

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**

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

**Dated : 28<sup>th</sup> August, 2018**

**Present:**

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

**O P No. 167/2017**

**BETWEEN:**

Poorvaj Solar Energy Pvt. Ltd.,  
No.658/8, 2<sup>nd</sup> Floor, F, 1<sup>st</sup> C Main Road,  
40<sup>th</sup> Cross, 8<sup>th</sup> Block, Jayanagar,  
Bengaluru – 560 082.

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**PETITIONER**

*[Represented by Kumar & Bhat, Advocates]*

**AND:**

- 1) Bangalore Electricity Supply Company Limited,  
Corporate Office, K.R. Circle,  
Bengaluru – 560 001.
- 2) Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan, Kempegowda Road,  
Bengaluru – 560 009.
- 3) Karnataka Renewable Energy Development Limited,  
Bharath Scouts and Guides Limited,  
Palace Road,  
Bengaluru – 560 001.
- 4) The Deputy Commissioner,  
Harihar Road, Karur Industrial Area,  
Davanagere- 577004

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**RESPONDENTS**

*[Respondents 1 & 2- represented by Shri Shahbaaz Husain, Advocate,  
Respondent-3 - represented by Shri Rakshith Jois, Y.P., Advocate,  
Respondent-4 - unrepresented]*

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**ORDERS**

- 1) This Petition is filed under Section 86(1) of the Electricity Act, 2003 praying to:
  - (i) direct the 1<sup>st</sup> Respondent (BESCOM) to comply with the original terms of the PPA and provide the confirmation for time extension with original tariff, under Article 8 i.e., *Force Majeure*;
  - (ii) direct the 1<sup>st</sup> Respondent (BESCOM) to accept the original tariff agreed in the Power Purchase Agreement (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* condition, 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 1<sup>st</sup> Respondent (BESCOM) 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.
  
- 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:

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- (a) The Petitioner is a company, registered under the Companies Act, 2013, carrying on the business of developing, executing, managing and running 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 the land owning farmers, with a minimum capacity of one 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 26.8.2014, 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 jurisdictional ESCOs.
- (c) Accordingly, Sri H P Rajesh, a land owning farmer had made an application for grant of solar power project with capacity of 3 MW to be established in his land at Sy.No. 7/3, Gopagondanahalli, Jagalur Taluk, Chitradurga District. The 3<sup>rd</sup> Respondent (KREDL), issued a Letter of Award (LoA) in his favour, vide allotment letter dated 17.03.2015. Thereafter, the 1<sup>st</sup> Respondent (BESCOM) executed a PPA dated 27.06.2015 with him (Solar Project Developer/SPD) for purchase of the power from the 3 MW Solar Power Plant.

- (d) As the SPD had no capacity to invest and establish the Solar Power Plant, he found an 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 02.09.2016 was also entered into between the 1<sup>st</sup> Respondent (BESCOM) and the Petitioner-SPV, for 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 Solar Power 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 27.06.2015, the same had to be approved by the Commission. After approval of the Commission, the PPA was handed over to the Petitioner on 27.08.2015.

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

- (f) The Petitioner lost about two months' time to receive the approved PPA, which is to be treated as a *Force Majeure* event, under Article 8.3 of the PPA. The 1<sup>st</sup> Respondent (BESCOM) had not initially understood the formalities of

forming an SPV and the modalities of the SPPA. The Commission had clarified the same during December, 2015 and even after that, the 1<sup>st</sup> Respondent (BESCOM) could not understand the clarification given by the Commission, and the Commission issued the new formats for AOA, MOA and SPPA on 21.03.2016. 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 GoK issued a Circular dated 01.12.2015, fixing the time for grant of the deemed conversion as 15 days. As per the Circular, the Petitioner had submitted all the requisite documents, like PPA, KREDL letter, RTC, PTCL NOC and other relevant documents, on 16.12.2015, before the Deputy Commissioner, for conversion of land. The Deputy Commissioner passed an Order on 14.06.2016, for conversion of the land, after a delay of 6 months. The Petitioner had also applied for evacuation approval before the 2<sup>nd</sup> Respondent (KPTCL) on 12.8.2015 and the same was granted on 16.9.2016, after a delay of 13 months. Subsequent to the power evacuation approval, the 2<sup>nd</sup> Respondent (KPTCL) granted the Work Order to carryout Sub-station work on 28.3.2017, resulting in a delay of more than 19 months. Subsequent to the evacuation approval, the Petitioner could obtain Work Order, to construct a 11 kV line, only during May, 2017.

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- (h) The Petitioner made a request on 30.11.2016, for providing the MEI breaker, and the same was received on 20.05.2017, after more than 5 months.
- (j) The 11 kV line from the Petitioner's Plant to the Sub-station, had to pass through the forest lands, and though the Petitioner had applied for approval from the Forest Department, Davanagere on 04.02.2016, the same was granted on 19.06.2017, after a period of more than 16 months.
- (k) The request for extension of time, to commission the Plant, was made to the 1<sup>st</sup> Respondent (BESCOM) on 09.12.2016, but the same was received by the Petitioner on 02.03.2017, after a delay of 3 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 Sub-station work, as the extension of time was not granted, immediately, despite a direction by the GoK, in the Circular dated 24.11.2016, that the 1<sup>st</sup> Respondent had to extend the time, under the PPA, within 15 days. Hence, there was a delay of 3 months for granting the extension of time. Further, there was a delay of three months, due to demonetization, which has to be treated as a *Force Majeure* event.
- (l) Owing to the inordinate delay in the issuance of various permissions and sanctions, including the 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 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.

- (m) The Petitioner has invested Rs.20 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.
  - (n) After the execution of the PPA, between the Petitioner and the 1<sup>st</sup> Respondent (BESCOM), 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 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents appeared through their learned counsel and filed their Statement of Objections. The 4<sup>th</sup> Respondent, though unrepresented, has filed his Objections.
- 4) The Objections of the 1<sup>st</sup> Respondent may be summarized. as follows:
- (a) As the Petitioner was unable to execute the Project, in a timely manner, it sought for extension of time for commissioning the Project, by six months, under the *Force Majeure* conditions. As several requests for extension of the

Scheduled Commissioning Date were received from the Solar Developers, the GoK issued an Order dated 24.11.2016, directing all the ESCOMs to constitute a three-member Committee, to consider and to dispose of the requests of the farmers / developers. A Committee was constituted by the 1<sup>st</sup> Respondent (BESCOM), to consider the requests for the extension sought for by the 1 to 3 MW Solar Generators, under the land owning farmers' category. The said Committee held a meeting on 15.02.2017, wherein the causes for the delayed achievement of the scheduled commercial operation were considered, in respect of 17 Generators, including the Petitioner and a decision was taken to accord extension of six months' time, to achieve the SCOD.

- (b) The Petitioner furnished the documents to the Committee, constituted for the purpose, for consideration of the 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.

Land conversion:

Date of submission of application	:	17.03.2016
Date of conversion	:	14.06.2016
Delay in getting approval	:	nearly 3 months

KPTCL evacuation approval (Regular):

Date of submission of application	:	12.08.2015
Date of approval	:	16.09.2016
Delay in getting approval	:	Nearly 13 months

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- (c) The Committee, after detailed discussions and scrutiny of all the documents, opined that, approval may be accorded for extension of the SCOD, by six months, considering Article 2.5 of the PPA, as there is a delay in the issuance of the approvals by various Government entities.
- (d) On 02.03.2017, the 1<sup>st</sup> Respondent (BESCOM) addressed a letter to the Petitioner, informing about the extension of time by six months, for the SCOD. The subject was placed before the 82<sup>nd</sup> Meeting of the Board of Directors of the 1<sup>st</sup> Respondent (BESCOM), held on 11.05.2017, for evaluation / disposal of the requests of the land owning farmers / SPVs, for extension of time for the CoD, in respect of the 1 to 3 MWs Solar Power Plants in Karnataka, under the farmers' category. The Board has ratified of the extension of time, issued by the 1<sup>st</sup> Respondent (BESCOM).
- (e) On 16.03.2017, the Commission addressed a letter to all the ESCOMs in the matter, pertaining to the extension of time granted to Solar Generators and informed them, not to allow any extension of time, beyond the scheduled commissioning, if any, as per the original PPA, without obtaining the prior opinion of the Commission. Further, vide letter dated 05.04.2017 the ESCOMs were directed by the Commission, to advise all the land owning Solar Developers / SPVs, to approach the Commission and seek for approval of the extension of time. In furtherance to the same, the Petitioner has filed this Petition.

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- (f) The Additional Chief Secretary to Government, Energy Department, vide letter dated 25.04.2017, addressed to the Commission, sought for its approval to the extension of the CoD by the 1<sup>st</sup> Respondent (BESCOM), for six months from the date of the SCOD, as per Articles 2.5 and 8 of the PPA.
- (g) The Project was commissioned on 22.06.2017.
- (h) 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 letter No.30/106/2014-15/NSM dated 28.07.2017, addressed to the Principal Secretaries (Power/Energy) of the State Governments, stating as below :

*“Ministry has requested not to give time extension if all the obligations are fulfilled by the concerned State Government Authorities/PSUs, etc., in a project. However, if there are delays of any kind on the part of State Government Authorities/PSUs like land allotment, transmission/Evacuation facilities, connectivity permission or force majeure, the competent authority in the State/SECI, NTPC, etc., may consider providing extension of the time duration strictly as per the contractual agreement.*

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

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- (j) The 1<sup>st</sup> Respondent (BESCOM) has, therefore, prayed that, the Commission may be pleased to accord directions, in the present Petition, in the interest of justice.
- 5) The Objections of the 2<sup>nd</sup> Respondent (KPTCL) may be summarized, as follows:
- (a) The Petitioner has alleged that, there is a delay of 13 months on the part of the 2<sup>nd</sup> Respondent (KPTCL), in approving power evacuation, which is denied as false. The application for power evacuation was not received on 12.08.2015, as stated by the Petitioner, but was received by the 2<sup>nd</sup> Respondent (KPTCL) on 18.6.2016. The chain of events, with regard to the approval of power evacuation is, as hereunder:
- (i) Application received on 18.06.2016;
- (ii) On receipt of application, a letter was addressed to the Petitioner on 18.06.2016 to pay the processing charges of Rs.57,250/-, along with the BESCOM feasibility, land conversion copy from the concerned Deputy Commissioner, original RTC and detailed information of IPP developer;
- (iii) On 01.07.2016, the above documents and receipt of payment of the processing fees were produced by the Petitioner;
- (iv) The tentative evacuation approval was issued to the Petitioner on 04.07.2016;

- (vi) On 10.07.2016, the Petitioner submitted the acceptance letter, agreeing with the terms and conditions of the tentative evacuation approval;
- (vii) On 11.08.2016, the field report was received from the field officers regarding the availability of the spare space to accommodate a 11 kV Terminal Bay;
- (viii) On 17.08.2016, the field report was submitted to CEE, P&C, for administrative approval;
- (ix) In the 76<sup>th</sup> TB Committee Meeting, held on 7.9.2016, the matter was discussed and approval was accorded, for utilization of the space available in the Sub-station, for construction of a Terminal Bay;
- (xi) On 16.09.2016, the regular evacuation approval was issued to the Petitioner.

From the above chain of events, it is clear that the 2<sup>nd</sup> Respondent (KPTCL) has not delayed the process of according the evacuation approval to the Petitioner.

- (b) The contention of the Petitioner that, there is a delay of 19 months 17 days by the 2<sup>nd</sup> Respondent (KPTCL) in granting the Work Order on 28.03.2017, to carryout the Sub-station work, is strongly denied as false. The Work Order can be sanctioned, only subsequent to the approval for power evacuation, and the evacuation approval was granted on 16.09.2016. The estimate for the work was received on 18.03.2017. The Work Order to carryout the

Sub-station work was granted on 28.03.2017, in about 5 months' time. The chain of events leading to sanction of the Work Order is, as follows:

- (i) The estimate for the subject work was received on 18.03.2017;
  - (ii) The Intimation for payment of necessary charges towards land lease, O&M and supervision was issued on 21.03.2017;
  - (iii) The Petitioner paid the charges on 24.03.2017 and the payment letter received on 25.03.2017;
  - (iv) The technical sanction was issued on 25.03.2017;
  - (v) The work approval was issued on 28.03.2017.
- (c) Thus, the 2<sup>nd</sup> Respondent (KPTCL) has not delayed in sanctioning the Work Order or in approving the power evacuation.
- (d) The allegation of the Petitioner that, the delay in receiving the MEI breaker is attributable to 2<sup>nd</sup> Respondent, is denied. The Petitioner took more than 4 months, to submit the request for inspection of the 11 kV MCVCB and the chain of events leading to delivery of MEI breaker is, as follows:
- (i) On 06.12.2016, the Petitioner submitted the MEI switch gear drawings for approval;
  - (ii) On 06.12.2016, the 11 kV PCVCB drawing approval letter was issued;

- (iii) On 20.04.2017, the Petitioner submitted the request for inspection of the 11 kV PCVCB;
- (iv) On 02.05.2017, inspection was carried out and TAQC acceptance letter was issued on 20.05.2017. DI was issued on 25.05.2017.

Therefore, there is no delay on the part of the 2<sup>nd</sup> Respondent (KPTCL).

- (e) The 2<sup>nd</sup> Respondent (KPTCL) has, therefore, prayed for issuance of directions, in the Petition, in the interest of justice.
- 6) The 3<sup>rd</sup> Respondent (KREDL), in its Statement of Objections, has stated that, it is for the 1<sup>st</sup> Respondent (BESCOM) to counter the contentions urged by the Petitioner and that, it is not a necessary party to this Petition. The 3<sup>rd</sup> Respondent (KREDL) has, therefore, prayed that the Petition against it, may be dismissed.
- 7) The submissions of the 4<sup>th</sup> Respondent (DC), in the reply filed by him, may be summarized, as follows:
  - (a) The application for conversion of land was not made on 16.12.2015, as averred in the Petition. The land owner submitted an application for conversion of the land, directly to the DC's office on 16.03.2016, without reference from the local authorities. Hence, the application was redirected

to the Tahsildar, Jagaluru, for necessary reports, on 26.03.2016. After conducting the spot inspection on 03.05.2016, the report was submitted by the Tahsildar on 05.05.2016. The land owner did not turn up for payment of land conversion charges and, therefore, a Notice was issued on 09.06.2016. The land owner paid the charges on 09.06.2016 and the Order of conversion was passed on 14.06.2016. As such, there is no delay on the part of the DC, in issuing the land conversion Order.

(b) The 4<sup>th</sup> Respondent has, therefore, prayed that, the Petition may be dismissed, as against him.

8) 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 1<sup>st</sup> Respondent (BESCOM) to the Petitioner, for achieving the commercial operation of the Petitioner's Plant, can be subjected to legal scrutiny by the Commission?
- (2) Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant, under *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?

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- 9) After considering the submissions made by the learned counsel for the parties and the pleadings and other material placed on record, our findings on the above issues are, as follows:
- 10) **ISSUE No.1:** *Whether the extension of time of six months, granted by the 1<sup>st</sup> Respondent (BESCOM) to the Petitioner, for achieving the commercial operation of the Petitioner's Plant, can be subjected to legal scrutiny by the Commission?*
- (a) Article 2.5 of the PPA does not specifically stipulate that, any extension of time granted by the 1<sup>st</sup> Respondent (BESCOM), should be got approved by the Commission. However, Article 2.5.1 of the PPA stipulates the grounds, on which alone the time could be extended, for achieving the commercial operation. Article 5.1 of the PPA provides for reduction of the tariff, as a consequence of the delay in the commissioning of the Project, beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated, therein. Whenever an event affects the quantum of tariff, applicable for supply of energy to the Distribution Licensees, we are of the considered opinion that the same should be scrutinized and approved by the Commission. It is a settled law that, this Commission has the exclusive jurisdiction to determine the tariff, for supply of electricity by a Generating Company to a Distribution Licensee, and it has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price, at which the electricity shall be procured from different agencies, through the 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 1<sup>st</sup> Respondent has accepted the Petitioner's claim of *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, to support 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 the consumers' interest, has to intervene and exercise its regulatory powers. Accordingly, we hold that, the Commission has the mandate and powers to

scrutinize the correctness and the legality of the extension of time granted by the 1<sup>st</sup> Respondent (BESCOM).

c) Therefore, we answer Issue No.(1), in the affirmative.

11) **ISSUE No. (2):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant, under 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 BESCOM 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 BESCOM and achieve financial closure and provide a certificate to BESCOM from the lead banker to this effect;*

*(b) All Consents, Clearances and Permits required for supply of power to BESCOM 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

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## **2.3.2 Appropriation of Performance Security**

Upon occurrence of delay in commencement of supply of power to BESCO as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, BESCO 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 BESCO 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 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 BESCOs.**

*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 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 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 1st Respondent (BESCOM)'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* Event was not caused by the non-performing party's negligent or intentional acts, errors or omissions. In this backdrop, we need to examine, if the Petitioner or the SPD, in any manner, was negligent in performing its obligations under the PPA.
- (c) The PPA is signed by the parties on 27.06.2015. As per Article 2.1 of the PPA, the Conditions Precedent had to be achieved within 365 days from the date of signing the PPA and the Project had to be commissioned within 18 months from the date of signing the PPA. 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 28.08.2015 by the Commission has caused 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. 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 approval of the PPA, in counting the period available for commissioning the Project. Hence, the time taken, in the regulatory process, for approval of PPA cannot be termed as '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 conversion of land on 16.12.2015. The Petitioner has stated that, ANNEXURE – J, dated 16.12.2015 is the application for conversion. However, there is no ANNEXURE - J to the Petition and the copy of the said application is not produced. The reply of the Deputy Commissioner, Davanagere, to the Petition reveals that, the application was made before the Deputy Commissioner for conversion of the land on 16.03.2016, i.e., after a lapse of about 8 months from the Effective Date of the PPA. A copy of this application is not produced by the Petitioner. No explanation is given for this delay, on the part of the SPD, in applying for the land conversion. It is stated by the Deputy Commissioner that the SPD did not take any follow up action on his application, and that after issuance of the Notice, he paid the land conversion charges on 09.06.2016. The land conversion Order was passed by the Deputy Commissioner on 14.06.2016, in

about 3 months' time from the date of application, which is found to be reasonable. In fact, the Petitioner has tried to mislead the Commission, by furnishing incorrect dates and facts.

- (e) The Petitioner has stated that, the SPD applied for the evacuation approval to the 2<sup>nd</sup> Respondent (KPTCL) on 12.08.2015 and that ANNEXURE - K is the application, which is addressed to the Managing Director of the KPTCL. The 2<sup>nd</sup> Respondent (KPTCL) has filed a copy of the application dated 16.06.2016, along with the Statement of Objections and stated that the same was received on 18.06.2016. This application is made almost an year after the execution of the PPA. No explanation is given for this delay in making the application by the SPD. The Petitioner has alleged that, the 2<sup>nd</sup> Respondent (KPTCL) has caused the delay of 13 months, in granting the evacuation approval. The 2<sup>nd</sup> Respondent (KPTCL), in its Statement of Objections, has furnished the dates and events leading to the grant of evacuation approval. The regular evacuation approval was granted on 16.09.2016, within 3 months from the date of application. This short period of time cannot be termed as 'delay'. In fact, the Petitioner has tried to mislead the Commission, even in this aspect.
- (f) It is the further allegation of the Petitioner that, there was a delay of 19 months by 2<sup>nd</sup> Respondent(KPTCL), in grant of the Work Order to carryout the Station Work. This allegation is denied by the 2<sup>nd</sup> Respondent (KPTCL) in

its Objections, filed. We note that, the time taken by the 2<sup>nd</sup> Respondent (KPTCL) from 16.09.2016, the date of grant of regular evacuation approval to 28.03.2017, the date of granting the Work Order, is 5 months, which is reasonable, considering the sequence of events mentioned in the Statement of Objections filed by 2<sup>nd</sup> Respondent. 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 1<sup>st</sup> Respondent (BESCOM), 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 3 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 a *Force Majeure* event.
- (h) The other allegation of the Petitioner is that, the Forest Department (*which is not arrayed as a party to the Petition*) delayed granting clearance, for laying of the 11 kV line. That, the application was made on 04.02.2016 and the clearance was given by the Forest Department on 19.06.2017. We note that, the Schedule-1 to the PPA dated 27.06.2015 contains the details of the Project and mentions that, the nearest Sub-station is Jagaluru Sub-station. The Petitioner ought to have known that, the line would require Forest Department's clearance and should have taken timely action to seek the

same. The Petitioner has applied for the Forest Department's clearance on 04.02.2016, after 8 months from the date of execution of PPA. The Regular Evacuation approval of the 2<sup>nd</sup> Respondent (KPTCL) dated 16.09.2016, contains a condition, at clause 9 that, all the required statutory approvals from Forest / PTCC / Railways / Pollution under check certificate / Electrical Inspectorate, etc., shall be in place before seeking the synchronization approval. We note that thus, it is the obligation of the Petitioner to obtain all approvals and develop the Project within 8 months, under the clauses of the PPA and the allotment letter dated 17.03.2015, issued by the Respondent-3 (KREDL). Not only the initial delay of 8 months, in seeking Forest Department's approval (clearance) is attributable to the Petitioner, even the later delay in issuance of the Forest Department's approval can be attributed to the Petitioner, because the Petitioner has not produced any documents / materials, to indicate the Petitioner/SPD's efforts to get the process of issuance of such clearance, expedited. We have noted earlier, the submission of the 4<sup>th</sup> Respondent (DC), that the Petitioner failed to take any follow-up action on its application for grant of land conversion. It could, therefore, be easily inferred that even on the issue of Forest Department's clearance the Petitioner/SPD has not been diligent in getting it in time, by furnishing necessary information/ documents.

- (j) It is also the allegation of the Petitioner that, the breaker was supplied by MEI, after a period of 5 months from the date of the Order. We note that, the breakers have to be tailor made, based on the drawing submitted, tested

and certified by the TAQC and, thereafter, dispatched. Considering the various steps involved, the period of about 3 months taken, in supply of breakers, cannot be termed 'delay'. The 2<sup>nd</sup> Respondent (KPTCL) has submitted that the Petitioner took more than 4 months to submit the letter for inspection of the 11 kV MCVCB and looking at the chain of events mentioned in its Statement of Objections, we find that there is no delay, as alleged. In fact, the Petitioner has failed to explain, as to why there was a delay, on its part, in taking timely necessary action for placing the Purchase Order, for the breaker.

- (k) It is also the case of the Petitioner that, the communication on extension of time for SCOD was sent on 02.03.2017, after 2 months from the date of request on 08.12.2016 and the Petitioner could not carry out 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.
- (l) 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 Respondent-1 (BESCOM). None of the reasons or the events, cited by the Petitioner, for delay in commissioning of its Project falls under the *Force Majeure* Events, mentioned

in the PPA, as held in the preceding paragraphs. Hence, we consider that, the Petitioner is not entitled to extension of time, as provided in the clauses of the PPA. Consequently, the Petitioner would be liable for payment of Liquidated Damages, as per Article 2.5.7 of the PPA.

- (m) 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.
- (n) 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, as stipulated in the PPA.
- (p) Therefore, we answer Issue No.(2), in the negative.

12) **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, 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 the generic tariff, for supply of the 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

the execution of a PPA with the 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 and 18 months. Any delay or failure in commencement of power supply, within the agreed date, would disrupt the operation of the Distribution Licensees, like the 1<sup>st</sup> Respondent (BESCOM), which could also result in their power procurement from alternative expensive sources, leading to higher retail tariff to the consumers or short supply, leading to revenue loss to them, and even to imposition of penalties for not meeting the Renewable Purchase Obligation, fixed by this Commission. The Capital Cost of the Solar Power Plants has been coming down, very rapidly, in the recent years, because of advancement in the technology and production efficiency, as well as economies of scale, in the backdrop of the largescale Solar capacity addition, across the globe. Thus, generic tariff for megawatt scale Solar Power Plants, which was fixed at Rs.14.50 per unit in the Commission's Order dated 13.07.2010, has been successively reduced to Rs.8.40 per unit in the Order dated 10.10.2013, Rs.6.51 per unit 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 more than a year, after the execution of the PPA, with barely four months left for its commissioning, as agreed in the PPA, and could not do commission, for certain reasons and events, which we have held to be not falling under the *Force Majeure* clause in the PPA, that could have entitled the Petitioner to seek extension of the commissioning date, agreed to in the PPA. It is safe to infer that, the normative Capital Cost of the Solar Power Plants, when the Petitioner took effective steps to procure the capital equipment for its Project, was lower than the normative cost of the Solar Power Plants, assumed in the Generic Tariff 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 to, 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 the investments were actually made, except for a mere statement that, Rs.20 Crores is 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 the investments have been made after the formation of SPV and execution of the SPPA. 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 the Project implementation, but the tariff as per the relevant clauses of the PPA. The Hon'ble Supreme Court of India, in Civil Appeal No. 1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided 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 1<sup>st</sup> respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA: -*

*'In case, commissioning of solar Power Project is delayed beyond 31<sup>st</sup> December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, **whichever is lower.**'*

*The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first respondent not being able to commence the generation of electricity within the “control period” stipulated in the 1<sup>st</sup> tariff order. It is also visualised that for the subsequent control period, the tariffs payable to a PROJECTS/ power producers (similarly situated as the first respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the*

*1<sup>st</sup> respondent would be entitled only for lower of the two tariffs...."*

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

(e) The Project was commissioned on 22.06.2017. Hence, on the facts and in the circumstances of the case, we hold that, the Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit, for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017.

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

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

For the foregoing reasons, we pass the following:

### **ORDER**

(a) It is declared that the Petitioner is not entitled to any of the reliefs, sought for, in the Petition;

(b) The Petitioner is entitled to a tariff of Rs.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, 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