

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. 155/2017

BETWEEN:

Nadagouda Energies Private Limited,
No.655/8, 2nd Floor, F, 1st C Main Road,
40th Cross, 8th Block, Jayanagar,
B E N G A L U R U – 560 082.

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PETITIONER

[Represented by Kumar & Bhat, Advocates]

AND:

- 1) Hubli Electricity Supply Company Limited,
P B Road, Navanagar,
Hubballi – 580 025.
- 2) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
Kempgowda Road,
Bengaluru - 560 009.
- 3) Karnataka Renewable Energy Development Limited,
Bharath Scouts and Guides Building,
Palace Road,
Bengaluru – 560 001.

- 4) The Deputy Commissioner,
Bijapur District,
Bijapur.

.. **RESPONDENTS**

[Respondents 1 & 2 represented by Indus Law, Advocates,
Respondent-3 represented by Sri Rakshith Jois, Y.P., Advocate,
Respondent-4 unrepresented]

ORDERS

- 1) This Petition is filed, under section 86(1)(b) of the Electricity Act, 2003, praying to:
- (i) direct the HESCOM, to comply with the original terms of the PPA and to 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 to 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* conditions, 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.

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- 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:
- (a) The Petitioner is a company registered under the Companies Act, 2013, carrying on the business of developing, executing, managing and running a 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, the GoK envisaged Utility Scale Grid Connected Solar Photo Voltaic and concentrated solar Power Projects and endeavoured to promote the Solar Energy Projects, preferably by land owning farmers, with a minimum capacity of 1 MW and maximum capacity of 3 MW per land owning farmer in the State, for sale of power to the Electricity Supply Companies (ESCOs), 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. inviting 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 Electricity Supply Companies (ESCOs).
- (c) Accordingly, Sri Rajashekar S Nadagouda, a land owning farmer had made an application for grant of solar power project with capacity of 3 MW to be established on his land at Jalageri village, Bijapur Taluk and District. The KREDL issued a Letter of Award, in his favour, vide allotment letter dated

16.3.2015. The 1st Respondent (HESCOM) executed a Power Purchase Agreement (PPA) dated 24.6.2015 with him [Solar Project Developer (SPD)], for purchase of power from the Solar Power Plant.

- (d) As the SPD had no capacity to invest and establish the Solar Power Plant, he found the investor and formed the Petitioner-SPV, with the SPD as a 26% shareholder, as permitted under Article 12.11 of the PPA. A Supplemental PPA (SPPA) dated 10.06.2016 was also entered into, between the 1st Respondent (HESCOM) and the Petitioner, for the development of the Solar Power Plant, with the consent of the SPD.
- (e) Immediately after entering into the PPA, the Petitioner started the 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 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 24.06.2015, the same had to be approved by the Commission. After approval of the Commission, the PPA was handed over to the Petitioner on 17.10.2015.

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

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- (f) The Petitioner lost more than 3 months' time to receive the approved PPA, which is to be treated as a *Force Majeure* Event, under Article 8.3. The 1st Respondent (HESCOM) 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 (HESCOM) could not understand the clarification given by the Commission and the Commission issued new formats for AOA, MOA and the SPPA on 21.3.2016. In between the above said two clarifications, nine (9) months had lapsed 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 Government of Karnataka (GoK) issued a Circular dated 01.12.2015, fixing the time for grant of deemed conversion,, as 15 days. As per the Circular, the Petitioner had submitted all the requisite documents, like PPA, the KREDL's letter, RTC, PTCL NOC and other relevant documents, on 07.12.2015, before the Deputy Commissioner. for conversion of land. The Deputy Commissioner passed an Order on 22.08.2016, for conversion of land, after a delay of 8 months and 16 days. The Petitioner had also applied for the evacuation approval, before the KPTCL on 23.12.2015 and the same was granted on 15.06.2016, after a delay of 6 months. Subsequent to the power evacuation approval, the 2nd Respondent (KPTCL) granted the Work Order to carryout the Sub-station work, on 28.11.2016, resulting in a delay of

11 months. Subsequent to the evacuation approval, the Petitioner could obtain the Work Order to construct the 11 kV line, only on 16.12.2016.

- (h) The request for extension of time, to commission the Plant was made before the 1st Respondent on 08.12.2016, but the same was received by the Petitioner on 04.02.2017 after a delay of 2 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 extension of time was not granted, immediately, despite a direction by the GoK, in the Circular dated 24.11.2016 that the 1st Respondent (HESCOM) had to extend the time, under the PPA, within 15 days. Further, there was a delay of three months, due to demonetization, which has to be treated as a *Force Majeure* Event.
- (j) Owing to the inordinate delay, in the issuance of the various permissions and sanctions, including the land conversion order, the time fixed, under the PPA had expired and the Petitioner had sought for the extension of time, to commission the Project. The reasons for the delay in the CoD would 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.
- (k) The Petitioner has invested Rs.18 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.

- (l) After execution of the PPA between the Petitioner and the 1st Respondent (HESCOM), 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 Respondents 1 to 3 appeared through the counsel. The 4th Respondent remained unrepresented. 3rd Respondent has filed Statement of Objections stating 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. Hence, the 3rd Respondent (KREDL) has prayed that the Petition against it may be dismissed.
- 4) Respondents 1 and 2, did not file any objections to the Petition, despite granting sufficient time. The learned counsel for Respondents 1 and 2 submitted during the arguments that, they have no objections, on the issue of extension of time granted to commission the Plant and they will abide by the Orders of the Commission on the tariff. The arguments were taken as 'concluded'. The Petitioner filed Written arguments.

- 5) 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 (HESCOM) 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?

- 6) After considering the submissions, made by the learned counsel for the parties, 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 1st Respondent (HESCOM) 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 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 the 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 claim of the *Force Majeure* Events and granted 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 SC 2765, in support of 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 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 legality of the extension of time, granted by the 1st Respondent (HESCOM) .

(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, 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 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

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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 HESCOM.

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 Article 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 HESCOM'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 the said clause, it is also necessary to prove that, the *Force Majeure* Events were not caused by the non-performing party's negligent or intentional acts, errors or omissions. In this backdrop, we need to examine, if the Petitioner or the SPD, in any manner, was negligent in performing its obligations, under the PPA.

(c) The PPA is signed by the parties on 24.06.2015. As per Article 2.1 of the PPA, the Conditions Precedent, had to be achieved within 365 days, from the date of signing of the PPA and the Project had to be commissioned within

18 months, from the date of signing of the PPA. The achievement of the Conditions Precedent, would include obtaining of all the approvals by the SPD. The Petitioner claims that, the delay, in handing over a copy of the PPA, after approval on 17.10.2015, 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. It was the obligation of the Petitioner, to demand and obtain a signed copy 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 application 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 the 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 the 'delay'. In any case, as noted earlier, it is not shown that the absence of 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 the conversion of land on 07.12.2015. A copy of the application is not produced. The order of the

Deputy Commissioner, Vijayapura, dated 22.08.2016, also does not reveal the date of the application. Even if the date is accepted as 07.12.2015, there is a delay of more than 5 months, in applying for the land conversion. 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 05.08.2016. The land conversion Order was passed, by the Deputy Commissioner, on 22.08.2016, within 17 days from the date of payment of the charges, which is reasonable.

- (e) The Petitioner has stated that, the SPD applied for the evacuation approval to the 2nd Respondent (KPTCL) on 23.12.2015. This application is made after 6 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 (KPTCL) has caused a delay of 6 months, in granting the evacuation approval. The processing fee was paid by the Petitioner on 18.02.2016 and the tentative evacuation approval was granted on 18.04.2016. After receipt of the acceptance to the evacuation scheme from the Petitioner, the regular evacuation approval was granted on 15.06.2016. According to the regular evacuation scheme, granted to the Petitioner, there was a requirement for the Petitioner to purchase the adjacent lands, for putting up 11 kV switchgear and allied equipment. However, later on 28.11.2016, the 2nd Respondent (KPTCL) has spared the land available in its Sub-station for the said purpose to the Petitioner, indicating that, it facilitated the Project implementation and the Petitioner failed to procure the required land.

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- (f) It is the further allegation of the Petitioner that, there was a delay of 11 months by 2nd Respondent (KPTCL), in granting of the Work Order to carry out the Sub-station work. The time taken by the 2nd Respondent (KPTCL) from 15.06.2016 the date of grant of the regular evacuation approval to 28.11.2016 the date of granting of the Work Order, is five months. 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 (HESCOM), while granting the 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 the 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 the *Force Majeure* Event.
- (h) We note that, it is the obligation of the SPD/Petitioner, to obtain all approvals and develop the Project, within 18 months, under the clauses of the PPA and the allotment letter dated 16.03.2015, issued by the 3rd Respondent (KREDL).
- (j) It is also the case of the Petitioner that, the communication on extension of time for SCOD was sent on 04.02.2017, after two months from the date of the request on 08.12.2016, and the Petitioner could not carry out the Sub-station work, as the approval had lapsed, by then. We have noted

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

- (k) 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 (HESCOM). None of the reasons or events, cited by the Petitioner, for the delay in commissioning of its Project, would fall under the *Force Majeure* Events, mentioned in the PPA, as held in the preceding Paragraphs. Hence, we consider that the Petitioner is not entitled to the 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.
- (l) 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

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

(l) The Hon'ble Supreme Court, 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 delay in achieving Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages stipulated in the PPA.

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

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

(a) 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, 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 the various sources, to the Distribution Licensees, based on, among other parameters, mainly the Capital cost of the Generating Plant. Such generic tariff is made available for a period, normally longer than a year called as, 'Control Period', during which the Generating Plants get implemented and commissioned, at the normative Capital Cost adopted in the Generic Tariff Order, generally after the execution of a PPA, with a Distribution Licensee. Such a 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, 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 (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 (RPO) fixed by this Commission. The Capital Cost of the Solar Power Plants, has been coming down very rapidly, in the recent years because of advancement in

technology and production efficiency, as well as, the economies of scale in the backdrop of largescale Solar capacity addition, across the globe. Thus, the generic tariff for megawatt scale Solar Power Plants, which was fixed at Rs.14.50 per unit in the Commission's Order dated 13.07.2010, has been successively reduced to Rs.8.40 per unit in the Order dated 10.10.2013, Rs.6.51 per unit in the order dated 30.07.2015, 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 SPV took the risk of implementation of the Project, after almost a year from the date of 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 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 Article 5.1 of the PPA. Admittedly, in the present case, the generic tariff for the Solar Power Plants that was agreed to in the PPA, was revised much before the Plant was ready for commissioning. In any case,

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

- (d) The 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.18 crores are 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 that, the major part of investments has been made after the formation of the SPV and execution of the SPPA, by which time, the Capital Costs of the Solar Power Projects had fallen. 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 Project implementation, but the tariff as per the relevant clauses of the PPA.
- (e) Article 5.1 of the PPA provides that, the tariff on the date of commercial operation will be applicable for the Project. Article 2.5.7 of the PPA provides for payment of damages if commencement of supply of power is not made by the SCOD. The Project is stated to have been commissioned on 31.03.2017, but no proof of injection of energy on the said date, is produced. In the Memo filed on 21.08.2018, it is stated by the Petitioner that, the Plant was synchronized on 31.03.2017 and the energy injection was gradually

ramped through commissioning of each the SMBs and inverters. It is stated that, the meter at CT/PT level and breaker may not show the quantum jump in the initial days, due to high meter constant and hence, relying on the meter reading alone, cannot prove synchronization and commissioning of the Project. It is also stated that, due to the problem in the meter and the connected polarity, the meter at the Sub-station erroneously recorded exports to the Grid as, import from 31.3.2017 to 28.04.2017, and hence the meter was replaced on 29.04.2017. It is stated that, the generation data was accurately recorded in the meter, fixed at the 11 kV breaker and maintained in the log book of the KPTCL. The Petitioner has also stated that, certain correspondences have taken place, seeking revision of 'B' form. We note that, the documents produced, do not prove injection of energy into the Grid on 31.3.2017. The Commission had sought injection data, in respect of the plants from the Respondents from 30.3.2017 to 4.4.2017. The data furnished reveals that, no injection of energy has taken place, during the said period. Thus, it can be safely inferred that, energy was injected from the Petitioner's Plant after 04.04.2017.

- (f) 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 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 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...."

- (g) In the Order dated 29.5.2018 in OP No.28/2018 (Aikyam Holdings Pvt Ltd-Vs-HESCOM and another), relating to a Wind Project, this Commission has distinguished between 'commissioning' and 'commercial operation' of a Project as follows:

"(b) Under the PPA, there is no definition of 'Commission / Commissioning of Project'. However, it is not in dispute that the words 'Commissioning' and 'Commercial Operation' are one and the same, when there is commissioning of the Project subsequent to the execution of the PPA. 'Commissioning / Commercial Operation' of the Project would imply the injection of the energy into the State Grid, in pursuance of some commercial transactions, either with a Distribution Licensee or with a third party availing Open Access. The above view of the Commission is supported by

various definitions and the clauses in the PPA, as noted above.

(c) Article 5.1 of the PPA provides that, the HESCOM shall, for the Delivered Energy, pay for the term of the PPA from the Commercial Operation Date (COD) to the Company at the rate of Rs. 4.50 per unit without any escalation. This liability would arise from the COD for the Delivered Energy. Therefore, one could infer that, without there being the energy delivered, there cannot be any Commercial Operation of the Project. Article 9.1 of the PPA provides for the term of the PPA, which states that, the term of the PPA would be for a period of twenty (20) years from the COD, unless terminated earlier. The term of the PPA should begin from the time when the energy is delivered from the Project, for the purpose of counting the period of completion of the term.

(d) The Commissioning Certificate issued by the authorities concerned (ANNEXURE-5 to the Petition) and the connected papers may, at best, evidence that the Wind Power Project of the Petitioner was interconnected to the Grid System on 28.03.2017. The veracity of the Commissioning Certificate could be accepted, provided there is injection of energy into the Grid, soon after the interconnection of the generator with the Grid. Therefore, it could be said that, the Commissioning Certificate does not prove the Commercial Operation of the Project, which requires actual injection of power into the Grid as on 28.03.2017. In the absence of any valid explanation for non-injection of energy into the Grid, the inference that could be drawn is that, all the facilities for the interconnection had not been provided. This is the reason why the Petitioner has pleaded at Paragraph-4 of the Petition that, 'Commercial Operation' does not contemplate the actual generation of power or delivery of power into Grid system. For the above reasons, we are of the considered view that, the actual injection of the energy into the Grid is an essential ingredient for claiming the 'Commercial Operation' of the Project at a particular time and date.

(e) Therefore, the learned counsel for the Petitioner has mainly contended that, in the present case, there was injection of 511 units of energy into the Grid between 23:03:25 hours and 23:18:28 hours on 28.03.2017. The learned counsel for the Petitioner has pointed out that, the Meter at the Delivery Point has a multiplying constant of 1,50,000, thereby, the meagre 511 units of energy injected into the Grid by the Wind Power Project of the Petitioner could not be recorded in the Meter at the Delivery Point. The Petitioner has not produced the generation details from 29.03.2017 to 31.03.2017. The non-production of such evidence would lead to an inference that, from 29.03.2017 to 31.03.2017, there was no generation from the Petitioner's Wind Power Project. The Commissioning Certificate produced by the Petitioner would only show that the Project was interconnected to the Grid on 28.03.2017 without stating anything with regard to the actual injection of energy into the Grid. The Commission notes that, the possibility of the Meter at the Generation Point recording the generation of certain units of power, by connecting it to some load, without there being any interconnection to the Grid, cannot be ruled out. Assuming that 511 units of energy was injected into the dedicated transmission line, admittedly, the quantum of Delivered Energy at the Delivery Point was 'nil', as recorded in the Meter at the Delivery Point. As noted above, even at the Generation Point, there was no generation of energy during the period, from 29.03.2017 to 31.03.2017. The Petitioner has not stated the reason as to why there could not be any generation of energy during this period. Therefore, we hold that, the 'Commercial Operation' has not taken place on or before 31.03.2017, as far as the Petitioner's Project is concerned. It is noted that, during the period from April, 2017 to June, 2017, there was injection of energy into the Grid. On the date of conclusion of the arguments, the Petitioner was asked to produce the extract of the Log Book, to ascertain the date from which the injection of energy had commenced in April, 2017. But, the Petitioner has not, so far, produced any such extract of the Log Book. Therefore, it could be inferred that, even during the beginning of April, 2017 also, there was no injection of energy into the Grid.

(f) We may note here that, the meaning of the word 'commissioning', as could be made out from the contents of the 'Commissioning Certificate', is only 'interconnection / synchronization of the Plant with the Grid, after following the Technical / Safety requirements'. The meaning of the word 'commissioning', as used in the various Generic Tariff Orders, is 'commercial operation of the Plant by injecting energy into the Grid, after interconnection with the Grid'.

(h) The terms of the PPA, in the case on hand, though, a Solar Power Project are similar to a Wind Project. Therefore, the above decision, read with the decision of the Hon'ble Supreme Court, in the EMCO case, insofar as the requirement of injection of energy into the Grid, on the date of commissioning of the Plant, is concerned, holds good in this case also.

(j) Hence, in the circumstances and on the facts of the case, we hold that, the Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit, for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017.

(k) Accordingly, we answer Issue No.(3), as above.

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

For the foregoing reasons, we pass the following:

ORDER

- (a) The Petition is dismissed and the Petitioner is not entitled to any of the reliefs, sought 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, 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