

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 28th August, 2018

Present:

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

OP No: 217/2017

BETWEEN:

Smt. Anjinamma,
W/o Late Thimmanna,
No.100, Surnahalli,
Challakere Taluk,
Chitradurga - 577 522.

.. **PETITIONER**

[Represented by Navayana Law Offices, Advocates]

AND:

Bangalore Electricity Supply Company Ltd.,
K.R. Circle,
Bengaluru - 560 001.

.. **RESPONDENT**

[Represented by Shri Shahbaaz Husain, Advocate]

ORDERS

- 1) This Petition is filed under Section 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 - 26.08.2017;
 - (b) Direct the Respondent to make payment at the tariff of Rs.8.40 per unit, for the Petitioner's Solar Power Project, for the term of the Power Purchase Agreement (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 (GoK) 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 17.03.2015, in favour of a land owning farmer, Sri Thimmanna (the Petitioner's husband) and allotted one MW capacity Solar Power Project, to be commissioned at Channamangathihalli Kaval Village, Parashuramapura Hobli, Challakere Taluk, Chitradurga District under 1-3 MW land owning Farmers' Scheme, subject to certain terms and conditions. Sri Thimmanna expired on 06.04.2015 and his legal heir, the Petitioner approached the Respondent to sign the PPA.

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- (b) The Petitioner executed a PPA dated 27.08.2015 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 (SCOD) is defined as, 18 months from the Effective Date. The Project had to be commissioned before 27.02.2017. The PPA was approved by the Commission, vide letter dated 02.09.2015 and hence, this date may be deemed to the Effective Date and the Plant had to be commissioned before 01.03.2017.
- (c) On 28.01.2016, the Petitioner submitted an application to the KPTCL for approval, for evacuation of power. The tentative evacuation approval was received on 12.09.2016. On 26.10.2016, the Petitioner requested Respondent (BESCOM) the for extension of COD by 6 months.
- (d) On 02.11.2016, the Petitioner placed an order for feeder panel (breaker) with the MEIL.
- (e) The Petitioner did not receive bay allotment, due to augmentation of transformer at 66/11 kV Dyavaranahalli Sub-station. The Project work slowed down, due to demonetisation decision of the Central Government. On 02.12.2016, the Petitioner requested the Respondent for extension of COD by 6 months.
- (f) On 19.06.2017, the Government addressed a letter to the KPTCL and the Electricity Supply Companies (ESCOMs), stating that the breakers available

with the ESCOMs, may be provided to the Project proponents under Land Owning Farmers' Scheme, as a temporary measure, as there was delay by the MEI in providing the breakers.

- (g) The Petitioner faced problems in executing the Project, due to delay in grant of the evacuation approval and land conversion Order. The Petitioner applied to the Respondent for extension of time to commission the Project on 24.08.2017, representing the *Force Majeure* conditions. Considering the difficulties faced by the Petitioner, the Respondent issued a letter dated 21.08.2017, granting extension of time of 6 months from the SCOD, upto 26.08.2017, to commission the Plant. *[Here itself, we may note that the letter of the Respondent, dated 21.08.2017, was issued subject to the condition that the Petitioner should file a Petition before this Commission, for establishing the force Majeure Event, to claim the condonation of delay in commissioning the Project. The Petitioner has not stated, in her Petition, this important condition mentioned in the letter dated 21.08.2017.]* The Project was commissioned on 26.08.2017.

- (h) The Petitioner has commissioned the Project 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 the reasons beyond the control of the Petitioner, has granted the same.

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- (j) The Petitioner 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 her case, in view of the fact that, the PPA was entered into much earlier to the dates mentioned in the said Orders. Further, the OM dated 21.08.2017, granting the extension of time, does not mention about altering the tariff and clarifies that, all other conditions of the PPA remains unaltered. Therefore, the Petitioner is entitled to the tariff of Rs.8.40 per unit.
- (k) As the SCOD was extended, considering the *Force Majeure* Events, and the newly determined SCOD and the expiry date shall be deemed to be the SCOD and expiry date, as per Article 2.5.6 of the PPA, the Respondent is not entitled to damages, without adjudication by the Commission.
- 3) On issuance of Notice, the Respondent entered appearance through the its learned 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 Petitioner was unable to execute the Project within time, it sought extension of time by 6 months, under the *Force Majeure* conditions, to commission the Project.

(c) 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 3-member Committee to consider and dispose of the requests of farmers/developers. Accordingly, a Committee was constituted by the Respondent and the Committee, in its meeting held on 18.08.2017, considered the request of the Petitioner. The Petitioner had cited the following reasons for the delayed execution of the Project.

Land Conversion:

Date of Submission of application	:	22.04.2016
Date of Conversion	:	22.07.2017
Delay in getting conversion order	:	1 year 3 months

KPTCL Evacuation Approval:

Date of Submission of application	:	28.01.2016
Date of Approval	:	13.07.2017
Delay in getting approval	:	1 year 6 months

The Committee, after detailed discussions and scrutiny of all the documents, opined that, approval may be accorded for extension of the SCOD upto 6 months, under Article 2.5 of PPA, as there was delay in issuance of the approvals by the various Government entities. The extension was granted, subject to the condition that, the tariff applicable and the Liquidated Damages to be paid, if any, is subject the KERC / GoK approval.

- (d) The Respondent, in the letter dated 21.08.2017, informed the Petitioner about the commissioning of the Project within 26.08.2017, subject to the above condition on tariff and damages. The Project was commissioned on 26.08.2017. The subject was placed before the Board of Directors of the BESCOM and the same was approved on 07.09.2017.
- (e) In the meanwhile, the Commission, in the letter dated 16.03.2017, informed all the ESCOMs of the State, not to allow any extension of time to the 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 the land owning Solar Developers/SPVs, to approach the Commission and seek approval of the extension of time. In furtherance to the same, the Petitioner has filed this Petition.
- (f) In respect of extensions of the Project duration of the already awarded Solar Power Projects, the Ministry of New and Renewable Energy, in the letter dated 28.07.2017, addressed to the Principal Secretaries (Power/Energy) of the State Governments, 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."

(g) The Respondent has, therefore, prayed for issuance of appropriate directions in the matter.

5) We have heard the learned counsel for the parties and perused the records. The following issues would arise for our consideration:

(1) Whether the extension of time of six months, granted by the Respondent (BESCOM) to the Petitioner, for achieving the commercial operation of the Petitioner's Project, can be subjected to legal scrutiny by this 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 learned counsel for the parties and the pleadings and other material placed on record, our findings on the above issues are, as follows:
- 7) **ISSUE No.(1):** *Whether the extension of time of six months, granted by the Respondent (BESCOM) to the Petitioner, for achieving the commercial operation of the Petitioner's Project, can be subjected to legal scrutiny by this Commission?*
- (a) Article 2.5 of the PPA does not specifically stipulate that, any extension of time granted by the 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 tariff, as a consequence of delay in the commissioning of the Project, beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein.
- (b) The Petitioner has contended that, the Respondent has legitimately granted the extension of time, on the grounds of *Force Majeure*, as provided under the PPA, without creating any extra obligation on the Respondent or creating any additional rights to the Petitioner. That, the extension granted, validly, was given legal force and become effective, upon achievement of the new SCOD. We are unable to accept the contention of the Petitioner.
- (c) It is a settled law that, the Commission has the exclusive jurisdiction to determine the tariff for the supply of electricity by a Generating Company to

a Distribution Licensee, and to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price, at which electricity shall be procured from different agencies through PPAs. The Respondent does not deny the Petitioner's grounds, for seeking extension of the commissioning date. As any such extension of the commissioning date has an impact on the tariff payable to the Petitioner, we are of the considered opinion that, the Commission is required to examine the correctness of the Petitioner's request for extension of the time, for commissioning its Plant, even in the absence of the Respondent opposing the case or in the absence of a provision in the PPA, for such legal scrutiny by the Commission. It needs to be ensured that, the consumers' interest and, thereby, public interest is not allowed to be affected by payment of a tariff higher than what is due to the Generating Company, because of any action or inaction of the Respondent-Distribution Licensee. While upholding the role of the Commission, as a regulator and custodian of the interest of consumers, the Hon'ble Supreme Court, in the case of *All India Power Engineers Federation Ltd v. Sasan Power Ltd.*, reported in (2017) 1 SCC 487, has held that, even if parties to a contract (generating company - seller of energy and distribution licensee - buyer of energy) waive off a certain term affecting the tariff, the Commission, as a custodian of consumers' interest, has to intervene and exercise its regulatory power.

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

8) **ISSUE No.(2):** *Whether the Petitioner has made out a case, for deferment or extension of the Scheduled Commissioning Date of its Plant?*

(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 fulfils 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 fulfil 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 fulfilment 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 BESCOM Event of Default; or*
- (b) Force Majeure Events affecting BESCOM; 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 BESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or BESCOM, or till such time such Event of Default is rectified by BESCOM.*

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 BESCOM by the scheduled commissioning date, the SPD shall pay to BESCOM, 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 Petitioner 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 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, in any manner, was negligent in performing her obligations under the PPA.

- (c) The PPA is signed by the parties on 27.08.2015. 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 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 Petitioner. It is the case of the Petitioner that, the date of approval of PPA by the Commission, i.e., 02.09.2015 should be considered as the Effective Date of the PPA. We note that, the provisions of the PPA do not provide for such a meaning and also that, there is only a 5 days' gap, between the date of signing the PPA and the date of communication of the Commission's approval. This has not affected the Project implementation.
- (d) The Petitioner applied for conversion of land on 22.4.2016, after a lapse of about 8 months from the Effective Date of the PPA. No explanation is given for this delay on the part of the Petitioner. The efforts made by the Petitioner in expediting the process of issuance of the land conversion Order, by providing the necessary information/documents, have not been elaborated. The conversion charges were paid by the Petitioner on 16.07.2017 and the conversion Order was passed by the Deputy Commissioner, Chitradurga, on

24.07.2017. It is not stated, in the pleadings or the document, the date on which the Petitioner received the intimation to pay the land conversion charges. Hence, we are unable to accept the contention of the Petitioner that, there was a delay in granting of the approval for conversion of the land. In fact, there is a delay on the part of the Petitioner in applying for the land conversion. Further, the Petitioner has not elaborated on the implementation steps of the Project, which were affected by the time taken in granting of the approval of land conversion.

- (e) The Petitioner applied for evacuation approval to the KPTCL on 28.01.2016/ 05.02.2016, after more than 5 months from the date of the PPA. No explanation is given for this delay. The Petitioner has alleged that, the KPTCL caused the delay in granting the evacuation approval without, however, elaborating on the efforts made by her to follow upon her application. The tentative evacuation approval is stated to have been granted on 12.09.2016 and the final evacuation approval was granted on 13.07.2017. The copies of the evacuation approvals are not produced. There are certain procedures to be followed by the Petitioner and the KPTCL, while granting the approval. It cannot be made out, as to who caused the delay. The KPTCL is not arrayed as a Respondent. The allegation that, there is a delay in granting the evacuation approval, is not substantiated / proved. It was for the Petitioner to produce proper documents to establish that the delay in granting the evacuation approval, was solely attributable to the KPTCL. In the absence of the same, an adverse inference is to be drawn against the

Petitioner. The further allegation that, the Petitioner did not receive bay allotment, due to augmentation of the transformer at 66/11 kV Dyavaranahalli Sub-station, is also not substantiated.

- (f) The other allegation of the Petitioner is that, the delay in execution of the work was caused by the demonetisation decision of the Central Government. This allegation is not substantiated and in any way, cannot be treated as a *Force Majeure* Event.
- (g) The Petitioner has also alleged that, the delay in supply of the MEI breakers caused delay in implementing the Project. The Purchase Order for the breaker was made on 02.11.2016. The Petitioner has not explained the reasons for the delay in placing the Purchase Order. We note that, the breakers have to be tailor-made, based on the drawing submitted, tested and certified by the TAQC and thereafter, despatched. Noting the delay in the delivery of breakers by the MEI, the GoK has issued directions, on 19.06.2017, to the ESCOMs and the KPTCL, to provide the breakers, available with the ESCOMs, to the Project proponents, under the land owning Farmers' Scheme. It is not known, whether there was any inordinate delay in delivering the MEI Breakers, in the Petitioner's case, though it appears that, the Respondent or the KPTCL has provided the bay to the Petitioner, to enable commissioning of the Project.

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- (h) 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 be issued by the Petitioner to the Respondent. None of the reasons or 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 the extension of time, as provided in the clauses of the PPA. Consequently, the Petitioner would be liable for payment of the Liquidated Damages, as per Article 2.5.7 of the PPA.
- (j) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. Admittedly, the 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.
- (k) 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), decided on 05.04.2018, has held that, for delay in achieving the Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages, stipulated in the PPA.

(l) 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) It is the submission of the Petitioner that, the tariff mentioned in the Generic Tariff Order dated 30.07.2015, is applicable to all the new grid-connected megawatt scale Solar PV Projects, entering into PPA on or after 01.09.2015 and getting commissioned during the period, from 01.09.2015 to 31.03.2018, for which PPAs have been entered into, prior to 01.09.2015. That, since the PPA of the Petitioner was signed on 27.08.2015, prior to 01.09.2015, the Petitioner is entitled to the tariff of Rs.8.40 per unit, agreed to in the PPA, for the term of the PPA, and the Generic Tariff Order dated 30.07.2015 or the subsequent Order dated 12.04.2017, is not applicable to her case. It is also submitted by the Petitioner that, the Hon'ble Supreme Court of India, in the case of *BESCOM Vs Konark Power and Gujarat Urja Vikas Nigam Ltd., Vs. Solar Semi Conductor Power Company (India) Ltd.*, has held that, once the PPA is approved, there cannot be a variance in the tariff.

(b) Article 5.1 of the PPA reads, as follows:

“5.1 Tariff Payable:

The PETITIONER 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 PETITIONER'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.”

(c) 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 the electricity, generated from the various sources, to the Distribution Licensees, based on, among other parameters, mainly the Capital Cost of the Generating Plant. Such generic tariff is made available for a period, normally, longer than a year, called as 'Control Period', during which, the Generating Plants get implemented and commissioned at the normative Capital Cost, adopted in the Generic Tariff Order, generally after the execution of a PPA with a Distribution Licensee. Such 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 the 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 with 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 the advancement in technology and production efficiency, as well as the economies of scale, in the backdrop of largescale Solar capacity addition, across the globe. Thus, the generic tariff for megawatt scale Solar Power Plants, which was fixed at Rs.14.50 per unit in the Commission's Order dated 13.07.2010, has been successively reduced to Rs.8.40 per unit in the Order dated 10.10.2013, to Rs.6.51 in the Order dated 30.07.2015, to Rs.4.36 per unit in the Order dated 12.04.2017 and to Rs.3.05 per unit in the Order dated 18.05.2018.

- (d) It is submitted by the Petitioner that, the OM dated 21.08.2017, granting the extension of time, does not mention about altering the tariff and clarifies that, all other conditions of the PPA remains unaltered. This is denied by the Respondent, stating that the OM dated 21.08.2017 specifically mentions that,

the tariff applicable and the damages, is subject to the KERC / GoK approval. Therefore, the contention of the Petitioner cannot be accepted.

- (e) The PPA provides that, the tariff on the date of commercial operation will be applicable for the Project. The Project is commissioned on 26.08.2017. The tariff prevailing, as on the date of commissioning, is Rs.4.36 per unit, as per the Generic Tariff Order dated 12.04.2017. We are unable to accept the interpretation of the Petitioner in respect of the Generic Tariff Orders dated 30.07.2015 and 12.04.2017, that they are not applicable to this case. Although the PPA is entered into, before the date of the said Orders, the Project is commissioned during the Control Period of the Order dated 12.04.2017. The Generic Tariff Order dated 12.04.2017, provides that, the tariff of Rs.4.36 per unit is applicable to the Projects, for which PPAs were entered into earlier, but not commissioned within the stipulated period. Hence, the Generic Tariff Order dated 12.04.2017 is applicable to the Petitioner's Project.
- (f) We note that, the Petitioner could not commission the Project, within the time agreed in the PPA 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. It is safe to infer that, the normative Capital Cost of the Solar Power Plants, when the Petitioner took effective steps to procure capital equipment for its Project, was lower than the normative cost of the Solar Power Plants, assumed in the Generic Tariff Orders dated 10.10.2013 and

30.07.2015. Thus, the Petitioner is not entitled to the tariff, originally agreed to 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 Article 5.1 of the PPA. 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.

- (g) The PPA provides that, the tariff, as on the date of commercial operation, will be applicable for the Project. The Project is commissioned on 26.08.2017. The Petitioner has not furnished any material particulars of the cost incurred in implementing the Project and the period when investments were actually made. As noted earlier, as per the terms and conditions of the PPA, the tariff payable to the Petitioner is not based on the Capital Cost incurred by the 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 1st Respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA: -

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

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

- (h) 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. As already noted, the Hon'ble Supreme Court, in the case reported in (2017) 1 SCC 487, has held that, the Commission, as a custodian of consumers' interest, has to intervene and exercise its regulatory power in such cases and thereby, the judgments in the case of *BESCOM vs Konark Power*, and *Gujarat Urja Vikas Nigam Ltd. vs Solar Semiconductor Power Company (India) Ltd.*, cited by the Petitioner, are not applicable in this case.

- (j) We may note here that, the Petitioner's claim that the Project was commissioned on 26.08.2017, the new scheduled commissioning date, is also doubtful, as the copy of Form 'B' for the month of August, 2017, produced as ANNEXURE-13 in support of such claim, reveals that, a mere 100 units were injected into the Respondent's Grid, in the 6 days, in August 2017, i.e., an average daily injection of 16.66 units. The fact, as per the copy of the Form 'B' for the month of September, 2017, there was an average daily injection of 270 units, would indicate that, power from the Petitioner's Plant was injected, only on the last day or last two days of August, 2017. As per Article 1.1 (vii) of the PPA, 'COD' means the date on which the Project is available for commercial operation, which we have held, in several other cases, necessarily require injection of power generated, into the Grid.
- (k) Hence, in the circumstances and on the facts of the case, we hold that, the Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit, for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017, prevalent as on the date of commercial operation of the Project.
- (l) Accordingly, we answer Issue No. (3), as above.
- 10) **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