

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 11th September, 2018

Present:

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

OP No.97/2017

BETWEEN:

- 1) Kurugunda Solar Power Project LL.P.,
BC 109, Davidson,
Camp : Belagavi – 590 001.

[Represented by Shri Vinayak M. Puranik, Authorized Representative]

- 2) Smt. Iravva R. Patil,
157/1, 78/7, Kurgunda Village,
Bailhongal Taluk,
Belagavi District.

.. **PETITIONERS**

[Represented by Keystone Partners, Advocates]

[Note: Petitioner No.2 is impleaded, as per Order dated 26.10.2017 on his Application]

AND:

Hubli Electricity Supply Company Limited,
Navanagar, P B Road,
Hubballi- 580 025.

.. **RESPONDENT**

[Represented by Indus Law, Advocates]

ORDERS

- 1) This Petition is filed under Section 86(1)(b) of the Electricity Act, 2003, seeking extension of time for the commercial operation of the Solar Power Project.

- 2) The issues that would arise for our consideration in the present Petition are, as follows:
 - (1) Whether the Petitioners have proved the *Force Majeure* Events, relied upon by them, to claim exclusion of the delayed period in commissioning of their Solar Power Project?

 - (2) Whether this Commission has jurisdiction to call upon the Petitioners to prove the *Force Majeure* Events, relied upon by them, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondent admitting or not denying the occurrence of such *Force Majeure* Events?

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

 - (4) What Order?

- 3) The learned counsel for the 2nd Petitioner argued that, the Commission has no jurisdiction to call upon the Petitioners to file a Petition before it, for proving the *Force Majeure* Events. In support of his argument, the learned counsel for the 2nd Petitioner has relied upon the different clauses of the Power Purchase Agreement (PPA) dated 30.06.2015, entered into between the Petitioners

and the Respondent [Hubli Electricity Supply Company Limited (HESCOM)]. He has also relied upon different decisions, in this regard. We shall first consider the jurisdictional issue.

4) For appreciating the jurisdictional issue, raised by the learned counsel for the 2nd Petitioner, the following relevant clauses in the PPA and the material facts, may be noted:

(a) The 2nd Petitioner, who is one of the farmers, was selected for developing a 3 MW Solar Power Project, on her land at Kurgund Village, Bailhongal Taluk, Belagavi District and for selling the power generated by the Project to the Respondent (HESCOM), as per the Guidelines, issued for selecting the land owning farmers, under the State Solar Policy 2014-2021. In this regard, the 2nd Petitioner [Solar Power Developer (SPD)] and the Respondent (HESCOM) have entered into a PPA dated 30.06.2015. The said PPA was approved by this Commission on 20.07.2015. The 2nd Petitioner submitted an application dated 29.12.2015 seeking permission to shift the project from Kurugund village to Bikkamboodi in Challakere Taluk. After 15 months, on 04.02.2017, then the KREDL conveyed its approval, but directed to set up the Project, in any place other than Challakere, as the target capacity of 200 MW for the Taluk was completed. As the 2nd Petitioner did not have land in any other place, she withdrew the application, for change of location on 22.03.2017.

- (b) The 1st Petitioner is a Special Purpose Vehicle (SPV), formed to establish and maintain the Solar Power Project, in terms of Article 12.11 of the PPA. A Supplemental PPA (SPPA) was entered into between the 1st Petitioner and the Respondent (HESCOM) on 21.09.2016 and approved by the Commission on 21.11.2016.
- (c) The PPA provides that, the Project shall be commissioned on or before 29.12.2016 i.e., 18 (eighteen) months from the date of the PPA. Article 5.1 of the PPA, which provides for the applicability of the tariff, reads thus:

“5.1 Tariff payable:

The SPD shall be entitled to receive the Tariff of Rs.8.40 (Rs. Eight Paise Forty only) 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 the 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 lower of the following:

- (i) Rs.8.40/- per kWh;*
- (ii) Varied tariff applicable as on the date of commercial operation.”*

Article 2.5 of the PPA, which provides for the extension of time to perform its obligations, reads thus:

“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 HESCOM Event of Default; or
- (b) Force Majeure Events affecting HESCOM; 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 HESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or HESCOM, or till such time such Event of Default is rectified by HESCOM.*
- 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.*
- 2.5.4** *In case of extension due to reasons specified in Article 2.5 (b) and (c), and if such Force Majeure Event continues even after a maximum period of 3 (three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 9.*
- 2.5.5** *If the Parties have not agreed. Within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 10.*
- 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."*

Article 10.3, which provides for the dispute resolution, reads thus:

“10.3 Dispute Resolution:

10.3.1 If any dispute is not settled amicably under clause 10.2, the same shall be referred by any of the parties to the KERC for dispute resolution in accordance with the provisions of the Electricity Act, 2003.”

- (c) The Petitioners were required to commission the Solar Power Project, on or before 29.12.2016 to claim the tariff of Rs.8.40 per unit, for the energy supplied. If there was a delay in commissioning of the Project beyond 29.12.2016, the tariff applicable was the 'Varied Tariff', as determined by this Commission, prevailing as on the Commercial Operation Date (COD). However, in case, the Petitioners were prevented from commissioning the Project within the time, due to the *Force Majeure* Events affecting them, the commissioning date would be deferred for a reasonable period, required to overcome the effects of such *Force Majeure* Events. Article 2.5.5 of the PPA implies that, the Respondent (HESCOM) has the discretion to agree on the time period, by which the commissioning date could be extended, on the ground of the *Force Majeure* Events affecting the Petitioners. Article 2.5.6 of the PPA provides that as a result of such extension of time, the commissioning date is deemed to have been extended.
- (d) The 2nd Petitioner submitted a letter dated 03.12.2016 to the Respondent (HESCOM), requesting for the extension of time for commissioning of the Solar

Power Project, by 6 (six) months, stating that, there was an inordinate delay in the disposal of the application, for change of location, that the Order of conversion of the land, the approval of the Evacuation and the 11 kV Bay allotment were yet to be received. Thereafter, the Respondent (HESCOM) intimated, in the letter dated 04.02.2017, that the extension of time was allowed for 6 (six) months, from the Schedule Commercial Operation Date (SCOD), for completion of the Solar Power Project in question.

- (e) This Commission, by letter dated 16.03.2017, directed all the Electricity Supply Companies (ESCOMs), in the State, not to allow any extension of time, beyond the SCOD, without obtaining the prior permission of the Commission, in respect of the Solar Power Projects. Subsequently, this Commission, by letter dated 05.04.2017, directed all the ESCOMs, to advise the SPDs / SPVs concerned of the Solar Power Projects, to file a Petition before this Commission, with all the relevant grounds and supporting documents, for seeking the approval of any extension of the Commissioning Date, granted by the ESCOMs. Thereafter, the 1st Petitioner has filed this Petition, before this Commission.
- (f) The plant was commissioned on 28.06.2017.
- 5) Upon Notice, the Respondent (HESCOM) appeared through its counsel and despite granting sufficient time, did not file the Statement of Objections.

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- 6) The Petitioners submitted their arguments. The learned counsel for the Respondent (HESCOM) submitted that, it would not specifically object to the pleas raised by the Petitioners and that Respondent (HESCOM) would abide by the Orders of this Commission. Therefore, the arguments of the Respondent were taken as 'concluded'. The written arguments were also filed on behalf of the Petitioners.
- 7) After considering the submissions of the Petitioners and the evidence on record, our findings on Issue No.(2) are, as follows:
- 8) **ISSUE No.(2):** *Whether this Commission has jurisdiction to call upon the Petitioners to prove the Force Majeure Events, relied upon by them, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondent admitting or not denying the occurrence of such Force Majeure Events?*
- (a) The learned counsel for the 2nd Petitioner submitted that, the arguments submitted in OP No.65/2017, a connected case, may be adopted in this case also. We have passed a reasoned Order and given our findings on the above Issue, in OP No.65/2017 and held that this Commission has the exclusive jurisdiction, to consider the validity of the extension of time, when it affects the tariff payable to a Generating Company, ultimately passed on to consumers. The same reasoning and findings would apply to this case also.
- (b) Therefore, we answer Issue No.(2), in the affirmative.

- 9) We shall now discuss Issue Nos.(1), (3) and (4) below.
- 10) **ISSUE No.(1):** *Whether the Petitioners have proved the Force Majeure Events, relied upon by them, to claim exclusion of the delayed period in commissioning of their Solar Power Project?*
- (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 HESCOM 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 HESCOM and achieve financial closure and provide a certificate to HESCOM from the lead banker to this effect;

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

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

2.1.2 *SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and HESCOM 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 HESCOM 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 HESCOM 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 HESCOM or due to Force Majeure, the SPD shall pay to HESCOM 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, HESCOM 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 HESCOM as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, HESCOM 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 HESCOM shall be entitled to terminate this Agreement in accordance with Article 9."

"2.5 Extensions of Time

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2.5.7 Liquidated damages for delay in commencement of supply of power to HESCOM. *Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to HESCOM by the scheduled commissioning date, the SPD shall pay to HESCOM, 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 HESCOM 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 HESCOM 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, the extension of time for commissioning the Project can be granted, if the SPD is prevented from performing its obligations due to the HESCOM's 'Event of Default' or the *Force Majeure* Events. It is the case of the Petitioners that, the Project was delayed due to factors, beyond their control and hence, the same have to be treated as 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 Petitioners, in any manner, were negligent in performing the obligations under the PPA and have complied with the requirements of Article 8.3 of the PPA.
- (c) The PPA is signed by the parties on 30.06.2015. 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 as per Article 4.1, the Project had to be commissioned within 18 months, from the date of signing of the PPA. The achievement of the Conditions Precedent, would include obtaining of all the approvals by the SPD. The 1st Petitioner claims that, the delay in handing over a copy of the PPA, after communication of the Commission's approval

on 20.07.2015, the delay in the grant of approvals for conversion of the land, approval for evacuation of the power, the CEIG approval, etc., have caused the delay, in implementing the Project. The recitals in the PPA would reveal that, the parties have signed the PPA and the copies of the same were delivered on the date of execution of the PPA. A signed copy of the PPA would be sufficient to proceed with the preliminary works for the 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 approvals, loans, etc. The Petitioners have not produced any documents to show that any of its applications 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 the 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 the PPA cannot be termed as 'delay'. In any case, as noted earlier, it is not shown that, the absence of the approved PPA, prevented the SPD from taking any step/action to implement the Project.

- (d) The SPD had applied for conversion of the land on 27.08.2016, after a lapse of more than one year, from the Effective Date of the PPA. The explanation given for this delay, on the part of the SPD is that, certain documents, like encumbrance certificate, RTC, Form 7 & 7A certificates, Mutation, Akarband,

PT sheet, in respect of the land, had to be obtained from the various authorities and even though, a request was made to the concerned authorities on 25.07.2015 (as mentioned in the Memo dated 27.03.2018), the same were given in April to June, 2016 with a delay of 395 days. The 1st Petitioner has produced the copies of the said documents on 26.09.2017. But, the Petitioner has not produced the copies of applications filed before the concerned authorities, to prove the dates of filing of the applications. On a close scrutiny of the documents, it is found that, the applications for the documents were made on different dates, but not on 25.07.2015, as mentioned in the Memo dated 27.3.2018, and the documents were issued on the date of the application or within a few days of the application, as could be seen from the dates, mentioned in the documents by the concerned authorities. For instance, the Form 7 and 7A certificates were applied on 21.5.2016 and issued on 06.06.2016, by the Tahsildar, Bailhongal. Therefore, the allegation that, there was a delay by the authorities ,to provide the documents, sought for by the 2nd Petitioner, cannot be accepted. Consequently, the explanation that, the delay caused by the authorities, in providing the above documents, resulted in then delay in applying for the land conversion, before the Deputy Commissioner, cannot be accepted. The land conversion charges were paid by the 2nd Petitioner on 07.08.2017. The land conversion Order was passed by the Deputy Commissioner, Belagavi on 29.08.2017, within 22 days after receipt of conversion charges. Hence, we are unable to accept the contention of the Petitioners that, there was a delay in granting of the approval for conversion

of the land, which affected the Project implementation. In fact, there is an inordinate delay, on the part of the SPD in applying for the conversion, and we note that the Petitioners have failed to produce the correct information about the dates, before the Commission and, in fact, tried to mislead us, as stated above.

- (e) It is stated by the Petitioners that, the SPV was formed and a SPPA was executed between the parties on 21.09.2016 and sent to the Commission for approval. It is stated that, the delay in the land conversion Order has caused the delay in disbursement of the loan. It is mentioned, in the Memo filed on 05.09.2017 and Written Arguments, filed on 09.11.2017 that, inspite of the delay in the conversion Order and obtaining of loan, the 1st Petitioner started the procurement process from 09.09.2016, from its own funds and commenced the civil and land development work from 01.07.2016, infusing its own capital, without waiting for the bank to release the funds. Therefore, it can be stated that, the time taken for the land conversion Order, has not affected the Project implementation. Even otherwise, as we have held above, the 2nd Petitioner alone was responsible for the delay in granting the land conversion Order.
- (f) The 2nd Petitioner applied for the evacuation approval to the Karnataka Power Transmission Corporation Limited (KPTCL) on 12.09.2016, after more than 15 months from the date of the PPA. No explanation is given for this delay by the Petitioner. The tentative evacuation approval was granted on

08.12.2016. The regular evacuation approval was granted on 02.02.2017. The Petitioners have alleged that, the KPTCL caused a delay of about 5 months, in granting the evacuation approval. The KPTCL has not been arrayed as a Respondent. The evacuation approval is granted in 5 months, which is reasonable, considering the various steps involved in the process. When a time line of 365 days is provided in the PPA, for getting all approvals, the delay by the Petitioners, in applying for such approvals and in performing other acts necessary, on their part and thereafter attributing the delay to the authorities, cannot be accepted.

- (g) It is also the allegation of the 1st Petitioner, in the Written submissions dated 06.02.2018 that, the delay in the approval of bay drawings, by the Respondent (HESCOM), caused the delay in the delivery of the Breaker by the MEI, by more than three months, from the date of placing the Order. It is stated that, the bay estimate intimation was received on 21.06.2017. In the meanwhile, the quotation from the MEI was received on 29.10.2016 and the Purchase Order for the breaker was placed on 05.11.2016, but the same was delivered after three months. It is stated that, the usual period of delivery is 10 to 12 weeks, from the date of the Purchase Order. It is stated that, the breakers have to be tailor-made, based on the drawing submitted, tested and certified by the TAQC and, thereafter, despatched. It is stated, in para 12 of the Written submissions, filed on 6.2.2018, that the drawings were approved on 12.06.2017 and the Petitioner could not approach the MEI, earlier to this date; that, however, as the COD was fast approaching, the

Petitioner, to reduce the time gap, placed the necessary Order with the MEI, without waiting for formal approval of drawings. Therefore, it can be stated that, the approval of drawings, by the KPTCL/HESCOM, did not delay the project. It is stated, in the Written submissions dated 06.02.2018, that a request was made by the 1st Petitioner, to spare the MEI PCVB breaker on 20.06.2016 and that the breaker has been received on rental basis.

- (h) It is also alleged that, the grant of the safety approval, was delayed, from 24.04.2017 to 24.06.2017. The CEIG is not made a party to the Petition. The various steps involved in granting the approval date-wise, are mentioned in the written arguments, filed by the 1st Petitioner on 14.09.2017, as follows:

"In between procurement of breaker and its receipt, there is another procedure to be followed in obtaining the CEIG approval as under. Such approval cannot be sought in advance:

CEIG Approval	
Drawings submitted by us	24/Apr/2017
Observation letter for drawings	16/May/2017
Approval received for drawings	19/Jun/2017
Submission of completion report with B1 test certificates by us.	20/Jun/2017
Initial Inspection issued to ACEI Dharwad	21/Jun/2017
ACEI inspected and recommended for Safety Approval to CEIG	23/Jun/2017
Issued Plant Safety Approval for commissioning the Project.	24/Jun/2017
Plant commissioned.	28/Jun/2017

The above delay is solely attributable to CEIG approving authority and beyond the control of the Petitioner. This is despite knowing the fact that the project is in advance stage and that any further delay will jeopardise the project."

We do not find any delay in grant of approval, considering the sequence of dates mentioned by the Petitioner and note that, there is no explanation for the belated submission of the drawings by the Petitioner.

- (j) We also note that, the Petitioners' futile attempt to change the location of the Project, on the ground that the land at the original location was fertile and a source of income to the SPD's family indicates the SPD's ambivalent attitude and lack of diligence in timely implementation of the Project and does not support the claim of the Petitioners that the blame for the delay in Project implementation was attributable to the Government, and other statutory authorities.
- (k) The Project was commissioned on 28.06.2017, after the grant of the safety approval.
- (l) It is a settled law that, the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under the clause, is stated to have been issued by the Petitioners to the Respondent (HESCOM). None of the reasons or events, cited by the Petitioners for the 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 that, the Petitioners are not entitled to extension of time, as provided in the clauses of the PPA. Consequently, the 1st Petitioner would be liable for payment of the Liquidated Damages, as per Article 2.5.7 of the PPA.

- (m) We have held that, the Petitioners are 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. For the same reason, as applicable to rejection of the Petitioner's claim for the extension of time for achieving SCOD, any claim of the Petitioners for the 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 1st Petitioner is 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 No.3600 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 the delay in achieving the Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages, stipulated in the PPA.
- (p) Therefore, we answer Issue No.(1), in the negative.

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- 11) **ISSUE No.(3)**: *What should be the tariff for the Project, for the term of the PPA?*
- (a) Article 5.1 of the PPA extracted earlier, provides for reduction of the tariff, as a consequence of the 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 the generic tariff for supply of the electricity, generated from the various sources, to the Distribution Licensees, based on, among other parameters, mainly the 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 a 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 of energy to its consumers. The time ordinarily required to complete the various pre-commissioning activities which, in respect of megawatt scale Solar Power Plants is taken as, 12 months to 18 months. Any delay or failure in the commencement of the power supply, within the agreed date, would disrupt the operation of the Distribution Licensees, like the Respondent (HESCOM), which could also result in their power procurement from the alternative expensive sources leading to a higher retail tariff to the consumers or short supply of power leading to

revenue loss to them and even to imposition of penalties, for not meeting the Renewable Purchase Obligation (RPO), 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 technology and production efficiency, as well as the economies of scale, in the backdrop of the largescale Solar capacity addition across the globe. Thus, the 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 in the Order dated 30.07.2015, then to 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.

- (b) The Petitioners could not commission the Project, 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 Petitioners to seek the extension of the commissioning date, agreed to, in the PPA.
- (c) It is stated, in the written arguments, filed by 2nd Petitioner on 09.11.2017, that the Petitioner was looking for an investor and, thereafter, the SPV was formed on 04.02.2016. It is also mentioned in the Petition, in Paragraph-10 that, the Deed of Assignment was signed on 30.06.2016. It is mentioned, in Paragraph 12 of the Petition, that after signing the Deed of Assignment, the 1st Petitioner started the Project development works on the site, which include land levelling, fencing, obtaining of the necessary approvals and

sanctions such as, conversion of the land, evacuation line and loan sanctions. In the Written Arguments dated 14.09.2017, it is stated that, the Purchase order for purchase of the transmission lines was made on 18.10.2016, service Order for erection and commissioning of the transmission lines was placed on 18.10.2016, the Agreement for sale and purchase of solar modules was executed on 09.09.2016, the Purchase Order for MMS was made on 27.09.2016, the Purchase Order for inverter was made on 08.10.2016, the Purchase Order for transformer was made on 29.10.2016, the Purchase Order for the breaker was made on 05.11.2016 and for the cables on 10.11.2016. The Panels would have been procured, much later. Therefore, it can be stated 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 Petitioners are not entitled to the tariff, as per the Generic Tariff Order dated 10.10.2013, originally agreed to in the PPA, when admittedly, the Solar Power 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. The Petitioners having voluntarily entered into a PPA, which has a clause providing for revision of the tariff agreed to, if there is a delay in commissioning of the Project, cannot now wriggle out of such a clause, without valid grounds. As per the terms 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 it is as per the relevant clauses of the PPA.

(d) Article 5.1 of the PPA provides that, the tariff on the date of commercial operation would be applicable for the Project. Article 2.5.7 of the PPA provides for payment of damages, if the commencement of supply of power is not made by the Scheduled Commercial Operation Date (SCOD). The Project is commissioned on 28.06.2017.

(e) Hence, in the circumstances and on the facts 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 Petitioners are not entitled to any of the reliefs, sought for, in the Petition;

- (b) The Petitioners are 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; and
- (c) The Petitioners are also liable to pay 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