conversion: 14.09.2016
 - (3) Delay in getting approval: Nearly 9 months.
 - (ii) KPTCL EVACUATION APPROVAL (REGULAR)
 - (1) Date of submission of application : 05.02.2016.
 - (2) Date of conversion: 19.09.2016
 - (3) Delay in getting approval: More than 7 months.

- (iii) PURCHASE OF SWITCHGEAR
 - (1) Date of Purchase Order: 06.05.2016
 - (2) Date of receipt at the Site: 27.09.2016
 - (3) Delay in getting the equipment: 4 months' delay.

That, the Committee, after detailed discussions and scrutiny of all the documents, opined that the approval may be accorded for extension of SCOD upto 6 months, considering Article 2.5 of the PPA, as there is delay in the issuance of the approvals by various Government entities.

- (e) On 02.03.2017, this Respondent in its letter informed the Petitioner about the extension of 6 months' time for achieving the Scheduled Commercial Operation.
- (f) Directions were sought from the Additional Chief Secretary, Government of Karnataka, regarding extension of the SCOD, upto 6 months, in respect of SPDs/SPVs, who have requested for extension under the Farmers' Category.
- (g) On 16.03.2017, this Commission addressed a letter to all the ESCOMs of the State, pertaining to extension of time, granted to the Solar Generators, and informed them not to allow extension of time beyond the SCD, if any, as per the original PPA, without obtaining prior opinion of the Commission.
- (h) That, vide letter dated 05.04.2017, the ESCOMs were directed by this Commission, to advise all the land owner solar developers / SPVs, to

approach the Commission and seek approval of the extension of time. In furtherance to the same, the Petitioner has filed this Petition.

- (j) The Additional Chief Secretary to Government, vide letter No. EN 67-VSC 2017 dated 25.04.2017, to this Commission, has requested it to consider approval for the 6 months' of COD granted by the BESCO, as per Articles 2.5 and 8 of the PPA.
- (k) The subject was placed before the 82nd meeting of the Board of Directors of the Respondent held on 11.05.2017, for evaluation / disposal of the requests of the land owing farmers / SPVs, for extension of time for achieving the Commercial Operation, in respect of 1 MW to 3 MW Solar Power Plants, in Karnataka, under the Farmers' Category. The Board ratified the action taken on the extensions, issued by this Respondent, subject to approval by this Commission.
- (l) The Project was commissioned on 28.06.2017.
- (m) In respect of the extension of the Project duration of the already awarded Solar Power Projects, the Ministry of New and Renewable Energy, had issued letter No.30/106/2014-15/NSM dated 28.07.2017, addressed to the Principal Secretaries (Power / Energy) of the State Governments, as stated below:

“Ministry had requested not to give time extension if all the obligations 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 the State Government Authorities / PSUs, like land allotment, transmission / evacuation facilities connectivity permission or force majeure, the competent authority in the State / SECI / 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 organizations regarding land, transmission or any such reasons, the extension of the Project may be allowed."

- (n) Therefore, this Respondent has prayed that, this Commission may accord directions in the present Petition, in the interest of justice and equity.
- 5) We have heard the oral submissions made by the learned counsel for the parties. The following issues would arise for our consideration:
- (1) Whether the Commission has powers to legally scrutinise, if the extension of time, granted for commissioning of the Petitioner's Project by the Respondent, is proper or otherwise?
 - (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 Project for the term of the PPA?
 - (3) What Order?

- 6) After considering the submissions of the parties and perusing the material placed on record, our findings, on the above Issues, are as follows:
- 7) **ISSUE No.(1):** *Whether the Commission has power to legally scrutinise, if the extension of time, granted for commissioning of the Petitioner's project by the Respondent, is proper or otherwise?*
- (a) Clause 2.5 of the PPA provides for extensions of time. The Petitioner contends that, as the Respondent had accepted the reasons for delay in commissioning the Project, as *Force Majeure* Events, and granted extension of time by 6 months, as provided in the PPA, such extension should be accepted and approved by the Commission. The mutual agreement between the generator and the Respondent, cannot be questioned. We are unable to accept the contention of the Petitioner. The extension of time, to commission the Project has a bearing on the tariff payable. The consumer, though not a formal party, ultimately pays for the supply of the 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 of India, 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 a certain term affecting the tariff, the Commission, as a custodian of consumer interest has to intervene and exercise its regulatory powers. Therefore, we hold that the Commission has the mandate and powers to

scrutinise the correctness and legality of the extension of time granted by the Respondent.

- (b) For the above reasons, Issue No.1 is answered, 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 Project?*
- (a) It would be useful to extract the various clauses of the PPA dated 02.07.2015, that are necessary for answering the issue raised.

“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*

BESCOM 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 BESCOM 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 BESCOM 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 BESCOM or due to Force Majeure, the SPD shall pay to BESCOM 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, BESCOM at its discretion may terminate this Agreement."

"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 BESCOM Event of Default; or
- (b) Force Majeure Events affecting BESCOM; 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 BESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or BESCOM, or till such time such Event of Default is rectified by BESCOM.

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 month 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.”

“Undertakings:

4.1 Obligations of the SPD:

- (a) The SPD shall construct the Project including the pooling station, the interconnection facilities and metering arrangements at the point of delivery of power as approved by STU /BESCO.
- (b) The SPD shall undertake by itself or by any other person acting on its behalf, at its own cost, construction/up-gradation of (a) the interconnection Facilities, (b) the transmission lines; and (c) metering arrangements with protective gear as per the specifications and requirements of STU/BESCO, as notified to the SPD.

- (c) *The SPD shall achieve scheduled date of completion and the commercial operation within 18 months from the effective date.*
- (d) *The SPD shall by itself or by any other person acting on its behalf undertake at its own cost maintenance of the interconnection facilities and the metering arrangements, including the dedicated transmission line up to the delivery point as per the specifications and requirements of STU/BESCOM, as notified to the SPD, in accordance with Prudent Utility Practices. The transmission / distribution line so constructed shall remain as dedicated transmission / distribution line without provision for any tapping.*
- (e) *The SPD shall operate and maintain the Project in accordance with Prudent Utility Practices, for the entire term of this agreement.*
- (f) *The SPD shall be responsible for all payments on account of any taxes, cesses, duties or levies imposed by the GoK or its competent statutory authority on the land, equipment, material or works of the Project or on the Electricity generated or consumed by the Project or by itself or on the income or assets owned by it."*

“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;*

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- (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 Clause 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 BESCOM's 'Event of Default' or *Force Majeure* Events. The *Force Majeure* Events and the requirement of issuing a written notice are mentioned in Clause 8.3 of the PPA. Under Article 8 of the PPA, it is also necessary to prove that the *Force Majeure* Events were 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, in any manner, was negligent in performing its obligations under the PPA.
- (c) The PPA is signed on 02.07.2015. The Conditions Precedent had to be achieved within 365 days from the date of signing the PPA and the Project had 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. It is alleged that, the initialled PPA was sent to the Commission, for approval and was so approved on 26.08.2015. The approval of the PPA was not communicated to the Petitioner and that, the Effective Date has to be the date of the approval of the PPA. We note that, the process of the approval of the PPA took sometime as the Commission had sought certain relevant documents from the BESCOM, in respect of the PPAs executed under the land owning Farmers' Scheme and after considering the documents produced on 20.08.2015, the approval was granted to the PPA on 26.08.2015. It is further noted that such time taken for the approval of the PPA has had no impact

on the commissioning of the Project, as the Petitioner has not indicated the steps or activities involved in the commissioning of the Project that got delayed or disrupted in the absence of the approved PPA. Hence, we are unable to accept that, there was delay in the approval affecting project implementation and also that the date of approval of the PPA has to be considered as the 'Effective Date', contrary to the definition in the PPA. The Petitioner could have initiated the preliminary works with the initialled PPA. The approved PPA would be required only at the final stages of certain activities like, loan disbursal, land conversion approval, etc.

- (d) The SPD applied for conversion of land on 04.01.2016, 6 months after signing the date of the PPA. No explanation is given for this delay on the part of the SPD. The land conversion Order was passed by the Deputy Commissioner, Tumakuru on 14.09.2016 as mentioned in Annexure P-8, the letter dated 02.12.2016. As the conversion Order is not produced, it is not known whether the SPD had furnished all the required documents on time to enable early issue of the Order. Further, the Petitioner has not indicated the steps or activities relating to the project implementation that got affected because of non-availability of land conversion Order.
- (e) The SPD applied for the evacuation approval to the KPTCL on 05.02.2016, after 8 months from the date of the PPA. No explanation is given for this delay. The regular evacuation approval is granted on 19.09.2016, as mentioned in Annexure P-8, letter dated 02.12.2016 (the evacuation

approval is not produced). We note that after receipt of the application seeking evacuation approval, field study has to be conducted by the concerned engineers of the KPTCL and after ascertaining the network feasibility, the tentative evacuation approval is given. After acceptance of the tentative evacuation approval and fulfilment of the conditions mentioned therein by the Project developer, the regular evacuation approval is given by the KPTCL. The dates of each step is necessary to conclude whether, if there is a delay on the part of the KPTCL or the Petitioner in the process, but the relevant dates have not been furnished by the Petitioner. Even otherwise, we note that the period taken (about 8 months from the date of application) is within the time of 365 days, specified in the PPA to achieve Conditions Precedent and it is not elaborated, as to how this process has delayed the project implementation.

- (f) We note that, it is settled law, the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under the clause, is stated to be issued by the Petitioner to the Respondent. It is clear that the SPD/Petitioner was not diligent in implementing the project within the stipulated time. Hence, we consider that the Petitioner is not entitled to extension of time, as provided in the clauses of the PPA.
- (g) We may note, here, that the Petitioner, while producing certain document in support of its claim that the project achieved COD on 28.06.2017 (as against the revised COD of 01.07.2017) has submitted that the COD does

not require the actual delivery of power, as per the terms of the PPA. Thereby, admittedly on 28.06.2017, the date on which the Petitioner's project is claimed to have been commissioned or immediately thereafter including 01.07.2017, there was no injection of power. While such a claim does not appear to be tenable, in view of the clear terms of the PPA, which entail injection or supply of power to the grid to treat the project as being commissioned, we are not going to examine the correctness or otherwise of such claim, as it is not material in the present case where the very grant of time extension resulting in revision of the COD needs to be decided first.

(h) In view of the above discussion, 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) The above clause of the PPA provides that, the tariff as on the date of commercial operation will be applicable for the Project. The Project is commissioned on 28.06.2017. It is the contention of the petitioner that the generic tariff orders dated 30.7.2015 or 12.4.2017 are not applicable to the Project, as the PPA was entered much before the passing of the said orders and hence, the tariff of Rs.8.40 per unit, should be paid for the term of the PPA. We note that the project was not commissioned, within the time stipulated in the PPA to be eligible for the tariff of Rs.8.40 per unit and the tariff as on the date of commissioning is Rs.4.36 per unit. The generic tariff order dated 12.4.2017, provides that the tariff of Rs.4.36 is applicable to Projects, for which the PPAs were entered into earlier but not commissioned within the stipulated period.

(c) The Hon'ble Supreme Court in Civil Appeal No. 1220 of 2015 (Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another) dated 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...."

- (d) 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) Further, 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 the 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."

- (f) 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 12.4.2017, as per Article 5.1 of the PPA.
- (g) We may note here that the Petitioner took the risk of implementation of the project after more than 15 months from the date of signing of the PPA, with barely three months left after its commissioning as agreed in the PPA and could not do it for certain reasons and events, which we have held to be not falling under the *Force Majeure* Clause in the PPA.
- (h) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. For not complying with the timelines for Conditions Precedent and commissioning of the Project, as mentioned in the PPA, the Petitioner is required to pay damages for such delay, as per the Articles 2.2 and 2.5.7 of the PPA.
- (j) 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 delay in achieving Conditions Precedent and commissioning the Project, the generating company is liable to pay damages stipulated in the PPA.
- (k) Therefore, we answer Issue No.(3), as above.

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

For the foregoing reasons, we pass the following:

ORDER

- (a) The Petition is dismissed and 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 liable to pay 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