

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 4th September, 2018

Present:

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

OP No.128/2017

BETWEEN:

Sirwar Renewable Energy Private Limited,
H. No. 2-2-20/L/7,
Flat No. 203, Golden Towers-2,
DD Colony, Baghamburpet,
Hyderabad – 500 013.

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PETITIONER

[Represented by Shri Shiva K.V. & Shri R. Manjunath, Advocates]

AND:

- 1) The Additional Chief Secretary to
Government of Karnataka,
Energy Department,
Vikasa Soudha,
Dr. B.R. Ambedkar Veedhi,
Bengaluru – 560 001.
- 2) The Managing Director,
Gulbarga Electricity Supply Company Limited,
Station Main Road,
Kalaburagi – 585 102.
- 3) Karnataka Power Transmission Corporation Limited,
Transmission Zone,
Sedam Road,
Kalaburagi – 585 105.

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RESPONDENTS

*[Respondent-2 represented by Just Law, Advocates,
Respondent 1 & 3 unrepresented]*

ORDERS

- 1) The Petitioner has filed this Petition, under Section 86(1)(f) of the Electricity Act, 2003, praying to:
 - (a) approve the extension of time, granted by the 2nd Respondent (GESCOM) to the new SCOD viz., 21.01.2017, vide Official Memorandum dated 19.01.2017;
 - (b) direct the 2nd Respondent (GESCOM), to make payment for the delivered energy under the Power Purchase Agreement (PPA) dated 01.07.2015 and the SPPA dated 05.07.2016, at the rate of Rs.8.40 per unit from the Commercial Operation Date (COD), 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 present case.

- 2) The facts of the case, as submitted by the Petitioner, may be summarized, as follows:
 - (a) The State Government, with an intention to increase generation of Solar power and to encourage the State's farmers, issued a Notification dated 26.08.2014, in terms of its Solar Policy for the year 2014-21.

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- (b) Pursuant to bids called by the Karnataka Renewable Energy Development Limited (KREDL), for allotment of Solar Power Plants under the Land Owning Farmers' Category, Dr. Vijay Shankar, a land owning farmer was selected, on first-come-first-served basis. His application for allotment of a Solar Power Project for 2 MW was accepted by the KREDL and a letter dated 16.03.2015 to set up the 2 MW Solar Power Project at Sy.No.184, Sirwar Village, Manvi Taluk, Raichur District, under the Farmers' Scheme, was issued to him, subject to certain terms and conditions.
- (c) Based on this allotment, Dr. Vijay Shankar, the Solar Project Developer (SPD) executed a PPA dated 01.07.2017 with the 2nd Respondent (GESCOM). The PPA was approved by the Commission, as communicated vide letter dated 31.08.2015. As per the PPA, the Effective Date was defined as 'the date of signing of the PPA'. The Scheduled Commissioning Date (SCOD) was defined as 'eighteen (18) months from 01.07.2015 (the Effective Date)'. Thus, the Project proponent was supposed to commission the Project by 31.12.2016.
- (d) The Government of Karnataka, through Department of Revenue, issued a Circular bearing No.RD 69 LGP 2015 dated 01.12.2015, notifying the list of documents to be obtained by the Deputy Commissioner, from the Project proponents, in order to grant the deemed conversion of the agricultural lands, for the purposes of installation of the Solar Power Projects. Though all

the relevant documents were submitted, only upon vicariously following it up, on 13.07.2016 the conversion Order was issued.

- (e) For grant of evacuation approval for its Solar Power Project, necessary application was made to the 3rd Respondent (KPTCL) on 18.03.2016. The KPTCL granted the tentative evacuation scheme approval on 18.06.2016.
- (f) As per the PPA terms, the Petitioner-Special Purpose Vehicle (SPV) was formed, with the SPD as a Director on its Board. A Supplemental PPA (SPPA) dated 05.07.2016, modifying the original PPA, came to be executed. This SPPA was approved by the Commission on 29.08.2016.
- (g) On 06.09.2016, the 3rd Respondent (KPTCL) granted the regular evacuation scheme approval to the Petitioner's Project, subject to certain terms and conditions, which included, construction of a 11kV overhead line, for a distance of 2 KM, from the Petitioner's Generating Station to the 110/11 kV Sub-station at Sirwar, with Mysore Electrical Industries Limited (MEIL) Make Switchgear (800 A) Terminal Bay (BP structure), along with required match control equipment, as per the specification to be approved by the 3rd Respondent (KPTCL).
- (h) Until the single line diagram and layout approval plan for the work of construction of the Terminal Bay at the Sub-station was accorded by the

3rd Respondent (KPTCL), the Petitioner could not procure the equipment from MEIL, the sole approved vendor of the 3rd Respondent (KPTCL). The Petitioner followed up, with 3rd Respondent (KPTCL), to get the approval of the single line diagram and layout plan. However, the same was not given within time. Finally, the Petitioner placed a Purchase Order on 27.09.2016 on the MEIL. The MEIL issued an acceptance letter, agreeing to supply the material.

- (j) The Petitioner, vide letter dated 19.04.2016, requested for the evacuation arrangement and bay extension.
- (k) The 3rd Respondent (KPTCL) accorded its approval to the single line diagram and layout plan, vide letter dated 26.12.2016.
- (l) A detailed representation, containing the Project progress and difficulties / *Force Majeure* Events encountered by the Petitioner, was given to the 2nd Respondent (GESCOM) on 07.12.2016. Further, by representation dated 28.12.2016, extension of time was sought for, in view of the delay in procuring the MCVCB & HT metering panel, as the MEIL was not in a position to give delivery.
- (m) The 2nd Respondent (GESCOM), presumably, by an internal communication, requested the 3rd Respondent (KPTCL) to verify the veracity of the claims of the Petitioner, on the work progress and the delay. The 3rd Respondent

(KPTCL) conducted a joint inspection of the Project site on 25.10.2016. Thereafter, on 27.12.2016, the Petitioner informed the 3rd Respondent (KPTCL) about the procurement of the material from APMC Raichur Sub-station and called upon the 3rd Respondent (KPTCL) to inspect the said material. Upon such representation, the 3rd Respondent (KPTCL) wrote a letter dated 31.12.2016 to the Chief Engineer (Electrical) (TAQC), requesting for inspection of the material at the earliest, in order to speed up the work and finish the inspection, for issuing the dispatch instructions.

- (n) Based on the then existing Project status and various representations submitted by the Petitioner and the recommendation made by a Committee constituted by the 2nd Respondent (GESCOM) to look into the aspect of the time extension, to be granted to the Projects, the 2nd Respondent (GESCOM) issued an Official Memorandum dated 19.01.2017, with the following conditions:

“There will be no change in Effective Date of the PPA dated 1.7.2015. For the PPA dated 1.7.2015, the GESCOM will follow the KERC order for application of tariff as per Article 2.5.7 and Article 5 for the delay in CoD.”

- (p) The Petitioner's Project achieved the CoD on 21.01.2017, within the extended SCOD, assigned by the 2nd Respondent (GESCOM). The second SPPA was executed on 16.03.2017.

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- (q) The Petitioner received a letter dated 28.04.2017 from the 2nd Respondent (GESCOM) requesting the Petitioner to file a Petition before the Commission, seeking approval of extension of time for achieving the CoD.
- (r) The Petitioner has been generating the energy and periodical invoices have been raised on the 2nd Respondent (GESCOM) every month, based on the joint meter reading in Form-B. However, no payments were made and hence, the Petitioner had submitted a representation dated 14.06.2017, requesting the 2nd Respondent (GESCOM), to release payments against the pending invoices.
- 4) The grounds urged by the Petitioner, in support of its prayers, may be summarized, as follows:
- (a) The Commission has passed three Generic Tariff Orders, fixing the tariff in respect of the Solar Power Projects, viz., Orders dated 10.10.2013, 30.07.2015 and 12.04.2017. In the Generic Tariff Order dated 30.07.2015, 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.

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- (b) The Tariff Order dated 12.04.2017 has been made applicable only to the new grid connected Solar Power Projects, entering into PPA on or after 01.04.2017, but before 01.04.2018, and also those that are commissioned during the period, from 01.04.2017 to 31.03.2018, for which the PPAs have not been entered into prior to 01.04.2017. Hence, this tariff Order also does 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.
- (c) The PPA, executed between the parties, not only provides for the time period within which the SCOD has to be achieved, but also provides for the right of the 2nd Respondent (GESCOM) to grant extension of time. Accordingly, the Petitioner has commissioned the Project within the mutually agreed CoD. Hence, the Petitioner is entitled to the tariff, as per the PPA.
- (d) The regular evacuation scheme approval dated 06.09.2016, granted by the 3rd Respondent (KPTCL), clearly mandates the Petitioner to secure the switchgear equipment and terminal bay, etc., from the MEIL only. The Petitioner can place a Purchase Order, only upon approval of the single line diagram and layout plan, being granted by the 3rd Respondent (KPTCL). The Petitioner waited for the approval of the single line diagram and layout, till 15.10.2016. However, the same was granted only on 02.12.2016. It is only thereafter, that the instructions of the material could have taken place. On 10.01.2017 the work completion approval was accorded by the

3rd Respondent (KPTCL). Thus, the delay in the work execution is not attributable to the fault of the Petitioner.

- (e) The time provided in the approved PPA, including provision of extension in SCOD for completion of the Project, cannot be interfered with, as it is due to natural cause or for unavoidable reasons beyond the control of the Petitioner. The 2nd Respondent legitimately extended the SCOD, supported by the official report as to the cause for delay, considering it as an exceptional case.
- (f) The 2nd Respondent (GESCOM) possesses jurisdiction, to grant extension of time and the same is acted upon by the Petitioner and hence, the act of extension is a *quasi-judicial* act, in the hands of the 2nd Respondent (GESCOM).
- 5) Upon issuance of Notice, the 2nd Respondent (GESCOM) appeared through its learned counsel, but failed to file any Objections despite being granted sufficient time. Ultimately, the learned counsel submitted that the 2nd Respondent (GESCOM) has no specific objections for the prayer and that it would abide by the directions of the Commission. Respondents-1 and 3 remained unrepresented.

6) We have heard the Counsel for the parties and perused the records. The following issues would arise for our consideration:

(1) Whether the extension of time of six months, granted by the 2nd Respondent to the Petitioner, for achieving the commercial operation of the Solar Power Plant, can be subjected to legal scrutiny by the Commission?

(2) Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?

(3) What should be the tariff for the Project, for the term of the PPA?

(4) What Order?

7) After considering the submissions made by the learned counsel for the parties and the pleadings and other material placed on record, our findings on the above issues are as follows:

8) **ISSUE No.(1):** *Whether the extension of time of six months, granted by the 2nd Respondent to the Petitioner, for achieving the commercial operation of the Solar Power Plant, can be subjected to legal scrutiny by the Commission?*

(a) Article 2.5 of the PPA does not specifically stipulate that, any extension of time granted by the 2nd Respondent (GESCOM) 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 quantum of tariff applicable, for supply of energy to the Distribution Licensees, we are of the considered opinion that, the same should be scrutinized and approved by the Commission. It is a settled law that, this Commission has the exclusive jurisdiction to determine the tariff, for supply of electricity by a Generating Company to a Distribution Licensee and it has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which the electricity shall be procured, from different agencies through 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 2nd Respondent (GESCOM) has also specifically intimated the Petitioner, in its Official Memorandum dated 19.01.2017, that the 2nd Respondent (GESCOM) will follow the KERC Order, for application of tariff, as per Articles 2.5.7 and 5, for the delay in the COD.

- (b) The Petitioner has contended that, as the 2nd Respondent (GESCOM) has accepted the claim of *Force Majeure* Events and granted the extension of time, the Commission has to pass an Order in favour of the Petitioner. We are unable to accept the contention of the Petitioner. Any extension of time,

to commission a Power Project, has a bearing on the tariff payable. The tariff determination / fixation of price for electricity, is not an adversarial proceedings. The consumer, though not a formal party, ultimately pays for the supply of electricity and is the most affected party. The Commission is required to safeguard such consumers' interest. While upholding the role of the Commission, as a regulator and custodian of the interest of consumers, the Hon'ble Supreme Court, in the case of *All India Power Engineers Federation Ltd v. Sasan Power Ltd.*, reported in (2017) 1 SCC 487, has held that, even if parties to a contract (generating company - seller of energy and distribution licensee - buyer of energy) waive off a certain term affecting the tariff, the Commission, as a custodian of the consumers' interest, has to intervene and exercise its regulatory powers. Accordingly, we hold that, the Commission has the mandate and powers to scrutinize the correctness and legality of the extension of time, granted by the 2nd Respondent (GESCOM).

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

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

(a) It would be useful to extract the relevant clauses of the PPA before we deal with this issue:

“2.1 Conditions Precedent:

The obligations of GESCOM 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 GESCOM and achieve financial closure and provide a certificate to GESCOM from the lead banker to this effect;

(b) All Consents, Clearances and Permits required for supply of power to GESCOM as per the terms of this Agreement; and

(c) Power evacuation approval from Karnataka Power Transmission Company Limited or GESCOM, as the case may be.

2.1.2 SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and GESCOM 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 GESCOM 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 GESCOM 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 GESCOM or due to Force Majeure, the SPD shall pay to GESCOM 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, GESCOM at its discretion may terminate this Agreement*

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XXX

XXX

2.3.2 Appropriation of Performance Security

Upon occurrence of delay in commencement of supply of power to GESCOM as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, GESCOM 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 GESCOM 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 GESCOM Event of Default; or
- (b) Force Majeure Events affecting GESCOM; 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 GESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or GESCOM, or till such time such Event of Default is rectified by GESCOM.*

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 GESCOMs.

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to GESCOM by the scheduled commissioning date, the SPD shall pay to GESCOM, 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 GESCOM 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 GESCOM of any Law or any of their respective obligations under this Agreement);*
- (vi) *Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
- (vii) *Fire, Earthquakes, explosions, accidents, landslides;*
- (viii) *Expropriation and/or compulsory acquisition of the Project in whole or in part;*

(ix) *Chemical or radioactive contamination or ionizing radiation; or*

(x) *Damage to or breakdown of transmission facilities of either Party;*

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

(i) *The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;*

(ii) *The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.*

(iii) *The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;*

(iv) *The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;*

(v) *In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."*

(b) We note that, under the Clause 2.5 of the PPA, extension of time, for commissioning the Project, can be granted, if the SPD is prevented from performing its obligations due to the 2nd Respondent (GESCOM)'s 'Event of Default' or the *Force Majeure* Events. The *Force Majeure* Events and the requirement of issuing a written Notice are mentioned in Article 8.3 of the PPA. Under the said clause, it is also necessary to prove that, the *Force Majeure* Event was not caused by the non-performing party's negligent or

intentional acts, errors or omissions. In this backdrop, we need to examine, if the Petitioner or the SPD, in any manner, was negligent in performing its obligations under the PPA.

- (c) The PPA is signed by the parties on 01.07.2015. As per Article 2.1 of the said PPA, the Conditions Precedent had to be achieved within 365 days from the date of signing the PPA and the Project had to be commissioned within 18 months, from the date of signing the PPA, within 31.12.2016. The achievement of the Conditions Precedent, would include obtaining of all the approvals by the SPD.
- (d) The SPD applied for conversion of the land on 05.05.2016, as per the relevant tabular column at ANNEXURE - U, after a lapse of about ten months from the Effective Date of the PPA. No explanation is given for this delay, on the part of the SPD. The land conversion charges were paid by the SPD on 27.06.2016. The land conversion Order was passed by the Deputy Commissioner, Raichur on 13.07.2016, in about two months from the date of application, which is found reasonable. In 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 3rd Respondent (KPTCL) on 18.03.2016, after about 9 months, from the date of the PPA. No explanation is given for this delay. The regular evacuation approval was

granted on 06.09.2016. The Petitioner has alleged that the 3rd Respondent (KPTCL) caused a delay of about 6 months, in granting the evacuation approval. The events, after applying for evacuation approval, are mentioned in ANNEXURE - U. As per this, the 3rd Respondent (KPTCL) intimated the Petitioner to pay the fee on 23.04.2016 and the same was remitted on 12.05.2016. The tentative evacuation approval was granted on 18.06.2016 and the same was accepted by the Petitioner on 06.07.2016. Thereafter, the regular evacuation approval was granted on 06.09.2016. On 27.10.2016, the Petitioner requested to spare the land in the Sub-station of the 3rd Respondent (KPTCL), for construction of the bay. The request was acceded to on 9.12.2016. The single line diagram and layout for construction of the bay, applied by the Petitioner on 25.10.2016, was granted on 02.12.2016. Thus, considering the above dates and events, we do not find any delay on the part of the 3rd Respondent (KPTCL), but find that there has been a delay on the part of the Petitioner / SPD, in approaching the 3rd Respondent (KPTCL).

- (f) It is the allegation of the Petitioner that, the MEI delayed the delivery of MCVCB. The Petitioner, in the letter dated 28.12.2016 (ANNEXURE-J to the Petition), addressed to the concerned engineer of the 3rd Respondent (KPTCL), has stated that, there would be delay in supply of MCVCB by the MEI and requested to provide a spare MCVCB, along with feeder panel, from any of its Sub-stations, to enable the Petitioner to commission and

synchronize the Solar Power Plant within the stipulated time. This request was acceded to on 31.12.2016 by the 3rd Respondent (KPTCL) and an Official Memorandum was issued, to divert a 11 kV MEI make MCVCB feeder available at the 110 kV S/s APMC, Raichur, to the Plant of the Petitioner, with certain conditions. Therefore, we find that, the 3rd Respondent (KPTCL) has extended full co-operation to the Petitioner in implementing the Project and acted immediately, on receiving the request of the Petitioner, to spare the MCVCB. Thereafter, on receipt of the CEIG safety approval and on completion of pre-commissioning tests, the Plant was commissioned on 21.01.2017. As noted earlier, it is the delay of the Petitioner in approaching the 3rd Respondent (KPTCL), in the matter of getting approvals, that delayed its procurement of the breaker.

- (g) We note that, when a timeline 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 to the authorities, cannot be accepted. The 2nd Respondent (GESCOM), while granting the extension of time, ought to have taken note of these aspects.
- (h) We note that, it is a settled law that, the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under the clause, is stated to be issued by the Petitioner to the 2nd Respondent (GESCOM). The

Petitioner was not diligent in implementing the Project, within the stipulated time.

- (j) None of the reasons or events cited by the Petitioner, for delay in commissioning of its Project, falls under the *Force Majeure* Events, mentioned in the PPA, as held in the preceding paragraphs. Hence, we consider the Petitioner is not entitled to extension of time, as provided in the clauses of the PPA. Consequently, the Petitioner would be liable for payment of Liquidated Damages, as per Article 2.5.7 of the PPA.
- (k) 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.

- (l) The Hon'ble Supreme Court of India, in Civil Appeal No3600 of 2018 (*M.P. Power Management Company Ltd. Vs Renew Clean Energy Pvt. Ltd., and another*), decided on 05.04.2018, has held that, for any delay in achieving Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages, stipulated in the PPA.
- (m) Therefore, we answer Issue No.(2), in the negative.
- 10) **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 Rs.8.40 per kWh based on the KERC tariff order S/03/1 dated 10.10.2013 in respect of SPD's solar PV projects in terms of this agreement for the period between COD and the expiry date. However, subject to clause 2.5, if there is a delay in commissioning of the project beyond the Scheduled Commissioning Date and during such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects shall be the lower of the following:

i. Rs.8.40/- per kWh

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

(b) Article 5.1 of the PPA, extracted earlier, provides for reduction of the 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 the 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 and 18 months. Any delay or failure in commencement of power supply, within the agreed date, would disrupt the operation of the Distribution Licensees, like the 2nd Respondent (GESCOM), which could also result in their power procurement from alternative expensive sources leading to higher retail tariff to the consumers or short supply leading to revenue loss to them, and even to imposition of penalties, for not meeting the Renewable Purchase Obligation fixed by this Commission. The Capital Cost of the Solar Power Plants has been coming

down, very rapidly in the recent years, because of the advancement in the 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 Order dated 10.10.2013, Rs.6.51 per unit as per Order dated 30.07.2015, Rs.4.36 per unit in the Order dated 12.04.2017 and Rs.3.05 per unit in the Order dated 18.05.2018.

- (c) We note that, the Petitioner SPV took the risk of implementation of the Project after a year, after the execution of the PPA, with barely six 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 in the PPA, that could have entitled the Petitioner to seek extension of the commissioning date, agreed to in the PPA. It is safe to infer that, the normative Capital Cost of the Solar Power Plants, when the Petitioner took effective steps to procure the capital equipment for its Project, was lower than the normative cost of the Solar Power Plants, assumed in the Generic Tariff Order dated 10.10.2013. Thus, the Petitioner is not entitled to the tariff, originally agreed to in the PPA, at Rs.8.40 per unit, when admittedly, the Plant was not commissioned within the stipulated time and it is entitled only for the revised tariff, as on the date of commissioning of the Plant, as per Article 5.1 of the PPA. Admittedly, in the present case, the

generic tariff for the 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 21.01.2017. The Petitioner has not furnished any material particulars of the cost incurred in implementing the Project and the period when investments were actually made. We may safely infer that, the major part of the investments has been made, after the formation of SPV and execution of SPPA on 5.7.2016. As noted earlier, as per the terms and conditions of the PPA, the tariff payable to the SPD / Petitioner is not based on the Capital Cost incurred by the SPD/ Petitioner in the Project implementation, but the tariff, as per the relevant clauses of the PPA. The Hon'ble Supreme Court of India, in Civil Appeal No.1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided 02.02.2016, has held, as follows:

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

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

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

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

- (e) 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.6.51 per unit, for the term of the PPA, as per the Generic Tariff Order dated 30.07.2015.
- (f) Accordingly, we answer Issue No. (3), as above.
- 11) **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.6.51 (Rupees six and Paise Fifty-One) 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 30.07.2015, 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