

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 18th September, 2018

Present:

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

OP No.73/2017

BETWEEN:

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

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

- 2) Sri Pandu R Dasar,
Kulagoda,
Belagavi District.

.. **PETITIONERS**

[Represented by Mariappa M S Associates, Advocates]

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

AND:

Gulbarga Electricity Supply Company Ltd.,
Station Main Road,
Kalaburagi- 585 101.

[Represented by M. Raghavendra Achar & Associates, Advocates]

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

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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, inspite 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?

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- 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 arguments, the learned counsel for the 2nd Petitioner has relied upon the different clauses of the Power Purchase Agreement (PPA) dated 03.07.2015, entered into between the Petitioner and the Respondent [Gulbarga Electricity Supply Company Limited (GESCOM)]. 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 1 MW Solar Power Project, on his land at Kulagod Village, Gokak Taluk, Belagavi District and for selling the power generated by the Project to the Respondent (GESCOM), 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 (GESCOM) have entered into a PPA dated 03.07.2015. The said PPA was approved by this Commission on 27.08.2015. 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 02.01.2017 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 GESCOM Event of Default; or*
- (b) Force Majeure Events affecting GESCOM; 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 GESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or GESCOM, or till such time such Event of Default is rectified by GESCOM.

- 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 02.01.2017, 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 02.01.2017, 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 (GESCOM) 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 (GESCOM), 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. The extension of time was granted on 17.03.2018

by the Respondent, subject to the conditions specified in Articles 2 and 5 of the PPA and also subject to the Commission's decision, in this petition, after having allowed the synchronisation of the Plant, pursuant to the Interim Order dated 18.05.2017 of the Commission.

- (e) This Commission, by letter dated 16.03.2017, directed all the Electricity Supply Companies (ESCOs), 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 ESCOs 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 ESCOs. Accordingly, the Respondent (GESCOM), 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 appeared through the counsel. The Respondent (GESCOM) filed Written Submissions.

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- 6) The submissions of Respondent (GESCOM), may be stated, as follows:
- (a) On the request of the 2nd Petitioner, he was allotted the Solar Power Project, under the Farmers' Scheme, with the condition that, he had to fulfil all the conditions mentioned in the letter of allotment dated 16.03.2015. One of the conditions was to obtain all statutory clearances within 60 days from 16.03.2015 and to complete the Project, within 18 months, from the date of PPA, failing which the allotment would be cancelled. The PPA was entered into between the parties on 03.07.2015 and as per the records furnished, the Petitioner has applied for land conversion, belatedly, on 15.12.2015. The Respondent is not a party in getting the statutory clearances.
- (b) The Plant was not commissioned within the stipulated time and the reason of the *Force Majeure* Events is not applicable in getting statutory clearances. The Petitioner has accepted the delay in obtaining statutory clearances and the delay is not attributable to the Respondent (GESCOM).
- (c) As per Clause 10.2 of the PPA, the Petitioner has not exhausted the remedy of mutual negotiations, before filing the Petition and hence, the Petition is not maintainable.
- (d) All the allegations made by the Petitioner are denied.
- (e) The Respondent has prayed for dismissal of the Petition.

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- 7) Both parties submitted that the pleadings may be considered and that they have nothing to argue. Therefore, the arguments of the parties were taken as 'concluded'. The written arguments were also filed on behalf of the Petitioners.
- 8) After considering the submissions of the Petitioners and the evidence on record, our findings on Issue No.(2) are, as follows:
- 9) **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 advanced 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 the consumers. The same reasoning and findings would apply to this case also.
- (b) Therefore, we answer Issue No.(2), in the affirmative.

- 10) We shall now discuss Issue Nos.(1), (3) and (4) below.
- 11) **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 GESCOM 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 GESCOM and achieve financial closure and provide a certificate to GESCOM from the lead banker to this effect;

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

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

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

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2.3.2 Appropriation of Performance Security

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

"2.5 Extensions of Time

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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 GESCOM by the scheduled commissioning date, the SPD shall pay to GESCOM, 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 GESCOM 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 GESCOM 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 GESCOM'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 issuing a written Notice are mentioned in Article 8.3 of the PPA. Under the said clause, it is also necessary to prove that, the *Force Majeure* 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 and has complied with the provisions of Article 8.3 of the PPA.
- (c) The PPA is signed by the parties on 03.07.2015. As per Article 2.1 of the said PPA, the Conditions Precedent 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 1st Petitioner claims that, the delay in handing over a copy of the PPA, after communication of the Commission's approval

on 29.08.2015, the delay in grant of approvals for conversion of the land and for evacuation of the power, have caused 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 their 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 the 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 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 conversion of the 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 03.07.2015 (as mentioned in the Memo dated 17.04.2018), the same were given during the period, from 03.07.2015 to 17.10.2015, with a delay of 3 months. The 1st Petitioner has produced the copies of some 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 03.07.2015, as mentioned in the Memo dated 16.04.2018 and some of the documents were issued, on the date of the application or within a few days of the application, as could be seen from the notings on the documents by the concerned authorities. Therefore, the allegation that, there was a delay by the authorities to provide the documents sought for by the 2nd Petitioner, cannot be accepted. Consequently, the explanation that, the delay caused by the authorities in providing the above documents, resulted in 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 20.06.2016. The land conversion Order was passed by the Deputy Commissioner, Belagavi, on 28.06.2016, within a few days after payment of the charges. Hence, we are unable to accept the contention of the Petitioners that, there was a delay in granting of the approval for the conversion of the land, which affected the Project implementation. In fact, there is a delay, on the part of the SPD, in applying for the conversion and we note that, the Petitioners have failed to produce

the correct information about the dates, before the Commission and, in fact, tried to mislead us, as stated above.

- (d) It is stated by the 1st Petitioner, in the Memo dated 29.08.2017, that the SPV was formed on 04.02.2016 and the SPPA was signed on 12.01.2017 and is pending before the Commission, for approval. It is also stated, in the Memo dated 29.08.2017, that the loan was sanctioned by the State Bank of India on 28.06.2016, however, in spite of the delay in disbursement of the loan and the land conversion Order, the 1st Petitioner started the procurement process in February, 2016 and commenced work relating to the implementation of the Project, from its own funds, in March, 2016. Therefore, it can be stated that, the Project was not delayed, due to the delay in disbursement of loan or the conversion Order, but due to belated formation of the SPV.
- (f) The 2nd Petitioner applied for the evacuation approval to the Karnataka Power Transmission Corporation Limited (KPTCL) on 21.11.2015, after about four months, from the date of the PPA. No explanation is given for this delay by the Petitioner. The processing fee was paid on 27.01.2016. The tentative evacuation approval was granted on 29.03.2016. The Petitioner accepted the conditions in the tentative evacuation approval on 13.04.2016 and requested for the regular evacuation approval. The regular evacuation approval was granted on 15.06.2016. The Petitioners have alleged that, the KPTCL caused a delay of about 7 months in

granting the evacuation approval. The KPTCL has not been arrayed as a Respondent. When a time line of 365 days is provided in the PPA for getting all approvals, the delay by the Petitioners, in applying for such approvals and thereafter, attributing the delay to the authorities, cannot be accepted.

- (g) It is also the allegation of the 1st Petitioner that, the breaker was provided by the MEI, after a delay of more than 6 months from the date of placing the order. It is stated that, the Purchase Order for the breaker was placed on 05.11.2016 and the breaker was delivered on 23.02.2017. It is stated that, the usual period of delivery is 10 to 12 weeks, from the date of Purchase Order. It is 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 Petitioner, in placing the Purchase Order and the later various steps involved, the period from 05.11.2016 to 23.02.2017, cannot be termed as 'delay'.
- (h) It is also alleged that, the inspection of the Project by the CEIG and the grant of the safety approval, was delayed, from 21.11.2016 to 30.03.2017. The CEIG is not made a party to the Petition. We do not find any delay in grant of approval, considering the sequence of dates mentioned by the 1st Petitioner in the Exhibit-34 and note that there is no explanation for the belated submission of the drawings by the Petitioner.

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- (j) The Project was granted synchronisation approval on 20.06.2017 and commissioned on 01.07.2017, after the grant of the safety approval.
- (k) 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 Petitioner to the Respondent (GESCOM). None of the reasons or events, cited by the Petitioners, for the delay in commissioning of its Project, falls under *Force Majeure* Events, mentioned in the PPA, as held in the preceding paragraphs. Hence, we consider that, the Petitioners are not entitled to extension of time, as provided in the clauses of the PPA. Consequently, the 1st Petitioner would be liable for payment of the Liquidated Damages, as per Article 2.5.7 of the PPA.
- (l) We have held that, the Petitioners are 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 the 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.

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- (m) 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.
- (n) Therefore, we answer Issue No.(1), in the negative.
- 12) **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 the generic tariff for supply of electricity, generated from the 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, 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 the 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 Petitioners 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 Petitioners to seek extension of the commissioning date, agreed to, in the PPA.

(c) It is stated in the Written submissions, filed by the 1st Petitioner on 17.04.2018, that the SPV was formed on 04.02.2016. It is also mentioned in the Petition in Paragraph-11 that, after signing the Deed of Assignment, the 1st Petitioner started the Project development work 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. We note that, the Purchase Order for construction of the 11 kV transmission line was made on 04.02.2016, the Agreement for purchase of Solar modules was entered into on 09.09.2016, the Purchase Order for supply of MMS was made on 30.09.2016, the Purchase Order for inverter was made on 08.10.2016, the Purchase Order for transformer was made on 08.10.2016, the Purchase Order for breaker was made on 05.11.2016 and for the cables on 10.11.2016. The panels would have been procured much later. Therefore, it can be stated that, the normative Capital Cost of the Solar Power Plants, 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 Petitioners are 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 Petitioner 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). The Project is commissioned on 01.07.2017.
- (e) 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.
- (j) Accordingly, 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 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;
- (c) The Petitioners are also liable to pay damages, as provided under Articles 2.2 and 2.5.7 of the PPA; and
- (d) Office is directed to process the SPPA dated 12.01.2017, for approval of the Commission.

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

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

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