

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**

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

**Dated : 21<sup>st</sup> June, 2018**

**Present:**

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

**OP No.196/2017**

**BETWEEN:**

Sourashakthi Energy Pvt. Ltd.,  
Ranganathapuram,  
Kamakshipalya,  
Bengaluru- 560 079.

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**PETITIONER**

*[Represented by Navayana Law Offices, Advocates]*

**AND:**

Chamundeshwari Electricity Supply Corporation Ltd.,  
No. 29, Kaveri Grameena Bank Road,  
Vijayanagar 2<sup>nd</sup> Stage,  
Mysuru- 570 019.

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**RESPONDENT**

*[Represented by Justlaw, Advocates]*

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**ORDERS**

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003, in effect, praying to:

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- a) Approve the extension of time granted by the Respondent and the new Scheduled Commissioning Date (i.e., 01.07.2017);
  - b) Direct the Respondent to make payment at the tariff of Rs.8.40 per unit for the Petitioner's Solar Power Project for the term of the PPA; and
  - c) Grant such other reliefs to meet the ends of justice and equity.
- 2) The facts of the case and submissions made in support of the above prayers by the Petitioner may be summed up as follows:
- (a) Pursuant to the Solar Policy of the Government of Karnataka dated 22.05.2014 and the Government Order dated 26.08.2014, the Karnataka Renewable Energy Development Limited, the Nodal Agency of the Government of Karnataka, for implementation of Solar Power Projects in the State, issued a letter dated 16.03.2015 in favour of a land owning farmer, Sri R Anantha Kumar [the Solar Project Developer (SPD)] and allotted 2 MW capacity Solar Power Project to be commissioned at Dodda Somanahalli Village, K R Pet Taluk, Mandya District under 1-3 MW Farmers' Scheme, subject to certain terms and conditions.
  - (b) Based on this allocation letter, the SPD executed a Power Purchase Agreement (PPA) dated 02.07.2015 with the Respondent. As per the said PPA, the 'Effective Date' is defined as the date of signing of the PPA. The Scheduled Commissioning Date (SCOD) is defined as 18 months from the

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Effective Date. The project had to be commissioned on or before 01.01.2017.

- (c) On 01.12.2015, the Government of Karnataka notified the list of documents to be obtained by the Deputy Commissioner from the Project proponents for grant of deemed conversion of land for installation of Solar Project, bringing clarity in the matter. The SPD applied for conversion of land in January, 2016 (copy of the application not produced) and was intimated on 18.07.2016 to pay the charges. On payment of charges, the land conversion order was passed in September, 2016 (copy of the Order not produced).
- (d) On 28.01.2016, the SPD submitted an application to the KPTCL for approval of evacuation of power, which granted the tentative evacuation approval on 01.07.2016 and the final evacuation approval on 04.08.2016. On 17.09.2016, the KPTCL informed the SPD of the approval granted for evacuation works on self-execution basis on payment of supervision charges.
- (e) On 23.06.2016, an SPPA was entered into between the Respondent and the SPV- the Petitioner, which was approved by the Commission on 29.08.2016.

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- (f) The SPD faced problems in executing the project as the SPPA was not approved by the Commission and because of the delay in grant of evacuation approval and land conversion order. The SPD applied on 26.10.2016 to the Respondent for extension of time to commission the Project. On 02.11.2016, the Petitioner placed purchase orders for MEI 11 kV 350 MVA out door single feeder panels. The project work was slowed down from November, 2016 due to demonetisation decision of the Government of India. The Respondent, considering the difficulties faced by the Petitioner, granted extension of time upto 01.07.2017. The delay in supply of MEI breakers further caused delay in implementation of the project. The project was commissioned on 29.06.2017.
- (g) The Petitioner pleads that, as the Petitioner has commissioned the project within the extended period, there is no delay in commissioning the project; the PPA provides for extension of the SCOD and the same cannot be interfered with as the period of extension is reasonable; and the Respondent, after considering that the delay in implementing the project was due to reasons beyond the control of the Petitioner, has granted the same.
- (h) It is the further pleading of the Petitioner that the Petitioner is entitled to Rs.8.40 per unit, as the generic tariff Orders dated 30.07.2015 and 12.04.2017 do not apply to its case in view of the fact that the PPA was entered into

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much earlier to the dates mentioned in the said orders and the extension of time granted by the Respondent does not mention about altering the tariff, but on the other hand states that 'all other terms and conditions of the PPA remain unaltered'.

- 3) On issuance of Notice, the Respondent entered appearance through its Counsel and filed the Statement of Objections.
  
- 4) The submissions of Respondent may be stated as follows:
  - (a) As per the terms of the PPA, the generator was required to commission the plant within 18 months, from the date of execution of the PPA.
  
  - (b) As the Petitioner was unable to execute the project within the stipulated time, the Petitioner sought extension of time by 6 months to commission the project, under *Force Majeure* conditions.
  
  - (c) As several requests for extension of scheduled commissioning date were received from solar developers, the Government of Karnataka issued an Order dated 24.11.2016 directing all the ESCOMs to constitute a 3-Member Committee to consider and dispose of the requests of farmers/developers. Accordingly, a Committee was constituted by the Respondent which in its meeting held on 15.02.2017, considered the requests of 6 generators,

including the Petitioner. The Petitioner had cited the following reasons for the delayed execution of the project.

**Land Conversion:**

Date of Submission of application: NA

Date of Conversion: 27.08.2016

**KPTCL Evacuation Approval:**

Date of Submission of application: 22.02.2016

Date of Approval: 01.07.2016

Delay in getting approval: 4 months 8 days

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

- (d) The Respondent in its letter dated 23.02.2017, informed the Petitioner about the extension of six (6) months' time for achieving the SCOD of the project, with certain conditions.
- (e) The Commission, in its letter dated 16.03.2017, informed all the ESCOMs of the State, not to allow any extension of time to solar generators beyond the scheduled commissioning date, as per the PPA without obtaining prior opinion of the Commission. Further, vide letter dated 05.04.2017, the ESCOMs were directed by the 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.

- (f) The Energy Department vide its letter dated 25.04.2017 to the Commission has communicated that it has found acceptable the 6 (six) months' extension of the SCOD as per Clause 2.5 and Article 8 of PPA.
- (g) In respect of extensions of the project duration of already awarded solar power projects, the Ministry of New and Renewable Energy, in letter dated 28.07.2017, addressed to the Principal Secretaries (Power/Energy) of the State Governments has stated as below:

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

- (h) The Respondent has therefore, prayed for issue of appropriate directions in the matter.

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- 5) We have heard the Counsel for the parties and perused the records. The following issues arise for our consideration:
- (1) Whether the extension of time, granted by the Respondent 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 Plant?
  - (3) What should be the tariff for the Project for the term of the PPA?
  - (4) What Order?
- 6) After considering the submissions made by the counsel for the parties and the pleadings and other material placed on record, our finding on the above issues are as follows:
- 7) **ISSUE No.(1):** *Whether the extension of time, granted by the Respondent 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, as the Respondent has accepted the reasons for delay in commissioning the project, as *Force Majeure* events, and granted



extension of time by six (6) months as provided in the PPA, such extension which is a quasi-judicial act by the Respondent should be accepted and approved by the Commission. That the mutual agreement between the generator and the 4<sup>th</sup> Respondent ESCOM cannot be questioned. We are unable to accept the contention of the Petitioner. Respondent has granted extension purportedly under the terms of the PPA and such an act cannot be treated as a quasi-judicial act, which cannot be interfered with. 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 the 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, 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 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.

- (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 Plant?*

(a) It would be useful to extract the relevant clauses of the PPA, before we deal with this issue:

### **2.1 Conditions Precedent:**

*The obligations of 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."

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- (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 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.
- (c) The PPA is signed by the parties on 02.07.2015. 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 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.
- (d) The SPD applied for conversion of land in January 2016, after a lapse of about seven months from the effective date of the PPA (the date of the application is not mentioned in the petition or the objections). No explanation is given for this delay on the part of the SPD. The conversion charges were intimated to be paid on 18.07.2016. It is not stated as to when these charges were paid. It is however, stated by the Petitioner that the land conversion order was passed in September, 2016 and, it is not known, whether this was because of

delay in payment of conversion charges. In the Respondent's Statement of Objections, it is mentioned that the date of conversion is 27.08.2016. Owing to lack of clarity in the pleadings, it cannot be made out who was responsible for the extra time taken in granting the conversion order. The Petitioner has also not elaborated on the implementation steps of the project, which were affected by the time taken in grant of approval of land conversion. Hence, we are unable to accept the contention of the Petitioner that, there was a delay in granting of the approval for conversion of land which affected the project implementation. In fact, there is a delay on the part of the SPD in applying for the conversion.

- (e) The SPD applied for the evacuation approval to the KPTCL on 28.01.2016, after about seven months from the date of the PPA. No explanation is given for this delay. The Petitioner has alleged that the KPTCL caused delay in granting the evacuation approval. The KPTCL is not arrayed as a Respondent. The tentative evacuation approval is stated to have been granted on 01.07.2016, in about 5 months' time, and thereafter, in about one month's time, the final evacuation approval was granted. This time taken cannot be stated to be unreasonable. The allegation that there is a delay of eight (8) months in granting evacuation approval is not substantiated. The implementation steps which were affected because of non-availability of final evacuation approval are not elaborated. Hence, we are unable to



accept the plea that this has affected commissioning of the project within the stipulated time.

- (f) The other allegation of the Petitioner is that the SPPA was not approved by the Commission and this caused delay in execution of the project. It is found from the records that the Respondent had sent the SPPA dated 23.06.2016 for approval of the Commission without the supporting documents regarding the formation of SPV and therefore correspondences had to be made, with the Respondent. After receipt of the necessary documents, the approval of SPPA was intimated on 29.08.2016. The Petitioner has not elaborated as to how the time taken by the Commission in the regulatory process of approval of SPPA has affected the implementation of the project.
- (g) The other allegation of the Petitioner is that the delay in execution of work was caused by the demonetisation decision of the Central Government. This allegation is not substantiated and cannot in any way be treated as a *Force Majeure* Event. The Petitioner has also alleged that the delay in supply of MEI breakers caused further delay in implementing the project. However, this allegation is also not substantiated, other than the submission that the State Government had intervened on 19.06.2017, to ensure priority supply of the breakers.
- (h) We note that, it is a settled law that the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under the clause, is stated to be issued by the Petitioner to the Respondent. None of the reasons

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or events cited by the Petitioner for 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 Petitioner is not entitled to extension of time, as provided in the relevant clauses of the PPA.

- (j) We note here that, the Petitioner has claimed that the 'COD does not require the actual delivery of power as per the terms of the PPA'. Admittedly, there was no injection of power into the grid on 29.06.2017 or perhaps even on 01.07.2017, the last day of the extended commissioning period. We have clarified earlier on several occasions that the 'Commercial Operation' would mean, when the generator injects power into the grid for consumption by the purchasing party. Thus, such claim is not tenable, but not material in the present case, as the correctness or otherwise of the grant of extended time for commissioning of the Petitioner's project needs to be decided first.
- (k) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. Admittedly the SPD/Petitioner has not achieved the Conditions Precedent within the specified time as required under Article 2.1 of the PPA. The actual dates on which they were achieved have not been furnished or elaborated by the Petitioner. For the same reason as applicable to rejection of the Petitioner's claim for extension of time for achieving the SCOD, any claim of the Petitioner for extension of time for achieving the Conditions Precedent is liable to be rejected. Thus, we hold that for not

complying with the timelines as mentioned in the PPA for the Conditions Precedent and commissioning of the Project, the Petitioner is required to pay damages for such delay, as per Articles 2.2 and 2.5.7 of the PPA.

(l) The Hon'ble Supreme Court of India, in Civil Appeal No. 3600 of 2018 (*M.P. Power Management Company Ltd. Vs Renew Clean Energy Pvt. Ltd., and another*) dated 05.04.2018, has held that for the delay in achieving Conditions Precedent and commissioning of the Project, the generating company is liable to pay damages stipulated in the PPA.

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

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

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

**“5.1 Tariff Payable:**

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

*i. Rs.8.40/- per kWh*

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

(b) Article 5.1 of the PPA extracted earlier, provides for reduction of tariff as a consequence of delay in commissioning of the Solar Power Project beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein. This is in view of the fact that this Commission periodically determines generic tariff for supply of electricity generated from various sources, to the Distribution Licensees, based on among other parameters mainly Capital cost of the generating plant. Such generic tariff is made available for a period normally longer than a year called as 'Control Period' during which the generating plants get implemented and commissioned at the normative capital cost adopted in the generic tariff order, generally after execution of a PPA with Distribution Licensee. Such PPA also has a clause stipulating the time within which the power supply should commence so that the Distribution licensee can plan further supply to its consumers. The time ordinarily required to complete various pre-commissioning activities, which in respect of megawatt scale solar power plants is taken as between 12 months to 18 months. Any delay or failure in commencement of power supply within the agreed date would disrupt the operation of the Distribution Licensees like the Respondent which could also result in their power procurement from alternative expensive sources leading to higher retail tariff to the consumers or short supply leading to revenue loss to them and even to imposition of penalties for not meeting the Renewable Purchase Obligation fixed by this Commission. The capital cost of solar power plants has been coming down very rapidly in the recent

years because of advancement in technology and production efficiency as well as economies of scale in the backdrop largescale solar capacity addition across the globe. Thus, generic tariff for megawatt scale solar power plants which was fixed at Rs.14.50 per unit in the Commission's Order dated 13.07.2010, has been successively reduced to Rs.8.40 per unit in the Commission's Order dated 10.10.2013, to Rs.6.51 in the Order dated 30.07.2015, then to Rs.4.36 per unit in the Order dated 12.04.2017 and now to Rs.3.05 per unit in the Order dated 18.05.2018.

- (c) We note that the Petitioner SPV took the risk of implementation of the project after a year from the date of execution of the PPA, with barely six months left for 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, that could have entitled the Petitioner to seek extension of the commissioning date agreed in the PPA. It is safe to infer that the normative capital cost of solar plants when the Petitioner took effective steps to procure capital equipment for its Project was lower than the normative cost of solar plants assumed in the generic tariff Orders dated 10.10.2013 and 30.07.2015. Thus, the Petitioner is not entitled to the tariff originally agreed in the PPA at Rs.8.40 per unit, when admittedly the plant was not commissioned within the stipulated time and it is entitled only for the revised tariff as on the date of commissioning of the plant as per clause 5.1 of the PPA. Admittedly, in the present case, the generic tariff for solar power plants that was agreed in the PPA, was revised much before the

plant was ready for commissioning. In any case, the Petitioner having voluntarily entered into a PPA which has a clause providing for revision of the tariff agreed if there is a delay in commissioning of the project within the scheduled period, cannot now wriggle out of such a clause without valid grounds.

- (d) The PPA provides that, the tariff as on the date of commercial operation will be applicable for the Project. The Project is commissioned on 29.06.2017. The Petitioner has not furnished any material particulars of the cost incurred in implementing the Project and the period when investments were actually made except for producing a copy of the sale invoice of MEI dated 08.07.2017 for Rs.7,29,913.00 which reveals payment of Rs.1,79,564/- made on 03.11.2016. As noted earlier, as per the terms and conditions of the PPA, the tariff payable to the SPD/Petitioner is not based on the capital cost incurred by the SPD/Petitioner in project implementation, but the tariff as per the relevant clauses of the PPA. The Hon'ble Supreme Court of India, in Civil Appeal No. 1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*) 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 1<sup>st</sup> 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 31<sup>st</sup> 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 1<sup>st</sup> tariff order. It is also visualised that for the subsequent control period, the tariffs payable to a PROJECTS/ power producers (similarly situated as the first respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1<sup>st</sup> respondent would be entitled only for lower of the two tariffs...."*

- (e) Hence, on the facts and in the circumstances of the case, we hold that the Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit, for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017, as applicable on the date of commercial operation of the project. We note that, during the proceedings, the Petitioner had alleged that no payment was made by the respondent for the energy injected from the date of commissioning of the project. Considering the submissions, an interim tariff of Rs.4.36 per unit was allowed.
- (f) Accordingly, 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, fixed by the Commission in the Order dated 12.4.2017, for the term of the PPA, as per Article 5.1 of the PPA; and,
- (c) The Petitioner is also liable to pay damages, including Liquidated Damages, as provided under Articles 2.2 and 2.5.7 of the PPA.

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

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

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