

No. N/28/2021

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.

Dated: 14.12.2021

Present

Shri Shambhu Dayal Meena	: Chairman
Shri H.M. Manjunatha	: Member
Shri M.D. Ravi	: Member

OP No.18/2021

BETWEEN:

Serum Institute of India Private Limited,
Having its Registered Office at:
212/2 Off Soli Poonawalla Road,
Hadapsar,
Pune-411 028.
Maharashtra.

And

Finance Division at:
Sarosh Bhavan,
16-B/1, Dr. Ambedkar Road,
Pune-411 001.
(Through its Authorised Signatory –
Mr. Vijay Chandrakant Bharate).

.....PETITIONER.

(Represented by Sri Avijeet Lala, Advocate &
Sri S. Guruprasanna, Advocate
of M/s Neeti Niyaman Advocates)

AND:

1) Bangalore Electricity Supply
Company Limited (BESCOM),
Having its Corporate Office,
BESCOM, K.R. Circle,
Bangalore,
Karnataka-560 001.
(Through its Managing Director)

- 2) Karnataka Power Transmission Company Limited (KPTCL),
Corporate Office, Kaveri Bhavan,
K.G. Road,
Bengaluru-560 009.
(Through its Managing Director)

...**RESPONDENTS**

(Represented by Sri S. Sriranga, Advocate,
& Ms. Sumana Naganand, Advocate
for M/s Just Law, Advocates)

ORDERS

1. The petitioner has filed the petition under Section 86 (1) (f) of the Electricity Act, 2003, praying for the following reliefs to:

- a) Hold and declare that the WTG-1 at location No.HTP-053 bearing RR No.HTPSII-178; and WTG-2 at location No.HTP-036 bearing RR No.HTPSII-179 achieved commercial operation on 31.03.2018 and, therefore, the petitioner is entitled to claim the tariff of Rs.3.74 per kWh for the Delivered Energy from WTG-1 at location No.HTP-053 bearing RR No.HTPSII-178; and WTG-2 at location No.HTP-036 bearing RR No.HTPSII-179, as mentioned in Article 5.1 of the PPA dated 06.02.2018 for the term of the PPA;
- b) Direct the respondent No.1(BESCOM) to pay for the Delivered Energy from March 2018 till the term of the PPA at the tariff of Rs.3.74 per kWh as per Article 5.1 of the PPA;
- c) Direct the respondent No.1/BESCOM to refund/release the amount of Rs.2,06,57,529 (Rupees Two crores six lakhs fifty seven thousand five hundred twenty nine only) already collected/deducted towards arbitrary and unilateral deductions from invoices raised by the petitioner from 31.03.2018 to 28.02.2021, along with interest.

- d) Grant Ad-interim reliefs in terms of prayer clause (b) as prayed hereinabove; and
 - e) Pass such order(s) as this Commission may deem fit and proper in the facts and circumstances of the case.
2. The facts relevant for the disposal of the present case as made out in the petition and the documents produced along with it, may be stated as follows:
- a) That the petitioner is owning, and operating three (3) Wind Turbine Generators (WTGs) of 2.1 MW (WTG-1 at location No.HTP-053), 2.1 MW (WTG-2 at location No.HTP-036) & 4.2 MW (WTG-3) aggregating to a total capacity of 8.4 MW, at Kambtrahalli village, Harapanahalli taluk, Davangere district, Karnataka.
 - b) That the petitioner entered into two separate Power Purchase Agreements (PPAs) both dated 06.02.2018 (Annexure-P2 colly.) with the 1st respondent (BESCOM) for sale of energy as per terms & conditions stated in the PPAs with respect to WTG-1 of 2.1 MW and other WTG-2 of 2.1 MW respectively. It may be noted that the WTG-3 of 4.2 MW is not the subject matter in the present petition.
 - c) The terms & conditions stated in both the PPAs are exactly similar. The reliefs to be granted to the petitioner depends on the fact as to whether these two WTGs have achieved Commercial Operation on 31.08.2018, so as to be eligible for tariff of Rs.3.74 per unit for the energy injected into/delivered

to the grid as provided in Article 5.1 (a) of the PPA. The relevant provisions in this respect in Article 5 of the PPA, which read thus:

"Article 5 – Rates and Charges:

5.1 Monthly Energy Charges:

- a) *If the commissioning or part commissioning of the projects is achieved and energy injected into the grid on or before 31.03.2018, subject to clause 5, 4, BESCO shall for the Delivered Energy pay, for the term of the PPA from the Commercial Operation Date, to the Company at the rate of Rs.3.74 (Rupees Three and paise seventy-four) only per Kilowatt-hour without any escalation.*
- b) *If the commissioning or part commissioning of the project is achieved and energy injected into the grid beyond 31.03.2018 and within 30.06.2018, subject to clause 5.4 BESCO shall for the Delivered Energy pay, for the term of the PPA from the Commercial Operation Date, to the Company at the rate of Rs.3.00 (Rupees Three) only per Kilowatt-hour without any escalation."*

5.2 xxxxxxxxxxx

5.3 xxxxxxxxxxx

5.4 *The Company shall be permitted to draw power up-to 10% of the installed capacity for start-up, after inspection by the concerned officers of the BESCO and 115% of such energy provided by the BESCO for start-up purposes shall be deducted from the Delivered Energy by the Company for determining the amount to be paid by the BESCO to the Company.*

5.5 *If energy other than the above requirement as per clause 5.4 is drawn from the Grid, the same shall be billed under the tariff applicable to HT industries including demand charges.*

d) That in furtherance of achieving Commercial Operation/Commissioning of the WTGs:

- (i) The Pre-Commissioning Test was got conducted and Pre-Commissioning Test Reports both dated 13.03.2018 (Annexure-P3 colly.) were obtained.
- (ii) The Chief Electrical Inspector to Government (CEIG) visited both spots and inspected Wind Turbines, 33 kV Metering Points and issued approval of electrical installations pertaining to these two Wind Turbines vide letters dated 17.03.2018 (Annexure-P4 colly.)
- (iii) Extension of Provisional Interconnection Approval up to 30.06.2018 was obtained vide letter dated 27.03.2018 (produced along with Annexure-P4) issued by the Chief Engineer (Ele.), (Planning & Coordination), KPTCL, Bengaluru.
- (iv) Minutes of the Meetings held on 31.03.2018 between KPTCL, BESCOM and M/s Serum Institute of India Private Limited, during synchronization/ commissioning of the two WTGs in question (Annexure-P5 colly.)
- (v) The Commissioning Certificates both dated 04.04.2018 (Annexure-P6 colly.) certifying that the two WTGs in question have been commissioned on 31.03.2018 (the Commissioning Certificates- Annexure-P6 wrongly mentioned the Commissioning Date as 31.03.2017 instead of 31.03.2018 and the mistake is obvious).
- e) On 28.03.2018 the petitioner forwarded the temporary interconnection approval dated 27.03.2018 along with copy of CEIG approval dated 17.03.2018 (Annexure-P4 colly.) to 2nd respondent (KPTCL) requesting for

the synchronization of the WTGs to interconnect with 400/220 kV Sub-station at Guttur through 33/220 kV pooling station. Though the project team of Suzlon Energy Limited who were responsible for setting up of the WTGs on behalf of the petitioner, continuously followed up with the Executive Engineer of the 2nd respondent (KPTCL) Guttur Sub-station, for synchronization of the WTGs with the grid, the said Executive Engineer ignored to visit the project site on 29.03.2018 and 30.03.2018 on account of State holidays. Therefore, the synchronization was carried out after the delay of 3 days on 31.03.2018.

- f) It appears on 01.04.2018 joint meter readings of the two energy meters of WTGs were taken and at that time it was found that there was only import but no export of energy from these two WTGs and that while taking the meter readings only two decimal digits (display 3) were considered. These facts are stated in the letter dated 03.10.2018 (Annexure-P7) addressed to the Executive Engineer (Ele.), MT Division, BESCO, Chitradurga, by the Assistant Executive Engineer (Ele.), NCE Sub-Division, BESCO, Chitradurga.
- g) The averments in the petition do not disclose as to whether the petitioner had submitted tariff invoices for the months of March, 2018 and onwards, soon after the Billing Period of the said months. On the other hand, the copies of the Energy Bill passed for payment towards the months of April to June, 2018 would show that the invoices for the months of April to June, 2018 were received by the 1st respondent (BESCO) on 14.01.2019.

h) It appears; the petitioner was in search of the reasons as to why the energy meters did not record injection of power into the grid from the WTGs commissioned on 31.03.2018. In the event no energy was injected into the grid as on 31.03.2018, the petitioner would get only the reduced tariff of Rs.3.00 per unit as per Article 5.1 (b) of the PPAs. Therefore, the petitioner must have represented his grievances before the officials of the 1st respondent (BESCOM).

i) The letter dated 03.10.2018 (Annexure-P7) addressed to the Executive Engineer (Ele.), MT Division, BESCOM, Chitradurga, by the Assistant Executive Engineer (Ele.), NCE Sub-Division, BESCOM, Chitradurga, reads as follows:

“Sub: Submission of data of energy injected to into the grid of M/s Serum Institute of India Private Limited – reg.

Ref: 1. GM (PP)/DGM(F&C)/AGM/(F&C)/BESCOM/BC-39/8778-79 dated 19.09.2018.

2. Commissioning Certificate issued by EE, MT Div, Chitradurga dated 04.04.2018.

3. B-Forms submitted by EE, MT Division, BESCOM, Chitradurga, for the month of March 2018 & April 2018.

On 01.04.2018, while taking joint reading by myself and Suzlon representative it has been observed that both of the above said metering locations have only import and no export as we had considered only two decimal digits (display 3).

I understand from Suzlon that after the commissioning, WTG will undergo free heating as per OEM for 8:00 hrs (approximately). Moreover, for the month of March 2018, wind velocity was less in between 3 to 5 m/sec. Hence recorded generation was very less.”

Hence, I hereby furnish the generation recorded in high resolution display mode-10 in six decimals as below:

RR No:HTPSH-179 (HTP-36) High resolution readings (Display-10)									
Parameter	Initial Reading as on 31.03.2018		Final Reading as on 01.04.2018		Difference		MC	Units	
	Main	Check	Main	Check	Main	Check		Main	Check
CT2 + kWh	0.222965	0.180135	0.233187	0.189877	0.010222	0.009742	15000	153.33	146.13
CT2 – kWh	0.091156	0.081578	0.098965	0.089265	0.007809	0.007687	15000	117.14	115.31

RR No:HTPSH-178 (HTP-53) High resolution readings (Display-10)									
Parameter	Initial Reading as on 31.03.2018		Final Reading as on 01.04.2018		Difference		MC	Units	
	Main	Check	Main	Check	Main	Check		Main	Check
CT2 + kWh	0.230189	0.220023	0.239867	0.230378	0.009678	0.010355	15000	145.17	155.33
CT2 – kWh	0.093198	0.091875	0.099678	0.098756	0.006480	0.006881	15000	97.20	103.22

This is for your kind information and for further needful.

Yours faithfully,
sd/-
Assistant Executive Engineer (Ele),
NCE Sub-Division BESCO,
Chitradurga."

- j) Subsequent to the above noted letter dated 03.10.2018 (Annexure-P7), the petitioner wrote letter dated 27.02.2019 (Annexure-P9) to the Executive Engineer, MT Division, BESCO, Chitradurga, requesting for issue of amended B-Form for the month of March, 2018 recording the energy injected into the grid as on 31.03.2018. The petitioner claims that it has received amended B-Forms for the month of March, 2018 in respect of WTGs. The said amended B-Forms are produced along with letter dated 27.02.2019 (Annexure-P9). The substance of the amended B-Forms regarding import and export of energy from the WTGs and the transmission losses as shown in the 'main meter' may be stated as follows:

Energy Meter Readings of RR No.HTPSII-179	Main Meter (kWh)	Energy Meter Readings R No.HTPSII-178	Main Meter (kWh)
Import (Units) = kWh IMP x MC	153.330000	Import (Units) = kWh IMP x MC	145.170000
Export (Units) = kWh EXP x MC	117.135000	Export (Units) = kWh EXP x MC	97.200000
Transmission Losses	2.26	Transmission Losses	1.87
Net Energy Exported (Units)	- 38.45	Net Energy Exported (Units)	- 49.84

- k) The 1st respondent (BESCOM) wrote letter dated 07.03.2019 (Annexure-P10) to the petitioner intimating that the bills for payment for the energy delivered for the months of April to June, 2018 in respect of Projects RR No.HTPS-II 178 and HTPS-II 179 HTPS were passed at the rate of Rs.3.00 per unit as these projects injected energy into the grids beyond 31.03.2018 as per 5.1 of the PPA. It is also intimated under this letter that for processing the invoices for the months of July, 2018 and onwards regular/extended interconnection approval was required and the same might be produced.
- l) The petitioner wrote letter dated 16.03.2019 (Annexure-P11) to the 1st respondent (BESCOM) claiming tariff at the rate of Rs.3.74 per unit for the energy delivered from the date of commissioning of the two projects on the basis of revised B-Forms issued for the month of March 2018. Subsequently, the petitioner also made the similar requests claiming tariff at rate of Rs.3.74 per unit.
- m) The material averments made by the petitioner in paras 27 & 28 of the petition may be noted, which read as follows:

“Para 27 – It is pertinent to highlight that at the time of commissioning on 31.03.2018, the subject WTGs exported/injected 97.20 units and 117.135 units of energy into grid. However, since the higher multiplication constant of installed meter was 15000, the meter could not record the reading of the energy pumped by the subject WTGs in the original “Form-B”. The generation recorded in high resolution display mode-10 in six decimals, as issued by respondent No.1 (BESCOM) on 03.10.2018, reflects that the subject WTGs had successfully exported energy to the grid during their commissioning on 31.03.2018.

Para 28 - In light of the above and in view of the facts of the instant case, the power supplied from subject WTGs of the petitioner with RR No. HTPSII-178 and HTPSII-179 are eligible for the tariff of Rs.3.74/ kWh in accordance with Article 5.1 (a) of the PPA. Therefore, respondent No.1 (BESCOM) is liable to pay the amount towards the power sale invoices from March 2018 onwards considering the tariff of Rs.3.74/kWh instead rate of Rs.3.00/ kWh.

- n) It appears that the 1st respondent (BESCOM) has not responded positively to the request of the petitioner for payment of tariff at the rate of Rs.3.74 per unit for the energy delivered for the months of April, 2018 and onwards. Therefore, the present petition is filed on 25.03.2021.
3. Both respondents appeared through counsel. They filed common statement of objections on 30.08.2021. The contents and the contentions raised by the respondents may be stated as follows:
- a) Several facts stated by the petitioner leading to commissioning of two Wind Power Projects in question up to 31.03.2018 are not disputed except

contending that there was no delay on the part of the respondents in commissioning the projects. It is stated that as there were public holidays on 29.03.2018 and 30.03.2018, the actual synchronization had happened on 31.03.2018. Further it is stated that the petitioner ought to have applied for synchronization well in advance since 29.03.2018 & 30.03.2018 being public holidays and any delay in commissioning of the Projects is attributable only to the petitioner.

b) The paras 11 to 13 of the statement of objections contain the defence set up by the respondents, the same read as follows:

“Para 11 – In response to the contentions raised by the petitioner it is submitted that the contentions raised by the petitioner are baseless. It is submitted that the plant is said to be commissioned only when it commences the actual injection of energy into the grid and same can be deciphered from the following clauses of the PPA;

Article 1.1 (vi) “Commercial Operation Date” shall mean the actual commissioning date of respective WTG of the Wind Power Project injecting power into the delivery point as certified by Corporation/BESCOM and in any case, shall not be beyond the scheduled date of completion.”

Article 1.1 (xi) “Delivery Point” or “Interconnection/evacuation Point” shall be the point at which the power is injected in to the sub-station bus of the BESCOM/Corporation;

Article 1.1 (xxxvi) “Scheduled Date of Completion” shall mean the date on which the Project is scheduled to deliver Electricity of BESCOM at the Delivery Point after completion of all the required tests i.e., on or before 31.03.2018.

"5.1 Monthly Energy Charges:

- a) *If the commissioning or part commissioning of the projects is achieved and energy injected into the grid on or before 31.03.2018, subject to clause 5, 4, BESCO shall for the Delivered Energy pay, for the term of the PPA from the Commercial Operation Date, to the Company at the rate of Rs.3.74 (Rupees Three and paise seventy-four) only per Kilowatt-hour without any escalation.*
- b) *If the commissioning or part commissioning of the project is achieved and energy injected into the grid beyond 31.03.2018 and within 30.06.2018, subject to clause 5.4 BESCO shall for the Delivered Energy pay, for the term of the PPA from the Commercial Operation Date, to the Company at the rate of Rs.3.00 (Rupees Three) only per Kilowatt-hour without any escalation.*

Para 12 – From the combined reading of the above articles, it is clear that the plant is said to achieve commercial operation date only when it delivers energy to the respondent No.1's delivery point. The plant is said to have achieved commercial operation date only when there is injection/ delivery of energy to the delivery point. Having failed to deliver energy to the delivery point, the petitioner has failed to commission the plant within the stipulated timeframe under the PPA i.e., to deliver energy on or before 31.03.2018. Therefore, as per Article 5.1 (b) of the PPA, if the petitioner commissions its plant beyond 31.03.2018, it is entitled to a lower tariff of Rs.3.00 per kWh without any escalation.

Para 13 - With regard to the averment that the energy generated was not recorded since the respondent No.2 considered only two decimal digits, it is submitted that such a contention of the petitioner is flawed. It is submitted that a miniscule amount of energy generation cannot be considered as the energy being delivered to the delivery point. The

internal communications of officers of the respondent No.1 cannot be the basis to come to the conclusion that there was an admitted position that the petitioner has generated and delivered energy to the respondent on 31.03.2018. It is submitted that the petitioner has not placed on record any material to show that the energy generated on 31.03.2018 was delivered to the sub-station. Therefore, in view of the same, it is submitted that the petitioner is only entitled to the lower tariff of Rs.3.00 per kWh as per Article 5.1 (b) of the PPA. Hence, the present petition deserves rejection."

c) In response to the averments made in paras 27 & 28 of the petition, the respondents in para 28 of their statement of objections replied as follows:

"Para 28 – RE PARA 27-28

Averment that the petitioner has injected 97.20 units and 117.135 units of energy into the grid is untenable. It is submitted that the petitioner may have generated a miniscule amount of energy, but the same was not delivered to the delivery point on 31.03.2018. As per Article 1.1 (vi), the petitioner is to have commissioned its plant when the energy is delivered to the delivery point. In the present case, the petitioner has failed to deliver to energy. Therefore, the petitioner is only eligible to a lower tariff of RS.3.00 per kWh as per Article 5.1 (b) of the PPA. Other averments contrary to the above are denied.

Averment that the respondent is liable to pay the petitioner the amount towards the power sales invoices raised from March 2018 onwards at a tariff of Rs.3.74 per kWh is untenable and denied."

d) It is also contended that the petition is not maintainable for misjoinder of causes of action.

e) For the above reasons, the respondents prayed for the dismissal of the petition.

4. The petitioner has filed the rejoinder to the statement of objections of respondents.

a) The rejoinder in response to the paragraphs 11 to 13 of the statement of objections, is narrated in paragraphs 17 to 19 of the said rejoinder:

“Para 17 – xxxxxxxxxxxx It is respectfully submitted that the limited issue herein, as has been explained hereinabove in paragraphs 9 to 12, is with respect to the recording/ measurement of energy at the check meters and not in respect to injection of energy and/ or commissioning of the subject WTGs, which fact is undisputed and borne out of records. In this regard, it is respectfully reiterated that the energy was injected from the subject WTGs of the petitioner and that the same was delivered at the Delivery Point of respondent No.2/ KPTCL located at 400/220 kV Station. Guttur on 31.03.2018 at the time of commissioning of the subject WTGs.

Para 18 -xxxxxxxxx It is submitted that the contention of the respondents that the petitioner has generated a miniscule amount of energy and it cannot be considered as the energy being delivered to the delivery point is erroneous and misleading. In this regard, it is submitted that the PPAs signed between the parties do not specify any minimum threshold requirement of energy to be delivered for the purpose of achieving the commissioning of the subject WTGs.

Para 19 - The contentions of the respondents that the petitioner cannot rely on the interim communication dated 03.10.2018 (Annexure P-7 of the petition) of the respondent No.1/BESCOM for the purpose of concluding that the energy was generated and injected is baseless and wrong. It is respectfully

submitted that the petitioner requested MT Division of the respondent No.1/ BESCO to review the recording/ measurement of energy for the subject WTGs. It was on the petitioner's request that the NCE Sub-Division of the respondent No.1/BESCO considered the high-resolution data records of the meter. It is submitted that the internal communication relied upon is in reference to the petitioner's request for the review of the recording/ measurement of energy and the contents of the communication demonstrates that the energy was generated and injected by the petitioner's subject WTGs.

- b) In the Rejoinder filed by the petitioner, it is stated that Order II Rule 3 of the Code of Civil Procedure, 1908 (CPC) provides for joinder of causes of action. Therefore, it is contended that the preliminary objection of the respondents is hyper technical and is to be rejected.
- c) Other averments in the rejoinder are almost repetition of the averments made in the petition. Therefore, it is prayed for rejection of the defence taken in the statement of objection.
5. We have heard the learned counsel for the parties. They have relied upon certain precedents. They have also filed their written submissions. The preliminary objection regarding misjoinder of causes of action is not well-founded and it is also not pressed. Similarly, the petitioner has also not argued regarding the alleged delay on the part of the respondents in commissioning the projects.
6. From the pleadings and the records and the submissions of the parties, the following Issues arise for our consideration:

Issue No.1: In the given facts and circumstances of the case, whether the claim of the petitioner falls under Article 5.1 (a) or Article 5.1 (b) of the PPA for computing the rate of tariff from 31.03.2018 or 01.04.2018 onwards as the case may be, for the energy delivered to the grid from the two WTGs in question?

Issue No.2: To which reliefs the petitioner is entitled to?

Issue No.3: What Order?

7. After considering the submission of the learned counsel for the parties and the relevant provisions of the PPA and the records, our findings on the above issues are as follows:

8.Issue No.1: In the given facts and circumstances of the case, whether the claim of the petitioner falls under Article 5.1 (a) or Article 5.1 (b) of the PPA for computing the rate of tariff from 31.03.2018 or 01.04.2018 onwards as the case may be, for the energy delivered to the grid from the two WTGs in question?

a) For the sake of easy reference, we may extract again the relevant provisions of Article 5 of the PPA which read as follows:

“Article 5 – Rates and Charges:

5.1 Monthly Energy Charges:

a) *If the commissioning or part commissioning of the projects is achieved and energy injected into the grid on or before 31.03.2018, subject to clause 5.4, BESCO shall for the Delivered Energy pay, for the term of the PPA from the Commercial Operation Date, to the Company at the rate of Rs.3.74 (Rupees Three and paise seventy-four) only per Kilowatt-hour without any escalation.*

b) *If the commissioning or part commissioning of the project is achieved and energy injected into the grid beyond 31.03.2018 and within 30.06.2018, subject to clause 5.4*

BESCOM shall for the Delivered Energy pay, for the term of the PPA from the Commercial Operation Date, to the Company at the rate of Rs.3.00 (Rupees Three) only per Kilowatt-hour without any escalation.

5.2 xxxxxxxxxxxx

5.3 xxxxxxxxxxxx

5.4 *The Company shall be permitted to draw power up-to 10% of the installed capacity for start-up, after inspection by the concerned officers of the BESCOM and 115% of such energy provided by the BESCOM for start-up purposes shall be deducted from the Delivered Energy by the Company for determining the amount to be paid by the BESCOM to the Company.*

5.5 *If energy other than the above requirement as per clause 5.4 is drawn from the Grid, the same shall be billed under the tariff applicable to HT industries including demand charges.*

b) For proper interpretation of Article 5.1 of the PPA, the relevant definitions stated in Article 1.1 of the PPA may be noted. The definitions stated in Article 1.1 of the PPA are preceded with the clause as follows:

“1.1 For all purposes of this Agreement, unless the context otherwise requires the following words and expressions shall have the respective meaning set forth below:

(xii) *“Delivered Energy” means the kilowatt hours of Electricity actually fed and measured by the energy meters at the Delivery Point in a Billing Period;*

Explanation: *Where a Receiving Station or a Pooling Stations is maintained for evacuating the electricity generated by the project to the grid system of the Corporation/BESCOM, the Delivered Energy shall be:*

$$DE = X_1 - (X_1 \times Z)$$

Where

DE is the Delivered Energy pertaining to the Project,

X_1 is the reading of the energy meter installed at the Project Site,

Z is the percentage transmission/distribution line loss incurred in the transmission/distribution line between the Project and the Receiving Station and shall be:

$$Z = \left[\frac{(X_1 + X_2 + X_3 + X_4 + \text{---}) - Y}{(X_1 + X_2 + X_3 + X_4 + \text{---})} \right] \times 100$$

Where

Y is the reading of the bulk energy meter installed on the 66 kV side of the Receiving Station

X_2, X_3, X_4 etc., are the readings of the energy meters installed at the various individual wind mill power plants set up in the area and connected to the Receiving Station;

(xxxviii) "Receiving Station" shall mean the 33/220 KV electric switching station constructed and maintained by the Company or by any other person on behalf of the Company at Doddatanda village in Harapanahalli Taluk near 400/220 KV sub-station of the Corporation/ BESCO located at Guttur, for the sole purpose evacuating the Electricity generated by the Project to the Grid System and for facilitating interconnection between the transmission lines emanating from the Project and the Grid System.

(xi) "Delivery Point" or "Interconnection/evacuation Point" shall be the point at which the power is injected in to the sub-station bus of the BESCO/Corporation;

(xxiv) "Interconnection/evacuation Facilities" in respect of the Company shall mean all the facilities installed by the Company or by any other person acting on its behalf to enable BESCO to receive the Delivered Energy from the Project at the Delivery Point including transformers and associated equipment, relay and switching equipment protective devices and safety

equipment and transmission lines from the Project to Corporation's/BESCOM nearest sub-station.

(iii) "Billing Period" means the calendar month ending with the Metering Date. The first Billing Period shall commence with the Commercial Operation Date and end with the Meter Reading Date corresponding to the month in which the Commercial Operation Date occurs;

(xxix) "Meter Reading Date" for a Billing Period, means the midnight of the last day of the calendar month;

(vi) "Commercial Operation Date" shall mean the actual commissioning date of respective WTG of the Wind Power Project injecting power into the delivery point as certified by Corporation/BESCOM and in any case, shall not be beyond the scheduled date of completion.

(xxxvi) "Scheduled Date of Completion" shall mean the date on which the Project is scheduled to deliver Electricity to BESCOM at the Delivery Point after completion of all the required tests, i.e., on or before 31.03.2018:

(xxv) "Installed Capacity" means the capacity of the Project at the generating terminal(s) and shall be equal to 2.10 MW;

(xxx) "Metering Point" means the point at which meters are installed for the purpose of recording of Delivered Energy at the Delivery Point and shall include two separate sets of electronic tri-vector meters, main meter installed by the Company and check meter installed by the BESCOM and both sealed by the BESCOM, having facilities to record both export and import of electricity to/from the grid;

(xxxix) "Tariff" shall have the meaning set forth in clause 5.1;"

c) For proper decision on Issue No.1, the following two points are to be considered:

(i) Whether the energy is delivered at the Delivery Point as on 31.03.2018 from the WTGs in question?

(ii) Whether the injection of any minimum quantum of energy at the Delivery Point is required as on 31.03.2018 to claim the tariff rate at Rs.3.74 per unit for the delivered energy as provided in Article 5.1 (a) of the PPA?

9. Reg. Point No.(i): Whether the energy is delivered at the Delivery Point as on 31.03.2018 from the WTGs in question?

a) In the present case Delivery Point is the bulk meter point at Guttur Sub-station of the 2nd respondent (KPTCL). Delivered Energy is the energy actually fed and measured by the energy meters at Delivery Point in a Billing Period, less the line loss calculated as per the explanation given under the definition of Delivered Energy. The Billing Period corresponds to the Calendar Month ending with the mid-night of the last day of the Calendar Month. The 'Commercial Operation Date' shall mean the actual commissioning date of the respective WTGs of the Wind Power Project injecting power into the Delivery Point as certified by the Corporation/BESCOM and in any case shall not be beyond the schedule date of completion i.e., on or before 31.03.2018. The installed capacity of each of the WTGs is 2.10 MW. The individual energy meters have been installed at the Project Site of two WTGs with RR No.HTPS II-178, RR No.HTPS II-179 respectively. The two WTGs in question and some other WTGs located in that area are connected to Receiving Station at Doddathanda Village in Harapanahalli Taluk of Ballari district, somewhere near 400/220 kV Guttur Sub-station.

- b) On 01.04.2018 while taking individual energy meter reading, it was found that both the energy meters at the location of the projects in question had shown to have recorded only import but no export as only two decimal digits (Display 3), out of the six decimals of the meters were considered. These facts are stated in letter dated 03.10.2018 (Annexure-P7). Therefore, for the Billing Month of March, 2018, the energy delivered to the grid was considered as nil.
- c) However, subsequently the generation recorded in the energy meters at the two locations were when taken in high resolution display mode -10 in six decimals, it was found that there were import to as well as export from the two WTGs to some extent as on the mid-night on 31.03.2018. These import and export quantities are shown in the amended B-Form issued for the month of March 2018 (they are produced along with Annexure-P9). We have already noted the quantum of import and export energies of the two WTGs in the earlier part of this Orders. It is as follows:

Energy Meter Readings of RR No.HTPSII-179	Main Meter (kWh)	Energy Meter Readings RR No.HTPSII-178	Main Meter (kWh)
Import (Units) = kWh IMP x MC	153.330000	Import (Units) = kWh IMP x MC	145.170000
Export (Units) =kWh EXP x MC	117.135000	Export (Units) =kWh EXP x MC	97.200000
Transmission Losses	2.26	Transmission Losses	1.87
Net Energy Exported (Units)	- 38.45	Net Energy Exported (Units)	- 49.84

- d) On the basis of the amended B-Forms, the 1st respondent (BESCOM) in its letter dated 07.03.2019 (Annexure-P10) informed the petitioner that the two WTGs have injected energy into the grid beyond 31.03.2018

thereby the energy invoices submitted were billed at the rate of Rs.3.00 per unit as per Article 5.1 of the PPA.

- e) It is shown that the two WTGs were commissioned on 31.03.2018 as per Commissioning Certificates dated 04.04.2018 (Annexure-P6 colly.) certifying that the said two WTGs in question have been commissioned on 31.03.2018 and in that respect the Minutes of the Meeting was drawn on 31.03.2018 (Annexure-P5 colly.)
- f) The learned counsel for the petitioner submitted that the above facts are sufficient to conclude that both the WTGs were commissioned and also achieved Commercial Operation on 31.03.2018 injecting power into the Delivery Point. On the other hand, the learned counsel for the petitioner submitted that no energy was injected into the Grid as was evident from the meter readings. However, the respondents have not specifically stated the reasons for which the injection of energy into the Grid could not be inferred. The respondents though contended that Annexure-P7 letter dated 03.10.2018 is an internal communication which cannot create any right in favour of the petitioner, it appears to us that the amended B-Form issued to the petitioner could not be disputed on any such ground. The amended B-Forms are based on the readings taken afresh as noted in the letter dated 03.10.2018 (Anexure-P7).
- g) The learned counsel for the petitioner contented that the issuing of Commissioning Certificate and accepting the contents of it would lead

to the conclusion that the power plant was actually commissioned and put into the operation and the energy was fed into Grid. He submitted that such a view is taken in ES Solar Private Limited & Another Vs. Bangalore Electricity Supply Company Limited (BESCOM) & Another, decided on 08.05.2019 in Appeal No.332 & 333 of 2018 of the Hon'ble ATE which has been upheld by the Hon'ble Supreme Court in Bangalore Electricity Supply Company Limited (BESCOM) Vs. ES Solar Private Limited & Another cited in (2021) 6 SCC 718. In substance, his contention is that once the Commissioning Certificate is duly issued, the Commercial Operation by injecting power into the Grid is to be accepted. The learned counsel for the respondents refuted such contentions and submitted that in the above cited decisions of the Hon'ble ATE or the Hon'ble Supreme Court of India, such a view is not taken. On consideration of the rival submissions of the learned counsel for the parties and on perusal of the said judgments, we are of the considered view that the proposition of law as suggested by the learned counsel for the petitioner is not laid down in those decisions. In the said judgments one of the questions for consideration was as to whether the commissioning of the project and Commercial Operation of the Project are one and the same or different concepts in a Solar Power Project where the PPA provided the definition of 'Scheduled Commissioning Date' and 'COD or Commercial Operation Date' as follows:

'Scheduled Commissioning Date' shall mean 12 (twelve) months from the Effective Date.

'COD' or 'Commercial Operation Date' shall mean the actual Commissioning Date of respective units of the Power Project where upon the Developer starts injecting power from the Power Project to the Delivery Point.

'The Effective Date' was defined as the Date of Approval of the PPA by the Commission (KERC).

The disputes involved in that case were as to whether commissioning of the project would complete only when the project starts injecting power into the Grid in spite of issuing the Commissioning Certificate and further that as to whether the Scheduled Commissioning Date would fall on 16.10.2017 as contended by BESCO or on 17.10.2017 as contended by the developer/appellant. In that case admittedly, there was injection of power on 17.10.2017. The answer to the 1st question had become unnecessary as the Hon'ble ATE upheld the contention of the developer that the Scheduled Commissioning Date would fall on 17.10.2017 on which day admittedly there was injection of power into the Grid, by rejecting the contention of the BESCO that the Scheduled Commissioning Date would fall on 16.10.2017. There was no issue for consideration by the Hon'ble ATE that mere commissioning of the project would lead to an inference that the injection of power into the Grid is to be accepted. The Hon'ble Supreme Court of India, upheld the finding of the Hon'ble ATE that the Scheduled Commissioning Date would fall on 17.10.2017 but not on 16.10.2017 and further in para 22 of

its judgment has stated that, xxxxxxxx in view of the conclusion reached by them on the issue relating to the Scheduled Commissioning Date being 17.10.2017, it is not necessary to adjudicate the point relating to the requirement of actual injection of power into the Grid to decide the Date of Commissioning xxxxxxxx.

h) In the present case, injection of energy into the Grid is made explicit in the definition of 'Commercial Operation Date' as well as in Article 5.1 of the PPA. The amended B-Forms show that there was injection of energy into the Grid to the extent of 97.200 units & 117.135 units respectively from the two WTGs. Though certain quantities of energy were drawn from the Grid, there is no impediment to conclude that certain quantities of energy were also injected into the Grid.

i) Therefore, Point No.1 is to be answered in affirmative.

10. Reg. Point No.(ii): Whether the injection of any minimum quantum of energy at the Delivery Point is required as on 31.03.2018 to claim the tariff rate at Rs.3.74 per unit for the delivered energy as provided in Article 5.1 (a) of the PPA?

a) We may also note the principles of construction of contracts, stated by the Hon'ble Supreme Court of India, cited in (2021) 6 Supreme Court Cases 718 between Bangalore Electricity Supply Company Limited (BESCOM) Vs. Solar Power Private Limited and Others at paras 16 & 17 which reads as follows:

"Para 16 – Before embarking on the exercise of interpretation of the agreement it is necessary to take stock of the well-

settled canons of construction of contracts. Lord Hoffmann in *Investors Compensation Scheme Limited Vs. West Bromwich Building Society* summarised the broad principles of interpretation of contract as follows: (WLR pp. 912-13)

- (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonable have been available to the parties in the situation in which they were at the time of contract.
- (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
- (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
- (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not

merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong or syntax; see Mannai Investment Company Limited Vs. Eagle Star Life Assurance Company Limited.

- (5) *The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require Judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. Vs. Salen Rederierna A.B.5, AC at p. 201: (AC p.201).*

‘xxxxxxx if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

Para 17 – The duty of the court is not to delve deep into the intricacies of human mind to explore the undisclosed intention, but only to take the meaning of words used i.e., to say expressed intentions (Kala Devi Vs. Takhatmal Land). In seeking to construe a clause in a contract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise which has to be undertaken is to determine what the words used mean. It can happen that in doing so one is driven to the conclusion that clause is ambiguous, and that it has two possible meanings. In those circumstances, the court has to prefer one above the other in accordance with the settled principles. If one meaning is more in accord with what the court considers to be the underlined purpose and

intent of the contract, or part of it, than the other, then the court will choose the former or rather than the latter. Ashville Investments Limited Vs. Elmer Contractors Limited. The intention of the parties must be understood from the language they have used, considered in the light of the surrounding circumstances and object of the contract. Bank of India Vs. K. Mohandas. Every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of enquiry is the meaning of an isolated clause. Bihar SEB Vs. Green Rubber Industries. “

- b) We may also note the principles stated in para 9 of the decision of the Hon'ble Supreme Court of India, cited in (2002) 3 Supreme Court Cases 533 between Padma Sundara Rao (Dead) and Others Vs. State of T.N. and Others, which reads thus:

“Para 9 – Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech of judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris Herrington v. British Railways Board. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.”

- c) There is no specific term in the PPA prescribing injection of any minimum quantum of energy into the Grid. We have to verify as to whether Article 5.1 (a) of the PPA implies injection of any minimum quantum of energy at the Delivery Point as on 31.03.2018 to claim the tariff at the rate of Rs.3.74 per unit for the delivered energy.

d) The definition clause of PPA shows that “tariff” shall have the meaning set-forth in Article 5.1 of the PPA. Therefore, for claiming tariff at Rs.3.74 per unit under Article 5.1 (a) of the PPA, all the requirements stated therein are to be fulfilled. Hence, the ingredients of Article 5.1 (a) of the PPA for claiming tariff at the rate of Rs.3.74 per unit may be stated as follows:

- (i) That the project has achieved commissioning and energy has been injected into the Grid on or before 31.03.2018.
- (ii) The liability of BESCO to pay the tariff at the rate of Rs.3.74 per unit for the Delivered Energy, would arise subject to Article 5.4 of the PPA.
- (iii) The liability to pay at such rate of Rs.3.74 per unit would commence from the date of commercial operation for the term of the PPA.

e) Article 5.4 of the PPA reads as follows:

“5.4 The Company shall be permitted to draw power up-to 10% of the installed capacity for start-up, after inspection by the concerned officers of the BESCO and 115% of such energy provided by the BESCO for start-up purposes shall be deducted from the Delivered Energy by the Company for determining the amount to be paid by the BESCO to the Company.”

f) In legal parlance, the meaning of the phrase/expression ‘subject to’ is described as follows:

- (i) The effect of the words ‘subject to’ in a deed is to introduce a condition or proviso.

- (ii) The words 'subject to' when used in a statute, have reference to effecting the intention of the law and the correct meaning is 'conditional upon'.
- (iii) xxxxxx Ordinarily the expression 'subject to' conveys the idea of a provision yielding place to another provision or other provisions subject to which it is made as has been held in *Surinder Singh Vs. Central Government* (AIR para 6) *South India Corporation (Private) Limited Vs. Secretary, Board of Revenue, Trivandrum*, *Ashok Leyland Limited Vs. State of Tamil Nadu* and *S.N. Chandrashekar Vs. State of Karnataka*. [para 68 of the judgment reported in (2007) 5 Supreme Court Cases 447 between *Southern Petrochemical Industries Company Limited Vs. Electricity Inspector & ETO and Others*].
- g) Keeping in view of the above meanings of the word "subject to", if we analyse Article 5.1 (a) along with Article 5.4 of the PPA, it is clear that 115% of the energy drawn from the Grid for start-up purposes by WTG should be deducted from the Delivered Energy as stated in the said Article 5.4 of the PPA, in determining the amount to be paid by the 1st respondent (BESCOM) to the petitioner for the Delivered Energy.
- h) In the present case, the contents of the letter dated 03.10.2018 (Annexure-P7) and the energy drawn from the Grid by WTG as recorded in the energy meter in kWh (active energy) would clearly indicate that the said import of energy from the Grid was towards 'start-up purposes' of WTG.
- i) The above analysis would show that though there is no specific term regarding minimum energy to be injected into the Grid for claiming tariff

at the rate of Rs.3.74 per unit for the billing month of March, 2018, the export energy (energy injected into the Grid) should be at least one unit more than 115% of the import energy (energy drawn from the Grid) during the said billing month.

- j) Admittedly in the present case, the import energy from the Grid is more than the export energy in case of both WTGs in question as on the mid-night of 31.03.2018 (billing month for March, 2018). In that event the actual delivered energy should be treated as in negative or nil.
- k) Therefore, we are of the considered opinion that Article 5.1 (a) read with Article 5.4 of the PPA impliedly prescribes the injection of a minimum quantum of energy which should be more than the quantum of energy drawn from the Grid, at the Delivery Point as on 31.03.2018 to claim the tariff rate at Rs.3.74 per unit for the Delivered Energy.
- l) For the above reasons, we hold Point No.(ii) in affirmative as explained above.

11. In view of the findings recorded above on Issue No.1, we hold that the claim of the petitioner falls under Article 5.1 (b) but not under Article 5.1 (a) of the PPA for computing the rate of tariff from 01.04.2018 onwards for the energy delivered to the Grid from the two WTGs in question. Hence, Issue No.1 is held accordingly.

12. Issue No.2: To which reliefs the petitioner is entitled to?

In view of the findings on Issue No.1, the petitioner is not entitled to any of the reliefs claimed in the petition.

13. Issue No.3: What Order?

For the foregoing reasons, we pass the following:

ORDER

The petition is dismissed. The petitioner is not entitled to any of the reliefs claimed in the petition.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member