

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 21st August, 2018

Present:

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

O P No. 158/2017

BETWEEN:

MNR Solar Energy Pvt. Ltd.,
No.655/8, 2nd Floor, F, 1st C Main Road,
40th Cross, 8th Block, Jayanagar,
Bengaluru - 560 082.

.. **PETITIONER**

[Represented by Kumar & Bhat, Advocates]

AND:

- 1) Bangalore Electricity Supply Company Limited,
Corporate Office, K.R. Circle,
Bengaluru – 560 001.
- 2) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan, Kempegowda Road,
Bengaluru – 560 009.
- 3) Karnataka Renewable Energy Development Limited,
Bharath Scouts and Guides Limited, Palace Road,
Bengaluru – 560 001.
- 4) The Deputy Commissioner,
Chitradurga District,
Chitradurga.

.. **RESPONDENTS**

*[Respondents 1 & 2- represented by Shri Shahbaaz Husain, Advocate,
Respondent-3 - represented by Shri Rakshith Jois, Y.P., Advocate.
Respondent-4 - unrepresented]*

ORDERS

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003 praying to:
- (i) direct the BESCO to comply with the original terms of the Power Purchase Agreement (PPA) and provide the confirmation for time extension with original tariff, under Article 8 i.e., *Force Majeure*;
 - (ii) direct the 1st Respondent to accept the original tariff, agreed in the PPA, i.e., Rs.8.40 per kWh and remit the same to the Petitioner;
 - (iii) declare that the Petitioner is entitled to the *Force Majeure* condition, as per Article 8 and consequently, is eligible to seek extension of time, as per Article 2 of the PPA with original tariff;
 - (iv) restrain the 1st Respondent from deducting any Liquidated Damages from the Petitioner, as *Force Majeure* Events have caused the delay;
 - (v) declare that the Petitioner is entitled to extension of time with original tariff, as per Article 2 of the PPA, without imposing or changing any conditions in the PPA; and,
 - (vi) grant such other reliefs as the Commission deems fit in the interest of justice and equity.
- 2) The facts of the case, as mentioned by the Petitioner and the grounds urged in support of its prayers, may be summed up, as follows:

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- (a) The Petitioner is a company registered under the Companies Act, 2013, carrying on the business of developing, executing, managing and running solar energy plant. The Government of Karnataka (GoK) issued the Karnataka Solar Policy 2014-21 vide Notification dated 22.05.2014. Under the said Policy, GoK envisaged Utility Scale Grid Connected Solar Photo Voltaic and concentrated solar power projects and endeavored to promote solar energy projects preferably by land owning farmers with a minimum capacity of 1 MW and maximum capacity 3 MW per land owning farmer in the State for sale of power to the Electricity Supply Companies (ESCOMs) at the KERC determined tariff from time to time.
- (b) The GoK issued guidelines vide Notification No. EN VSC 2014, Bangalore, dated 26.08.2014 to invite applications from the eligible land owners for awarding 1-3 MW capacity Solar Photo Voltaic Power MW Scale plants and to enter into PPAs with the concerned ESCOMs.
- (c) Accordingly, Sri Manjunath K.T., a land owning farmer had made an application for grant of solar power project with capacity of 2 MW to be established in his land at Sy.No.190/1, J.G. Halli, Hiriyur Taluk. KREDL issued letter of award in his favour, vide allotment letter dated 16.03.2015. Thereafter, the 1st Respondent executed a Power Purchase Agreement (PPA) dated 3.7.2015 with him (Solar Projects Developer/SPD) for purchase of power from the 2 MW solar power plant.

- (d) As the SPD had no capacity to invest and establish the solar power plant, he found an investor and formed the Petitioner SPV namely, MNR Solar Energy Private Limited, with the SPD as a 26% shareholder as permitted under clause 12.11 of the PPA. A supplemental PPA dated 02.09.2016 was also entered into between the 1st Respondent and the Petitioner SPV, for development of solar power plant with the consent of the SPD.
- (e) Immediately after entering into PPA, the Petitioner started project development work on the site like land levelling, fencing, obtaining necessary approvals and sanctions such as conversion of land, evacuation line, funds, from the authorities concerned and loan sanction from banks for the establishment of the power project. As per Article 2 of the PPA, the project had to be completed on or before the scheduled commissioning date, i.e., within eighteen (18) months from the effective date. Even though the PPA was signed on 3.7.2015, the same had to be approved by the Commission. After approval of the Commission, the PPA was handed over to the Petitioner on 28.08.2015.

Here itself we may note that many of the actions stated to have been initiated/taken by the Petitioner are, in fact, of the SPD.

- (f) The Petitioner lost about two months' time to receive the approved PPA, which is to be treated as a *Force Majeure* event under Article 8.3. The BESCOM had not initially understood the formalities of forming an SPV and the modalities of the Supplemental Agreement. The Commission had

clarified the same during December, 2015 and even after that the 1st Respondent could not understand the clarification given by the Commission and the Commission issued new formats for AOA, MOA and Supplemental PPA on 21.03.2016. In between the above said two clarifications, nine (9) months had elapsed from the date of the PPA. As there was no clarity with regard to assignment of the PPA, the Petitioner could not get any investor to provide funds for the Project.

- (g) The GoK issued a Circular, dated 01.12.2015, fixing the time for grant of deemed conversion for 15 days. As per the Circular, the Petitioner had submitted all the requisite documents, like PPA, KREDL's letter, RTC, PTCL NOC and other relevant documents on 16.12.2015, before the Deputy Commissioner, for conversion of the land. The Deputy Commissioner passed the Order on 19.12.2016, for conversion of the land, after a delay of about 12 months. The Petitioner had also applied for evacuation approval before the KPTCL on 28.03.2016 and the same was granted on 17.09.2016, after a delay of five months and twenty-one days. Subsequent to the power evacuation approval, the 2nd Respondent granted the Work Order to carryout the Sub-station work on 15.03.2017, resulting in a delay of 11 months and 15 days. Subsequent to the evacuation approval, the Petitioner could obtain the Work Order to construct the 11 kV line, only on 26.11.2016.
- (h) The Petitioner made a request, on 30.08.2016, for providing the MEI breaker and the same was received on 15.12.2016, after 3½ months.

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- (j) Some portion of the 11 kV line from the Petitioner's Plant to the Sub-station, had to cross the NH-48, for which the 1st Respondent had to get approval from the National Highways Authority of India (NHAI) and this approval took about five months' time. The Petitioner got approval through the 1st Respondent on 19.04.2017. The 1st Respondent ought to have processed for permission from the NHAI, while estimating the 11 kV approval. Therefore, the permission to lay the 11 kV line was given after 12 months and 23 days from the date of application for power evacuation, for which the Petitioner is not responsible and the said delay was caused due to the fault of the 1st and 2nd Respondents.
- (k) The request for extension of time to commission the Plant was made to the 1st Respondent on 08.12.2016, but the same was received by the Petitioner on 03.02.2017, after a delay of two months. As the above-said approvals are valid for 18 months from the date of the signing of the PPA, the Petitioner could not carryout the Sub-station work, as the extension of time was not granted immediately, despite a direction by the GoK, in the Circular dated 24.11.2016, that the 1st Respondent had to extend the time under the PPA within 15 days. Hence, there was a delay of two months in granting the extension of time. Further, there was a delay of three months due to demonetization, which has to be treated as a *Force Majeure* Event.
- (l) Due to the inordinate delay in the issuance of various permissions and sanctions, including conversion Order, the time fixed under the PPA had

expired and the Petitioner had sought for extension of time, to commission the Project. The reasons for the delay in CoD fall under the *Force Majeure* Events, as defined under Article 8, read with Article 2 of the PPA and, therefore, the application for extension of time, with original tariff, has to be considered by the Commission.

- (m) The Petitioner has invested Rs.13 crores and has committed to revenue sharing with the farmer, assuming the original tariff. If any change is effected to the original tariff, the same would amount to violation of the PPA, cause heavy losses to the Petitioner and affect the livelihood of the farmer.
 - (n) After execution of the PPA, between the Petitioner and the Respondent, the conditions set-forth therein would only apply and there would be no scope for any third party to intervene, guide or alter the agreement and no substantive regulations can vary the clauses on conditions, timelines, tariff, etc., in the said PPA.
- 3) Upon issuance of Notice, the 1st, 2nd and 3rd Respondents appeared through their learned counsel and filed their Statements of Objections. The 4th Respondent remained unrepresented.
- 4) The gist of the objections of the 1st Respondent may be stated, as follows:
- (a) As the Petitioner was unable to execute the Project, in a timely manner, he sought for extension of time, for commissioning the Project, by six

months under the *Force Majeure* conditions. As several requests for extension of the Scheduled Commissioning Date were received from the Solar developers, the GoK issued an Order dated 24.11.2016, directing all the Electricity Supply Companies (ESCOMs) to constitute a three-member Committee to consider and to dispose of the requests of the farmers/ developers. A Committee was constituted by the 1st Respondent to consider the requests for the extension of time, sought for by 1 to 3 MW Solar generators, under the land owning farmers' category. The said Committee held a meeting on 23.01.2017, wherein the causes for the delayed achievement of scheduled commercial operation were considered in respect of eleven generators, including the Petitioner, and a decision was taken to accord extension of six months' time to achieve the SCOD.

- (b) The Petitioner furnished the documents to the Committee, constituted for the purpose for consideration of request for extension of time. As per the same, the following information was gathered, pertaining to the various reasons assigned for the delayed execution of the Project.

KPTCL evacuation approval (Regular):

Date of submission of application	23.03.2016
Date of approval	17.09.2016
Delay in getting approval	Nearly six months

MEI Switch gear:

Date of purchase order	22.08.2016
Date of receipt at the site	14.12.2016
Delay in getting approval	Nearly four months

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- (c) The Committee, after detailed discussions and scrutiny of all the documents, opined that, approval may be accorded for extension of the SCOD by six months, considering Article 2.5 of the PPA, as there is a delay in the issuance of approvals by the various Government entities.
- (d) On 03.02.2017, the 1st Respondent addressed a letter to the Petitioner, informing about the extension of time by six months for the SCOD. The subject was placed before the 81st Meeting of the Board of Directors of the 1st Respondent, held on 09.02.2017 for evaluation/disposal of the requests of the land owning farmers/SPVs, for extension of time for CoD, in respect of 1 to 3 MWs Solar Power Plants in Karnataka, under the farmers' category. The Board has taken on record, the facts of the extension of time issued by the 1st Respondent.
- (e) On 16.03.2017, the Commission addressed a letter to all the ESCOMs 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 scheduled commissioning, if any, as per the original 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 land owning 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.
- (f) The Additional Chief Secretary to Government, Energy Department, vide the letter dated 25.04.2017 addressed to the Commission, has sought for

its approval to the extension of CoD, given by the 1st Respondent (BESCOM) for six months from the date of SCOD, as per Articles 2.5 and 8 of the PPA.

- (h) The Project was commissioned on 25.06.2017.
- (k) In respect of the extension of Project duration of the already awarded Solar Power Projects, the Ministry of New and Renewable Energy has issued letter No. 30/106/2014-15/NSM dated 28.07.2017, addressed to the Principal Secretaries (Power/Energy) of the State Governments, as stated below:

“Ministry has 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 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) The 1st Respondent has, therefore, prayed that, the Commission may be pleased to accord directions in the present Petition, in the interest of justice.

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- 5) The gist of the Statement of Objections of the 2nd Respondent may be stated as follows:
- (a) The Petitioner's allegation that there is delay of 5 months and 21 days on the part of the 2nd Respondent, in approving power evacuation, is denied as false. The delay in granting the power evacuation approval was solely due to the delay of three months by the Petitioner in paying the processing charges of Rs.57,250/-, despite two reminders. The chain of events with regard to the approval of power evacuation is, as hereunder:
- (i) Application was received on 30.03.2016;
- (ii) On receipt of application, letter was addressed to the Petitioner on 06.04.2016, to pay the processing charges of Rs.57,250/-, along with the BESCO feasibility, land conversion copy from the concerned Deputy Commissioner, original RTC and detailed information of IPP developer;
- (iii) On 29.04.2016, Reminder-1 to pay processing charges of Rs.57,250/- was issued;
- (iv) On 17.05.2016, Reminder-2 to pay the processing charge of Rs.57,250/- was issued;
- (v) The Petitioner submitted the receipt of payment of processing fees on 01.07.2016;
- (vi) The tentative evacuation approval was issued to the Petitioner on 04.07.2016;

- (vii) On 21.07.2016, the Petitioner submitted the acceptance letter, agreeing with the terms and conditions of the tentative evacuation approval, and requested for allotment of one terminal bay for evacuation of power from its Power Plant;
- (viii) On 09.08.2016, the field report was received from the field officers, regarding the availability of spare space to accommodate a 11 kV terminal bay;
- (ix) On 16.08.2016, the field report was submitted to the CEE, P&C for administrative approval;
- (x) In the 76th TB Committee Meeting, held on 7.9.2016, the matter was discussed and approval was accorded for utilization of the space available in the Sub-station, for construction of a Terminal Bay;
- (xi) On 17.09.2016, a copy of the Official Memorandum from the Deputy Commissioner, Chitradurga District on land conversion was received;
- (xii) On 17.09.2016, the regular evacuation approval was issued to the Petitioner.

From the above chain of events, it is clear that, the 2nd Respondent has not delayed the process of according evacuation approval to the Petitioner.

- (b) The contention of the Petitioner that, there is a delay of 11½ months by the 2nd Respondent in granting the Work Order on 28.03.2017, to carryout the Sub-station work, is strongly denied as false. The Work Order can be sanctioned only subsequent to the approval of power evacuation and

the evacuation approval was granted on 17.09.2016. The Work Order to carry out the Sub-station work was granted on 15.03.2017, whereas the Petitioner has averred that there is delay of 11½ months, which is absolutely false, as the Work Order was granted in about six months' time. The chain of events leading to sanction of the Work Order by the 2nd Respondent is, as follows :

- (i) The estimate, for the subject work, was received on 08.12.2016;
 - (ii) The intimation for payment of necessary charges towards land lease, O&M and supervision, was issued on 04.01.2017;
 - (iii) The Petitioner paid the charges, and the payment letter was received on 06.01.2017;
 - (iv) The technical sanction was issued on 25.01.2017;
 - (v) The Work Agreement and Super Grid License were submitted to the Petitioner on 01.02.2017;
 - (vi) The work approval was issued on 15.03.2017.
- (c) Thus, the 2nd Respondent has not delayed in sanctioning of the Work Order or in approving the power evacuation. The delay was caused, due to delay by the Petitioner to submit the estimate for the work.
- 6) The 3rd Respondent, in its Statement of Objections, has stated that, it is for the 1st Respondent to counter the contentions urged by the Petitioner and

that, it is not a necessary party to this Petition. The 3rd Respondent has, therefore, prayed that, the Petition against it be dismissed.

7) We have heard the learned Counsel for the parties and perused the records. The following issues would arise for our consideration:

(1) Whether the extension of time of six months, granted by the 1st Respondent (BESCOM) to the Petitioner, for achieving the commercial operation of the Petitioner's Plant, 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, under the *Force Majeure* Events, as per the PPA?

(3) What should be the tariff for the Project, for the term of the PPA?

(4) What Order?

8) After considering the submissions made by the learned counsel for the parties and perusing the pleadings and other material placed on record, our findings on the above issues are, as follows:

9) **ISSUE No.(1):** *Whether the extension of time of six months, granted by the 1st Respondent (BESCOM) to the Petitioner, for achieving the commercial operation of the Petitioner's Plant, can be subjected to legal scrutiny by the Commission?*

(a) Article 2.5 of the PPA does not specifically stipulate that, any extension of time, granted by the 1st Respondent (BESCOM), should be got approved by the Commission. However, Article 2.5.1 of the PPA stipulates the

grounds, on which alone the time could be extended, for achieving the commercial operation. Article 5.1 of the PPA provides for reduction of tariff, as a consequence of delay in the commissioning of the Project beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated, therein. Whenever an event affects the quantum of tariff, applicable for supply of energy to the Distribution Licensees, we are of the considered opinion that the same should be scrutinized and approved by the Commission. It is a settled law that, this Commission has the exclusive jurisdiction to determine the tariff, for supply of electricity by a Generating Company to a Distribution Licensee and it has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which the electricity shall be procured from different agencies through PPAs. Therefore, we hold that, even in the absence of a specific term in the PPA, an event affecting or altering the tariff, already approved in the PPA, should be got approved by this Commission.

- (b) The Petitioner has contended that, as the 1st Respondent has accepted the Petitioner's claim of the *Force Majeure* Events and granted the extension of time, the Commission has to pass an Order in favour of the Petitioner, treating the averments and pleadings of the Petitioner as admitted by the Respondent. Reliance is placed by the Petitioner on the judgments of the Hon'ble Delhi High Court in the case, reported in AIR 2005 DELHI 319, and the Hon'ble Supreme Court, in the case reported in AIR 2005 Supreme Court 2765, to support such contention. We are unable to

accept the contention of the Petitioner. Any extension of time to commission a Power Project has a bearing on the tariff payable. The tariff determination / fixation of price for electricity, is not an adversarial proceeding. 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, in the case of *All India Power Engineers Federation Ltd., Vs. Sasan Power Ltd.*, reported in (2017) 1 SCC 487, has held that, even if parties to a contract (generating company - seller of energy and the distribution licensee - buyer of energy) waive a certain term affecting the tariff, the Commission, as a custodian of the consumers' interest, has to intervene and exercise its regulatory power. Accordingly, we hold that, the Commission has the mandate and powers to scrutinize the correctness and legality of the extension of time, granted by the 1st Respondent.

(c) Therefore, we answer Issue No.(1), in the affirmative.

10) **ISSUE No. (2):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant, under the Force Majeure Events, as per the PPA?*

(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 BESCO and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.

2.1.1 (i) The SPD shall obtain all permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the Project (hereinafter referred to as “Approvals”):

(ii) The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:

(a) The DPR to BESCO and achieve financial closure and provide a certificate to BESCO from the lead banker to this effect;

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

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

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

2.5.3 In case of extension occurring due to reasons specified in clause 2.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6(six) months.

2.5.6 As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined date shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement."

2.5.7 Liquidated damages for delay in commencement of supply of power to BESCOs. Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to BESCO by the scheduled commissioning date, the SPD shall pay to BESCO, liquidated damages for the delay in such commencement of supply of power as follows:

(a) For the delay up to one month- amount equivalent to 20 % of the performance security.

(b) For the delay of more than one month up to three months - amount equivalent to 40 % of the performance security.

(c) For the delay of more than three 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 BESCO 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 BESCO of any Law or any of their respective obligations under this Agreement);
- (vi) Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;
- (vii) Fire, Earthquakes, explosions, accidents, landslides;
- (viii) Expropriation and/or compulsory acquisition of the Project in whole or in part;
- (ix) Chemical or radioactive contamination or ionizing radiation; or
- (x) Damage to or breakdown of transmission facilities of either Party;

(b) The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:

- (i) The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;
- (ii) The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.

(iii) *The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;*

(iv) *The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;*

(v) *In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."*

(b) We note that, under the Clause 2.5 of the PPA, extension of time for commissioning the Project can be granted, if the SPD is prevented from performing its obligations, due to the BESCO's 'Event of Default' or '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 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 by the parties on 03.07.2015. As per Article 2.1 of the 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. The Petitioner claims that, the delay in handing over a copy of

the PPA, after approval, on 28.08.2015 by the Commission, has caused the delay in implementing the Project. The recitals in the PPA would reveal that, the parties have signed the PPA and copies of the same were delivered on the date 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 Petitioner has not produced any documents to show that, any of its applications for approval, loans etc. was rejected or delayed, on this count. Therefore, we are unable to accept that the time taken for approval of the PPA is a *Force Majeure* Event, causing delay in the commissioning of the Project. The provisions of the PPA do not provide for exclusion of the time taken for approval of the PPA in counting the period available for commissioning the Project. Hence, the time taken in the regulatory process, for 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) It is the case of the Petitioner that, the SPD applied for conversion of land on 16.12.2015. The Petitioner has stated that, ANNEXURE-J, dated 16.12.2015, is the application for conversion of land. This letter is addressed to the Tahsildar of Hiriyur, seeking a declaration that, the land is not included under SCPTCL. This is not an application made to the Deputy Commissioner, for conversion of land. The Order of the Deputy

Commissioner, Chitradurga reveals that, the application was made before the Deputy Commissioner, for conversion of land, on 29.11.2016, after a lapse of about 1 year 5 months, from the Effective Date of the PPA. The copy of such application is not produced by the Petitioner. No explanation is given for this delay on the part of the SPD in applying for the land conversion. The land conversion charges were paid by the SPD on 15.12.2016. The land conversion Order was passed by the Deputy Commissioner, on 19.12.2016, in about 20 days from the date of application, which is found to be very reasonable. In fact, the Petitioner has tried to mislead the Commission by furnishing the incorrect dates and facts.

- (e) The SPD has applied for the evacuation approval to 2nd Respondent on 28.03.2016, after about nine months from the date of the PPA. No explanation is given for this delay in making the application. The Petitioner has alleged that, the 2nd Respondent has caused delay of 5 months 21 days in granting the evacuation approval. The 2nd Respondent, in its Statement of Objections, while denying the Petitioner's allegation as false has furnished the dates and events, leading to the grant of evacuation approval. After the intimation dated 06.04.2016, by the 2nd Respondent, to pay the charges and after issuance of two reminders, the Petitioner, on 01.07.2016, has submitted the proof of charges paid. This delay of about 3 months is not attributable to the 2nd Respondent, but entirely to the Petitioner. Immediately on payment of charges, the tentative evacuation approval was granted, on 04.07.2016. On 21.07.2016, the Petitioner

requested for allotment of a terminal bay. After getting the reports from the concerned officers, the regular evacuation approval was granted on 17.09.2016. Therefore, within a period of three months from the date of payment of charges, the evacuation approval was granted by the 2nd Respondent and this reasonable period cannot be termed as 'delay'.

- (f) It is the further allegation of the Petitioner that, there was delay of 11 months 15 days by the 2nd Respondent, in grant of the Work Order to carry out the Station Work. This allegation is denied by the 2nd Respondent, and we find that, considerable time was taken by the Petitioner in submitting the work estimate, which was done only on 08.12.2016. The time taken by the 2nd Respondent from 08.12.2016 to 15.03.2017, for granting the Work Order is only three months, which appears to be reasonable. When a time line of 365 days is provided in the PPA, for getting all approvals, the inordinate delay by the SPD/Petitioner in applying for such approvals and thereafter, attributing the delay to the authorities, cannot be accepted. The 1st Respondent, while granting extension of time to commission the Project, ought to have taken note of these aspects.
- (g) The other allegation is that, a delay of three months, in execution of the Project work, was caused by the demonetisation decision of the Central Government. This allegation is not substantiated and, in any case, cannot be treated as a *Force Majeure* event.

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- (h) The other allegation of the Petitioner is that, the 1st Respondent had to get the approval of the NHAI, for the construction of 11 kV line and this took 5 months. We note that, it is the obligation of the Petitioner to obtain all the approvals under the clauses of the PPA and the allotment letter dated 16.03.2015 issued by the 3rd Respondent. Even if it were to be the obligation of the 1st Respondent, the application for approval and the approval by the NHAI are not produced with the pleadings and it is not demonstrated, as to what caused the delay or who was responsible for the same. Therefore, this event cannot be considered as falling under the *Force Majeure* clause of the PPA.
- (j) It is also the allegation of the Petitioner that, the breaker was supplied by MEI, after a period of three months, from the date of the Order. We note that, the breakers have to be tailor-made, based on the drawing submitted, tested and certified by the TAQC and thereafter dispatched. Considering the various steps involved, the period of about three months in the supply of breakers, cannot be termed 'delay'. It is also not explained, as to why there was a delay on the part of the Petitioner in taking timely action necessary for placing the Purchase Order for the breaker.
- (k) It is also the case of the Petitioner that, the communication on extension of time for SCOD was sent on 03.02.2017, after two months from the date of request, on 08.12.2016, and the Petitioner could not carry out Sub-station work, as the approval had lapsed, by then. We have noted

earlier, the inordinately long time taken by the Petitioner in making the applications for grant of various approvals. Had timely action been taken, these chain of events could have been completed within the stipulated time and the Plant could have been commissioned, within the SCOD.

- (l) 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 1st Respondent. None of the reasons 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 hold that, the Petitioner is not entitled to extension of time, as provided in the clauses of the PPA. Consequently, the Petitioner would be liable for payment of the Liquidated Damages, as per Article 2.5.7 of the PPA.
- (m) We have held that, the Petitioner is not entitled to the extension of time beyond the SCOD 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 SCOD, any claim of the Petitioner 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 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.

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

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

11) **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, provides for reduction of tariff, as a consequence of delay in commissioning of the Solar Power Project, beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein. This is in view of the fact that, this Commission periodically determines generic tariff, for supply of electricity generated from various sources, to the Distribution Licensees, based on, among other parameters, mainly the capital cost of the Generating Plant. Such generic tariff is made available for a period, normally longer than a year, called as 'Control Period', during which, the Generating Plants get implemented and commissioned, at the normative Capital Cost, adopted in the Generic Tariff Order, generally after execution of a PPA with the 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 the commencement of power supply within the agreed date, would disrupt the operation of the Distribution Licensees, like the 1st 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 the 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, 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 Commission's Order dated 10.10.2013, Rs.6.51 per unit in the Order dated 30.07.2015, Rs.4.36 per unit in the Commission's Order dated 12.04.2017 and Rs.3.05 per unit in the Order dated 18.5.2018.

- (c) We note that, the Petitioner SPV took the risk of implementation of the Project, after more than a year, after the execution of the PPA, with barely four months left for its commissioning, as agreed to 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 to in the PPA. It is safe to infer that, the normative Capital Cost of the Solar Power Plants, when the Petitioner took effective steps to procure capital equipment for its Project, was lower than the normative cost of the Solar Power 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, 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 the 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 to, 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 on the date of commercial operation, will be applicable for the Project. The Project is commissioned on 25.06.2017. 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 a mere statement that, Rs.13 Crores is spent on the Project. The Petitioner has stated that, the owner of the Project had no capacity to invest and establish the Plant and hence, found the investor - SPV (the Petitioner). We may safely infer it that, the major part of the investments has been made, after the formation of the SPV and execution of the SPPA on 02.09.2016. In any case, 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 the Project implementation, but the tariff as per the relevant clauses of the PPA. The Hon'ble Supreme Court, in Civil Appeal No.1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided on 02.02.2016, has held, as follows:

"31. Apart from that both the Respondent No.2 and the appellate tribunal failed to notice and the 1st respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA:

'In case, commissioning of solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by

*Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, **whichever is lower.**'*

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first respondent not being able to commence the generation of electricity within the "control period" stipulated in the 1st tariff order. It is also visualised that for the subsequent control period, the tariffs payable to a PROJECTS/ power producer (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...."

- (e) The ratio of the Hon'ble Supreme Court judgment, in the above case, is applicable to the Petitioner's case also, as the PPA envisages a similar situation.
- (f) Hence, in the circumstances and on the facts of the case, we hold that, the Petitioner's Plant, commissioned on 25.06.2017, 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 per Article 5.1 of the PPA.
- (g) Accordingly, we answer Issue No.(3), as above.

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

For the foregoing reasons, we pass the following:

ORDER

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