

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**

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

**Dated : 9<sup>th</sup> November, 2018**

**Present:**

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

**OP No.133/2017**

**BETWEEN:**

- 1) Globalexotium Renewable Solutions Private Limited,  
Plot No. 50, Shiva Nagar,  
Aland Road,  
Near Adarsh ITI,  
Kalaburagi-585103.
- 2) Sri Mallikarjun Gundappa Hanamshetty,  
Plot No. 50, Shiva Nagar, Aland Road,  
Near Adarsh ITI,  
Kalaburagi-585103.

.. **PETITIONERS**

*[Petitioners represented by Tapasya Law Chambers, Advocates]*

**AND:**

- 1) Karnataka Renewable Energy Development Limited,  
Represented by its Managing Director,  
No.39, Shantigruha,  
Bharat Scouts and Guides Building,  
Palace Road,  
Bengaluru - 560 001.
- 2) Gulbarga Electricity Supply Company Limited,  
Represented by its Chief Engineer (Electricity),  
Station Main Road,  
Kalaburagi – 585 102.

- 3) The Executive Engineer(EI),  
C&M Division, GESCOM,  
Kalaburagi.

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**RESPONDENTS**

*[Respondent-1 represented by Sri Rakshit Jois Y P, Advocate,  
Respondents 2 & 3 represented by Sri G S Kannur, Advocate]*

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**ORDERS**

- 1) The Petitioner has filed this Petition, under Section 86(1)(f) of the Electricity Act, 2003 in effect praying to:
- (a) approve the extension of time, granted by the 2<sup>nd</sup> Respondent (GESCOM) to the new SCOD, vide Order dated 15.03.2017, without altering the tariff fixed under the PPA dated 07.07.2015;
- (b) declare the Effective Date of the PPA as 07.09.2015, the date of approval of the PPA; and,
- (c) pass such other and incidental orders, as may be deemed appropriate, based on the facts and circumstances of the case.
- 2) The facts of the case, as submitted by the Petitioners, 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 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, the second Petitioner, a land owning farmer was selected, on first-come-first-served basis. His application for allotment of a Solar Power Project of 1 MW capacity was accepted by the KREDL and a letter of allotment dated 16.03.2015 to set up the Solar Power Project at Sy.No.58/4, Jidaga Village, Aland Taluk, Kalaburagi District, under the Farmers' Scheme, was issued to him, subject to certain terms and conditions.
- (c) Based on this allotment, the Solar Project Developer (SPD), executed a Power Purchase Agreement (PPA) dated 07.07.2015 with the 2<sup>nd</sup> Respondent (GESCOM). The PPA was approved by the Commission, as communicated vide letter dated 27.08.2015. Subsequent to receipt of the approval by the 2<sup>nd</sup> Respondent on 05.09.2015, the original PPA was given to the second Petitioner during the second week of September, 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 07.07.2015 (the Effective Date)'. Thus, the Project proponent was required to commission the Project by 06.01.2017.
- (d) Immediately on receipt of the original PPA, the first Petitioner, a Special Purpose Vehicle (SPV) was created to develop and execute the Project and

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a draft Supplemental Power Purchase Agreement (SPPA) was executed with the 2<sup>nd</sup> Respondent.

- (e) The second Petitioner applied for conversion of land before the Deputy Commissioner, Kalaburagi on 24.06.2016. However, the same was granted on 03.06.2017.
- (e) For grant of evacuation approval for its Solar Power Project, necessary application was made to the 3<sup>rd</sup> Respondent on 20.06.2016.
- (f) The draft Supplemental PPA (SPPA) dated 24.06.2016, incorporating the SPV, was sent to the Commission for approval vide letters dated 27.06.2016 and 14.12.2016 of the 2<sup>nd</sup> Respondent. This SPPA was returned by the Commission, for curing certain defects, pointed out by the Commission.
- (g) On 17.03.2017, the 2<sup>nd</sup> Respondent granted the tentative evacuation scheme approval to the Petitioner's Project, subject to certain terms and conditions. The said terms and conditions were accepted by the Petitioner and a request was made on 17.03.2017, to issue evacuation approval, bay extension estimate and feasibility report. The regular evacuation approval was granted on 22.05.2017. The Project was commissioned on 05.07.2017.

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- (h) The Petitioners had requested the 2<sup>nd</sup> Respondent, vide letter dated 21.12.2016, for extension of time by 6 (six) months to complete the Project. The extension of time upto 05.07.2017, was granted by the 2<sup>nd</sup> Respondent on 15.03.2017 and a SPPA executed on 17.3.2017. The SPPA is pending approval of this Commission, as certain documents, sought for earlier by the Commission were not furnished.
- (j) The Petitioners received a letter dated 28.04.2017 from the 2<sup>nd</sup> Respondent (GESCOM), requesting the Petitioner to file a Petition before the Commission, seeking approval of extension of time for achieving the Commercial Operation Date (COD). Hence, this Petition has been filed.
- 4) The grounds urged by the Petitioners, in support of their prayers, may be summarized, as follows:
- (a) The delay in execution of the Project was due to delay of 60 days in receipt of the original PPA, after approval by the Commission, as the Petitioners could not commence any work without the original PPA. The Project was also delayed, due to delay, by the authorities in granting land conversion and evacuation approvals, formation of SPV, etc. Owing to return of the SPPA by this Commission without approving the same, the Petitioners had to invest their own funds and no financial institution could be approached. The Project was also delayed due to demonetisation.

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- (b) The 2<sup>nd</sup> Respondent (GESCOM) has granted extension of time, based on the recommendation of the Committee and was approved by the Managing Director, considering all relevant aspects. Accordingly, the Petitioner has commissioned the Project within the mutually agreed COD. Hence, the same has to be approved.
- 5) Upon issuance of Notice, the Respondents appeared through their counsel and filed Statement of Objections. The 1<sup>st</sup> Respondent has submitted that, it is only a formal party to the Petition and that the other Respondents have to counter the contentions of the Petitioners. The gist of the objections, filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (GESCOM), may be stated, as follows:
- (a) As the 2<sup>nd</sup> Petitioner was unable to execute the Project, in a timely manner, he sought for extension of time, for commissioning the Project, by 6 (six) months, under the *Force Majeure* conditions. As several requests for extension of the Scheduled Commissioning Date were received from the Solar developers, the Government of Karnataka (GoK) issued an Order dated 24.11.2016, directing all the Electricity Supply Companies (ESCOMs) to constitute a three-member Committee, to consider and to dispose of the requests of the farmers / developers. A Committee was constituted by the 2<sup>nd</sup> Respondent, to consider the requests for the extension of time, sought for, by the 1 to 3 MW Solar Generators, under the land owning farmers' category. The said Committee held a meeting on 27.01.2017 wherein, the causes for the delayed achievement of the scheduled commercial operation were

considered, in respect of 10 generators, including the Petitioner, and a decision was taken to accord extension of 6 (six) months' time, to achieve the SCOD.

- (b) The Petitioner furnished the documents to the Committee, constituted for the purpose for consideration of request for extension of time. As per the same, the following information was gathered pertaining to the various reasons assigned for the delayed execution of the Project.

Land conversion

Date of submission of application	:	24.06.2016
Date of conversion	:	03.06.2017
Delay in getting approval	:	11 months

KPTCL evacuation approval (Regular):

Date of submission of application	:	20.06.2016
Date of approval	:	17.03.2017
Delay in getting approval	:	11 months

Bay extension approval:

Date of submission	:	17.03.2017
Request for use of existing breaker	:	30.06.2017
Delay	:	3 months

- (c) The Committee, after detailed discussions and scrutiny of all the documents, opined that, approval may be accorded for the extension of SCOD, by 6 (six) months, considering Article 2.5 of the PPA, as there is a delay in the issuance of approvals by the various Government entities.

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- (d) On 03.02.2017 (*the correct date is 15.03.2017*), the Respondent addressed a letter to the Petitioner, informing about the extension of time, by six months, for the SCOD, with certain conditions.
- (e) On 16.03.2017, the Commission addressed a letter to all the ESCOMs in the matter pertaining to extension of time granted to the Solar Generators and informed them, not to allow any extension of time beyond the scheduled commissioning, if any, as per the original PPA, without obtaining the prior opinion of the Commission. Further, vide letter dated 05.04.2017, the ESCOMs were directed by the Commission to advise all the land owning Solar Developers / SPVs, to approach the Commission and seek for the approval of the extension of time. In furtherance to the same, the Petitioner has filed this petition.
- (f) The Additional Chief Secretary to Government, Energy Department, vide letter dated 25.04.2017, addressed to the Commission, has sought for its approval to the extension of the COD, given by the Respondent by 6 (six) months from the date of the SCOD, as per Articles 2.5 and 8 of the PPA.
- (g) The Project was commissioned on 05.07.2017.
- (h) In respect of extension of the Project duration of the already awarded Solar Power Projects, the Ministry of New and Renewable Energy, has issued letter



No.30/106/2014-15/NSM dated 28.7.2017, addressed to the Principal Secretaries (Power/Energy) of the State Governments, as stated below:

*"Ministry has requested not to give time extension if all the obligations are fulfilled by the concerned State Government Authorities/PSUs, etc., in a project. However, if there are delays of any kind on the part of State Government Authorities/PSUs like land allotment, transmission/Evacuation facilities, connectivity permission or force majeure, the competent authority in the State/SECI, NTPC, etc., may consider providing extension of the time duration strictly as per the contractual agreement.*

*It Is also to be clarified that if a project equipment/materials have been purchased/ordered and substantial advances paid as per original completion date, and there is a delay on part of the state organisations regarding land, transmission or any such reasons, the extension of the project may be allowed."*

- (j) If the prayer of the Petitioner is considered, the consumer would have pay a higher cost for the energy.
- (k) The Respondents have, therefore, prayed that the Commission may be pleased to accord directions in the present Petition, in the interest of justice.
- 6) We have heard the learned counsel for the parties and perused the material placed on record. The following issues would arise, for our consideration:

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- (1) Whether the extension of time of six months, granted by the 2<sup>nd</sup> Respondent to the Petitioners, for achieving the commercial operation of the Solar Power Plant, can be subjected to legal scrutiny by the Commission?
  - (2) Whether the Petitioners have 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 2<sup>nd</sup> Respondent to the Petitioners, 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 2<sup>nd</sup> 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 2<sup>nd</sup> Respondent (GESCOM) has also specifically intimated the Petitioner, in its Order dated 15.03.2017, that the 2<sup>nd</sup> Respondent (GESCOM) will follow the KERC Order, for application of tariff.

- (b) The Petitioners have contended that, as the 2<sup>nd</sup> 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 Petitioners. We are unable to accept the contention of the Petitioners. 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, therefore, 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 2<sup>nd</sup> Respondent (GESCOM).

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

9) **ISSUE No.(2):** *Whether the Petitioners have 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 GESCO and achieve financial closure and provide a certificate to GESCO from the lead banker to this effect;

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

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

**2.1.2** SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and GESCO 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 GESCO 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 GESCO 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 GESCO or due to Force Majeure, the SPD shall pay to GESCO 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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### **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 Article 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 2<sup>nd</sup> 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. Keeping these in mind, we need to examine, if the 1<sup>st</sup> 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 07.07.2015 and it is not a draft as claimed by the Petitioners. 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, by 06.01.2017. The achievement of the Conditions Precedent, would include obtaining of all the approvals by the SPD. It is alleged by the Petitioners that, due to the delay in handing over the original PPA after approval of the Commission, the Petitioners could not commence the work relating to execution of 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, by the Commission, has no bearing on the initial obligations of the SPD such as, applying for land conversion, evacuation approvals, loans, etc. The Petitioners have not produced any documents to show that any of their application for such approval, loans, etc., was rejected or delayed on this count. Therefore, we are unable to accept that, the time taken for the approval of the PPA is a *Force Majeure* Event, causing delay in the commissioning of the Project. 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 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 the land on 24.06.2016, after a lapse of more than 11 months from the Effective Date of the PPA. No explanation is given for this delay, on the part of the SPD. Similarly, the Petitioners have not furnished the details of any efforts made by the SPD, in getting the land conversion approval expedited by providing the necessary information/documents to the concerned authorities. The land conversion charges were paid,, by the SPD on 05.05.2017. The land conversion Order was passed by the Deputy Commissioner, Kalaburagi on 03.06.2017, within a month of payment of charges. In fact, there is a delay on the part of the SPD in applying for the conversion, which is not convincingly explained.
- (e) The SPV applied for the evacuation approval on 20.06.2016, after more than 11 months, from the date of the PPA. No explanation is given for this delay. Further, no details of the efforts, made by the Petitioners, for getting the process of grant of evacuation approval expedited have been furnished. The tentative evacuation approval was granted on 17.03.2017 and the regular evacuation approval was granted on 22.05.2017. The Petitioners have alleged that the 2<sup>nd</sup> Respondent caused a delay of about 11 months, in granting the evacuation approval. The events, after applying for evacuation approval, are mentioned in ANNEXURE - U. We find that that

there has been an inordinate, unexplained delay on the part of the Petitioners in applying for the evacuation approval, because of which the subsequent chain of events has got delayed.

- (f) It is the averred by the Petitioners that, as the MEI delayed the delivery of MCVCB, a request was made to the 2<sup>nd</sup> Respondent to permit the Petitioners to use the existing breaker at the sub-station. This request which was made on 30.06.2017/04.07.2017, was acceded to by the Respondent on 04.07.2017 and there is no delay. Therefore, we find that, the 2<sup>nd</sup> Respondent has extended full co-operation to the Petitioners, in implementing the Project and acted promptly, on receiving the request of the Petitioners, to spare the MCVCB. Thereafter, on receipt of the CEIG safety approval and on completion of pre-commissioning tests, the Plant was commissioned on 05.07.2017.
- (g) It is also the allegation of the Petitioners that the project was delayed as the Commission did not approve the SPPAs. We note that, contrary to the averment of the Petitioners that the SPV was formed immediately after receipt of the approved PPA in September, 2015, we find that the SPV was incorporated in January,2016 and it entered into MoU with the SPD (2<sup>nd</sup> Petitioner) only in May,2016. The Commission had returned the SPPA incorporating SPV for want of certain necessary documents as could be made out from Annexures K and L to the Petition. This observation was not

complied with. Similarly, on the SPPA incorporating the revised SCOD submitted for approval, the Commission conveyed its observations, as in Annexure S, but the parties did not comply with the same. Thus, any delay in the implementation of the project because of the time taken in the regulatory process of the SPPAs is attributable solely to the Petitioners.

- (h) The averment of the Petitioners that the Central Government's act of demonetisation also delayed the project implementation is not substantiated and in any case, it is not a *force majeure* event as specified in the PPA.
- (j) 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 2<sup>nd</sup> Respondent (GESCOM), while granting the extension of time, ought to have taken note of these aspects.
- (k) 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 Petitioners to the 2<sup>nd</sup> Respondent (GESCOM). We found that the Petitioners were not diligent in implementing the Project, within the stipulated time.
- (l) 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.

- (m) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. Admittedly, the SPD / Petitioners have 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 Petitioners. For the same reason, as applicable to rejection of the Petitioners' claim for extension of time for achieving the SCOD, any claim of the Petitioners 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 Petitioners are required to pay damages for such delay, as per Articles 2.2 and 2.5.7 of the PPA.
- (n) 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.
- (p) 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 2<sup>nd</sup> 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, considering the largescale Solar capacity additions, 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.



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- (c) We note that, the 1<sup>st</sup> Petitioner 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 1<sup>st</sup> 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 Petitioners 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 Petitioners are 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 Petitioners 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 05.07.2017. The

Petitioners have not furnished any material particulars of the cost incurred in implementing the Project and the period when investments were actually made. As noted earlier, as per the terms and conditions of the PPA, the tariff payable to the SPD / 1<sup>st</sup> Petitioner is not based on the Capital Cost incurred by the SPD/ 1<sup>st</sup> 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 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....”*

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 Petitioners' 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.

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

For the foregoing reasons, we pass the following:

**ORDER**

- (a) It is declared that the Petitioners are not entitled to any of the reliefs, sought for, in the Petition;
- (b) The 1<sup>st</sup> 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 Petitioners' Plant, as fixed by the Commission in the Order dated 12.04.2017, for the term of the PPA, as per Article 5.1 of the PPA;

(c) The 1<sup>st</sup> Petitioner is also liable to pay damages, as provided under Articles 2.2 and 2.5.7 of the PPA and,

(d) The parties are directed to submit the required documents to the Commission for approval of the SPPAs.

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

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

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