
**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560052**

Dated : 26th June, 2018

Present:

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

OP No. 186/2017

BETWEEN:

Flaunt Solar Energy Private Limited,
No.35/2, Park Manor Building,
Park Road, Tasker Town,
Bengaluru – 560 051.

[Represented by Navayana Law Offices, Advocates]

..

PETITIONER

AND:

Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.

[Represented by Shri Shahbaaz Husain, Advocate]

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RESPONDENT

ORDERS

- 1) In this Petition filed under Sections 62, read with Section 64 and 86(1)(f) of the Electricity Act, 2003, the Petitioner in effect has prayed for:

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- (a) Approval of the extension granted by the Respondent to new Scheduled Commissioning Date (SCD), viz., 29.06.2017, vide letter dated 16.06.2017 (produced as ANNEXURE-P1 to the Petition); and,
- (b) Direction to the Respondent to make payment for the energy under the Power Purchase Agreement (PPA) dated 30.06.2015 (produced as ANNEXURE-P3) and the Supplemental Agreement dated 21.11.2016 (produced as ANNEXURE - P7) at the rate of ₹8.40 per unit, from the Commercial Operation Date (COD) of the Project, for the entire term of the PPA.
- 2) The material facts of the case, as submitted by the Petitioner in the Petition, may be stated as follows:
- (a) That, the Respondent - Karnataka Renewable Energy Development Limited, which is the Nodal Agency for implementation of Solar Power Projects in the State of Karnataka, issued a letter dated 16.03.2015 in favour of Smt. K.H. Lakshamma (Solar Project Developer or SPD) and allotted 3 MW capacity Solar Power Project, to be commissioned at Hunsanakodihalli Village, Kodihalli Hobli, Kanakapura Taluk, Ramanagara District, Karnataka, under Segment-1, Category-1 of the Solar Policy of the Government of Karnataka, and in compliance of the Government Order dated 26.08.2014, and instructed her to execute a PPA with the

Respondent, under the Farmers' Scheme, subject to certain terms and conditions.

- (b) That, based on the above allocation letter, the said Smt. K.H. Lakshamma initialled the PPA dated 30.06.2015 with the Respondent and this PPA was approved by this Commission, vide letter dated 26.08.2015.
- (c) That, as the documentary evidence of the precise date on which the PPA was executed pursuant to the approval of this Commission is not available, the date of approval has to be the 'Effective Date' for the purposes of this Petition.
- (d) That, in the said PPA, the 'Effective Date' is defined as the date of signing of the PPA and the SCD is defined as '18 months from the Effective Date'. Thus, the project proponent was supposed to commission the project by 25.08.2015.
- (e) That, the Petitioner had initiated steps to procure the conversion approval for the agricultural land for the Project from the Deputy Commissioner and allied permissions. That, the permission for usage of the land for non-agricultural purpose was granted on 22.12.2016 and the regular Evacuation Approval was granted only on 03.10.2016 and since the Line Estimate Approval was not received, the Petitioner in letter dated 25.10.2016 to the Respondent, representing the *Force Majeure* events

sought for time extension for execution of the Project.(Here itself we may note that some of the actions stated to be taken by the Petitioner are actually of the SPD).

- (f) That, the Petitioner had placed Purchase Orders on 02.11.2016 with Mysore Electrical Industries Limited for supply of MEI Make 11 kV 350 MVA outdoor Single Feeder Panels and Annunciator Panels.
- (g) That, the Project work was further slowed down from November, 2016 onwards, on account of the demonetization decision taken by the Central Government.
- (h) That, subsequently, the Petitioner, the Special Purpose Vehicle (SPV), stepped into the shoes of the aforesaid Smt. K.H. Lakshamma (SPD) and consequently, a Supplemental Agreement (SPPA) dated 21.11.2016 was executed and the same was approved by this Commission on 14.12.2016.
- (j) That, another detailed representation containing the Project progress and difficulties and *Force Majeure* events encountered by the Petitioner was given to the Respondent, vide letter dated 02.12.2016, in which various issues, such as: delay in allotting permission towards town planning NOC, NA conversion, bay allotment, estimation and construction approval, etc., by various Government Departments and delay due to self-funding route were indicated.

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- (k) That, the Respondent, by its letter dated 16.06.2017, considering the *Force Majeure* and other circumstances of the Petitioner, approved the extension of time for SCD by 6 (six) months from the date of SCD, to the Petitioner's Project and thus the project was to be commissioned within 29.06.2017.
- (l) The project was commissioned on 29.06.2017.
- 3) The grounds urged by the Petitioner in support of its prayers may be summarized as follows:
- (a) That, the Petitioner is entitled to the tariff of ₹8.40 per unit as mentioned in the PPA. In all, this Commission has passed three Generic Tariff Orders in respect of the Solar Power Projects, viz., Tariff Orders dated 10.10.2013, 30.07.2015 and 12.04.2017. In the Generic Tariff Order dated 30.07.2015 (passed in modification of the earlier Tariff Order), it is clearly held that, in respect of the Projects that are commissioned during the period 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 agreements shall be applicable.
- (b) That, even the latest Generic Tariff Order dated 12.04.2017 has been made applicable to, only the new grid connected Solar Projects entering into PPAs on or after 01.04.2017, but before 01.04.2018 and also those Projects which are commissioned during the period from 01.04.2017 to

31.03.2018, for which the PPAs have not been entered into, prior 01.04.2017. Hence, the latest Generic Tariff Order also does not revise the tariff of the Petitioner's Project. Consequently, the Petitioner is entitled to the tariff of Rs.8.40 per unit, as agreed to under the PPA.

- (c) That, the PPA, executed between the parties, not only provides for the time period within which the Scheduled Commercial Operation Date (SCOD) has to be achieved, but also provides for the right of the Respondent to grant extension of time. Considering the reasons for delay in commissioning the project, the Respondent has granted extension of time. Accordingly, the Petitioner has commissioned the Project within the mutually agreed COD. Hence, the Petitioner is entitled to the tariff as per the PPA.
- (d) That, the Project of the Petitioner has experienced several hurdles, which can be termed as the *Force Majeure* Events, within the meaning of Article 8 of the PPA and this has been adequately represented before the Respondent by the Petitioner. The pleas of the Petitioner have been considered and accepted.
- (e) That, the extension of time granted validly to the Petitioner was given the legal force and would become effective upon the achievement of the SCOD, especially under the circumstances wherein extension requested was before the expiry of the original SCOD, granted under the terms of the PPA, was not affected in violation of any other Regulation and well within

the act of valid extension with the consent of the Petitioner. That the extension of time was granted as per Clause 2.5.6 of the PPA dated 30.06.2015 and as a result of such extension, the SCD and the Expiry Date newly determined shall be deemed to be the SCD and Expiry Date for the purposes of the Agreement dated 30.06.2015. That, hence, the Respondent is not entitled for any Liquidated Damages without adjudication.

- (f) That, the extension of time granted by the Respondent by letter dated 16.06.2017 does not mention about altering the tariff and specifically clarifies that all other terms and conditions of the PPA remain unaltered. Hence, the Petitioner is entitled for the tariff agreed in PPA dated 30.06.2015, at the rate of Rs.8.40 per unit.
- 4) Upon Notice, the Respondent has appeared through its learned counsel and filed its Statement of Objections, the gist of which is as follows:
- (a) That, as per the PPA dated 30.06.2015, the SPD was required to commission the Plant within 18 months from the date of execution of the PPA. Hence, the project had to be commissioned by 29.12.2016.
- (b) That, as the Petitioner was unable to execute the Project in a timely manner, a letter was addressed by the Petitioner to the Respondent seeking extension of time for commissioning the Project by 6 months under *force majeure* conditions. That, as several requests for extension of SCD

were received from the Solar Developers, the Government of Karnataka issued an Order dated 24.11.2016 directing all the Electricity Supply Companies (ESCOs) to constitute a 3-Member Committee to consider and dispose of the request of the farmers / developers.

- (c) That, in furtherance to the said direction, a Committee was constituted by the Respondent to consider the requests for extension sought for by 1 MW to 3 MW Solar Generators under the land-owning farmer category, which held a meeting on 25.03.2017, wherein the causes for the delayed achievement of the Scheduled Commercial Operation were considered in respect of 9 Generators, including the Petitioner and decision was taken to accord extension of 6 months to achieve the SCD.
- (d) That, the Petitioner furnished the documents to the said Committee, for consideration of its request for extension of time. As per the same, the following information was gathered pertaining to the various reasons assigned for the delayed execution of the Project:

- (i) LAND CONVERSION
(1) Date of conversion : 22.12.2016
- (ii) KPTCL EVACUATION APPROVAL (REGULAR)
(1) Date of submission of application: 04.07.2016.
(2) Date of conversion : 03.10.2016
(3) Delay in getting approval : 3 months.

That, the Committee, after detailed discussions and scrutiny of all the documents, opined that approval may be accorded for extension of

SCOD upto 6 months, considering Article 2.5 of the PPA, as there is delay in the issuance of approvals by various Government entities.

- (e) That, on 16.06.2017, the Respondent issued a letter conveying the extension of 6 months for achieving the Scheduled Commercial Operation.
- (f) That, a letter was addressed to the Additional Chief Secretary, Government of Karnataka seeking directions regarding extension of SCOD upto 6 months in respect of SPDs/SPVs, who have requested for extension, under the Farmers' Category.
- (g) That, on 16.03.2017, the Commission addressed a letter to all the ESCOMs of the State, in the matter pertaining to extension of time granted to the Solar Generators, and informed them not to allow any extension of time beyond the SCD, if any, as per the original PPA, without obtaining prior opinion of the Commission.
- (h) That, vide letter dated 05.04.2017 the ESCOMs were directed by this Commission to advise all the land owner solar developers / SPVs to approach the Commission and seek for approval of the extension of time. That, in furtherance to the same, the Petitioner has filed this Petition.
- (j) That, the Additional Chief Secretary to Government, vide letter No. EN 67-VSC 2017 dated 25.04.2017, addressed to this Commission, has requested

approval to the extensions of COD by the Respondent for 6 months from the SCOD, as per Articles 2.5 and 8 of the PPA.

- (k) That, the subject was placed before the 82nd Meeting of the Board of Directors of the Respondent, held on 11.05.2017, for evaluation / disposal of the requests of the land owing farmers / SPVs, for extension of time for achieving the Commercial Operation in respect of 1 MW to 3 MW Solar Power Plants in Karnataka, under Farmers' Category. That, the Board ratified the action taken on the extensions issued by this Respondent, subject to approval by this Commission.
- (l) That, the Project was commissioned on 29.06.2017.
- (m) That, in respect of the extension of the Project duration of the already awarded Solar Power Projects the Ministry of New and Renewable Energy has issued a 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 had requested not to give time extension if all the obligations 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 the State Government Authorities / PSUs, like land allotment, transmission / evacuation facilities connectivity permission or force majeure, the competent authority in the State / SECI / NTPC, etc., may consider providing extension of the time duration, strictly as per the Contractual Agreement.

It is also to be clarified that if in a Project equipment / materials have been purchased / ordered and substantial advances paid as per original completion date, and there is a delay on part of the State organizations regarding land, transmission or any such reasons, the extension of the Project may be allowed."

- (n) Therefore, the Respondent has prayed that this Commission may accord directions in the Petition, in the interest of justice and equity.
- 5) We have heard the oral submissions made by the learned counsel for the parties. The following issues would arise for our consideration:
- (1) Whether the Commission has powers to scrutinise, if the extension of time granted by the Respondent, is proper or otherwise?
 - (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?
 - (3) What Order?
- 6) After considering the submissions of the parties and perusing the material placed on record, our findings on the above Issues are as follows:
- 7) **ISSUE No.(1):** *Whether the Commission has powers to scrutinise, if the extension of time granted by the Respondent, is proper or otherwise?*
- (a) Clause 2.5 of the PPA provides for extensions of time. The contention of the Petitioner is that since the Respondent has accepted the reasons for

delay in commissioning the project as force majeure events and granted extension of time by 6 months as provided in the PPA, the tariff for the project should not be altered. We are unable to accept the contention of the Petitioner. The extension of time to commission the project has a bearing on the tariff payable. The consumer, though not a formal party, ultimately pays for the supply of 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 of India, in the case of *All India Power Engineers Federation Ltd. v. Sasan Power Ltd.*, reported in (2017) 1 SCC 487, has held that even if parties to a contract (generating company- seller of energy and distribution licensee-buyer of energy) waive a certain term affecting the tariff, the Commission, as a custodian of consumer interest has to intervene and exercise its regulatory power. Therefore, we hold that the Commission has the mandate and powers to scrutinise the correctness and legality of the extension of time granted by the Respondent.

- (b) For the above reasons, Issue No.(1) is answered, in the affirmative.
- 8) **ISSUE No.(2):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?*
- (a) It would be useful to extract the relevant Clauses of the PPA before we deal with this issue:

“2.1 Conditions Precedent:

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

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

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

- (a) The DPR to BESCO and achieve financial closure and provide a certificate to BESCO from the lead banker to this effect;
- (b) All Consents, Clearances and Permits required for supply of power to BESCO as per the terms of this Agreement; and
- (c) Power evacuation approval from Karnataka Power Transmission Company Limited or BESCO, as the case may be.

2.1.2 SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and BESCO shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent.

2.1.3 The SPD shall notify BESCO in writing at least once a month on the progress made in satisfying the Conditions Precedent. The date, on which the SPD fulfills any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify BESCO of the same.”

“2.2 Damages for delay by the SPD

2.2.1 In the event that the SPD does not fulfill any or all of the Conditions Precedent set forth in Clause 2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to BESCO or due to Force Majeure, the SPD shall pay to BESCO damages in an

amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days, BESCO at its discretion may terminate this Agreement."

"2.5 Extensions of Time

2.5.1 In the event that the SPD is prevented from performing its obligations under Clause 4.1 by the Scheduled Commissioning Date due to:

- (a) Any BESCO Event of Default; or
- (b) Force Majeure Events affecting BESCO; or
- (c) Force Majeure Events affecting the SPD.

2.5.2 The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than 'day for day' basis, to permit the SPD or BESCO through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or BESCO, or till such time such Event of Default is rectified by BESCO.

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

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

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

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

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

(c) For the delay of more than three months up to six months - amount equivalent to 100 % of the performance security.

For avoidance of doubt, in the event of failure to pay the above mentioned damages by the SPD, the BESCO is entitled to encash the performance security.”

“Undertakings:

4.1 Obligations of the SPD:

(a) The SPD shall construct the Project including the pooling station, the interconnection facilities and metering arrangements at the point of delivery of power as approved by STU /BESCO.

(b) The SPD shall undertake by itself or by any other person acting on its behalf, at its own cost, construction/up-gradation of (a) the interconnection Facilities, (b) the transmission lines; and (c) metering arrangements with protective gear as per the specifications and requirements of STU/BESCO, as notified to the SPD.

(c) The SPD shall achieve scheduled date of completion and the commercial operation within 18 months from the effective date.

(d) The SPD shall by itself or by any other person acting on its behalf undertake at its own cost maintenance of the interconnection facilities and the metering arrangements, including the dedicated transmission line up to the delivery point as per the specifications and requirements of STU/BESCO, as notified to the SPD, in accordance with Prudent Utility Practices. The

transmission / distribution line so constructed shall remain as dedicated transmission/ distribution line without provision for any tapping.

(e) The SPD shall operate and maintain the Project in accordance with Prudent Utility Practices, for the entire term of this agreement.

(f) The SPD shall be responsible for all payments on account of any taxes, cesses, duties or levies imposed by the GoK or its competent statutory authority on the land, equipment, material or works of the Project or on the Electricity generated or consumed by the Project or by itself or on the income or assets owned by it."

"8.3 Force Majeure Events:

(a) *Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following:*

(i) *Acts of God;*

(ii) *Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;*

(iii) *Strikes, work stoppages, work slowdowns or other labour dispute which affects a Party's ability to perform under this Agreement;*

(iv) *Acts of war (whether declared or undeclared), invasion or civil unrest;*

(v) *Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the SPD or BESCO of any Law or any of their respective obligations under this Agreement);*

(vi) *Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*

- (vii) *Fire, Earthquakes, explosions, accidents, landslides;*
- (viii) *Expropriation and/or compulsory acquisition of the Project in whole or in part;*
- (ix) *Chemical or radioactive contamination or ionizing radiation; or*
- (x) *Damage to or breakdown of transmission facilities of either Party;*

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

- (i) The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;*
- (ii) The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.*
- (iii) The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;*
- (iv) The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;*
- (v) In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."*

- (b) We note that under the Clause 2.5 of the PPA, extension of time for commissioning the Project can be granted, if the SPD is prevented from performing its obligations due to the BESCO's 'Event of Default' or Force Majeure events. The Force Majeure events and the requirement of issuing a written notice are mentioned in Clause 8.3 of the PPA. Under Article 8 of the PPA, 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 on 30.06.2015. 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 the PPA. The achievement of the Conditions Precedent would include obtaining of all the approvals by the SPD. It is contended that, the initialled PPA was sent to the Commission for approval of the Commission and was approved on 26.08.2015 and as the actual date of execution of the PPA after approval is not available, the effective date of the PPA has to be the date of approval of the PPA. We note that the PPA was sent for approval by the Respondent on 10.07.2015. On 13.07.2015, the Commission had sought certain documents from BESCO in respect of PPAs executed under the land owning farmers' scheme. After considering the relevant documents produced on 20.08.2015, approval was granted to the PPA in this case, on 26.08.2015. We note that, while the process of approval of the PPA has taken up sometime it has had no impact on the commissioning of the project as the Petitioner has not elaborated on the steps or activities involved in the commissioning of the project that got delayed or disrupted in the absence of the approval of the PPA. We also note that as per Clause 1.1 (xii), 'Effective Date' means the date of signing of the PPA and this has been so understood by both parties even in the

process of extension of COD, but disputed by the Petitioner now. Hence, we are unable to accept that the date of approval of the PPA has to be considered as the 'effective date', contrary to the definition in the PPA. The Petitioner could have initiated the preliminary works with the initialled PPA wherever required. The approved PPA would be required only at the final stages of certain activities like, loan disbursement, land conversion approval, etc.

- (d) The land conversion Order was passed by the DC, on 22.12.2016, as per the Statement of Objections (the copy of conversion order is not produced). It cannot be made out when the application for conversion was submitted by the SPD and hence, it is not known whether there was delay on the part of the SPD in seeking land conversion Order or the authorities in granting the conversion order, though the Petitioner implies that there was delay by the authorities without substantiating it. We therefore do not consider that the process of issue of land conversion Order has delayed the commissioning of the project.
- (e) The SPD had applied for the evacuation approval to KPTCL on 04.07.2016, after more than a year from the date of the PPA. No explanation is given for this delay. The regular evacuation approval is granted on 03.10.2016, as mentioned in Annexure P-8, letter dated 02.12.2016 and the Statement of Objections (copy of the evacuation approval is not produced). We note that after receipt of the application seeking evacuation approval, the field study has to be conducted by the concerned engineers of KPTCL

and after ascertaining the network feasibility, the tentative evacuation approval is given. After acceptance of the tentative evacuation approval and fulfilment of the conditions mentioned therein by the project developer, the regular evacuation approval is given by KPTCL. The dates of each step is necessary to verify if there is delay on the part of KPTCL or the Petitioner. The relevant dates are not given and the Petitioner has not elaborated on the steps or activities that were affected by the absence of the evacuation approval. Even otherwise, we note that the period taken (about 3 months from the date of application) is reasonable and cannot be taken as having delayed the commissioning of the project within scheduled commissioning date.

- (f) We note that, it is 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. The Petitioner was not diligent in implementing the project within the stipulated time. Hence, we consider that the Petitioner is not entitled to extension of time, as provided in the relevant clauses of the PPA.

- (g) We note that the Petitioner has claimed that the COD does not require the actual delivery of power as per the terms of the PPA. Thus, admittedly there was no injection of power from the Petitioner's plant into the grid on 29.06.2017, the last day of the extended commissioning period. We have clarified earlier on several occasions that 'Commercial Operation' would mean when the generator injects power into the grid for consumption by

the purchasing party. Thus the Petitioner's claim is not tenable but not material in the present case as the correctness or otherwise of the grant of extended time for commissioning of the Petitioner's project needs to be decided first.

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

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

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

"5.1 Tariff Payable:

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

i. Rs.8.40/- per kWh

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

(b) The above clause of the PPA provides that, the tariff as on the date of commercial operation will be applicable for the Project. The Project is stated to be commissioned on 29.06.2017. It is the contention of the Petitioner that the generic tariff orders dated 30.7.2015 or 12.4.2017 are not applicable to the project as the PPA was entered much before the passing of the said orders and hence, the tariff of Rs.8.40 per unit should

be paid for the term of the PPA. We note that the project was not commissioned within the time stipulated in the PPA to be eligible for the tariff of Rs.8.40 per unit and the tariff as on the date of commissioning is Rs.4.36 per unit. The generic tariff order dated 12.04.2017 provides that the tariff of Rs.4.36 is applicable to projects for which PPAs were entered into earlier but not commissioned within the stipulated period.

(c) It is the submission of the Petitioner that the extension of time granted by the Respondent by letter dated 16.06.2017 does not mention about altering the tariff and specifically clarifies that all other terms and conditions of the PPA remain unaltered and hence, the Petitioner is entitled for the tariff agreed in PPA dated 30.06.2015, at the rate of Rs.8.40 per unit. We find that this is not true. The letter dated 16.06.2017 specifically states that the tariff applicable and liquidated damages, if any, is subject to the approval of the Commission/Government of Karnataka.

(d) The Hon'ble Supreme Court of India in Civil Appeal No. 1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*) dated 02.02.2016 has held as follows:

“31. Apart from that both the respondent No. 2 and the appellate tribunal failed to notice and the 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...."

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

- (e) In the recent 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.

.....

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."

- (f) Hence, 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 12.4.2017.
- (g) We may note here that the Petitioner took the risk of implementation of the project, almost seventeen months after signing of the PPA, with barely a month left for its commissioning as agreed in the PPA and could not do it for certain reasons and events which we have held to be not falling under the 'Force Majeure' clause of the PPA.
- (h) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. For not complying with the timelines for Conditions Precedent and commissioning of the Project, as mentioned in the PPA, the Petitioner is required to pay damages for such delay, as per the Articles 2.2 and 2.5.7 of the PPA.

- (j) The Hon'ble Supreme Court of India, in Civil Appeal No. 3600 of 2018 (*M.P. Power Management Company Ltd. Vs Renew Clean Energy Pvt. Ltd., and another*) dated 05.04.2018, has held that for delay in achieving Conditions Precedent and commissioning the Project, the generating company is liable to pay damages stipulated in the PPA.
- (k) In view of the above discussions, we answer Issue No.(3), in the negative.
- 10) **ISSUE No.(4):** *What Order?*

For the foregoing reasons, we pass the following:

ORDER

- (a) The Petition is dismissed and the Petitioner is not entitled to any of the reliefs sought;
- (b) The Petitioner is entitled to a tariff of Rs.4.36 (Rupees Four and Paise Thirty Six) only per unit, the varied tariff as applicable on the date of commissioning of the Petitioner's plant, 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 liable to pay damages, including Liquidated Damages, as provided under Articles 2.2 and 2.5.7 of the PPA.

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

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

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