

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 25th September, 2018

Present:

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

O P No. 150/2017

BETWEEN:

Rajpet Energy LLP,
961, Upstairs, 8th Cross,
Swarna Nagar,
Kolar District – 563 122.

..

PETITIONER

[Represented by Navayana Law Offices, Advocates]

AND:

- 1) The Managing Director,
Bangalore Electricity Supply Company Limited,
Corporate Office,
K.R. Circle,
Bengaluru – 560 001.
- 2) The Managing Director,
Karnataka Renewable Energy Development Limited,
No. 39, 'Shanthigruha', Bharat Scouts & Guides Building,
Palace Road,
Bengaluru – 560 001.
- 3) The Government of Karnataka,
Department of Energy, represented by
The Additional Chief Secretary to Government,
Vikasa Soudha,
Bengaluru -560001.

- 4) The Managing Director,
Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
Kempegowda Road,
Bengaluru – 560 009.

.. **RESPONDENTS**

*[Respondents 1 and 4 represented by Shri Shahbaaz Husain, Advocate,
Respondent 2 represented by Sri G.S. Kannur, Advocate,
Respondent 3 unrepresented]*

ORDERS

- 1) The Petitioner has filed this Petition under Section 86 of the Electricity Act, 2003. The Petitioner has prayed to:
- a) declare that the Petitioner is entitled to the tariff of Rs.8.40 per unit as per the Power Purchase Agreement (PPA), approved by the Commission on 26.08.2015;
 - b) direct the 1st Respondent (BESCOM) to pay the difference amounts between Rs.8.40 per unit, and Rs.6.51 per unit; and,
 - c) pass such other and incidental orders as may be deemed appropriate on the facts and in the circumstances of the case, on merits.
- 2) The facts of the case, as mentioned by the Petitioner, may be summed up, as follows:
- (a) The Karnataka Renewable Energy Development (KREDL), the 2nd Respondent had invited the applications from the land owners across the State of Karnataka, for establishment of 1 - 3 MW Solar Power Projects, as

per the Solar Policy. Smt. R.H. Kasturi [Solar Power Developer (SPD)] was allotted a Project of 1 MW in Bangarpet Taluk, Kolar District, and the 2nd Respondent issued a letter dated 16.03.2015 allotting the Project, subject to certain terms and conditions.

- (b) A PPA between the 1st Respondent (BESCOM) and the SPD was executed on 02.07.2015, which was approved by the Commission, vide its letter dated 26.08.2015.
- (c) The SPD made an application dated 09.10.2015, before the Deputy Commissioner, Kolar district, seeking conversion of the agricultural land for non-agricultural purposes. The Deputy Commissioner, Kolar, passed an Order dated 20.06.2016, permitting the land for non-agricultural usage.
- (d) The SPD submitted an application, before the 4th Respondent (KPTCL), for grant of evacuation approval for the Project on 20.01.2016. Thereafter, the SPD paid the processing fee and requested for approval of the 11 kV bay booking, vide letter dated 13.05.2016.
- (e) The SPD, on 01.07.2016, informed the 1st Respondent (BESCOM) that the Petitioner-Company was formed, as a Special Purpose Vehicle (SPV), for executing the Project.

-
- (f) The SPD, on 23.07.2016, applied to the 4th Respondent (KPTCL), for a comprehensive evacuation power approval, along with the consent obtained from the Raygen Power Private Limited, a similarly situated Power Project, for use of its transmission lines for common evacuation of power.
- (g) On 20.08.2016, the SPD submitted a copy of the loan sanction letter, demonstrating the substantial progress made in the Project execution.
- (h) On 07.09.2016, the 4th Respondent (KPTCL) issued a feasibility letter with regard to the evacuation scheme.
- (j) The Petitioner and the 1st Respondent (BESCOM) executed a Supplemental PPA dated 24.09.2016, incorporating the formation of SPV in the same.
- (k) On 25.10.2016, tentative evacuation scheme was approved by the 4th Respondent (KPTCL), subject to certain terms and conditions.
- (l) On 08.11.2016, the Commission accorded approval to the Supplemental PPA dated 24.09.2016.
- (m) The Petitioner, by the letter dated 28.10.2016, requested for the regularization of the tentative evacuation scheme and on 23.11.2016, the 4th Respondent (KPTCL) accorded the regular evacuation approval, in a comprehensive manner, subject to certain terms and conditions.

-
- (n) The Petitioner, in the letter 20.12.2016, addressed to the 1st Respondent (BESCOM), gave the details of the Project allotment and submitted a detailed chronology of events, as regards the Project progress, commencing from its allotment, and made a request for payment of the tariff at Rs.8.40 per unit, as per the terms of the PPA, by granting extension of the Scheduled Commercial Operation Date (SCOD), for a further period of three months i.e., up to 01.04.2017.
- (p) The Petitioner, in the letter dated 09.01.2017 addressed to the 1st Respondent (BESCOM), submitted the relevant records, for considering its request for extension of the SCOD for a further period of three months, in view of the *Force Majeure* Events.
- (q) The Chief Electrical Inspector to the Government (CEIG), by the letter dated 16.02.2017, accorded the safety approval to the Project, subject to certain terms and conditions.
- (r) On 23.02.2017, the Petitioner submitted another letter, requesting for extension of six months, in view of the ongoing labour problems and stoppage of disbursement of loan that lead to the delay in testing and commissioning.
- (s) The 1st Respondent (BESCOM), by the letter dated 02.03.2017, granted the extension of time up to six months from the SCOD, keeping all other terms of

the PPA, unaltered. The Petitioner, by the letter dated 04.03.2017, informed the 4th Respondent (KPTCL) of the completion of the Project and sought for the inter-connection approval, for enabling commissioning. The 4th Respondent (KPTCL), granted the provisional inter-connection approval on 25.03.2017. The Plant was commissioned on 25.03.2017.

- (t) The 1st Respondent (BESCOM), on 31.3.2017, informed the SPD that the extension of time for the SCOD, by six months, is subject to the condition that the tariff applicable and the Liquidated Damages to be paid, if any, are subject to the Commission's / Government's approval.
 - (u) Subsequent to the commissioning, the Petitioner had raised the invoices, as per the tariff in the PPA viz., Rs.8.40 per unit. However, the 1st Respondent (BESCOM), has paid at Rs.6.51 per unit. Further, the 1st Respondent(BESCOM), in the letter dated 01.08.2017 addressed to the SPD, stated that it has been informed by the Commission not to send any Supplemental PPAs (SPPAs) for approval, unless and until a Petition is filed by the SPDs / SPVs, urging relevant grounds for justifying the claim, for extension of time, under the *Force Majeure* conditions of the PPA.
- 3) The grounds urged by the Petitioner, in support of its prayers, may be summarized, as follows:

(a) As per Article 5.1 of the PPA, the Petitioner is entitled to receive a tariff of Rs.8.40 per unit, based on the Commission's Order dated 10.10.2013. However, subject to Article 2.5, if there is a delay in commissioning the Project, beyond the SCOD, and during such period, there is a variation in the KERC tariff, then the applicable tariff of the project shall be lower of the following:

Rs.8.40 per unit;

Varied tariff as on the CoD.

(b) As per Article 2.5.1 of the PPA, in the event of the Petitioner being prevented from performing its obligations, under Article 4.1 by the SCOD, due to the *Force Majeure* Events, affecting the Petitioner, then the Petitioner is entitled to the extension of the SCOD, by six months. The PPA has been finally executed on 26.08.2015, the date on which the Commission granted its approval. The 18 months' timeline from 26.08.2015 ends on 25.02.2017. However, the 1st Respondent (BESCOM), vide letter dated 31.03.2017, has extended the SCOD, by six months from the original SCOD, i.e., up to August, 2017. As the Petitioner has commissioned the Project on 25.03.2017 itself, the Petitioner is entitled to the tariff of Rs.8.40 per unit.

(c) The Commission, in the Order dated 30.07.2015, has specifically held in Paragraph-3, that the tariff of Rs.6.51 per unit, determined under the 30.07.2015 Order, is applicable to all the new Projects entering into PPA on or after 01.09.2015 and getting commissioned from 01.09.2015 to 31.03.2018.

That, in respect of the Projects that are commissioned from 01.09.2015 to 31.03.2018, for which the PPAs have been entered into and submitted to the Commission prior to 01.09.2015 for approval, the tariff as per the said Agreement shall be applicable. Therefore, the Petitioner is entitled to the tariff at Rs.8.40 per unit, as per the PPA.

- (d) Because the 1st Respondent (BESCOM), by the letter dated 01.08.2017, has informed that this Commission has admitted the action of the 1st Respondent (BESCOM), in permitting the developer to commission the Project, beyond the original COD as per the PPA, the extension letter dated 31.03.2017, issued by the 1st Respondent (BESCOM), stands validated by the Commission and the PPA tariff, is applicable to the Petitioner.
- 4) Upon issuance of notice, the Respondents 1, 2 and 4 appeared through the counsel. Respondent 3 remained unrepresented. Respondents 1 and 2 have filed their Statements of Objections.
- 5) The 2nd Respondent (KREDL) has submitted that, it is for the other Respondents to counter the averments, made by the Petitioner and state, as to whether the *Force Majeure* clause is applicable and whether the Petitioner is eligible for the extension of time. It is also submitted that, as the 2nd Respondent (KREDL) has no role to play in this Petition, the Petition against it, may be dismissed.

- 6) The objections of the 1st Respondent (BESCOM), may be stated, as follows:
- (a) As several requests for extension of the SCOD were received from the Solar Developers, the Government of Karnataka (GoK) issued an Order dated 24.11.2016, directing all the Electricity Supply Companies (ESCOMs) to constitute a 3-member Committee, to consider and to dispose of the requests of farmers / developers. Accordingly, a Committee was constituted by the 1st Respondent (BESCOM), to consider the requests for the extension of time, sought for by the 1 to 3 MW Solar Generators, under the land owning farmers' category. The Committee held a meeting on 15.02.2017, wherein, causes for the delayed achievement of the SCOD were considered in respect of 17 generators, including the Petitioner, and decision was taken to accord extension of six months to achieve the SCOD.
- (b) The Petitioner furnished the documents to the said Committee, for consideration of the request for the 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:

Land conversion:

Date of submission of application	:	09.10.2015
Date of conversion	:	20.06.2016
Delay in getting approval	:	Eight months

KPTCL Evacuation Approval(Regular):

Date of submission of application	:	20.01.2016
Date of approval	:	23.11.2016
Delay in getting approval	:	Ten months

Bay Extension approval:

Date of submission	:	23.07.2016
Date of approval	:	23.11.2016
Delay in getting approval	:	Four months

- (d) The Committee, after detailed discussions and scrutiny of the documents, opined that, approval may be accorded for extension of the SCOD, upto six months, considering Article 2.5 of the PPA, as there is a delay in the issuance of approvals by the various Government entities. On 02.03.2017, the 1st Respondent (BESCOM), in its letter addressed to the Petitioner, informed about the extension of time, by six months, for achieving the SCOD.
- (e) Thereafter, on 16.03.2017 the Commission addressed a letter to all the ESCOMs of the State, in the matter of extension of time, granted to the Solar Generators and informed them, not to allow any extension of time, beyond the SCOD, as per the original PPA, without obtaining the prior opinion of the Commission. Further, vide letter dated 05.04.2017, the ESCOMs were directed by the Commission to advise all the land owning 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 Government has addressed a letter dated 25.04.2017 to the Commission, stating that the Government has recommended the approvals accorded in respect of extension of the CoD by the 1st Respondent (BESCOM), for six months, from the date of SCOD, as per Articles 2.5 and 8 of the PPA.
- (g) The subject was placed before the 82nd Board Meeting of the 1st Respondent (BESCOM) held on 11.05.2017, for evaluation / disposal of the requests of the land owning farmers / SPVs, for extension of time for the COD, in respect of 1 to 3 MW Solar Power Plants, in Karnataka, under farmers' category. The Board ratified the action taken on the extensions, issued by the 1st Respondent (BESCOM), subject to approval of the Commission. The Project was commissioned on 25.03.2017.
- (h) In respect of extension of the 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."

- (j) Therefore, the 1st Respondent (BESCOM) has prayed that the Commission may be pleased to accord directions, in the present Petition, in the interest of justice.
- 7) 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, 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?
 - (3) What should be the tariff for the Project, for the term of the PPA?
 - (4) What Order?

8) **ISSUE No.(1):** *Whether the extension of time, 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 the tariff, as a consequence of the 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(BESCOM) has accepted the claim of *Force Majeure* Events and granted extension of time, that has to be taken as admitted and validated by the Commission. 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 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 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 the legality of the extension of time, granted by the 1st Respondent (BESCOM).
- (c) Therefore, we answer Issue No.(1), in the affirmative.

- 9) **ISSUE No.(2):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?*
- (a) We note that under the Article 2.5 of the PPA, the extension of time for commissioning of the Project can be granted, if the SPD is prevented from performing its obligations, due to the ESCOM's '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 Article 8 of the PPA, 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.
- (b) The PPA was signed on 02.07.2015. The Conditions Precedent had to be achieved within 365 days, from the date of signing the PPA and the Project had to be commissioned within 18 months, from the date of signing of the PPA i.e., before 01.01.2017. The achievement of the Conditions Precedent, would include obtaining of all the approvals by the SPD.
- (c) The SPD applied for conversion of land on 09.10.2015, after a period of 4 months, from the date of the PPA. No explanation is given for this delay, on the part of the SPD, in the Petition. In fact, there is no averment at all, in the Petition, on this aspect. However, in the letter dated 20.12.2016 addressed by the Petitioner to the 1st Respondent (BESCOM)

(Annexure P-17), it is stated that the PPA could not be signed after receipt of LoA by the farmer due to non-availability of the draft PPA and approval of the KERC, and the farmer was forced to raise crops during the period from 16.03.2015 (date of LoA) and 02.07.2015 (date of PPA) and could start the process of conversion, only after harvesting the standing crops. From this, it is clear that, the initiation of the process for the conversion of land was delayed by the SPD, as there were standing crops on the land. The allegation in the letter that, due to non-availability of draft PPA and approval of the KERC, after receipt of LoA, the conversion process could not be initiated, therefore, cannot be accepted. In the letter dated 16.03.2015 of the 2nd Respondent (KREDL) to the SPD (Annexure P-1), it is mentioned that the SPD has to contact the ESCOMs, for entering into PPA, after submitting certain documents mentioned in the letter. Therefore, the reasons for the delay, in applying for the conversion of land, as stated in the letter dated 20.12.2016, would reveal that the SPD was not diligent in implementing the Project. After applying for the conversion of land, the land conversion charges were paid by the SPD on 18.06.2016. The land conversion Order was passed by the Deputy Commissioner, Kolar on 20.06.2016, in about eight months, from the date of application. As can be seen from the conversion Order, the Deputy Commissioner has obtained the reports from the Tahsildar, Bangarpet, the Director of the Planning Department, Kolar and after approval of the Single Window Committee, granted the land conversion Order. Had the Petitioner applied for the land conversion, much earlier, the approval could have also been obtained earlier. Hence, we are unable to

accept the contention of the Petitioner that, the time taken in granting of the approval for conversion of land, is attributable to the Deputy Commissioner, alone. In fact, there is a delay on the part of the SPD, in applying for the conversion. In any case, it is not elaborated, as to how the time taken in the process of land conversion, affected the Project implementation.

- (d) The SPD applied for the evacuation approval to the 4th Respondent (KPTCL) on 20.01.2016 (as per Annexure P-5), after about 7 months, from the date of the PPA. However, in the letter dated 20.12.2016 (Annexure P-17), the date of application is mentioned as 13.05.2016. If that is so, there is a further delay in applying for the evacuation approval. No explanation is given for this delay. The 4th Respondent (KPTCL) intimated to the SPD to pay the processing charges on 06.02.2016, which she paid on 13.05.2016, after a delay of more than 3 months. In the letter dated 13.05.2016 (Annexure P-6), the SPD has informed the 4th Respondent (KPTCL) that, she will pay the necessary 11 kV bay rental and lease charges, for connectivity to the 11 kV bay at the 66/11 kV N.G.Hulkur Sub-station, to book the available bay. The tentative evacuation approval was granted on 25.10.2016. The Petitioner, on 28.10.2016, gave acceptance to the evacuation scheme and the regular evacuation approval was granted on 23.11.2016. As can be seen from the dates mentioned above, there is an inordinate delay by the SPD, in applying for the evacuation approval and in paying the charges. Another aspect, which is noticed from the records is that, the SPD, vide letter dated 23.07.2016

(Annexure P-9), requested the 4th Respondent (KPTCL) to approve the evacuation scheme to the existing 380 v/11 kV common Pooling Station of another SPV - Raygen Power Pvt. Ltd., to ease out the overhead expenses, reduce transmission loss and ROW issues. This request was acceded to, by the 4th Respondent and a comprehensive evacuation scheme was approved. As can be made out from the tentative evacuation approval, the land in the 4th Respondent (KPTCL)'s Sub-station was spared for construction of the 11 kV terminal bay, on collection of the lease charges. Therefore, it can be stated that the 4th Respondent (KPTCL), has facilitated the implementation of the Project and it was the SPD, who delayed in applying for the evacuation approval, in making payment of the charges and had also belatedly sought for the comprehensive evacuation approval.

- (e) 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 have been issued by the Petitioner to the 1st Respondent (BESCOM). The reasons quoted by the Petitioner do not fall under the events of *Force Majeure*, 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 clauses of the PPA. Consequently, the Petitioner would be liable for payment of liquidated damages as per Article 2.5.7 of the PPA.
- (f) 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 the 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.

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

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

10) **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) It is the Petitioner's case that, the Tariff Order dated 30.7.2015 is not applicable to the project. The Petitioner contends that, the Respondent has granted extension of time of 6 months, after considering the *Force Majeure* Events, as provided in the PPA and hence, the tariff of Rs.8.40 per unit, as agreed to in the PPA, should not be altered. We have held earlier that, the Petitioner is not entitled for extension of the time, beyond the SCOD, to commission the Project. The Project is commissioned on 25.03.2017, beyond the SCOD. The Generic Tariff Order dated 30.07.2015 is applicable for the Projects commissioned during the period, from 01.09.2015 to 31.03.2017.
- (c) Article 5.1 of the PPA provides that, if there is delay in commercial operation of the project, the varied tariff as on the date of commercial operation will be applicable for the Project.

- (c) 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 projects/ power producers (similarly situated as the first Respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1st Respondent would be entitled only for lower of the two tariffs...."

- (d) In the decision of the Hon'ble Appellate Tribunal for Electricity in Appeal No.221/2016 and others, dated 07.05.2018 (*Savitha Oil Technologies Ltd vs KERC & another*), it has been held that, the tariff, as on the COD, is applicable for a Project and the tariff should not be linked to the date of signing or

approval of the PPA. The relevant portions of the judgment are extracted below:

“xi. Further, it is a settled practice under the Section 62 of the Act that tariff determination process under various regulations for a new project begins from the COD of the said project as per extant regulations of the control period where COD of the project takes place. Subsequently, the tariff of such project is adjusted based on regulations/orders of the subsequent control period and it is not linked to the date of signing/approval of the PPA. If the PPA is approved at a later date or in other control period the tariff is applicable from the COD date as per prevalent regulation at that time.

XXX

XXX

XXX

xiv. In the present case too after carefully considering the provisions of the Act, 2004 Regulations, 2005 Order, 2009 Order, earlier judgement of this Tribunal and keeping in view the interest of the consumers it would be correct to draw a conclusion that the tariff applicable to the Appellants' WPPs would be as per the 2005 Order during which COD of the WPP has happened. The same corollary is applicable to other WPPs having COD is in some other control period.”

- (e) The ratio of the above judgements is applicable to the Petitioner's case also, as the PPA envisages a similar situation. Hence, 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, as per Article 5.1 of the PPA.
- (f) In view of the above discussions, we answer Issue No.(3), as above.

11) **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