

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

Dated : 12th July, 2018

Present:

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

O.P. No.62 of 2017

BETWEEN:

Raygen Power Private Limited,
2112, 9th Main, D Block,
Sahakar Nagar,
Bengaluru – 560 019

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PETITIONER

[Represented by Navayana Law Offices, Advocates]

AND:

- 1) Chamundeshwari Electricity Supply Corporation Limited,
No. 29, Kaveri Grameena Bank Raod,
Hinkal.
Vijayanagar, 2nd Stage,
Mysuru-570 019.
- 2) The Karnataka Renewable Energy Development Limited,
39, Shanthi Gruha,
Bharat Scouts and Guides Building,
Palace Road,
Bengaluru- 560 001.
- 3) The Additional Chief Secretary,
Government of Karnataka,
Department of Energy,
Vikasa Soudha,
Bengaluru-560 001.

- 4) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
Bengaluru – 560 009.

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RESPONDENTS

*[Respondents 1 and 4 represented by Justlaw, Advocates,
Respondents 2 and 3 represented by Sri G.S. Kannur, Advocate]*

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ORDERS

- 1) This Petition is filed under section 86(1)(f) of the Electricity Act, 2003
praying to:
- (i) Accord approval to the SPPA dated 20.02.2017, executed between the Petitioner and the Respondent-1, submitted for approval of the Commission;
 - (ii) Direct the Respondent-1 to make payment at the tariff of Rs.8.40 per unit, agreed in the PPA, for the term of the PPA; and,
 - (iii) Pass such other orders to meet the ends of justice and equity.
- 2) The Respondents 2 to 4 were impleaded as Respondents, after the petition was admitted.
- 3) The material facts of the case, as submitted by the Petitioner, may be summed up, as follows:
- (a) Pursuant to the Solar Policy and the Government Order for development of solar projects, the Karnataka Renewable Energy Development Limited (KREDL) invited 'online' application on 09.10.2014 from eligible land owning farmers. After evaluation of the applications received, the application of Shri R.H. Jayarama Reddy (Solar Project Developer or SPD),

for allotment of solar project, was accepted and the KREDL issued letter of Allotment dated 16.03.2015 to the SPD and instructed him to execute a Power Purchase Agreement (PPA) with the Respondent-1.

- (b) Pursuant to above, the SPD planned to develop, design, engineer, procure, finance, construct, own, operate and maintain a Solar Power Project of 3 MW capacity at Dalavaya Hosahalli Village, Bangarapet Taluk, Kolar District.
- (c) On 20.06.2015, the PPA came to be signed between the Respondent-1 and the SPD and was approved by the Commission, vide its letter dated 08.07.2015.
- (d) The SPD submitted the documents regarding formation of the Petitioner company as an SPV for implementation of the above solar project, and on 10.09.2015 requested the Respondent-1 for assignment of the project to the Petitioner Company.
- (e) After obtaining clarification from the Commission about the formation of SPV and assignment of the project, through the Respondent-1, a Supplemental PPA (SPPA) was entered into by the Petitioner with the Respondent-1 on 22.02.2016, for which the Commission conferred its approval on 15.03.2016.

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- (f) In view of various difficulties faced in the project execution for reasons beyond its control, the Petitioner, in its letter dated 03.02.2017, requested the Respondent-1 to extend the Commercial Operation Date (COD) for a further period of three months (from the earlier date of 19.12.2016) and the Respondent-1, by its letter dated 18.02.2017, extended the time by three months as requested by the Petitioner with certain conditions.
- (g) The Petitioner, by its letter dated 20.02.2017, had furnished an undertaking that the project will be commissioned on or before 19.03.2017 and signed another SPPA.
- (h) Subsequently, the Respondent-1, in its letter dated 23.02. 2017, informed the Petitioner to file a petition before the Commission seeking approval of change in the scheduled commissioning date.
- (j) The project was successfully commissioned at 16.05 hours on 07.03.2017 and the Petitioner raised its first invoice on 05.04.2017 for the energy generated and delivered to the Respondent-1 for the period, from 07.03.2017 to 31.03.2017. The Respondent-1, on 20.04.2017, informed that the Commission has directed the Respondent-1 to advise the Petitioner to file a Petition with necessary documents, in order to approve the second SPPA between the Petitioner and the Respondent-1. Hence, this Petition.

4) The grounds urged by the Petitioner in support of its prayers may be stated, as follows:

(a) As per Article 5.1 of the said PPA the tariff is payable as follows:

"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:

- a. *Rs.8.40 per kWh*
- b. *Varied tariff applicable as on the date of Commercial Operation"*

(b) On 30.07.2015, the Commission passed an Order determining the Tariff for Grid interactive MW Scale Solar Power Plants.

(c) The PPA in respect of Petitioner's Solar Project, dated 20.06.2015, has been approved by the Commission by letter dated 08.07.2015. The Commission's Order dated 30.07.2015, varying the tariff for some of the Solar Power Projects, is inapplicable to the Petitioner's Project because, the Commission has clearly stated, in its Order dated 30.07.2015 that, in respect of projects that are commissioned during the period 01st September, 2015 to 31st March, 2018, for which PPAs have been entered into and submitted to the Commission, prior to 01st September, 2015 for approval, the tariff as per the existing PPAs shall be applicable. Hence, even if Article 5.1 of the PPA is to be invoked, there is no variance in the

tariff as on the COD, as the Scheduled COD is amended, as 19th March, 2017 and the project is commissioned on 07th March, 2017. Hence, under all the circumstances, the tariff payable to the Petitioner is Rs.8.40 per unit, based on the Commission's Tariff Order dated 10th October, 2013, read with the Tariff Order dated 30.07.2015.

- 5) On issuance of Notice, the Respondents entered appearance through their learned counsel and the Respondents 1 and 2 filed the Statement of Objections.

- 6) The submissions of Respondent-1 may be stated, as follows:
 - (a) As the Petitioner could not complete the project within the scheduled time, the Petitioner, on 03.02.2017, requested the Respondent-1, for extension of time for commissioning of the plant by two months, on account of the *Force Majeure* Events. On consideration of the same, the Respondent-1 allowed the extension of commissioning date, by three months, vide letter dated 18.02.2017. It was made clear that the Petitioner had to commission the project on or before 19.03.2017. The Petitioner was also asked to furnish an undertaking to the said effect, which was furnished on 20.02.2017. In furtherance to the change in commissioning date, a SPPA dated 20.02.2017 was executed, for which, in its letter dated 23.02.2017, the Petitioner sought the approval of the Commission.

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- (b) On 07.03.2017, the Petitioner successfully commissioned the project and started generating electricity. On 05.04.2017, the Petitioner raised an invoice for Rs.29,34,346.80/- for the electricity supplied for the period from 07.03.2017 to 31.03.2017, at the rate of Rs.8.40/- per unit. The Respondent has on 07.06.2017, paid to the Petitioner a sum of Rs.22,51,378/- towards the said invoice. Aggrieved by the non-payment of the same in accordance with the SPPA, which is yet to receive the approval of the Commission, the Petitioner has filed the present Petition.
- (c) There was no delay on the part of the Respondent-1 in seeking for approval of the Commission for the SPPA dated 20.2.2017, as it was sought on 23.02.2017, itself. Further, it is a settled law that, unless the PPAs are approved by the Commission, the same are not enforceable.
- (d) A combined reading of the terms of the PPA would indicate the intention of the parties, as per which, the Petitioner was required to commission the plant, no later than 18 months from the date of signing the PPA, i.e., by 19.12.2016. However, the Petitioner failed to do so and instead on 03.02.2017, made a request for extension of the COD by a further period of two months. As per the terms of the contract between the parties, in the event of delay in the commissioning date, the tariff payable to the Petitioner would be the lower of the two options given, namely, the tariff of Rs.8.40 or varied tariff fixed by this Commission for such period. The Order dated 30.07.2015, being the order in force from 30.07.2015 to 12.04.2017, the tariff fixed therein would be payable. The Respondent-1

has, therefore, made payments to the Petitioner in terms of the said Order at Rs. 6.51 per unit for the energy supplied for the period 07.03.2017 to 31.04.2017. The same is according to the terms of the PPA and there is no infirmity in the same.

- 7) The Respondent-2, in the Statement of Objections, has stated that the Petition is liable to be dismissed, insofar as, the Respondent-2 is concerned, as there is no prayer against it and it has no role in the matter, after the Letter of Award (LoA) is issued.
- 8) The other two Respondents have not filed any Objections.
- 9) We have heard the learned counsel for the parties and perused the records, including the documents filed.
- 10) The following Issues would arise for our consideration:
 - (1) Whether the Commission has the powers to grant or decline approval to any extension of time given by the Respondent-1 for commissioning of the Petitioner's Project?
 - (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?
 - (3) What Order?

- 11) **ISSUE No.(1):** *Whether the Commission has the powers to grant or decline approval to any extension of time given by the Respondent-1 for commissioning of the Petitioner's Project?*
- (a) Article 2.5 of the PPA provides for extensions of time. The contention of the Petitioner is that, since the Respondent has accepted the reasons for delay in commissioning the project as *Force Majeure* Events and granted extension of time by three months as provided in the PPA, it cannot be withdrawn. That, the Respondent cannot go back on the promise made. We are unable to accept the contention of the Petitioner. The extension of time to commission the project has a bearing on the tariff payable. 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 of India, 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 a certain term affecting the tariff, the Commission, as a custodian of consumer interest, has to intervene and exercise its regulatory power.
- (b) For the above reasons, we hold that, the Commission has the mandate and powers to scrutinise the correctness and legality of the extension of time granted by the Respondent.
- (c) Therefore, we answer Issue No.(1), in the affirmative.

12) **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 provisions of the PPA, before we deal with this issue:

“2.1 Conditions Precedent:

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

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

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

2.1.2 *SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and CESC 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 CESC 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 CESC 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 CESC or due to Force Majeure, the SPD shall pay to CESC 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, CESC 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 CESC as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, CESC 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 CESC 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 CESC Event of Default; or
- (b) Force Majeure Events affecting CESC; 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 CESC through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or CESC, or till such time such Event of Default is rectified by CESC.*

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 CESC.

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to CESC by the scheduled commissioning date, the SPD shall pay to CESC, 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 CESC 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 CESC 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 ESCOM's 'Event of Default' or 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 Article 8 of the PPA, 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 dated 20.06.2015. 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 i.e., on or before 19.12.2016. The achievement of the Conditions Precedent would include obtaining of all the approvals by the SPD.
- (d) The SPD applied for conversion of land on 09.10.2015, after a period of nearly 4 months from the date of the PPA. No explanation is given for this delay on the part of the SPD in the Petition. In fact, there is no averment at all, in the Petition, on this aspect. However, in the letter dated 2.12.2016, addressed by the Petitioner to the Respondent-1 (ANNEXURE P-36), it is stated that the PPA could not be signed, after receipt of the LoA by the SPD farmer, due to non-availability of the draft PPA and approval of the KERC, and the SPD farmer was forced to raise crops during the period from 16.03.2015 (date of the LoA) and 20.06.2015 (date of the PPA) and could start the process of conversion only after harvesting the standing crops. From this, it is clear that the initiation of the process of conversion of land was delayed by the SPD, as there were standing crops on the land. Therefore, the allegation in the letter that due to non-availability of draft PPA and approval of the KERC, after receipt of the LoA, the conversion process could not be initiated, cannot be accepted. The ground alleged for delay in signing the PPA is not substantiated. The PPA has been approved in less than two weeks and, in the meanwhile, a copy of the signed PPA / LOA could have been used for initiating steps for implementation of the project wherever required. The actual reasons for

the delay in applying for conversion, as stated in the letter dated 02.12.2016, would reveal that, the SPD was not diligent in implementing the project. After applying for conversion of land, the land conversion charges were paid by the SPD on 18.06.2016. The land conversion Order was passed by the DC, Kolar on 20.06.2016, in about nine months, from the date of application. As can be seen from the Conversion Order, the DC has obtained reports from the Tahsildar, Bangarpet, the Director of the Planning Department, Kolar and after approval in the single window committee, has granted the Conversion Order. The Petitioner has not given the details of efforts made by the SPD in getting the process of land conversion expedited by furnishing required documents, etc. Had the Petitioner applied for the conversion much earlier, the approval could have been obtained within the period of 365 days stipulated in the PPA. Hence, we are unable to accept the contention of the Petitioner that, there was a delay in granting of the approval for conversion of land affecting the implementation of the project, when the Petitioner has not elaborated on the implementation steps of the project that were affected by the time taken in grant of approval of land conversion. 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 Respondent-2 on 08.10.2015, after about 4 months from the date of the PPA. In the letter dated 07.12.2015, addressed to the Chief Engineer, KPTCL, Bengaluru (ANNEXURE P-19), the date of application is mentioned as 23.11.2015. If that is so, there is a further delay in applying for evacuation approval.

No explanation is given for this delay. The SPD paid the processing charges on 07.12.2015 and the tentative Evacuation Approval was granted on 12.01.2016. The Petitioner, on 28.03.2016, gave its consent for the evacuation scheme and requested for sparing the 11 kV spare bay which was available in the N.G. Hulkur sub-station of the KPTCL, for terminating the 11 kv line from the Petitioner's project. The regular evacuation scheme was approved on 22.04.2016. The Petitioner made another request, on 30.05.2016, to spare the existing 11 kV bay and allot the same to the Petitioner's project. In the letter dated 24.06.2016, addressed by the Chief Engineer Electricity of the Transmission Zone, KPTCL, to the Chief Engineer Electricity, Planning and Co-ordination, KPTCL (ANNEXURE P-25), it is mentioned that the Petitioner had, vide letter dated 28.03.2016, requested to spare the vacant land of the KPTCL to construct the terminal bay. This is not correct. In the letter dated 28.03.2016 of the Petitioner (ANNEXURE P-21), the request was only to spare the spare bay available at the sub-station and not the land. It is also the averment of the Petitioner, in the Memo dated 19.12.2017, that the Petitioner requested the KPTCL on 28.3.2016 and 30.5.2016 to consider allotting one of the two existing spare bays to the Petitioner, as the owners of the land were not willing to sell the adjacent lands. This request, to spare the bay, was declined. It is only on 17.9.2016 (Annexure P-26) that the Petitioner, for the first time, made a request to spare the vacant land for constructing the terminal bay, referring to the letter dated 24.06.2016 of the Chief Engineer, mentioned above. Pursuant to this request of the Petitioner, the Respondent-3 requested for payment of certain charges for sparing the

land of the KPTCL, for construction of 11 kV terminal bay. The charges were paid on 29.09.2016 and the same was intimated to the Respondent-3, vide letter dated 19.10.2016. The regular Evacuation Approval was granted on 23.11.2016. From the above events, we consider that the allegations of delay by the Respondent in granting evacuation approval, cannot be accepted. The allegation that, it took 11 months for the KPTCL, to consider the simple issue of allotment of land, cannot be accepted, in view of the facts mentioned above. Under Article 4.1 (a) of the PPA, it was the obligation of the Project Developer to create the necessary infrastructure and interconnection facilities. The KPTCL was neither obliged to spare the bay, nor the land in its sub-station, for construction of bay by the Petitioner. Having obtained the land for construction of bay in the sub-station of the KPTCL, after a belated request, it is not proper on the part of the Petitioner to contend that the project was delayed, due to the acts of the KPTCL, for no fault of the Petitioner.

- (f) It is the further allegation of the Petitioner that, the delay in supply of breaker by the MEIL has also delayed the project. The Petitioner placed a Purchase Order for the 11 kV Vacuum Circuit Breaker (VCB) on 13.06.2016 and paid the advance to the MEIL. On 20.6.2016, the Petitioner sought approval of the VCB drawings from the KPTCL and the same were approved on 26.07.2016. On 27.7.2016, the Petitioner submitted the approved drawings to the MEIL. The VCB was delivered on 08.12.2016. We note that, the Petitioner could have placed the Purchase Order for the VCB, soon after the tentative Evacuation Approval was granted by the

KPTCL on 12.01.2016, or at least, after the regular Evacuation Approval was granted on 22.04.2016. The Petitioner has delayed the process of placing the order for the VCB and seeking approval of the VCB drawings. Thereafter, it is not known whether the Petitioner pursued with the MEIL and informed it about the urgency of supply. From the events mentioned above, we consider that, the Petitioner initially made attempts to get the spare bay at the sub-station allotted to its project and after rejection of the said request, which cannot be termed as unreasonable, sought for the land and placed order for purchase of bay equipment.

- (g) The Petitioner has also submitted that, the delay in obtaining of credit facility from the Banks delayed the project implementation. Such a claim is not tenable.

- (h) We note that, it is settled law that, the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under the clause, is stated to be issued by the Petitioner to the Respondent. The reasons, quoted by the Petitioner, do not fall under the *Force Majeure* Events, mentioned in the PPA, as held in the preceding paragraphs. Hence, we consider that, the Petitioner is not entitled to extension of time, as provided in the clauses of the PPA.

- (j) Therefore, we answer Issue No.(2), in the negative.

13) **ISSUE No.(3):** *What should be the tariff for the Project for the term of the PPA?*

(a) Clause 5.1 of the PPA reads as follows:

“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:

- c. Rs.8.40 per kWh*
- d. Varied tariff applicable as on the date of Commercial Operation”*

(b) It is the Petitioner's case that, the Tariff Order dated 30.7.2015 is not applicable to the project and that the Respondent has granted the extension of time by three months, after considering the *Force Majeure* Events, as provided in the PPA and hence, the agreed tariff of Rs.8.40 per unit should not be altered. We note that, the Petitioner's Project is commissioned on 07.03.2017 and the Generic Tariff Order dated 30.7.2015 is applicable for the projects commissioned during the period, from 01.09.2015 to 31.03.2017. The PPA provides that, the tariff, as on the date of commercial operation, will be applicable for the Project that is commissioned belatedly, as per Article 5.1 of the PPA.

- (c) The Hon'ble Supreme Court, in Civil Appeal No.1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided on 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 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...."

- (d) 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. Hence, 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, under Article 5.1 of the PPA.

- (e) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. For not complying with the timelines for Conditions Precedent and commissioning of the Project, as mentioned in the PPA, the Petitioner is required to pay damages for such delay, as per the Articles 2.2 and 2.5.7 of the PPA. We note here that, 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 delay in achieving Conditions Precedent and commissioning the Project, the generating company is liable to pay damages stipulated in the PPA.
- (f) Therefore, we answer Issue No.(3), as above.

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

For the foregoing reasons, we pass the following:

ORDER

- (a) It is hereby declared that, the Petitioner is not entitled to any of the reliefs sought;
- (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