

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 29th November, 2018

Present:

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

O.P. No. 230/2017

BETWEEN:

Jayamal Energy LLP,
No.47, Ground Floor,
N S Iyengar Street,
Opp. Deepak Cable (India) Ltd.,
Seshadripuram,
Bengaluru – 560 020.

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PETITIONER

[Represented by Navayana Law Offices, Advocates]

AND:

The Bangalore Electricity Supply Company Limited,
Represented by its Managing Director,
Corporate Office,
K.R. Circle,
Bengaluru – 560 001.

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RESPONDENT

[Respondent represented by Shri Shahbaaz Husain, Advocate]

ORDERS

- 1) The Petitioner has filed this Petition, under Section 62, read with Sections 64 and 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., 01.10.2017, for its Solar Power Project. vide Official Memorandum dated 30.08.2017;
- (b) Direct the Respondent to make payment for the delivered energy under the Power Purchase Agreement (PPA) dated 02.07.2015 at Rs.8.40 per unit, from the commercial operation date of the Petitioner's Project, for the entire term of the PPA; and,
- (c) Pass such other and incidental Orders, including an Order as to costs, as may be deemed appropriate under the facts and circumstances of the case.
- 2) The facts of the case, as submitted by the Petitioner, may be summed up, as follows:
- (a) The Karnataka Renewable Energy Development Limited (KREDL), a nodal agency of the Government of Karnataka, for facilitating the development of renewable energy in the State of Karnataka, invited applications, online, on 9th October, 2014 for allotment of the Solar Power Projects under the land owning farmers' category, under Segment-1 Category-1 of the Solar Policy of the Government of Karnataka, and in compliance of the Government Order bearing No.EN 62 VSC 2014, Bangalore, dated 26.8.2014. After evaluation of the applications received, the proposal of Shri C.S. Nanjundaiah, one of the applicants for development of a 2 MW Solar Power Plant at Shyasamaru Village, Hulikunte Hobli, Sira Taluk, Tumakuru District, was accepted. The KREDL issued a letter of allotment

dated 17.03.2015 and instructed him to execute a PPA with the Respondent(BESCOM).

- (b) A PPA was executed between the Respondent (BESCOM) and the applicant [Solar Project Developer (SPD)], on 02.07.2015 and approved by the Commission on 25.08.2015. As per the PPA, the project had to be commissioned within 18 months i.e., before 01.01.2017.
- (c) As per Article 12.11(i) of the PPA, a Special Purpose Vehicle (SPV) (Petitioner) was created on 22.6.2016, to implement the Project. The SPD, submitting the documents regarding formation of SPV, requested the Respondent (BESCOM) for assignment of the Project to the SPV and accordingly the Supplemental PPA (SPPA) dated 29.07.2016 was entered into, between the Petitioner and the Respondent(BESCOM). This is pending approval by the Commission.
- (d) The Petitioner requested KPTCL for power evacuation approval and received tentative evacuation approval on 18.08.2016. The Petitioner realizing the circumstances and progress of the project, on 25.10.2016, requested the Respondent for extension of the Commercial Operation Date (COD), by six months. The Regular evacuation approval was granted on 27.10.2016. On 02.11.2016, the Petitioner placed purchase order for feeders with MEI Ltd.

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- (e) The SPD, vide letter dated 18.11.2016, requested the Deputy Commissioner, Tumakuru, for deemed conversion of land. The conversion Order is yet to be passed.
- (f) The Petitioner did not receive bay allotment due to augmentation of transformer at 66/11 kV Dyavarannahalli Sub-station. Further, the Project work slowed down from November, 2016 onwards, on account of demonetisation decision by the Central Government, which had an adverse impact on the various activities, in respect of the Project. Therefore, in the representation dated 02.12.2016, made to the Respondent (BESCOM), the Petitioner sought extension of time to commission the project, by 6 months. On 03.01.2017, the SPD made request for extension of six months' time, to achieve Conditions Precedent, as the land conversion order was not granted, regular evacuation approval was granted only on 27.10.2016 and line estimate was not received.
- (g) On 18.03.2017, the KPTCL issued the line estimate.
- (h) The Respondent, vide letter dated 16.06.2017, granted extension of time upto 01.07.2017, to commission the Project, pursuant to the requests made on 03.01.2017, 09.01.2017 and 06.03.2017.

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- (j) The Government of Karnataka addressed a letter dated 19.06.2017, to KPTCL and the Respondent, to provide temporary feeders, as MEI Ltd was not in a position to supply the feeders.
- (k) On 01.07.2017, the KPTCL issued a letter to the effect that the Petitioner had completed the works. However, due to right of way issues at a couple of spans, the villagers damaged the poles and conductors, forcing the Petitioner to reroute the line, increasing the length from 6.9 km to 10.9 km. Due to this, the line could not be charged on 01.07.2017. Therefore, the Petitioner, vide letter dated 24.08.2017, requested the Respondent to extend the time, by another 3 months, to commission the Project. The KPTCL revised the provisional interconnection approval on 31.08.2017. The Respondent, vide Official Memorandum dated 30.08.2017, granted time upto 01.10.2017, to commission the Project. The Project was commissioned on 31.08.2017.
- 3) The grounds urged by the Petitioner, in support of its prayers, may be summarized, as follows:
- (a) The Petitioner has commissioned the Project, within the extended period, agreed to by the Respondent (BESCOM) and, therefore, there is no delay in commissioning the Project.
- (b) The PPA provides for extension of the SCOD, for completion of the Project and the same cannot be interfered with, in this case, as it is due to a

natural cause or for unavoidable reasons, beyond the control of the Petitioner, and the Respondent (BESCOM), based on the official report and considering it as an exceptionally special case, provided for a reasonable period of extension, to commission the Project.

- (c) The Petitioner is entitled to the tariff of Rs.8.40 per unit, as mentioned in the PPA. The Commission has passed three Generic Tariff Orders, dated 10.10.2013, 30.07.2015 and 12.04.2017, in respect of the Solar Power Projects. In the Tariff Order dated 30.07.2015 (passed, in modification of an earlier Tariff Orders), it is clearly held that, in respect of the Projects that are commissioned during the period from 01.09.2015 to 31.03.2018 for which, the PPAs have been entered into and submitted to the Commission prior to 01.09.2015 for approval, the tariff as per the said Agreements, shall be applicable. The Tariff Order dated 12.04.2017, has been made applicable to only the new grid connected Solar Power Projects, entering into PPAs on or after 01.04.2017, but before 01.04.2018 and also those which are commissioned during the period, from 01.04.2017 to 31.03.2018, for which PPAs have not been entered into, prior to 01.04.2017. Hence, these Tariff Orders do not revise the tariff of the Petitioner's Project. Consequently, the Petitioner is entitled to the tariff of Rs.8.40 per unit, as agreed to, under the PPA.
- (d) The Petitioner has commissioned the Project, within the time period permitted by the Respondent (BESCOM). The Project of the Petitioner has experienced several hurdles, which can be termed as the *Force Majeure*

Events, within the meaning of the Article 8 of the PPA, and this has been adequately represented before the Respondent (BESCOM) by the Petitioner. The pleas of the Petitioner have been considered and accepted. The entire basis for the grant of extension has been, the due consideration of the representation of the Petitioner.

- (e) The extension of time was granted, as per Article 2.5.6 of the PPA dated 02.07.2015. As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined, shall be deemed to be Scheduled Commissioning Date for the purposes of the Agreement. Having commissioned the Project, within the COD agreed under the PPA, the Petitioner is entitled to the tariff, as agreed under the PPA. The Respondent(BESCOM) is not entitled to the Liquidated Damages, without adjudication by this Commission.
- (f) The Hon'ble Supreme Court, in the case of *BESCOM –Vs- Konark Power*, has held that, once the tariff has been agreed upon in the PPA, even the Regulator cannot change it. Further, the Hon'ble Supreme Court, in the case of *Gujarat Urja Vikas Nigam Ltd.,-Vs- Solar Semiconductor Power Company (India) Pvt.Ltd., and others* (Civil Appeal No.6399 of 2016, decided on 25.10.2017), has held that, once the tariff is agreed upon under the PPA, the same cannot be altered by exercising the inherent powers, as there is no inherent power vested in the Commissions, *de hors* the one conferred under the statute.

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- (g) The extension of time, granted by the Respondent by Official Memorandum dated 30.08.2017, does not mention altering of the tariff and specifically clarifies that all other terms and conditions of the PPA remain unaltered. Hence, the Petitioner is entitled for Tariff agreed to in the PPA dated 02.07.2015 at the rate of Rs.8.40 per unit.
- 4) Upon issuance of Notice, the Respondent appeared through its counsel. The Respondent (BESCOM), has filed the Statement of Objections.
- 5) The objections of the Respondent (BESCOM) may be stated, as follows:
- (a) The Petitioner could not commission the Project, within the time specified in the PPA. As several requests for extension of the SCD were received from the Solar Developers, the Government of Karnataka issued an Order dated 24.11.2016, directing all the Electricity Supply Companies (ESCOMs) to constitute a 3-member Committee, to consider and to dispose of the requests of the farmers / developers. Accordingly, a Committee was constituted by the Respondent(BESCOM), to consider the requests for the extension of time, sought for by the 1 to 3 MW Solar Generators, under the land owning farmers' category. The Committee held a meeting on 25.03.2017, wherein the causes for the delayed achievement of the SCOD were considered, in respect of 9 generators, including the Petitioner and decision was taken to accord extension of six months' time, to achieve the SCD, subject to the condition that the tariff applicable and the

Liquidated Damages to be paid, if any, is subject to the approval of the Commission / Government.

- (b) The Petitioner furnished the documents to the said Committee, 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 :	18.11.2016
Date of conversion :	Not yet received

KPTCL Evacuation Approval(Regular):

Date of submission of application :	18.07.2016
Date of approval :	27.10.2016
Delay in getting approval :	3 months

Bay extension approval:

Date of submission :	19.08.2016
Date of approval :	Not yet received

- (c) The Committee, after detailed discussions and scrutiny of the documents, opined that, the approval may be accorded for the extension of the SCOD upto six months, considering Article 2.5 of the PPA, as there is a delay in the issuance of approvals by the various Government entities. On 16.06.2017, the Respondent(BESCOM), in its letter addressed to the Petitioner, informed about the extension of time, by six months, for achieving the SCOD, subject to the condition that the tariff applicable and damages to be paid, if any, are subject to the approval of the KERC/ Government of Karnataka.

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- (d) On 16.03.2017, the Commission had addressed a letter to all the ESCOMs of the State, in the matter of extension of time granted to the Solar Generators and informed them not to allow any extension of time, beyond the SCOD, as per the original 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.
- (e) The Government, in the letter dated 25.04.2017 addressed to the Commission, has recommended the approvals accorded in respect of extension of the COD by the Respondent(BESCOM), for six months from the date of SCOD, as per Articles 2.5 and 8 of the PPA.
- (f) The subject was placed before the 82nd Board Meeting of the 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 MW Solar Power Plants, in Karnataka, under the farmers' category. The Board ratified the action taken on the extension issued by the Respondent (BESCOM), subject to approval of the Commission.
- (g) The Project was commissioned on 31.08.2017.

- (h) In respect of 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, as stated 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.”

- (j) Therefore, the Respondent (BESCOM) has prayed to accord just directions in the present Petition, in the interest of justice.

- 6) We have heard the learned counsel for the parties and perused the material placed on record. The following issues would arise, for our consideration:

- (1) Whether this Commission has jurisdiction, to call upon the Petitioner to prove the *Force Majeure* Events, relied upon by him by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the

Respondent admitting or not denying the occurrence of such Force Majeure Events?

- (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?
- 7) **ISSUE No.(1):** *Whether this Commission has jurisdiction, to call upon the Petitioner to prove the Force Majeure Events, relied upon by him, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondent admitting or not denying the occurrence of such Force Majeure Events?*
- (a) We have passed a reasoned Order and given our findings on the above Issue, in OP No.65/2017 and held that this Commission has the exclusive jurisdiction to consider the validity of the extension of time, when it affects the tariff payable to a generating company, ultimately passed on to consumers. The same reasoning and findings would apply to this case also.
 - (b) 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) We note that, in this case, the Respondent has granted extension of 9 months' time to commission the project. Under Article 2.5 of the PPA,

extension of time for commissioning the Project can be granted by BESCOM upto a maximum period of 6 months, if the SPD is prevented from performing its obligations, due to the ESCOM'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 Article 8 of the PPA, it is also necessary to prove that, the *Force Majeure* Events were not caused by the non-performing party's negligent or intentional acts, errors or omissions. Considering these, we need to examine, if the Petitioner or the SPD, in any manner, was negligent in performing its obligations under the PPA.

- (b) The PPA is dated 02.07.2015. The Conditions Precedent had to be achieved within 365 days, from the date of signing the PPA and the Project had to be commissioned within 18 months from the date of signing the PPA. The achievement of the Conditions Precedent would include, obtaining of all the approvals by the SPD.

- (c) The SPD applied for the deemed conversion of land to the Deputy Commissioner, Tumakuru on 18.11.2016 (Annexure P-9), after more than 16 months from the date of the PPA, with less than 2 months remaining for the SCOD. No explanation is given for this delay, on the part of the SPD, in applying for the conversion of land. It is not mentioned as to why the conversion order is not passed by the Deputy Commissioner. In fact, there is no averment, at all, in the Petition, on this aspect. We note that the Karnataka Land Revenue (Amendment) Act, 2015 was enacted on

12.08.2015, amending section 95 by introducing sub section (10) which reads as follows:

"(10) If any occupant of any agriculture land assessed or held for the purpose of agriculture wishes to divert such land or part thereof for the purpose of setting up of solar power generation in accordance with Karnataka Solar Policy 2014-21 issued in G.O EN 21 VSC 2014 dated 22.05.2014 which has been approved by State and Central Government and which has been approved by the Competent Authority, the permission applied for conversion of such land shall be deemed to have been granted for that purpose so long as they use for purpose for which permission is granted subject to payment of the conversion fine and all such other fees payable if any, in this regard."

- (d) Pursuant to this, the Government of Karnataka issued a Circular dated 01.12.2015, providing that any person intending to establish a solar power project under the Government Policy, after approval by the concerned authority, has applied for conversion of land with the documents mentioned in the Circular and paid the conversion charges/penalty, the conversion has to be considered as deemed conversion. The circular also mentions that the DC has to complete the proceedings of deemed conversion within 15 days after receipt of the conversion charges/penalty.
- (e) The Hon'ble High Court of Karnataka, in the Order dated 04.07.2017 in WP Nos.27418-20/2017 (*Ravindra Energy Ltd & another vs State of Karnataka & others*), in paras 10 and 15, has held, as follows:

"10. As per the provisions contained in the Act as amended by the Karnataka Act No.31 of 2015 by which Clause no.10 of Section 95 has been inserted, 'if any occupant of any

agriculture land assessed or held for the purpose of agriculture wishes to divert such land or part thereof for the purpose of setting up of solar power generation in accordance with Karnataka Solar Policy 2014-2021 issued in G.O.No.EN 21 VSC 2014, dated 22.05.2014 which has been approved by the Competent Authority, the permission applied for conversion of such land shall be deemed to have been granted for that purpose so long as they use for purpose for which permission is granted subject to payment of the conversion fine and all such other fees payable if any, in this regard.' This provision inserted by way of amendment has come into effect from 13.08.2015. Petitioner has filed application on 05.11.2016. The Deputy Commissioner was required to consider the application in the light of the amended provision introduced as per Act No.31 of 2015. The requirement as spelt out in clause no.10 of Section 95 of the Act, is that the applicant must show that he was an occupant of the agricultural land. If he desired to divert such land or part thereof for setting up solar generation and that such desire should be in accordance with the Karnataka Solar Policy 2014-2021 issued vide Government Order dated 22.05.2014 and also that the same ought to have been approved by the competent authority. In that event, the permission applied for conversion of such land shall be deemed to have been granted. ..."

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"15. It is also necessary to notice that as long as Petitioners satisfy the requirement spelt out in clause no.10 of Section 95 as amended, Petitioners are entitled for an order regarding deemed conversion. Merely because objections were raised by some of the devotees, it cannot be said that request for deemed conversion cannot be granted. If the applicants or any other devotees of the deity or the Mutt intend to establish their rights or claims as asserted in their objections, they are required to approach the Competent Court seeking appropriate declaration in that regard pertaining to the lands in question. The said question cannot be decided in this proceedings nor the Deputy Commissioner can embark upon an inquiry into the same. Hence, as all the requirements of clause 10 of Section 95 of the Act having been complied with by the Petitioners in this case, they are entitled for a declaration that benefit of

deemed conversion shall accrue to them in view of the application filed by them."

- (f) Therefore, it can be said that if the Petitioner had submitted the required documents and paid the conversion charges, the provision of deemed conversion would apply and thus, on the ground that land conversion order was delayed, the extension of time to commission the Project could not have been granted in the Petitioner's case. We note that admittedly, even without the land conversion order the project has been commissioned.
- (g) The SPD applied for the evacuation approval on 19.02.2016 (as per letters produced at Annexure P-10 and P-11). However, the date of Petitioner's application for KPTCL evacuation approval is mentioned as 18.07.2016, in the Respondent's Statement of Objections. The copy of the application for KPTCL evacuation approval is not produced by the Petitioner. Even if the date of application is taken as 19.02.2016, there is a delay of more than 7 months from the date of PPA in making the application. This delay is not explained. The tentative evacuation approval was granted on 18.08.2016. The Petitioner, gave acceptance to the evacuation scheme on 19.08.2016. Thereafter, the regular evacuation approval was granted on 27.10.2016. The Regular evacuation scheme dated 27.10.2016 mentions several correspondences, indicating the actions taken at various levels by KPTCL in the matter which required some time. It is safe to infer that had the SPD/Petitioner applied for evacuation soon after entering into the PPA, the same would have been granted much earlier

(i.e., about 7 months earlier to 27.10.2016). Hence, we are unable to accept the Petitioner's claim that there was delay in grant of evacuation approval, and that it delayed commissioning of its project and also that it was a *Force Majeure* Event.

- (h) Under Article 4.1(a) of the PPA, it was the obligation of the Project Developer to create the necessary infrastructure and interconnection facilities. It can be made out from the Evacuation approval that the land of KPTCL in the sub-station was spared for construction of 11 kV terminal bay. Therefore, it can be said that the KPTCL provided all assistance to the Petitioner in establishing the project. The KPTCL was not obliged to spare the land in its Sub-station, for construction of a bay, by the Petitioner. Having obtained the land for construction of a bay in the Sub-station of the KPTCL, we consider that it is not proper, on the part of the Petitioner, to contend that the Project was delayed due to the acts of the KPTCL and for no fault of the Petitioner.
- (j) The other allegation of the Petitioner is that the line estimate was issued by KPTCL (belatedly) on 18.3.2017. The KPTCL is not arrayed as a party to the proceedings and the averment is not substantiated. The other allegation is that supply of feeders was delayed by MEI Ltd. The Purchase Order for the equipment was placed on 02.11.2016 as per Annexure P-8. It is stated that the Government of Karnataka, instructed KPTCL and ESCOMs to provide temporary feeders. It can be inferred that the feeder was spared by KPTCL or ESCOM to facilitate the commissioning of the Project and

thereby, project implementation could not have been delayed on this account.

- (k) It is stated by the Petitioner that the work was completed on 30.6.2017 but due to right of way problems, the local villagers damaged the poles and conductors, forcing the Petitioner to reroute the line increasing the length from 6.9 km to 10.9 km. That due to this, the Petitioner could not charge the line on 1.7.2017 upto which date the extension of time had been granted by BESCO. On 24.08.2017, the Petitioner requested the Respondent for further extension of time by 3 months to commission the project. The request was acceded to, vide Official Memorandum dated 30.8.2017 and the solar plant was commissioned on 31.08.2017.
- (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 describing the particulars of any *Force Majeure* Event, as soon as practicable, after its occurrence. Further, the reasons quoted by the Petitioner, do not fall under the Events of *Force Majeure*, mentioned in the PPA, as held in the preceding paragraphs. Hence, we hold that the Petitioner is not entitled to the extension of time, as provided in the clauses of the PPA. The Respondent(BESCO) should have considered these aspects, before granting the extension of time to the Petitioner. Extension of time was granted for 9 months, which is not provided in the PPA and cannot be approved.
- (m) Therefore, we answer Issue No.(2), in the negative.

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

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

"5.1 Tariff Payable:

The SPD shall be entitled to receive the tariff of Rs8.40 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) It is the Petitioner's case that, the Tariff Orders dated 30.07.2015 and 12.04.2017, are not applicable to the Project, as it has been commissioned within the extended period of commissioning, granted by the Respondent (BESCOM). It is the submission of the Petitioner that the Respondent (BESCOM) has granted extension of time by 6 months, after considering the *Force Majeure* Events, as provided in the PPA and hence, the tariff of Rs.8.40 per unit, should not be altered. It is also stated by the Petitioner that, the Respondent(BESCOM), while granting extension of time, vide letter dated 16.06.2017 and OM dated 30.08.2017, had not mentioned about altering the tariff and had stated that all other terms of the PPA remain unaltered. We note that, this is not correct. The Respondent (BESCOM), in the letter dated 16.06.2017 and OM dated 30.08.2017 has stated that, the tariff applicable and the Liquidated

Damages to be paid, is subject to the approval of the KERC / Government of Karnataka.

- (c) The Project is commissioned on 31.08.2017. The Generic Tariff Order dated 12.04.2017, is applicable for the Projects, commissioned during the period, from 01.04.2017 to 31.3.2018. The PPA provides that, the tariff, as on the date of commercial operation, would be applicable for the Project, if it is commissioned beyond the Scheduled Commissioning Date.
- (d) The Hon'ble Supreme Court, 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 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 Respondent would be entitled only for lower of the two tariffs...."

- (e) Further, in the decision of the Hon'ble Appellate Tribunal for Electricity, in Appeal No.221/2016 and others, dated 07.05.2018 (*Savitha Oil Technologies Ltd vs KERC & another*), it has been held that, the tariff, as on the COD, is applicable for a Project and the tariff should not be linked to the date of signing or approval of the PPA. The relevant portions of the judgment are extracted below:

"xi. Further, it is a settled practice under the Section 62 of the Act that tariff determination process under various regulations for a new project begins from the COD of the said project as per extant regulations of the control period where COD of the project takes place. Subsequently, the tariff of such project is adjusted based on regulations/orders of the subsequent control period and it is not linked to the date of signing/approval of the PPA. If the PPA is approved at a later date or in other control period, the tariff is applicable from the COD date as per prevalent regulation at that time.

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xiv. In the present case too after carefully considering the provisions of the Act, 2004 Regulations, 2005 Order, 2009 Order, earlier judgement of this Tribunal and keeping in view the interest of the consumers it would be correct to draw a conclusion that the tariff applicable to the Appellants' WPPs would be as per the 2005 Order during which COD of the WPP has happened. The same corollary is applicable to other WPPs having COD is in some other control period."

- (f) The ratio of the above judgments of the Hon'ble Supreme Court and of the Hon'ble Appellate Tribunal for Electricity, is applicable to the Petitioner's case also. The judgments, cited by the Petitioner, would not

be applicable, as the facts and circumstances of the cases decided are different. Hence, we hold that, the Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit, for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017, prevalent on the date of commissioning of the Project.

- (g) The SPD shall plan sufficiently in advance, allowing adequate time to obtain the required clearances, approvals and consents of various authorities and other persons, keeping in mind the different milestones stated in PPA to comply with the Conditions Precedent that need to be achieved and obligations of the SPD that need to be fulfilled. Further, he shall coordinate all these activities in an efficient manner. The PPA provides 12 months for achieving Condition Precedent and 18 months for achieving SCOD, from the date of executing PPA.
- (h) We note here that, the Petitioner (SPV) took the risk of implementation of the Project, 12 months after the execution of the PPA, with barely 6 months left for its commissioning, as agreed to in the PPA and could not do it, for certain reasons and events, which we have held to be not falling under the *Force Majeure* clause of the PPA. The SPD/Petitioner has not explained the reasons for delay of 12 months in initiating the implementation of the project without which he cannot succeed. Had the SPD/Petitioner initiated the implementation of the project, soon after execution of PPA, the project could have been commissioned a year before 31.8.2017.

- (j) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. Admittedly Conditions Precedent were not fulfilled within 365 days and we have noted that the application for conversion of land was made by the SPD after one year from the date of PPA. Thus, for not complying with the timelines for Conditions Precedent and commissioning of the Project, as mentioned in the PPA, the Petitioner is required to pay damages for such delay, as per the Articles 2.2 and 2.5.7 of the PPA. The Hon'ble Supreme Court, in its judgment dated 05.04.2018, in Civil Appeal No.3600 of 2018 (*M.P. Power Management Company Ltd Vs. Renew Clean Energy Pvt.Ltd., and another*), has held that, for delay in achieving the Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages, as stipulated in the PPA.
- (k) We have seen from the records in this office that the SPPA dated 29.07.2016 was returned on 15.9.2016 as the required documents showing incorporation of the SPV were not furnished and the SPPA was not in the approved specimen format. The parties have to resubmit the duly corrected SPPA for approval of the Commission.
- (l) Therefore, 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;
- (c) The Petitioner is also liable to pay damages, as provided under Articles 2.2 and 2.5.7 of the PPA; and
- (d) The parties are directed to re-submit the SPPA, for approval of the Commission.

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

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

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