

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. 197/2017

BETWEEN:

Heliocore Private Limited,
No.307, Hoysala Sai Shelters,
Rajagopalachari Road,
Sanjay Nagar,
Bengaluru – 560 094.

..

PETITIONER

[Represented by Navayana Law Offices,, Advocates]

AND:

- 1) Karnataka Renewable Energy Development Limited,
No.39, "SHANTHIGRUHA"
Bharath Scouts & Guides Building,
Palace Road,
Bengaluru – 560 001.
- 2) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
K.G. Road,
Bengaluru – 560 009.
- 3) The State of Karnataka,
By its Additional Chief Secretary,
Department of Energy,
2nd Floor, Vikasa Soudha,
Bengaluru – 560 001.

- 4) Chamundershwari Electricity Supply Corporation Limited,
No.29, Kaveri Grameena Bank Road,
Vijayanagar, 2nd Stage,
Mysuru – 570 019.

.. **RESPONDENTS**

*[Respondent-1 is represented by Shri Rakshith Jois Y.P., Advocate,
Respondents-2 and 4 are represented by Just Law, Advocates]*

ORDERS

- 1) In this Petition filed under Section 86 (1) (e) read with Section 86 (1) (f) of the Electricity Act, 2003, the Petitioner has prayed to:
- (a) Approve the six months' extension of time to commission the project, granted by the 4th Respondent – Chamundeshwari Electricity Supply Corporation Limited (CESC), vide its communication dated 23.02.2017;
- (b) Direct the 4th Respondent (CESC) to make payment for the delivered energy at the rate of Rs.8.40 per unit from the Commercial Operation Date (COD) of the Petitioner's Project for the entire term of the Power Purchase Agreement (PPA) dated 04.07.2015; and,
- (c) Pass such other orders as deemed appropriate on the facts and in the circumstances of the case.
- 2) The material facts, stated by the Petitioner in the Petition, in support of its prayers may be stated, as follows:
- (a) That, the 1st Respondent - Karnataka Renewable Energy Development Limited (KREDL), which is the Nodal Agency for facilitating the development of development of Renewable Energy in the State, issued a Letter of Award (LoA) dated 17.03.2015, in favour of Shri R.M. Rama (Solar

Project Developer/SPD), for establishing a solar power plant of 3 MW at Kyatagankere Village, Pavagada Taluk, Tumakuru District, and instructed him to execute a PPA with the 4th Respondent (CESC).

- (b) That, the Solar Power Developer (SPD) and the 4th Respondent (CESC) initialled a PPA on 04.07.2015 (ANNEXURE-P2), which was sent for approval and approved by this Commission, vide letter dated 26.08.2015.
- (c) That, the Scheduled Commissioning Date (SCD), as per the PPA, is 18 months from the date of execution of the PPA.
- (d) The tariff payable, under the PPA, as set out in Article 5, is Rs.8.40 per unit.
- (e) That, the 4th Respondent (CESC), executed a Supplemental Agreement dated 07.09.2016 with the Special Purpose Vehicle (SPV), viz., the Petitioner.
- (f) That, on 29.09.2016, the Deputy Commissioner, Tumkur District, issued an Official Memorandum, permitting to use the agricultural land for establishment of a Solar Power Project of the Petitioner.
- (g) That, the 2nd Respondent (KPTCL), granted the tentative Evacuation Scheme approval, by letter dated 27.10.2016, and regular Evacuation Scheme approval, vide letter dated 14.11.2016.

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- (h) That, the Petitioner diligently started execution of the Project and however, a number of difficulties were encountered, in implementing the Project. Hence, the Petitioner made representations dated 28.11.2016, 15.12.2016 and 01.01.2017, requesting the Respondents to consider extension of time upto 6 months from the Scheduled Commercial Operation Date (SCOD) for implementation of the Project. This request of the Petitioner was favourably considered and the extension of time of 6 months was granted by the 4th Respondent (CESC), by its letter dated 23.02.2017.
- (j) That, the Petitioner received the Safety Approval from the Chief Electrical Inspectorate to the Government of Karnataka on 03.07.2017.
- (k) That, the 2nd Respondent (KPTCL) issued a Commissioning Certificate dated 15.07.2017, certifying the commissioning of the Project on 03.07.2017, i.e., within the extended period.
- 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, as the Generic Tariff Orders dated 30.07.2015 and 12.04.2017, in respect of Solar Power Projects, are not applicable to the Petitioner's project. 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. The 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, these orders do not revise the tariff of the Petitioner's Project.

- (b) 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 4th Respondent (CESC) 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.
- (c) The Project of the Petitioner has experienced several hurdles, which can be termed as, the *Force Majeure* Events, within the meaning of Article 8 of the PPA and this was represented before the 4th Respondent (CESC) by the Petitioner. The pleas of the Petitioner have been considered and accepted.
- (d) In the Provisional Interconnection Approval, as well as, in the Final Interconnection Approval, granted to the Petitioner, the 2nd Respondent

(KPTCL) has mentioned that the evacuation of power shall commence only after the completion and commissioning of the following works:

- (i) Upstream strengthening i.e., 66 kV SC line to DC line, between 220 kV Kotagudda (Pavagada) and 66 kV Nagalamadike Sub-Stations;
- (ii) Commissioning of the proposed 220 / 66 kV Kotagudda Sub-Stations.

The delay in commissioning the Project by the Petitioner is squarely due to the inability of the 2nd Respondent (KPTCL) to offtake / evacuate the power from the Project.

- (e) The SCD was extended on the grounds of *Force Majeure* and the newly determined SCD and the Expiry Date shall be deemed to be the SCD and the Expiry Date, as per Article 2.5.6 of the PPA. This was done voluntarily and legitimately by the 4th Respondent (CESC). Hence, the 4th Respondent (CESC), is not entitled to any Liquidated Damages.
 - (f) The extension of time granted by the 4th Respondent (CESC) does not contemplate 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 to in PPA, at the rate of ₹8.40 per unit.
- 4) Upon Notice, the Respondents 1, 2 and 4 have appeared through their learned counsel and Respondent No.3, the State of Karnataka, has remained unrepresented.

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- 5) The 1st Respondent (KREDL) has filed its Statement of Objections, in which it has contended that, it is not a necessary party to this Petition and hence, it has requested that the Petition against it be dismissed.
- 6) The 2nd Respondent has not filed any Statement of Objections.
- 7) The 4th Respondent (CESC) has filed its Statement of Objections, the gist of which is, as follows:
- (a) The Petitioner was unable to execute the Project in a timely manner and requested for extension of time for commissioning the project by 6 months. As several requests for extension of the SCD were received from the Solar developers, the Government of Karnataka issued an Order dated 24.11.2016 directing all the Electricity Supply Companies (ESCOMs) to constitute a 3-Member Committee to consider and to dispose of, the request of farmers / developers.
- (b) In furtherance to the said direction, a Committee was constituted by the Respondent to consider the requests for extension sought for by 1 MW to 3 MW Solar Generators under the land-owning farmers' category. The said Committee had held a meeting on 15.02.2017, wherein the causes for the delayed achievement of the Scheduled Commercial Operation were considered in respect of 6 Generators, including the Petitioner, and decision was taken to accord extension of 6 months to achieve the SCD.

(c) The Petitioner, herein, furnished the documents to the Committee and 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 : 01.07.2016.
- (2) Date of conversion : 29.09.2016
- (3) Delay in getting approval: 2 months.

(ii) KPTCL EVACUATION APPROVAL (REGULAR)

- (1) Date of payment of fee: 20.05.2016.
- (2) Date of tentative approval :27.10.2016
- (3) Delay in getting approval: Nearly 5 months and 6 days.

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

(d) On 23.02.2017, the Respondent issued an Official Memorandum conveying the extension of 06 months for achieving the SCOD, i.e., upto 03.07.2017, with certain conditions.

(e) Thereafter, on 16.03.2017, this Commission addressed a letter to all the ESCOMs of the State, in the matter, pertaining to extension of time granted to the Solar Generators, and informed them not to allow any extension of time beyond the SCD, if any, as per the original PPA, without obtaining prior opinion of the Commission.

- (f) 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 for approval of the extension of time. In furtherance to the same, the Petitioner has filed this Petition.
- (g) The Additional Chief Secretary to Government, vide letter dated 25.04.2017, has requested the Commission, to consider the approvals accorded, in respect of the extensions of the COD by this Respondent for 6 months from the SCOD, as per Articles 2.5 and 8 of the PPA.
- (h) The Additional Chief Secretary to Government, vide letter dated 23.06.2017, requested the Commission to approve the extension of time to achieve SCOD.
- (j) That, the Project was commissioned on 03.07.2017.
- (k) That, in respect of the extension of the Project duration of the already awarded Solar Power Projects, the Ministry of New and Renewable Energy has issued a 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."

- (l) Therefore, the 4th Respondent has prayed that, this Commission may accord directions in the present Petition, in the interest of justice and equity.

- 8) 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 extension of time, granted by the Respondent-4, for commissioning of the Petitioner's 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 Project?
 - (3) What should be the tariff for the Project for the term of the PPA?
 - (4) What Order?

- 9) After considering the submissions of the parties and perusing the material placed on record, our findings on the above Issues are as follows:

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- 10) **ISSUE No.(1):** *Whether the extension of time, granted by the Respondent-4, for commissioning of the Petitioner's Project, can be subjected to legal scrutiny by the Commission?*
- (a) Clause 2.5 of the PPA provides for extensions of time. The Petitioner contends that since the Respondent has accepted the reasons for delay in commissioning the Project, as *Force Majeure* Events, and granted extension of time by 6 (six) months as provided in the PPA, such an extension should be accepted and approved by the Commission. The mutual agreement between the generator and the 4th Respondent (BESCOM) cannot be questioned. We are unable to accept the contention of the Petitioner. Any 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 electricity and 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, has in the case of *All India Power Engineers Federation Ltd. v. Sasan Power Ltd.*, reported in (2017) 1 SCC 487, 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 consumers' 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-4.
- (b) For the above reasons, Issue No.(1) is answered, in the affirmative.

- 11) **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 extract the various clauses of the PPA dated 04.07.2015, that are necessary for answering the issue raised

“2.1 Conditions Precedent:

The obligations of CESC 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 CESC and achieve financial closure and provide a certificate to CESC from the lead banker to this effect;

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

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

2.1.2 *SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and CESC 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 CESC 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 CESC 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 CESC or due to Force Majeure, the SPD shall pay to CESC 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, CESC 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 CESC as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, CESC 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 CESC 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 CESC Event of Default; or
- (b) Force Majeure Events affecting CESC; 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 CESC through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or CESC, or till such time such Event of Default is rectified by CESC.*

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 CESC.

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to CESC by the scheduled commissioning date, the SPD shall pay to CESC, 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 CESC 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 CESC 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, extension of time for commissioning the Project can be granted, if the SPD is prevented from performing its obligations due to the CESC'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 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, in any manner, was negligent in performing its obligations under the PPA.

(c) The PPA is signed on 04.07.2015. 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 submitted that, the initialled

PPA was sent to the Commission for approval of the Commission and was approved on 26.08.2015. It is contended that the approval of the PPA was not communicated to the Petitioner and hence, the effective date has to be the date of approval of the PPA. We note that the PPA was sent for approval by the 4th Respondent (CESC) on 04.07.2015, and pursuant to a letter dated 24.07.2015 of the Commission, the 4th Respondent (CESC) forwarded proof of ownership of land of the SPD on 07.08.2015 and considering the same, approval was granted to the PPA on 26.08.2015. While the process of approval of the PPA has taken sometime, we note that it has had no impact on the commissioning of the project as the Petitioner has not elaborated on the steps or activities involved in commissioning of the project that got delayed or disrupted in the absence of approved PPA. We also note that as per Clause 1.1 (xii), 'Effective Date' means the date of signing of the PPA. Hence, we are unable to accept that the Petitioner's claim that there was delay in approval of PPA affecting the project implementation and that therefore 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 wherever required. The approved PPA would be required only at the final stages of certain activities like loan release, land conversion approval, etc.

- (d) The SPD applied for conversion of land on 01.07.2016, almost 11 months from the date of the PPA. No explanation is given for this delay on the part of the SPD. The land conversion charges were paid by the SPD on 26.9.2016. The land conversion Order was passed by the Deputy

Commissioner, Tumakuru, on 29.9.2016, in less than three months from the date of application and within 3 days from the date of payment of charges. We find that the time taken for this process is reasonable and it cannot be termed as delay.

(e) The SPD applied for the evacuation approval to Respondent No.2 on 20.5.2016/20.7.2016, after about 10 months from the date of the PPA. No explanation is given for this delay. The tentative evacuation approval was granted on 27.10.2016 and regular evacuation approval on 14.11.2016. It is alleged by the Petitioner that the evacuation approval had mentioned that evacuation of power would commence only after completion and commissioning of the following works:

1. Upstream strengthening, i.e., 66 kV SC line to DC line between 220 kV Kotagudda (Pavagada) and 66 kV Nagalamadike Sub-Stations;

2. Commissioning of the proposed 220 / 66 kV Kotagudda Sub-Stations.

It is further alleged that the delay in commissioning the Project by the Petitioner is due to the inability of the 2nd Respondent (KPTCL) to offtake / evacuate the power from the Project and the same was beyond the control of the Petitioner. This allegation is vague. It is not stated how the above works have affected the implementation of the project. It is not the Petitioner's case that the project was ready before the completion of the above works, but evacuation of power could not take place due to non-completion of the above works. We note that as per the Commissioning Certificate dated 15.07.2017, the plant is connected to Nagalamadike KPTCL grid sub-station. The PPA also mentions the Nagalamadike sub-station as the nearest receiving station of KPTCL.

Hence, we can infer that the completion or otherwise of the above works has not affected the commissioning of the project, and that, the power is evacuated by connecting the project to Nagalamadike sub-station, as provided in the PPA.

(f) We note that, it is 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 be issued by the Petitioner to the Respondent. The 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 relevant clauses of the PPA.

(g) Therefore, we answer Issue No. (2), in the negative.

12) **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 3.7.2017. 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, so as 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 PPAs were entered into earlier but not commissioned within the stipulated period.
- (c) The Hon'ble Supreme Court of India, 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' judgement in the above case is applicable to the Petitioner's case as the PPA envisages a similar situation. 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.
- (e) We note here that the Petitioner took the risk of implementation of the project, 14 months after execution of the PPA, with barely four months left for its commissioning as agreed in the PPA and could not do it for certain reasons and events, which we hold to be not falling under the *Force Majeure* Clause of the PPA.
- (f) We have held that, the Petitioner is not entitled to extension of time to commission the Project. Thus, 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.
- (g) 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.

(h) Therefore, we answer Issue No. (3), as above.

13) **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