

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**

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

**Dated : 22<sup>th</sup> November, 2018**

**Present:**

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

**OP No.115/2017**

**BETWEEN:**

Shri Kallappa Laxmappa Nyamagoudar,  
Malali Village,  
Mudhol Taluk,  
Bagalkot District.

.. **PETITIONER**

*[Represented by Crestlaw Partners, Advocates]*

**AND:**

Hubli Electricity Supply Company Limited,  
Navanagar,  
P.B. Road,  
Hubballi- 580 025.

.. **RESPONDENT**

*[Represented by Indus Law, Advocates]*

-----

**ORDERS**

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003, seeking approval of the extension of time granted by the Respondent, vide letter dated 04.02.2017, for the commercial operation of the Solar Power Project.

- 2) The facts of the case, as mentioned by the Petitioner, may be summarized, as follows:
- (a) The State Government, with an intention to increase generation of Solar power and to encourage the State's farmers, issued a Notification dated 26.08.2014, in terms of its Solar Policy for the period 2014-21.
  - (b) Pursuant to bids called by the Karnataka Renewable Energy Development Limited (KREDL), for allotment of Solar Power Plants under the Land Owning Farmers' Category, the Petitioner, a land owning farmer was selected. His application for allotment of a Solar Power Project for 1 MW was accepted by the KREDL and a letter of award dated 16.03.2015 to set up the Solar Power Project, was issued to him, subject to certain terms and conditions.
  - (c) Based on this allotment, the Petitioner [Solar Project Developer (SPD)] executed a PPA dated 27.06.2015 with the Respondent (HESCOM).
  - (d) As per the PPA, the Effective Date was defined as 'the date of signing of the PPA'. The Scheduled Commissioning Date (SCOD) was defined as 'eighteen (18) months from 27.06.2015 (the Effective Date)'. Thus, the Project proponent was required to commission the Project by 27.12.2016.

- 
- (e) The Petitioner's application for land grant before the concerned authority was made on 31.08.2015. The land grant order was passed on 23.12.2015/07.01.2016. The Petitioner applied for correction of extent of land in RTC on 16.11.2015 and the same was carried out by an order dated 31.12.2015. Thereafter, the Petitioner applied for conversion of land on 16.02.2016, before the Deputy Commissioner, Belagavi. The land conversion order was passed on 16.7.2016, after 5 months.
- (f) For grant of evacuation approval, necessary application was made to the Respondent on 12.05.2016. No action was taken by the Respondent, on the request for evacuation approval.
- (g) The Petitioner was offered credit facilities, to the tune of Rs.634 lakhs from the Bank of India, Mudhol Branch. The Petitioner placed order for the Solar PV modules and received the same on 15.08.2016.
- (h) The Petitioner requested the Respondent, vide letter dated 22.08.2016, to spare the land in Malali Sub-station, for construction of a 11 kV terminal bay. On 22.11.2016, the Respondent issued a statement, indicating the calculation of certain charges for sparing the land and the same was paid on 04.02.2017. The Respondent provided the estimates for 11 kV separate switch-gear terminal bay at the sub-station on 30.11.2016, under self-execution Scheme. The Respondent issued an Official Memorandum

dated 08.02.2017, according the administrative approval, for the estimate of evacuation of power from Petitioner's plant.

- (j) On 10.11.2016, the Petitioner made a request to the Respondent, to permit the use of bay, breaker and switchgear available at the Sub-station, anticipating delay in the supply of the breaker by MEI Ltd. The Respondent did not respond to the request.
- (k) On 1.12.2016, the Petitioner requested the Respondent to extend the time for commissioning the plant and extension of time of 6 months was granted on 4.2.2017. Only on 27.12.2016, (the original SCOD) the Petitioner was called upon to pay the charges towards evacuation of power from the plant and the same was paid. After completion of all the works and inspections, the Plant was ready for commissioning on 07.01.2017 and the Petitioner addressed a letter dated 07.01.2017 to the CEIG, for inspection of the installation. After grant of extension of time to commission the Plant, the Petitioner requested the CEIG to approve the installation, for commissioning the plant. On 13.02.2017, the safety approval was granted and the plant was commissioned on 15.02.2017, within 1½ months from the original SCOD.
- (l) The Petitioner received a letter dated 13.04.2017 from the Respondent, requesting the Petitioner to file a Petition before the Commission, seeking approval of extension of time for achieving the Commercial Operation Date (COD). Hence, this Petition is filed.

- 
- 3) The grounds urged by the Petitioner, in support of its prayers, may be summarized, as follows:
- (a) The delay in execution of the project was due to reasons beyond the control of the Petitioner and covered under Articles 2.5.1 and 8.3 (a) (vi) of the PPA. There was a delay of 6 months by the authorities in granting approval for conversion of land and also delay by MEI in supply of equipment and further demonetisation also delayed commissioning of the Project.
- (b) The Respondent has granted the extension of time, considering all the relevant aspects and accepting the *Force Majeure* Events. Accordingly, the Petitioner has commissioned the Project within the mutually agreed COD.
- 4) Upon issuance of Notice, the Respondent appeared through its counsel. However, despite granting sufficient time, the Respondent did not file any Objections. During arguments, the learned counsel for the Respondent submitted that, they have no written objections to file and prayed that the Commission may be pleased to accord appropriate directions in the Petition, in the interest of justice.
- 5) We have heard the learned counsel for the parties and perused the material placed on record. The following issues would arise, for our consideration:

- 
- (1) Whether the extension of time of six months, granted by the Respondent to the Petitioner, for achieving the commercial operation of the Solar Power 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?
  - (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 learned counsel for the parties and the pleadings and other material placed on record, our findings on the above issues are as follows:
- 7) **ISSUE No.(1):** *Whether the extension of time of six months, granted by the Respondent to the Petitioner, for achieving the commercial operation of the Solar Power 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 Respondent (HESCOM) 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) 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 proceedings. 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 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 off a certain term affecting the tariff, the Commission, as a custodian of the consumers' interest, has to intervene and exercise its regulatory powers. 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 Respondent (HESCOM), even if the Respondent has no Objections to the grounds urged by the Petitioner in support of the extension granted by the Respondent.

(c) Therefore, we answer Issue No. (1), 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 HESCOM 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 HESCOM and achieve financial closure and provide a certificate to HESCOM from the lead banker to this effect;*

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



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

**2.1.2** SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and HESCOM 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 HESCOM 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 HESCOM 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 HESCOM or due to Force Majeure, the SPD shall pay to HESCOM 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, HESCOM 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 HESCOM as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, HESCOM 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

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

**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 HESCOMs.**

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to HESCOM by the scheduled commissioning date, the SPD shall pay to HESCOM, 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 HESCOM 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 HESCOM 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 Respondent's (HESCOM) 'Event of Default' or 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* 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 27.06.2015. 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, i.e., within 27.12.2016. The achievement of the Conditions Precedent, would include obtaining of all the approvals by the SPD.
- (d) The SPD applied for conversion of the land on 16.02.2016 , after a lapse of 8 months from the Effective Date of the PPA. The explanation given for this delay is that, the Petitioner had earlier, on 31.08.2015 sought land grant Order from the Tahsildar and the same was granted on 23.12.2015 / 7.1.2016; and the Petitioner applied for correction of extent of land on 16.11.2015 and the same was carried out on 31.12.2015. We note that the Government Order dated 26.8.2014 and the Allotment Letter issued by the KREDL, allotting the Project to the SPDs, had certain conditions, which included that the farmer had to produce all documents relating to the ownership of the land and RTC within 60 days to the ESCOM, failing which the allotment would be cancelled. We are also aware that the time of 60 days, to provide the land documents, was extended by the Government of Karnataka on 11.05.2015, by a further period of 60 days. Therefore, it was the responsibility of the SPD to procure the required documents within the time of 120 days. After the allotment of the Project on 16.03.2015, the Petitioner ought to have taken necessary action to procure the documents relating to the re-grant of land or correction of the extent of land from the concerned authorities. The

Petitioner had made the applications for the above purpose after more than 2 months and 5 months, respectively, after executing the PPA. This lapse on the part of the Petitioner cannot be held to be attributable to the Respondent and in any manner cannot be a force majeure event. After applying for the conversion of land and payment of the land conversion charges by the SPD, the land conversion Order was passed by the Deputy Commissioner, Bagalkot on 16.07.2016, within 5 months from the date of application and within a month from the date of payment of charges. This period is reasonable and cannot be termed as 'delay'. In fact, there is a delay on the part of the SPD, in applying for the land conversion approval, for which the explanation given cannot be accepted, as it only shows the lack of diligence on the part of the Petitioner in the Project implementation.

- (e) The SPD applied for the evacuation approval on 12.05.2016, after about 11 months, from the date of the PPA. No explanation is given for this delay. The tentative evacuation approval was granted on 11.08.2016. On 22.08.2016, the Petitioner made a request to spare the land in the Sub-station for the 11 kV terminal bay. The Petitioner has alleged that, the Respondent did not act upon the said request, immediately and caused delay. The charges for sparing the land were paid on 04.02.2017 and the estimate for evacuation approval was given on 08.02.2017. Admittedly, the charges for land, etc., though made known to the Petitioner in advance, were not paid promptly. We find that, there has been an inordinate, unexplained delay, on the part of the Petitioner, in applying for the evacuation approval. In fact, it was the

obligation of the Petitioner to purchase the land for the bay. However, the Respondent has considered the request of the Petitioner and spared the land in the Sub-station, thereby assisting in the speedy execution of the Project. Therefore, we find that, the Respondent has extended full co-operation to the Petitioner, in implementing the Project and acted within reasonable time, on receiving the request of the Petitioner, to spare the land.

- (f) We note that, the Petitioner's allegations that there was delay in supply of equipment by MEI and that demonetisation also affected Project implementation, are not substantiated. In any case, they cannot be considered as *Force Majeure* Events ,as per the terms of the PPA.
- (g) We note that, when a timeline of 365 days is provided in the PPA, for getting all the approvals, the inordinate delay by the SPD / Petitioner, in applying for such approvals and, thereafter, attributing the delay to the authorities, cannot accepted. The Respondent (HESCOM), while granting the extension of time, ought to have taken note of these aspects.
- (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 (HESCOM). We consider that the Petitioner was not diligent in implementing the Project, within the stipulated time.

- 
- (j) None of the reasons or events cited by the Petitioner, for the delay in commissioning of its Project, falls under the *Force Majeure* Events, mentioned in the PPA, as held in the preceding paragraphs. Hence, we consider the Petitioner is not entitled to extension of time, as provided in the clauses of the PPA. Consequently, the Petitioner would also be liable for payment of Liquidated Damages, as per Article 2.5.7 of the PPA.
- (i) 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 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 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.
- (k) The Hon'ble Supreme Court of India, in Civil Appeal No3600 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 any delay in achieving



Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages, stipulated in the PPA.

(l) 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) Article 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 the 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 the 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 and thereafter commission the Project, which in respect of megawatt scale Solar Power Plants is taken as, between 12 months and 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 (HESCOM), 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 the advancement in the technology and production efficiency, as well as economies of scale, in the backdrop of 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 Order dated 10.10.2013, Rs.6.51 per unit as per Order dated 30.07.2015,

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.

- (c) We note that, the Petitioner was not diligent in taking the initial steps for implementation of the Project and took effective steps like seeking evacuation approval, credit facility etc., almost after a year from the date of the execution of the PPA with barely six 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 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 Petitioner is not entitled to the tariff, originally agreed to 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 Article 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. Further, admittedly major part of the capital cost was incurred only after sanction of loan in June, 2016. 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, on the date of commercial operation, will be applicable for the Project. The Project is commissioned on 15.02.2017. 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 of India, in Civil Appeal No.1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided 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....”*

The ratio of the Hon'ble Supreme Court's judgment, in the above case, is applicable to the Petitioner's case, as the PPA envisages a similar situation.

(e) 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.6.51 per unit, for the term of the PPA, as per the Generic Tariff Order dated 30.07.2015.

(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) 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.6.51 (Rupees six and Paise Fifty-One) 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 30.07.2015, for the term of the PPA, as per Article 5.1 of the PPA; and,

(c) The Petitioner is also liable to pay 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