

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 28th June, 2018

Present:

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

OP No.132/2017

BETWEEN:

Tanivi Solar Pvt Ltd.,
302, 3rd floor, The Orion Building,
Koregaon Road,
Pune-411 001.

(Represented by Navayana Law Offices, Advocates) ..

PETITIONER

AND:

Chamundeshwari Electricity Supply Corporation Ltd.,
No. 29, Kaveri Grameena Bank Road,
Vijayanagar 2nd Stage,
Mysuru- 570 019.

(Respondent represented by Just Law, Advocates) ..

RESPONDENT

ORDERS

- 1) This Petition is filed under Sections 86(1)(b) & 86(1)(f) of the Electricity Act, 2003, in effect, praying to:

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- (a) Approve the extension of time granted by the Respondent to the new scheduled commissioning date viz., 19.02.2017;
- (b) Direct the Respondent to make payment at the rate of Rs.8.40 per unit for the energy delivered by the Petitioner's Solar Power Project for the term of the PPA; and,
- (c) Grant such other reliefs to meet the ends of justice and equity.
- 2) The facts of the case and submissions made in support of the above prayers by the Petitioner may be summed up as follows:
- (a) Pursuant to the Solar Policy of the Government of Karnataka dated 22.05.2014 and the Government Order dated 26.08.2014, the Karnataka Renewable Energy Development Limited (KREDL), the Nodal Agency of the Government of Karnataka for implementation of Solar Power Projects in the State, issued a letter dated 16.03.2015 in favour of a land owning farmer, Sri Phanendra Babu [the Solar Project Developer (SPD)] and allotted a 3 MW capacity Solar Power Project to be commissioned at Siraguppa Village, Ballari District under 1-3 MW Farmers' Scheme, subject to certain terms and conditions.
- (b) Based on this allocation letter, the SPD executed a Power Purchase Agreement (PPA) dated 22.06.2015 with the Respondent. As per the said

PPA, the effective date is defined as the date of signing of the PPA. The Scheduled Commissioning Date (SCD) is defined as 18 months from the Effective Date. The Project had to be commissioned before 21.12.2016.

- (c) The Petitioner (SPV) was formed for implementing the Project and SPPA dated 24.05.2016 was entered into between the Respondent and the SPV. The SPPA was approved by the Commission on 02.06.2016.
- (d) On 01.12.2015, the Government of Karnataka had notified the list of documents to be obtained by the Deputy Commissioner from the Project proponents to grant deemed conversion of land for establishing the solar Projects. Soon after execution of the SPPA, the SPV applied for conversion of land and other permissions but despite best efforts, the permissions / approvals could not be obtained within the stipulated time. Hence, the Petitioner addressed letters dated 29.11.2016 and 07.12.2016 to the Respondent seeking extension of time for execution of the Project, citing *force majeure* events. The Project work was further slowed down due to demonetisation resulting in cash flow crunch.
- (e) On 09.12.2016, the KPTCL conducted a joint inspection of the Project site and submitted a detailed report to the Respondent about the status of the Project.

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- (f) Subsequently, the Petitioner approached KPTCL seeking evacuation approval. The tentative evacuation approval was granted on 18.05.2016. The regular evacuation approval was granted on 23.06.2016, subject to certain terms and conditions.
- (g) Due to delay by KPTCL in approving single line diagram and layout plan for construction of terminal bay at the sub-station at Siraguppa, the Petitioner could not place orders for supply of necessary equipment from MEIL. On 15.10.2016, the Petitioner placed purchase orders for the equipment and the same was accepted by MEIL on 18.10.2016. On completion of the construction of line and bay and after inspections by the concerned engineers of KPTCL, on 18.01.2017, a letter was written by the Superintending Engineer of KPTCL that the evacuation work was completed by the Petitioner.
- (h) On 23.01.2017, the Petitioner made a representation to the Respondent to grant extension of time and synchronisation permission to enable commissioning of the Project. The Respondent, after considering the reasons quoted by the Petitioner, issued an OM dated 17.02.2017, granting the extension of time upto 21.02.2017 to commission the Project. In the OM, it was also mentioned that a SPPA had to be executed and that if the Project is not commissioned by 21.02.2017, Articles 2.5.7 and 5.1 of the PPA would be invoked.

- (j) The Project was commissioned on 19.02.2017, within the extended period.

- (k) The Petitioner has pleaded that, as the project was commissioned within the extended period, there is no delay in commissioning the Project. That the PPA provides for extension of SCOD and the same cannot be interfered with as the period of extension is reasonable and the Respondent, after considering that the delay in implementing the Project was due to reasons beyond the control of the Petitioner, has granted the same.

- (l) It is the further pleading of the Petitioner that it is entitled to Rs.8.40 per unit, as the generic tariff orders dated 30.07.2015 and 12.04.2017 do not apply to its case in view of the fact that the PPA was entered into much earlier to the dates mentioned in the said orders.

- 3) On issuance of Notice, the Respondent entered appearance through its Counsel and filed the Statement of Objections.

- 4) The submissions of the Respondent may be stated as follows:
 - (a) As per the terms of the PPA, the generator was required to commission the plant within 18 months from the date of execution of the PPA.

- (b) As the Project could not be executed within time, the Petitioner sought extension of time by 6 months to commission the Project under *force majeure* conditions.
- (c) As several requests for extension of scheduled commissioning date were received from solar developers, the Government of Karnataka issued an Order dated 24.11.2016 directing all the ESCOMs to constitute a 3-Member Committee to consider and dispose the requests of farmers/developers. Accordingly, a Committee was constituted by the Respondent and the Committee in its meeting held on 15.02.2017, considered requests of 6 generators, including the Petitioner. The Petitioner had cited the following reasons for the delayed execution of the Project.

Land Conversion:

Date of Submission of application: 21.04.2016

Date of Conversion: 29.03.2017

Delay in getting the approval: 11 months

KPTCL Evacuation Approval:

Date of Submission of application: 18.02.2016*

Date of Approval: 26.04.2016

Delay in getting approval: 6 months

[We note that this date, as mentioned in the written submissions of the Petitioner, is 07.10.2015/26.12.2015.]

The Committee, after detailed discussions and scrutiny of all the documents, opined that approval may be accorded for extension of SCOD by 2 months

under Article 2.5 of PPA as there was delay in issue of approvals by various Government entities.

- (d) The Respondent in its letter dated 23.02.2017 informed the Petitioner about the extension of time by 2 months for achieving SCOD of the Project, with certain conditions.
- (e) The Commission in its letter dated 16.03.2017 informed all the ESCOMs of the State, not to allow any extension of time to solar generators beyond the scheduled commissioning date, as per the PPA without obtaining prior opinion of the Commission. Further, vide letter dated 05.04.2017, the ESCOMs were directed by the Commission to advise all land owner 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 Energy Department vide its letter dated 25.04.2017 to the Commission has communicated that it has found acceptable the 6 (six) month's extension of SCOD as per Clause 2.5 and Article 8 of PPA.
- (g) In respect of extensions of the Project duration of already awarded Solar Power Projects, the Ministry of New and Renewable Energy in its letter dated 28.07.2017 addressed to the Principal Secretaries (Power/Energy), State Government has stated as below:

“Ministry had 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 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.”

- (h) The Respondent has therefore, prayed for issue of appropriate directions in the matter.
- 5) We have heard the Counsel for the parties and perused the records. The following issues arise for our consideration:
- (1) Whether the extension of time granted, by the Respondent for commissioning of the Petitioner's Project, 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?

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- 6) After considering the submissions made by the Counsel for the parties and the pleadings and other material placed on record, our finding on the above issues are as follows:
- 7) **ISSUE No.(1):** *Whether the extension of time, granted by the Respondent for commissioning of the Petitioner's Project, can be subjected to legal scrutiny by the Commission?*
- (a) Clause 2.5 of the PPA provides for extensions of time. The Petitioner contends 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, such extension should be accepted and approved by the Commission. That the mutual agreement between the generator and the Respondent, ESCOM cannot be questioned. We are unable to accept the contention of the Petitioner. Any 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, has in the case of *All India Power Engineers Federation Ltd v. Sasan Power Ltd.*, reported in (2017) 1 SCC 487, 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 CESC 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 CESC and achieve financial closure and provide a certificate to CESC from the lead banker to this effect;

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

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

2.1.2 SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and CESC 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 CESC 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 CESC 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 CESC or due to Force Majeure, the SPD shall pay to CESC 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, CESC at its discretion may terminate this Agreement

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XXX

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2.3.2 Appropriation of Performance Security

Upon occurrence of delay in commencement of supply of power to CESC as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, CESC 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 CESC 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 CESC Event of Default; or
- (b) Force Majeure Events affecting CESC; 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 CESC through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or CESC, or till such time such Event of Default is rectified by CESC.

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 CESC.

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to CESC by the scheduled commissioning date, the SPD shall pay to CESC, 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 CESC 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 CESC 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 CESC'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 the said clause, it is also necessary to prove that, the *Force Majeure* event was not caused by the non-performing party's negligent or intentional acts, errors or omissions. In this backdrop, we need to examine, if the Petitioner or the SPD, in any manner, was negligent in performing its obligations under the PPA.

- (c) The PPA is signed by the parties on 22.06.2015. As per Article 2.1 of the said PPA, the Conditions Precedent had to be achieved within 365 days from the date of signing the PPA and as per Article 4.1 (c) of the PPA, the Project has to achieve scheduled date of completion and commercial operation within 18 months from the date of signing the PPA, i.e., before 21.12.2016. The achievement of the Conditions Precedent would include obtaining of all the approvals by the SPD.
- (d) The SPD applied for conversion of land on 21.04.2016, after a lapse of about ten months from the effective date of the PPA whereas the date of the application is not mentioned in the petition, it is stated as 01.09.2015 in the written submissions but in the land conversion Order dated 29.03.2017 of the DC, Ballari, it is mentioned as 21.04.2016). No explanation is given for this delay of 10 months after signing of the PPA on the part of the SPD, in making the application for conversion. While it was informed to pay the conversion charges on 10.03.2017, it was paid on 17.03.2017. The land conversion Order was passed on 29.03.2017. Whenever there is an allegation of delay by the authorities in granting permissions/approvals, it needs to be examined

whether the time taken is for valid reasons or not. In the letter dated 01.12.2015 addressed by the Revenue Department of the Government to all DCs and Tahsildars of the State regarding granting conversion permissions for land, it is mentioned that before granting the conversion order, the authorities have to ensure that certain conditions mentioned in the letter are not violated. In order to ascertain the nature of the land in question, correspondences have taken place between the DC, Ballari and the Tahsildar, Siraguppa and other authorities about the status of the land, as per the documents at Annexure P-41. After obtaining the necessary reports from the authorities, the DC has passed the conversion order. The Petitioner has not elaborated on the implementation steps of the Project which were affected by the time taken in grant of approval of land conversion or the efforts made by the SPD or Petitioner in getting the process of issue of land conversion Order expedited by furnishing necessary documents/ explanation. The application for conversion was made after 10 months from the date of PPA and the conversion order was passed after 10 months, after due verification. Had the Petitioner applied for the conversion of land immediately on execution of the PPA, the approval would have been granted much earlier. Hence, we are not inclined to agree with the Petitioner's claim that there was delay in issue of land conversion Order affecting timely implementation of the Petitioner's Project.

- (e) The date on which the SPD applied for the evacuation approval to KPTCL is not mentioned in the petition or in the Objections. In the Written submissions

dated 10.04.2018, it is stated to be 07.10.2015. However, the required documents were admittedly produced only on 26.12.2015. The processing fee was paid on 18.02.2016. The date of tentative evacuation approval is 26.04.2016 and the date of acceptance of the tentative evacuation approval by the Petitioner is 02.05.2016. The regular evacuation approval was given on 23.06.2016, after certain internal correspondences between the various KPTCL functionaries. The evacuation approval is given within 6 months. It is thus evident that there was delay by the SPD not only in applying for grant of evacuation approval, but also in furnishing the required documents. Further, it is not as if the Petitioner's Project was complete but for the grant of evacuation approval, thereby hampering the commissioning of the project. Hence, we do not find that the time taken for grant of evacuation approval has adversely affected timely implementation of the Petitioner's Project.

- (f) The other allegation of the Petitioner is that due to delay by KPTCL in approving single line diagram and layout plan for construction of terminal bay at the sub-station at Siraguppa, the Petitioner could not place orders for supply of necessary equipment from MEIL. It is seen from Annexure P-12, that the approval for single line diagram and layout plan for construction of 11 kV terminal bay at the sub-station was given on 30.11.2016. However, as per Annexure P-10 and P-11, the Purchase Order for the said material was made on 15.10.2016 even before the approval was given by KPTCL. Hence, we are unable to accept that the delay in granting the approval by KPTCL had

delayed placing of orders for the equipment by the Petitioner. Further, as noted earlier the SPD delayed applying for grant of evacuation approval and such delay would have had impact on approval of single line diagram and layout plan.

- (g) The other allegation of the Petitioner is that delay in execution of work was caused by the demonetisation decision of the Central Government. This allegation is not substantiated and cannot in any way be treated as a *force majeure* event as per the terms of the PPA. The Petitioner has also alleged that the delay in supply of MEI breakers caused further delay in implementing the Project. However, this allegation is also not substantiated.
- (h) We note that, it is settled law that the *Force Majeure* clause in the PPA has to be strictly interpreted. It is submitted by the Petitioner that the letters dated 29.11.2016, 07.12.2016, 09.12.2016 and 23.01.2017 addressed to the Respondent seeking extension of time based on force majeure events should be treated as notice, as contemplated under clause 8.3. This submission cannot be accepted, as the said letters dated 29.11.2016 and 07.12.2016 (Annexure P-6 & 7) only mention the status of work and the causes of delay. In the notice contemplated as per clause 8.3(b) of the PPA, the party claiming the benefit of the clause 8.3(a), has to describe the particulars of the force majeure event as soon as practicable after its occurrence. This requirement is not complied with. Hence, the letters cannot be construed as notice under the said clause. Consequently, we consider that the Petitioner

is not entitled for extension of time for commissioning its Project, as provided in the relevant clauses of the PPA.

- (j) The Petitioner has submitted that as on December 2016, the Project was substantially ready for commissioning (90% of the works were completed) and the remaining works could not be completed due to force majeure events beyond the control of the petitioner. At Annexure P-8, the Petitioner has produced the site status report of the solar plant as per the observations made by the Executive Engineer of KPTCL. This Report dated 9.12.2016, reveals that close to 90% of civil works was completed, 75% of solar modules were delivered and stored, 90% of Module Mounting structure installation was completed, 3 inverters were installed, 90% work of switchyard was ready, fencing work was in progress, 90% of the construction of 11 kV overhead line from Project site to sub-station was completed and bay works of sub-station had to be carried out. In the letters of the Petitioner dated 29.11.2016 and 07.12.2016 seeking extension of time to commission the Project, the various works pending are enumerated. These indicate that the Project was not ready for being commissioned by 21.12.2016-the Scheduled Commissioning Date and in view of the pending works, could not at all have been commissioned within the SCD. The construction of the 11 kV terminal bay at the sub-station was completed as on 18.01.2017 as per Annexure P-17. However, it is stated that the PTCC proposal was under process with BSNL, Ballari. The plant was ready for synchronisation on 23.01.2017, as per the letter dated 23.01.2017 at Annexure P-18. Thus, we are not convinced that the

delay in commissioning of the Petitioner's Project was because of the *Force Majeure* Events. Hence, we consider that the Petitioner is not entitled to extension of time, as provided in the clauses of the PPA.

- (k) We have held in the preceding paragraphs, that the Petitioner is not entitled to extension of time, as none of the events and reasons cited, qualify as force majeure events. Thus, there is delay, not only in the commencement of supply of power by the Petitioner to the Respondent, but also in achieving the Conditions Precedent within the stipulated time, as per the terms of the PPA, making it liable for payment of damages. It is submitted by the Petitioner that the Respondent has not levied the damages and has in fact, returned the performance bank guarantee, indicating that it has waived the damages, for delay in achieving Conditions Precedent and commissioning of the plant. The Respondent has mentioned in the letter dated 17.02.2017 granting extension of time to commission the Project, that the damages will have to be paid if the Project was not commissioned by 21.02.2017 and that as the Project was commissioned within the extended time, no damages can be levied. As held by us, such extension of time is not justified and proper.
- (l) 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. 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.

(m) 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.

(n) In the written submissions dated 10.04.2018, the Petitioner has referred to certain case laws, without mentioning the propositions on which the same are relied upon and how they apply to this case. These case laws were not relied during arguments. Hence, we no occasion to consider them.

(p) 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) Article 5.1 of the PPA extracted earlier, provides for reduction of tariff as a consequence of delay in commissioning of the Solar Power Project beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein. This is in view of the fact that this Commission periodically determines generic tariff for supply of electricity generated from various sources, to the Distribution Licensees, based on among other parameters mainly Capital cost of the generating plant. Such generic tariff is made available for a period normally longer than a year called as 'control period' during which the generating plants get implemented and commissioned at the normative capital cost adopted in the generic tariff order, generally after execution of a PPA with Distribution Licensee. Such PPA also has a clause stipulating the time within which the power supply should commence so that the Distribution licensee can plan further supply to its consumers. The time ordinarily required to complete various pre-commissioning activities, which in respect of megawatt scale solar power plants is taken as between 12 months to 18 months. Any delay or failure in commencement of power supply within the agreed date would disrupt the operation of the Distribution Licensees like the Respondent which could also result in their power procurement from

alternative expensive sources leading to higher retail tariff to the consumers or short supply leading to revenue loss to them and even to imposition of penalties for not meeting the Renewable Purchase Obligation fixed by this Commission. The capital cost of solar power plants has been coming down very rapidly in the recent years because of advancement in technology and production efficiency as well as economies of scale in the backdrop largescale solar capacity addition across the globe. Thus, generic tariff for megawatt scale solar power plants which was fixed at Rs.14.50 per unit in the Commission's Order dated 13.07.2010 has been successively reduced to Rs.8.40 per unit in the Commission's Order dated 10.10.2013, to Rs.6.51 in the Order dated 30.07.2015, then to Rs.4.36 per unit in the Order dated 12.04.2017 and now to Rs.3.05 per unit in the Order dated 18.05.2018.

- (c) We note that the SPV took the risk of implementation of the Project after eleven months from signing of the PPA, with barely seven months 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 in the PPA, that could have entitled the Petitioner to seek extension of the commissioning date agreed in the PPA. The Petitioner is not entitled to the tariff originally agreed in the PPA at Rs.8.40 per unit, when admittedly the plant was not commissioned within the stipulated time and it is entitled only for the revised tariff as on the date of commissioning of the plant as per clause 5.1 of the PPA. Admittedly, in the present case, the generic tariff for solar power plants that was agreed in the PPA, was revised much before the

plant was ready for commissioning. In any case, the Petitioner having voluntarily entered into a PPA which has a clause providing for revision of the tariff agreed 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) It is submitted by the Petitioner that the generic tariff order dated 30.07.2015 is not applicable to its Project as the PPA was entered into much earlier. We are unable to accept this submission. The said order is also applicable to Projects which had entered into PPAs earlier but are commissioned within the control period of the Order. The Project of the Petitioner is commissioned within the control period of the Order dated 30.07.2015. Hence, the tariff of Rs.6.51 per unit is applicable.
- (e) It is also the submission of the Petitioner that as on the date of approval of the SPPA, the Commission's Order dated 30.7.2015 fixing the tariff at Rs.6.51 per unit was in place, but the Commission did not vary the agreed tariff of Rs.8.40 per unit, and hence, the said tariff of Rs.8.40 per unit has to be paid for the term of the PPA. This submission cannot be accepted, as the SPPA was limited, only to incorporate the SPV in the relevant clauses. The other aspects were not considered while approving the SPPA.
- (f) The PPA provides that, the tariff on the date of commercial operation will be applicable for the Project. The Project is commissioned on 19.02.2017. The

Petitioner, in the Written arguments and documents filed on 10.04.2018, has submitted that the Petitioner is entitled to the tariff of Rs.8.40 per unit, as the capital cost incurred is comparable to the capital cost considered in the tariff order dated 10.10.2013. The cost parameters of individual Project cannot be considered as the petition is not filed for Project specific tariff determination and the clauses in the PPA relating to tariff have to be adhered to. As per the terms and conditions of the PPA, the tariff payable to the SPD/Petitioner is not based on the capital cost incurred in Project implementation, but as per the relevant clauses of the PPA. The Hon'ble Supreme Court of India in Civil Appeal No. 1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*) 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...."

- (g) Hence in the facts and circumstances of the case, we hold that the Petitioner's Plant is entitled to a tariff of Rs.6.51 per unit for the term of the PPA, as per the Generic Tariff Order dated 30.07.2015, prevalent as on the date of commercial operation of the Project.
- (h) Accordingly, we answer Issue No.(3), as above.
- (j) We note here that during the proceedings, the Petitioner had alleged that no payment was made by the Respondent for the energy injected from the date of commissioning of the Project. Considering the submissions, payment at Rs.4.36 per unit was directed to be made till the disposal of the Petition.
- 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.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;
- (c) The Petitioner is also liable to pay damages, including Liquidated Damages, as provided under Articles 2.2 and 2.5.7 of the PPA; and,
- (d) The difference between the interim payment of Rs.4.36 (Rupees Four and Paise Thirty Six) only per unit and the tariff of Rs.6.51 (Rupees Six and Paise Fifty-One) per unit shall be paid to the Petitioner from the date of commissioning of the Project, within a period of 4 (four) weeks from the date of this Order.

Sd-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd-
(H.D. ARUN KUMAR)
MEMBER

Sd-
(D.B. MANIVAL RAJU)
MEMBER