

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 20th November, 2018

Present:

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

OP No.156/2017

BETWEEN:

Koppal Solar Power Projects Private Limited,
Flat No. P-10,
SPS Kinj, Basaveshwara Badavane,
Hosapete,
Ballari. ..

PETITIONER

[Represented by Sri Shiva KV and Manjunath R, Advocates]

AND:

- 1) The State of Karnataka,
Represented by the
Additional Chief Secretary to Government,
Energy Department,
Vikasa Soudha,
Dr.Ambedkar Veedhi,
Bengaluru - 560 001.
- 2) Gulbarga Electricity Supply Company Limited,
Represented by its Managing Director,
Station Main Road,
Kalaburagi – 585 102.
- 3) The Chief Engineer, Electy,
Karnataka Power Transmission Corporation Limited,
Transmission Zone,
Sedam Road,
Kalaburagi-585102..

.. **RESPONDENTS**

[Respondents 2 & 3 represented by Indus Law, Advocates]

ORDERS

- 1) The Petitioner has filed this Petition, under Section 86(1)(b) & 86(1)(f) of the Electricity Act, 2003, in effect, praying to:
 - (a) Approve the extension of time, granted by the 2nd Respondent (GESCOM) to the new SCOD (i.e.,30.6.2017) vide OM dated 15.03.2017;
 - (b) Direct the 2nd Respondent (GESCOM), to make payment for the delivered energy at Rs.8.40 per unit; and,
 - (c) Pass such other and incidental Orders, as may be deemed appropriate, based on the facts and in the circumstances of the case.

- 2) The facts of the case, as submitted by the Petitioner, may be summarized, as follows:
 - (a) The State Government, with an intention to increase generation of Solar power and to encourage the State's farmers, issued a Notification dated 26.08.2014, in terms of its Solar Policy for the period 2014-21.
 - (b) Pursuant to notification by the Karnataka Renewable Energy Development Limited (KREDL), calling for applications for allotment of Solar Power Plants under the Land Owning Farmers' Category, the application filed by Shri K.Ramachandra Raju, a Chartered Accountant and land owning farmer, for allotment of a Solar Power Project for 2 MW was accepted by the KREDL and

a letter dated 16.03.2015 to set up the Solar Power Project, at Sy.Nos.24 & 25, Sultanpur Village, Koppal Taluk and District, under the Farmers' Scheme, was issued to him, subject to certain terms and conditions.

- (c) Based on this allotment, he [Solar Project Developer (SPD)] executed a Power Purchase Agreement (PPA) dated 03.07.2015 with the 2nd Respondent (GESCOM), which was approved by the Commission, as communicated vide letter dated 31.08.2015. The Commission returned the original PPA to the 2nd Respondent vide letter dated 15.12.2015, after a delay of six months. 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 02.01.2017.
- (d) The Petitioner-SPV with the SPD as a shareholder, was created to develop and execute the project and a SPPA dated 25.06.2016 was executed with the 2nd Respondent. The SPPA was approved on 14.10.2016, after a delay of 4 months.
- (e) The Government of Karnataka issued a Circular dated 01.12.2015, fixing the time for grant of the deemed conversion as 15 days. As per this Circular, the application for conversion of land before the Deputy Commissioner, Koppal was made, with relevant documents on 16.07.2016. However, the conversion was granted on 24.11.2016.

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- (f) For grant of evacuation approval for its Solar Power Project, necessary application was made on 14.06.2016. The necessary fee was paid on 25.06.2016. The tentative evacuation approval was granted on 02.09.2016 with certain terms and conditions. The regular evacuation approval was granted on 07.09.2016.
- (g) The Petitioner requested the 3rd Respondent, vide letter dated 02.09.2016, to spare the land in Kerehalli Sub-station, for construction of 33 kV terminal bay. On 22.02.2017, the 3rd Respondent demanded payment of certain charges for sparing the land and the same was paid on 04.03.2017. The 3rd Respondent demanded supervision charges and processing fee on 06.04.2017, and upon payment of the same on 17.4.2017, the evacuation scheme and construction of bay was completed on 24.06.2017 and a letter was issued to this effect by 3rd Respondent. The 3rd Respondent took 6 months' time for this purpose.
- (h) Further, the Petitioner followed up with the 3rd Respondent, to get the single line diagram and layout approval, for construction of a terminal bay at the Sub-station. The plant was commissioned on 30.06.2017.
- (j) The Petitioner had requested the 2nd Respondent, vide letter dated 14.12.2016, for extension of time by 6 months to complete the Project. The extension of time upto 30.06.2017, was granted on 15.03.2017 and a Supplemental PPA (SPPA) executed on 16.03.2017.

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- (k) The Petitioner received a letter dated 07.07.2017 from the 2nd Respondent (GESCOM), requesting the Petitioner to file a Petition before the Commission, seeking approval of extension of time for achieving the Commercial Operation Date (COD). Hence, this Petition is filed.
- 3) The grounds urged by the Petitioner, in support of its prayers, may be summarized, as follows:
- (a) The Petitioner is entitled to the tariff of Rs.8.40 per unit, as mentioned in the PPA. The Commission has passed three Generic Tariff Orders, dated 10.10.2013, 30.07.2015 and 12.04.2017, in respect of the Solar Power Projects. In the Tariff Order dated 30.07.2015 (passed, in modification of an earlier Tariff Orders), it is clearly held that, in respect of the Projects that are commissioned during the period from 01.09.2015 to 31.03.2018 for which, the PPAs have been entered into and submitted to the Commission, prior to 01.09.2015 for approval, the tariff as per the said Agreements, shall be applicable. The Tariff Order dated 12.04.2017, has been made applicable to only the new grid connected Solar Power Projects, entering into PPAs on or after 01.04.2017, but before 01.04.2018 and also those which are commissioned during the period, from 01.04.2017 to 31.03.2018, for which PPAs have not been entered into, prior to 01.04.2017. Hence, these Tariff Orders do not revise the tariff of the Petitioner's Project. Consequently, the Petitioner is entitled to the tariff of Rs.8.40 per unit, as agreed to, under the PPA.

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- (b) The Petitioner has commissioned the Project, within the time period permitted by the Respondent (GESCOM). In view of this mutual agreement, there is no scope for the unilateral downward revision of the tariff. The Project of the Petitioner has experienced several hurdles, which can be termed as the *Force Majeure* Events, within the meaning of the Article 8 of the PPA, and this has been adequately represented before the 2nd Respondent (GESCOM) by the Petitioner. The pleas of the Petitioner have been considered and accepted. The entire basis for the grant of extension has been, the due consideration of the representation of the Petitioner.
- (c) The delay in execution of the Project was, due to delay in receipt of the original PPA, after approval by the Commission, as the Petitioner could not commence any work without the original PPA. The Project was also delayed due to delay by the authorities in granting conversion of land and evacuation approvals, bay approvals, etc.
- (d) The 2nd Respondent (GESCOM) has granted extension of time within the purview of the PPA, considering all relevant aspects and the Petitioner has commissioned the Project within the mutually agreed and revised COD. Hence, the same cannot be interfered with. The Petitioner has prayed to allow the Petition.
- 4) Upon issuance of Notice, while the Respondent-1 remained unrepresented, the Respondents-2 and 3 appeared through their counsel. However, despite

granting sufficient time, they did not file any Objections. During arguments, the learned counsel for the Respondents submitted that they have no objections to the Petition and prayed that the Commission may be pleased to accord appropriate directions in the Petition, in the interest of justice.

5) We have heard the learned counsel for the parties and perused the records.

The following issues would arise, for our consideration:

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

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

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

(4) What Order?

6) 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:

- 7) **ISSUE No.(1):** *Whether the extension of time of six months, granted by the 2nd Respondent to the Petitioner, for achieving the commercial operation of the Solar Power Plant, can be subjected to legal scrutiny by the Commission?*
- (a) Article 2.5 of the PPA does not specifically stipulate that, any extension of time granted by the 2nd Respondent (GESCOM) should be got approved by the Commission. However, Article 2.5.1 of the PPA, stipulates the grounds on which alone, the time could be extended, for achieving the commercial operation. Article 5.1 of the PPA provides for reduction of tariff, as a consequence of delay in the commissioning of the Project, beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein. Whenever an event affects the quantum of tariff applicable, for supply of energy to the Distribution Licensees, we are of the considered opinion that, the same should be scrutinized and approved by the Commission. It is a settled law that, this Commission has the exclusive jurisdiction to determine the tariff, for supply of electricity by a Generating Company to a Distribution Licensee and it has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which the electricity shall be procured, from different agencies through PPAs. Therefore, we hold that, even in the absence of a specific term in the PPA, an event affecting or altering the tariff, already approved in the PPA, should be got approved by this Commission. The 2nd Respondent (GESCOM) has also specifically intimated the Petitioner, in its

Order dated 15.03.2017, that the 2nd Respondent (GESCOM) will follow the KERC Order, for application of tariff, as per Article 5.1 of the PPA.

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

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

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

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

“2.1 Conditions Precedent:

The obligations of GESCOM and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.

2.1.1 (i) *The SPD shall obtain all permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the Project (hereinafter referred to as “Approvals”):*

(ii) The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:

(a) The DPR to GESCOM and achieve financial closure and provide a certificate to GESCOM from the lead banker to this effect;

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

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

2.1.2 *SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and GESCOM shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent.*

2.1.3 *The SPD shall notify GESCOM in writing at least once a month on the progress made in satisfying the Conditions*

Precedent. The date, on which the SPD fulfills any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify GESCOM of the same.

2.2 Damages for delay by the SPD

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

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2.3.2 Appropriation of Performance Security

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

“2.5 Extensions of Time

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

- (a) *Any GESCOM Event of Default; or*
- (b) *Force Majeure Events affecting GESCOM; or*
- (c) *Force Majeure Events affecting the SPD.*

2.5.2 *The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than 'day for day' basis, to permit the SPD or GESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or GESCOM, or till such time such Event of Default is rectified by GESCOM.*

2.5.3 *In case of extension occurring due to reasons specified in clause 2.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (six) months.*

2.5.6 *As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined date shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement.*

2.5.7 Liquidated damages for delay in commencement of supply of power to GESCOMs.

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to GESCOM by the scheduled commissioning date, the SPD shall pay to GESCOM, liquidated damages for the delay in such commencement of supply of power as follows:

- (a) *For the delay up to one month- amount equivalent to 20 % of the performance security.*

(b) For the delay of more than one month up to three months - amount equivalent to 40 % of the performance security.

(c) For the delay of more than three months up to six months - amount equivalent to 100 % of the performance security.

For avoidance of doubt, in the event of failure to pay the above mentioned damages by the SPD, the GESCOM entitled to encash the performance security."

"8.3 Force Majeure Events:

(a) *Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following:*

- (i) *Acts of God;*
- (ii) *Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;*
- (iii) *Strikes, work stoppages, work slowdowns or other labour dispute which affects a Party's ability to perform under this Agreement;*
- (iv) *Acts of war (whether declared or undeclared), invasion or civil unrest;*
- (v) *Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the SPD or GESCOM of any Law or any of their respective obligations under this Agreement);*
- (vi) *Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
- (vii) *Fire, Earthquakes, explosions, accidents, landslides;*
- (viii) *Expropriation and/or compulsory acquisition of the Project in whole or in part;*

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

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

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

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

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

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

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

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

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

examine, if the Petitioner or the SPD, in any manner, was negligent in performing its obligations under the PPA.

- (c) The PPA is signed by the parties on 03.07.2015. As per Article 2.1 of the said PPA, the Conditions Precedent had to be achieved within 365 days from the date of signing the PPA and the Project had to be commissioned within 18 months, from the date of signing the PPA, i.e., on or before 02.01.2017. The achievement of the Conditions Precedent, would include obtaining of all the approvals by the SPD. It is alleged by the Petitioner that, due to the delay in handing over the original PPA after approval of the Commission, the Petitioner 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. If the same was not delivered, the SPD/Petitioner ought to have demanded and collected the same. 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 approvals for land conversion and evacuation, loans, etc. The Petitioner has not produced any documents to show that any of its application for such approval, loans, etc., was rejected or delayed, for want of approval of the PPA. Therefore, we are unable to accept that, the time taken for approval of the PPA is a *Force Majeure* Event, causing delay in the commissioning of the Project.

- (d) The SPD applied for conversion of the land on 16.07.2016, after a lapse of more than one year from the Effective Date of the PPA. The only explanation given, for this delay, is that several documents had to be procured from the Revenue Department for applying for conversion of land. This statement of the Petitioner is not substantiated. It is not stated, as to when the applications were made to the concerned authorities to provide the documents and how much time was taken by the concerned authorities to provide the same. The Petitioner has not provided the details or elaborated on the efforts made to expedite the process of grant of land conversion by furnishing necessary information or documents. After applying for conversion of land, the land conversion charges were paid by the SPD on 27.10.2016. The land conversion Order was passed by the Deputy Commissioner, Koppal on 24.11.2016, within a month of payment of charges and in about 4 months, from the date of application for conversion. This period is reasonable and cannot be termed as 'delay' when the Petitioner has not provided the details of efforts made to expedite this process. In fact, there is a delay on the part of the SPD in applying for the conversion, which is not convincingly explained.
- (e) The SPD applied for the evacuation approval on 14.06.2016, after more than 11 months, from the date of the PPA. No explanation was given for this delay. The tentative evacuation approval was granted on 02.09.2016 and the regular evacuation approval was granted on 07.09.2016. The Petitioner has alleged that the 3rd Respondent caused a delay of about 3 months, in granting the evacuation approval. The events, after applying for evacuation

approval, are mentioned in ANNEXURE - U. We find that there has been an inordinate, unexplained delay on the part of the Petitioner in applying for the evacuation approval. The evacuation approval was granted in 3 months' time, which is reasonable.

- (f) It is averred by the Petitioner that, the sparing of land for the bay was delayed by the 3rd Respondent. The request to spare the land was made by the Petitioner on 02.09.2016. After considering various technical aspects and collecting necessary charges, the request was acceded to on 22.02.2017. In fact, under the evacuation approval dated 07.09.2016, one of the conditions was that the generator had to procure suitable land adjacent to the switchyard of the sub-station to facilitate construction of line terminal bay. It is also provided that the KPTCL/GESCOM may consider, parting of its land for putting up terminal bay. In this case, the KPTCL has parted its land for the bay. Therefore, we find that, the 2nd Respondent has extended full co-operation to the Petitioner in implementing the Project and acted within a reasonable time, on receiving the request of the Petitioner to spare the land.
- (g) We note that, when a timeline of 365 days is provided in the PPA, for getting all the approvals, the inordinate delay by the SPD / Petitioner, in applying for such approvals and, thereafter, attributing the delay to the authorities, cannot be accepted. If the SPD/Petitioner was diligent in Project implementation, the approvals could have been easily obtained, within the

stipulated timeline. The 2nd Respondent (GESCOM), while granting the extension of time, ought to have taken note of these aspects.

- (h) We note that, it is a settled law that, the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under the clause, is stated to be issued by the Petitioner to the 2nd Respondent (GESCOM). We find that the Petitioner was not diligent in implementing the Project, within the stipulated time.
- (j) It is also the allegation of the Petitioner that the project was delayed as the Commission delayed the approval of SPPA dated 25.06.2016. The Commission had received the SPPA from 2nd Respondent on 28.6.2016. after scrutiny of the same, the Commission addressed a letter dated 05.07.2016 to the 2nd Respondent to submit all documents relating to formation of SPV. The documents were received, from the 2nd Respondent on 05.10.2016, and the SPPA was approved and approval communicated, vide letter dated 14.10.2016. The Petitioner has not explained or elaborated the events or acts that were affected by the absence of approved PPA. Therefore, the allegation of delay, in the approval of SPPA, resulted in delayed commissioning of the Project, cannot be accepted.
- (k) None of the reasons or events cited by the Petitioner, 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 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.

- (l) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. Admittedly, the SPD / Petitioner has not achieved the Conditions Precedent, within the specified time, as required under Article 2.1 of the PPA. The actual dates, on which they were achieved, have not been furnished or elaborated by the Petitioner. For the same reason, as applicable to rejection of the Petitioner's claim for extension of time for achieving the SCOD, any claim of the Petitioner for extension of time for achieving conditions Precedent, is liable to be rejected. Thus, we hold that, for not complying with the timelines, as mentioned in the PPA for Conditions Precedent and commissioning of the Project, the Petitioner is required to pay damages for such delay, as per Articles 2.2 and 2.5.7 of the PPA.
- (m) 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 any delay in achieving Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages, stipulated in the PPA.
- (n) Therefore, we answer Issue No.(2), in the negative.

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

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

"5.1 Tariff Payable:

The SPD shall be entitled to receive the tariff of Rs.8.40 per kWh based on the KERC tariff order S/03/1 dated 10.10.2013 in respect of SPD's solar PV projects in terms of this agreement for the period between COD and the expiry date. However, subject to clause 2.5, if there is a delay in commissioning of the project beyond the Scheduled Commissioning Date and during such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects shall be the lower of the following:

i. Rs.8.40/- per kWh

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

(b) Article 5.1 of the PPA, extracted earlier, provides for reduction of the tariff, as a consequence of delay in commissioning of the Solar Power Project, beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated, therein. This is in view of the fact that, this Commission periodically determines generic tariff, for supply of electricity generated from various sources, to the Distribution Licensees, based on, among other parameters, mainly Capital Cost of the Generating Plant. Such generic tariff is made available for a period, normally, longer than a year, called as 'Control Period', during which the Generating Plants get implemented and commissioned at the normative Capital Cost, adopted in the Generic Tariff Order, generally after the execution of a PPA with Distribution Licensee. Such

PPA also has a clause stipulating the time, within which the power supply should commence, so that the Distribution licensee can plan further supply to its consumers. The time, ordinarily required to complete various pre-commissioning activities, which in respect of megawatt scale Solar Power Plants is taken as, between 12 months and 18 months. Any delay or failure in commencement of power supply, within the agreed date, would disrupt the operation of the Distribution Licensees, like the 2nd Respondent (GESCOM), which could also result in their power procurement from alternative expensive source,s leading to higher retail tariff to the consumers or short supply leading to revenue loss to them, and even 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, rapidly in the recent years, because of the advancement in the technology and production efficiency, as well as economies of scale, because of 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.

- (c) We note that, the 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 Petitioner to seek extension of the commissioning date, agreed to in the PPA. It is safe to infer that, the normative Capital Cost of the Solar Power Plants, when the Petitioner took effective steps to procure the capital equipment for its Project, was lower than the normative cost of the Solar Power Plants, assumed in the Generic Tariff Order dated 10.10.2013. Thus, the Petitioner is not entitled to the tariff, originally agreed to in the PPA, at Rs.8.40 per unit, when admittedly the Plant was not commissioned within the stipulated time and it is entitled only for the revised tariff, as on the date of commissioning of the Plant, as per Article 5.1 of the PPA. Admittedly, in the present case, the generic tariff for the Solar Power Plants, that was agreed to in the PPA, was revised much before the Plant was ready for commissioning. In any case, the Petitioner having voluntarily entered into a PPA, which has a clause providing for revision of the tariff agreed, if there is a delay in commissioning of the Project, within the scheduled period, cannot now wriggle out of such a clause, without valid grounds.

- (d) The contention of the Petitioner is that the generic tariff order dated 12.4.2017 is not applicable to the case. The PPA provides that the tariff, on the date of commercial operation, will be applicable for the Project. The Project is commissioned on 04.07.2017. The Petitioner has not furnished any material particulars of the cost incurred, in implementing the Project and the period when investments were actually made. As noted earlier, as per the terms

and conditions of the PPA, the tariff payable to the SPD / Petitioner is not based on the Capital Cost incurred by the SPD/ Petitioner in the Project implementation, but as per the relevant clauses of the PPA. The Hon'ble Supreme Court of India, in Civil Appeal No.1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided 02.02.2016, has held, as follows:

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

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

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

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

(e) Hence, on the facts and in the circumstances of the case, we hold that, the Petitioner's Plant is entitled to a tariff of Rs.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.

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

For the foregoing reasons, we pass the following:

ORDER

(a) It is declared that the Petitioner is not entitled to any of the reliefs, sought for, in the Petition;

(b) The Petitioner is entitled to a tariff of Rs.4.36 (Rupees four and Paise thirty-six) only per unit, the varied tariff as applicable on the date of commissioning of the Petitioner's Plant, as fixed by the Commission in the Order dated 12.04.2017, for the term of the PPA, as per Article 5.1 of the PPA; and,

(c) The Petitioner is also liable to pay damages, 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