

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**

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

**Dated : 29<sup>th</sup> May, 2018**

**Present:**

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

**OP No. 148/2017**

**BETWEEN:**

Sri Ugrappa Solar Private Limited,  
No.658/8, 2<sup>nd</sup> Floor, F, I 'C' Main Road,  
40<sup>th</sup> Cross, 8<sup>th</sup> Block,  
Jayanagar,  
Bengaluru-560 082.

.. **PETITIONER**

*[Represented by Kumar & Bhat, Advocates]*

**AND:**

- 1) Bangalore Electricity Supply Company Limited,  
K.R. Circle,  
Bengaluru – 560 001.
- 2) Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan,  
K.G. Road,  
Bengaluru – 560 009.
- 3) Karnataka Renewable Energy Development Limited,  
No.39, "SHANTHIGRUHA"  
Bharath Scouts & Guides Building,  
Palace Road,  
Bengaluru – 560 001.

- 4) The Deputy Commissioner,  
Mini Vidhana Soudha,  
Tumakuru- 572 101.

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**RESPONDENTS**

*[Respondents 1 and 2 represented by Sri Shahbaaz Husain, Advocate,  
Respondent 3 represented by Sri Rakshith Jois Y P, Advocate,  
Respondent 4 remained absent]*

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**ORDERS**

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003 in effect praying to:
- (a) Direct Respondent No.1 to comply with the terms of the PPA dated 26.9.2015 and confirm the extension of time with the agreed tariff of Rs.6.51 per unit for the Petitioner's 3MW solar power project;
- (b) Direct the Respondent not to deduct any liquidated damages as the delay in commissioning the project was due to Force Majeure Events; and,
- (c) Grant such other reliefs to meet the ends of justice and equity.
- 2) The facts of the case and submissions made, in support of the above prayers by the Petitioner, may be summed up as follows:
- (a) Pursuant to the Solar Policy of the Government of Karnataka, dated 22.05.2014 and the Government Order, dated 26.08.2014, the Karnataka

Renewable Energy Development Limited (KREDL), the Nodal Agency of the Government of Karnataka for implementation of Solar Power Projects in the State, issued a letter dated 28.08 2015 in favour of a land owning farmer, Sri Balasimha Rao [the Solar Project Developer (SPD)] and allotted 3 MW capacity Solar Power Project to be commissioned at Sy.No.296/3, Kamanadurga Village, Nagalamadike Hobli, Pavagada Taluk, Tumakuru District, under 1-3 MW Farmers' Scheme, subject to certain terms and conditions.

- (b) Based on this allocation letter, the SPD executed a Power Purchase Agreement (PPA) dated 26.09.2015 with the Respondent No.1. The PPA was approved by this Commission on 28.01.2016 and handed over to the Petitioner on 22.02.2016. Here itself, we may note that the Petitioner is the Special Purpose Vehicle formed with the SPD as one of the shareholders on 05.10.2016 and therefore, some of the actions stated to have been taken by the Petitioner are actually of the SPD. 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. Thus, the Project proponent was supposed to commission the project by 25.03.2017.

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- (c) On 08.07.2016, the SPD had applied to the Deputy Commissioner, Tumakuru for conversion of land in which the project was proposed to be implemented. The Deputy Commissioner, issued an Official Memorandum dated 03.10. 2016 granting the Conversion Order, after payment of requisite fee by the SPD on 22.09.2016.
- (e) The SPD approached the Respondent No. 2, the Karnataka Power Transmission Corporation Ltd., (KPTCL) for grant of Evacuation Approval for its Project on 28.03.2016. The KPTCL, accorded the Evacuation approval on 07.10.2016.
- (f) The Petitioner Special Purpose Vehicle (SPV) was formed on 05.10.2016 and all the rights and obligations of the SPD were transferred to the SPV. Consequently, a Supplemental Agreement (SPPA) dated 23.01.2017 came to be executed.
- (g) The KPTCL granted the Work Orders to carry out the sub-station work on 04.01.2017 and to lay the 11 kV line on 9.3.2017.
- (h) The Petitioner applied to the Respondent-1 for extension of time on 13.02.2017 and, considering the genuine delay caused, the SCOD was extended by 6 months, on 16.06.2017.

- (j) The project was commissioned on 07.08.2017.
- (k) The Petitioner pleads that due to delay in handing over of the copy of the PPA to the Petitioner by about 5 months, delay in grant of land conversion order by about 3 months, delay in grant of evacuation approval by about 6 months, delay in issue of work orders to construct the sub-station and 11 kV line by about 9 months and 11 months respectively, delay in communication of extension of time by the BESCO by about 4 months and demonetisation decision of the Central Government, the project could not be commissioned within time, and that these events have to be construed as force majeure events and the tariff of Rs.6.51 per unit has to be paid. That as the Petitioner has spent Rs.19.50 Crores on the project, it is entitled to the tariff of Rs.6.51 per unit. That as the Respondents and the Government have accepted that due to delay in grant of approvals, the project could not be completed within time and have granted extension of time to commission the project, the Petitioner should be granted the reliefs sought.
- (l) It is the further pleading of the Petitioner that the Farmer's Solar Plant scheme is intended to financially benefit the farmers in distress and the reduction of tariff will cause further distress.

- (m) The other ground urged by the Petitioner is that the Respondents have not denied the pleadings of the Petitioner and the same amounts to admission. That, as per the provisions of Order 12 Rule 6 of CPC, the non-denial of averments made by the Petitioner amounts to admission and hence, the Petitioner is entitled to the reliefs claimed. The Petitioner has pointed out that the Hon'ble Supreme Court has held the above view, in the decision reported in AIR 2005 SC 2765 (Chiranjit Lal Mehra & others Vs Smt.Kamal Saroj Mahajan and another) and the High Court of Delhi has also held a similar view in the decision reported in AIR 2005 Delhi 319 (Rajiv Srivastava vs Sanjiv Tuli and another).
- 3) On issuance of Notice, the Respondents entered appearance through their Counsel and filed the Statement of Objections and the Respondent 4, who is a formal party, remained absent.
- 4) The submissions of Respondent-1 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. Accordingly, the Petitioner was supposed to commission the project by 25.03.2017.

- (b) As the Petitioner was unable to execute the project within the stipulated time, the Petitioner sought extension of time by 6 months to commission the project, under *force majeure* conditions.
- (c) As several requests for extension of scheduled commissioning date were received from solar developers, the Government of Karnataka issued an Order dated 24.11.2016 directing all the ESCOMs to constitute a 3-member Committee to consider and dispose of the requests of farmers/developers. Accordingly, a Committee was constituted by the Respondent-1 and the Committee in its meeting held on 25.03.2017, considered requests of 9 (nine) generators, including the Petitioner. The Petitioner had cited the following reasons for the delayed execution of the project:

**Land Conversion:**

Date of Submission of application: 10.7.2016

Date of Conversion: 3.10.2016

Delay in getting approval: 3 months

**KPTCL Evacuation Approval (Regular):**

Date of Submission of application: 18.5.2016\*

Date of Approval: 07.10.2016

Delay in getting approval: 5 months

*[\*We note that the date of application is wrongly mentioned in the Objections of the Respondent.]*

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The Committee, after detailed discussions and scrutiny of all the documents, opined that approval may be accorded for extension of SCOD by upto 6 (six) months under Article 2.5 of the PPA as there was delay in issue of approvals by various Government entities.

- (d) The Respondent-1 in its letter dated 16.03.2017 informed the Petitioner about the extension of time for achieving scheduled commercial operation of the Project.
- (e) The Commission in its letter dated 16.03.2017 informed all the ESCOMs of the State, not to allow any extension of time to solar generators beyond the scheduled commissioning date as per the PPA, without obtaining prior opinion of the Commission. Further, vide letter dated 05.04.2017, the ESCOMs were directed by the Commission to advise all land owner solar developers/SPVs to approach the Commission and seek approval of the extension of time. In furtherance to the same, the Petitioner has filed this Petition.
- (f) The Energy Department, vide its letter dated 25.04.2017 to the Commission, has communicated that it has found acceptable the 6 (six) month's extension of the SCOD granted by the BESCO as per Clause 2.5 and Article 8 of PPA. That further, the subject was placed before the

82<sup>nd</sup> Meeting of the Board of Directors of the BESCO, held on 08.06.2017 and the Board ratified the actions taken on the extensions issued by the BESCO subject to approval of the Commission.

- (g) In respect of extensions of the project duration of already awarded solar power projects, the Ministry of New and Renewable Energy in its letter dated 28.07.2017, addressed to the Principal Secretaries (Power/Energy) 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."*

- (h) The Respondent-1 has, therefore, prayed for issue of appropriate directions in the matter.

- 5) The submissions of Respondent-2 may be stated as follows:
- (a) The allegation that, there was a delay of 6 (six) months 11 (eleven) days by the Respondent-2 in granting the power evacuation approval, is denied. The Respondent-2 submits that, the application was received on 28.03.2016 and on 01.04.2016 the Petitioner was requested to pay the processing fee and produce the feasibility report. On 29.04.2016 the Petitioner requested for allotment of two (2) terminal bays and approval for construction of 11 kV double circuit line. After holding discussions with the field staff, in its letter dated 18.05.2016, it was suggested to the Petitioner to construct higher capacity line and reduce the number of bays to one (1) so that the space and transmission losses can be reduced. The Petitioner accepted the proposal on 18.05.2016 and tentative evacuation approval was given on 24.05.2016. That after obtaining report from the concerned officers and holding discussion in the 64<sup>th</sup> TB Meeting on 27.6.2016, approval was accorded to utilise the space available in the substation for construction of the terminal bay. Also, that after production of land conversion Order dated 03.10.2016, the regular evacuation approval was issued on 07.10.2016.
- (b) The allegation that there was a delay of 9 (nine) months 3 (three) days by Respondent-2, in granting the work order to carry out the sub-station work,

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is denied. The Respondent-2 submits that the work order can be granted only after the evacuation approval is given. That the Work Order was granted on 04.01.2017, in about 2 months from the date of evacuation approval (07.10.2016). That the estimate for the work was received on 21.10.2016 and on 07.11.2016 the Petitioner was informed to pay the necessary charges. That the Petitioner paid the charges on 17.12.2016. That after issuance of technical sanction, the work order was issued on 04.01.2017. That, therefore, the allegations of delay by the Respondent-2 are denied.

- 6) The Respondent-3 in its statement of Objections has stated that no relief is claimed as against it and hence, the petition may be dismissed as against it.
- 7) We have heard the Counsel for the parties and perused the records. The following issues arise for our consideration:
  - (1) Whether the extension of time of six months granted by the Respondent-1 (BESCOM) to the Petitioner for achieving the commercial operation of the Petitioner's Project can be subjected to legal scrutiny by the Commission?

- (2) Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Project?
  - (3) What should be the tariff for the Project for the term of the PPA?
  - (4) What Order?
- 8) After considering the submissions made by the counsel for the parties and the pleadings and other material placed on record, our finding on the above issues are as follows:
- 9) **ISSUE No.1:** *Whether the extension of time of six months granted by the Respondent-1(BESCOM) to the Petitioner for achieving the commercial operation of the Petitioner's Project can be subjected to legal scrutiny by the Commission?*
- (a) Article 2.5 of the PPA does not specifically stipulate that, any extension of time granted by the 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. Whenever an event affects the tariff applicable for supply of energy to the Distribution Licensees, we are of the considered opinion that

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the same should be scrutinized and approved by the Commission. It is a settled law that this Commission has the exclusive jurisdiction to determine the tariff for supply of electricity by a Generating Company to a Distribution Licensee and it has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which the electricity shall be procured from different agencies through PPAs. Therefore, we hold that, even in the absence of a specific term in the PPA, an event affecting or altering the tariff already approved in the PPA should be got approved by this Commission. The BESCO has also specifically intimated the Petitioner, in its letter dated 16.06.2017, that the approval accorded to commission the project within 25.09.2017 (i.e. within six months beyond the scheduled commissioning date) is subject to the tariff applicable and the liquidated damages to be paid, if any, and is subject to approval of the Commission.

- (b) The Petitioner has contended that, as the Respondent-1 has accepted the claim of the *force majeure* events and granted the extension of time, the Commission has to pass an order in favour of the Petitioner, treating the same as admission by the Respondent-1. Reliance is placed on two decisions mentioned in the preceding paragraphs. We are unable to accept the contention of the Petitioner. Any extension of time to commission a power project has a bearing on the tariff payable. Tariff

determination/fixation of price for electricity is not an adversarial proceedings. The consumer, though not a formal party, ultimately pays for the supply of electricity and is the most affected party. The Commission is required to safeguard such consumers' interest. While upholding the role of the Commission as a regulator and custodian of the interest of consumers, the Hon'ble Supreme Court, has in the case of All India Power Engineers Federation Ltd v. Sasan Power Ltd, reported in (2017) 1 SCC 487, held that even if parties to a contract (Generating Company- seller of the energy and Distribution Licensee- buyer of the energy) waive a certain term affecting the tariff, the Commission, as a custodian of consumer interest has to intervene and exercise its regulatory power. Therefore, the case laws cited by the Petitioner do not have any application to this case. Accordingly, we hold that the Commission has the mandate and powers to scrutinise the correctness and legality of the extension of time granted by the Respondent-1.

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

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

(a) It would be useful to extract the relevant clauses of the PPA, as follows, 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 fulfills any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify BESCO of the same.*

## **2.2 Damages for delay by the SPD**

**2.2.1** In the event that the SPD does not fulfill any or all of the Conditions Precedent set forth in Clause 2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to BESCO or due to Force Majeure, the SPD shall pay to BESCO damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days, BESCO at its discretion may terminate this Agreement

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## **2.3.2 Appropriation of Performance Security**

Upon occurrence of delay in commencement of supply of power to BESCO as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, BESCO shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages. Upon such encashment and appropriation from the Performance Security, the SPD shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the SPD shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which BESCO shall be entitled to terminate this Agreement in accordance with Article 9."

**“2.5 Extensions of Time**

**2.5.1** *In the event that the SPD is prevented from performing its obligations under Clause 4.1 by the Scheduled Commissioning Date due to:*

- (a) Any 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 BESCOB 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 BESCOB of any Law or any of their respective obligations under this Agreement);*

- (vi) *Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
- (vii) *Fire, Earthquakes, explosions, accidents, landslides;*
- (viii) *Expropriation and/or compulsory acquisition of the Project in whole or in part;*
- (ix) *Chemical or radioactive contamination or ionizing radiation; or*
- (x) *Damage to or breakdown of transmission facilities of either Party;*

*(b) The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:*

- (i) The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;*
- (ii) The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.*
- (iii) The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;*
- (iv) The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;*
- (v) In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."*

- (b) We note that under the Clause 2.5 of the PPA, extension of time for commissioning the Project can be granted, if the SPD is prevented from

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performing its obligations due to the BESCO's 'Event of Default' or the *Force Majeure* events. The *Force Majeure* events and the requirement of issuing a written Notice are mentioned in Clause 8.3 of the PPA. Under the said clause, it is also necessary to prove that, the *Force Majeure* event was not caused by the non-performing party's negligent or intentional acts, errors or omissions. In this backdrop, we need to examine, if the Petitioner or the SPD, in any manner, was negligent in performing its obligations under the PPA.

- (c) The PPA is signed by the parties on 26.09.2015. As per Article 2.1 of the said PPA, the Conditions Precedent have to be achieved within 365 days from the date of signing the PPA and the Project has to be commissioned within 18 months from the date of signing the PPA. The achievement of the Conditions Precedent would include obtaining of all the approvals by the SPD. The Petitioner claims that, the delay in handing over a copy of the PPA, after approval, on 28.01.2016 by the Commission, has caused delay in implementing the Project. The recitals in the PPA would reveal that, the parties have signed the PPA and copies of the same were delivered on the date of the PPA. A signed copy of the PPA would be sufficient to proceed with the preliminary works for implementation of the Project. The approval of the PPA on 28.01.2016 by the Commission has no bearing on the initial obligations of the SPD, such as, applying for approvals, loans,

etc. The Petitioner has not produced any documents to show that any of its application for approval, loans etc., was rejected or delayed on this count. Therefore, we are unable to accept that, the time taken for approval of the PPA is a *force majeure* event, causing delay in the commissioning of the Project. The process of approval of the PPA took some time as the allocation of the Petitioner's project, under the land owning farmer's solar project scheme had to be got confirmed as it was beyond the capacity of 300 MW mentioned in the Solar Policy. The provisions of the PPA do not provide for exclusion of the time taken for approval of the PPA in counting the period available for commissioning the project. Hence, the time taken in the regulatory process for approval of the PPA cannot be termed as 'delay'. In any case as noted earlier it is not shown that the absence of approved PPA prevented the SPD from taking any step/action to implement the project.

- (d) The SPD applied for conversion of land on 08.07.2016, after a lapse of about nine (9) months from the effective date of the PPA and for that matter after a lapse of five (5) months from the date on which the SPD/Petitioner statedly received the approved PPA. No explanation is given for this delay on the part of the SPD. The land conversion charges were paid by the SPD on 22.09.2016. The land conversion Order was passed by the Deputy Commissioner, Tumakuru on 03.10.2016, in about

three months from the date of application which is found reasonable. The Petitioner has not elaborated on the implementation steps of the project which were affected by the time taken in grant of approval of land conversion. Hence, we are unable to accept the contention of the Petitioner that, there was a delay in granting of the approval for conversion of land which affected the project implementation. Is a matter of fact, there is a delay on the part of the SPD in applying for the conversion.

- (e) The SPD applied for the evacuation approval to the Respondent-2 on 28.03.2016, after about six months from the date of the PPA. No explanation is given for this delay. The Petitioner has alleged that the Respondent-2 caused delay of about 6 (six) months in granting the evacuation approval. The Respondent-2 has in its Statement of Objections, furnished the dates and events leading to the grant of evacuation approval. After the intimation dated 01.04.2016 by the Respondent-2 to pay the charges, the Petitioner, on 29.04.2016 requested for allotment of two (2) terminal bays. The Respondent-2, on 18.05.2016, suggested construction of one terminal bay, which was accepted by the SPD, and approval of utilisation of the space available in the Respondent-2's sub-station was communicated to the SPD, after discussion in the Technical Board's meeting held on 27.06.2016 (in the

absence of exact date of such communication, it is taken as July, 2016). While tentative evacuation approval was given on 24.05.2016, regular evacuation approval could be given only on 07.10.2016 after the SPD produced the land conversion Order dated 03.10.2016. Admittedly the delay from July 2016 to 07.10.2016 was due to non-availability of land conversion order. Had the Petitioner applied for land conversion earlier, this period of delay could have been avoided. The further allegation of the Petitioner that there was delay of 9 (nine) months by the Respondent-2, in grant of the Work Order to carry out the Station Work, is countered by the Respondent-2 in its Objections and we find that there was delay in the payment of charges by the Petitioner from 07.11.2016 to 17.12.2016 and the Work Order was granted in 2 (two) months from the date of evacuation approval. The allegation of delay on this count is also not acceptable. When a time-line of 365 days is provided in the PPA for getting all the approvals, the inordinate delay by the SPD/Petitioner in applying for such approvals and, thereafter, attributing the delay by the authorities cannot be accepted. The Respondent-1, while granting extension of time, ought to have taken note of these aspects.

- (f) The other allegation is that a delay of 3 (three) months in execution of the project work was caused by the demonetisation decision of the Central Government. The Petitioner pleads that there was disruption in formal

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banking system and limitation on withdrawal of cash, making payment towards labour work, procurement of equipment and materials etc., for its project in the rural area was difficult. This allegation is not substantiated and in any way cannot be treated as a *force majeure* event.

- (g) We note that, it is 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-1. None of the reasons or events cited by the Petitioner for delay in commissioning of its project falls under *Force Majeure events* mentioned in the PPA, as held in the preceding paragraphs. Hence, we feel that the Petitioner is not entitled to extension of time, as provided in the clauses of the PPA. Consequently, the Petitioner would be liable for the payment of liquidated damages as per Article 2.2 of the PPA.
- (h) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. Admittedly, the SPD/Petitioner has not achieved the Conditions Precedent within the specified time, as required under Article 2.1 of the PPA. The actual dates, on which they were achieved, have not been furnished or elaborated by the Petitioner. For the same reason as applicable to rejection of the Petitioner's claim for extension of time for achieving SCOD, any claim of the Petitioner for extension of time

for achieving Conditions Precedent is liable to be rejected. Thus, we hold that for not complying with the timelines as mentioned in the PPA for Conditions Precedent and commissioning of the Project, the Petitioner is required to pay damages for such delay, as per Articles 2.2 and 2.5.7 of the PPA.

- (j) The Hon'ble Supreme Court of India, in Civil Appeal No. 3600 of 2018 (M.P. Power Management Company Ltd. Vs Renew Clean Energy Pvt.Ltd., and another) dated 05.04.2018, has held that for delay in achieving Conditions Precedent and commissioning the Project, the generating company is liable to pay damages stipulated in the PPA.
  - (k) Therefore, we answer Issue No.2 in the negative.
- 11) **ISSUE No.(3):** *What should be the tariff for the Project for the term of the PPA?*
- (a) Clause 5.1 of the PPA reads as follows:

***"5.1 Tariff Payable:***

*The SPD shall be entitled to receive the tariff of Rs.6.51 per kWh based on the KERC tariff order S/03/1 dated 30.7.2015 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.6.51/- per kWh*

*ii Varied tariff applicable as on the date of commercial operation."*

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

power plants is taken as between 12 months to 18 months. Any delay or failure in commencement of power supply within the agreed date would disrupt the operation of the Distribution Licensees like the Respondent-1 which could also result in their power procurement from alternative expensive sources leading to higher retail tariff to the consumers or short supply leading to revenue loss to them and even to imposition of penalties for not meeting the Renewable Purchase Obligation fixed by this Commission. The capital cost of solar power plants has been coming down very rapidly in the recent years, because of advancement in technology and production efficiency as well as economies of scale in the backdrop largescale solar capacity addition across the globe. Thus, generic tariff for megawatt scale solar power plants which was fixed at Rs.14.50 per unit in the Commission's Order dated 13.07.2010 has been successively reduced to Rs.8.40 per unit in the Commission's Order dated 10.10.2013, Rs.6.51 per unit in the Commission's Order 30.07.2015 and then to Rs.4.36 per unit in the Commission's Order dated 12.04.2017.

- (c) We note that the Petitioner-SPV took the risk of implementation of the project, a year after the execution of the PPA, with barely six months left for its commissioning, as agreed in the PPA and could not do it for certain reasons and events which we have held to be not falling under the *Force Majeure* clause in the PPA, that could have entitled the Petitioner to seek

extension of the commissioning date, agreed in the PPA. It is safe to infer that the normative capital cost of solar plants when the Petitioner took effective steps to procure capital equipment for its project was lower than the normative cost of solar plants, assumed in the generic tariff Orders dated 10.10.2013 and 30.07.2015. Thus, the Petitioner is not entitled to the tariff, originally agreed in the PPA at Rs.6.51 per unit, when admittedly the plant was not commissioned within the stipulated time and it is entitled only for the revised tariff, as on the date of commissioning of the plant, as per clause 5.1 of the PPA. Admittedly, in the present case, the generic tariff for solar power plants that was agreed in the PPA, was revised much before the plant was ready for commissioning. In any case, the Petitioner having voluntarily entered into a PPA which has a clause providing for revision of the tariff agreed, if there is a delay in commissioning of the project within the scheduled period, cannot now wriggle out of such a clause without valid grounds.

- (d) The PPA provides that, the tariff on the date of commercial operation will be applicable for the Project. The Project is commissioned on 07.08.2017. The Petitioner has not furnished any material particulars of the cost incurred in implementing the Project and the dates/period when investments were actually made except for a mere statement that Rs.19.50 crores is spent on the project. The Petitioner has stated that the

owner of the project had no capacity to invest and establish the plant and hence, found the investor- SPV (the Petitioner). We may safely infer that, the major part of investments have been made after the formation of SPV and execution of SPPA on 23.01.2017. We note that, the Work Orders for construction of bay and 11 kV line were given on 04.01.2017 and 09.03.2017. These works would have been carried out in the year 2017 and panels would have been procured much later. In any case, as noted earlier, as per the terms and conditions of the PPA, the tariff payable to the SPD/Petitioner is not based on the Capital Cost incurred by the SPD/Petitioner in 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) dated 02.02.2016, has held as follows:

*“31. Apart from that both the respondent No 2 and the appellate tribunal failed to notice and the 1<sup>st</sup> respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA: -*

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

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

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

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

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

For the foregoing reasons, we pass the following:

### **ORDER**

(a) The Petition is dismissed and the Petitioner is not entitled to any of the reliefs sought;

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