

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**

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

**Dated : 27<sup>th</sup> September, 2018**

**Present:**

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

**OP No.114/2017**

**BETWEEN:**

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

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

- 2) Smt. Marakka,  
Chennamangathihalli kaval Village,  
Challakere Taluk,  
Chitradurga District.

.. **PETITIONERS**

*[Represented by Mariappa M.S. Associates, Advocates]*

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

**AND:**

Mangalore Electricity Supply Company Limited,  
MESCOM Bhavana, Bejai  
Mangaluru-575 004.

.. **RESPONDENT**

*[Represented by Sri Shahbaaz Hussain, Advocate]*

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**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 2<sup>nd</sup> 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 2<sup>nd</sup> Petitioner has relied upon the different clauses of the Power Purchase

Agreement (PPA) dated 29.08.2015, entered into between the Petitioner and the Respondent [Mangalore Electricity Supply Company Limited (MESCOM)]. 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 2<sup>nd</sup> Petitioner, the following relevant clauses in the PPA and the material facts, may be noted:
  - (a) The 2<sup>nd</sup> Petitioner, who is one of the farmers, was selected for developing a 01 MW Solar Power Project, on her land at Suranahalli Village, Challakere Taluk, Chitradurga District (the place is mentioned as Chennamangatihalli kaval village in the petition and as Suranahalli village in the PPA) and for selling the power generated by the Project to the Respondent (MESCOM), as per the Guidelines, issued for selecting the land owning farmers under the State Solar Policy 2014-2021. In this regard, the 2<sup>nd</sup> Petitioner [Solar Project Developer (SPD)] and the Respondent (MESCOM) have entered into a PPA dated 29.08.2015. The said PPA was approved by this Commission on 01.09.2015. The 1<sup>st</sup> 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. The PPA provides that the Project shall be commissioned on or before 28.02.2017 i.e., 18 (eighteen) months from the date of the PPA.

(b) 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 MESCOM Event of Default; or*
- (b) Force Majeure Events affecting MESCOM; 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 MESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or MESCOM ,*

or till such time such Event of Default is rectified by MESCOM .

- 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 28.02.2017, 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 28.02.2017, 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 (MESCOM ) has 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 2<sup>nd</sup> Petitioner submitted a letter dated 03.12.2016 to the Respondent (MESCOM), requesting for extension of time for commissioning of the Solar Power Project by 6 (six) months, stating that, there was an inordinate delay in getting the approval of the Evacuation Line and the 11 kV Bay allotment and that there was a delay in granting of conversion of the 'Agricultural' land for 'Non-Agricultural' purposes. Thereafter, the Respondent (MESCOM) intimated, in the letter dated 08.02.2017, that the extension of time was allowed for 6 (six) months, from the Scheduled Commercial Operation Date

(SCOD), for completion of the Solar Power Project in question and that all the other terms and conditions of the PPA, would remain unaltered.

- (e) This Commission, by the letter dated 16.03.2017, directed all the Electricity Supply Companies (ESCOs), 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 ESCOs 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 approval of any extension of the Commissioning Date, granted by the ESCOs. Accordingly, the Respondent (MESCOM), directed the Petitioners to file the necessary Petition before this Commission, for obtaining the approval of the Commission, for the extension of time granted by it for achieving the SCOD. Thereafter, the 1<sup>st</sup> Petitioner has filed this Petition, before this Commission.
- 5) Upon Notice, the Respondent (MESCOM) appeared through its counsel. The Respondent (MESCOM) filed Objections.
- 6) The submissions of Respondent (MESCOM), may be stated as, follows:

- (a) As per the terms of the PPA, the generator was required to commission the Plant within 18 months, from the date of execution of the PPA. Accordingly, the Petitioner was supposed to commission the Project by 28.02.2017.
- (b) As the Petitioner was unable to execute the Project within time, the Petitioner sought extension of time, by 6 months, to commission the Project under the *Force Majeure* conditions.
- (c) As several requests for extension of scheduled commissioning date were received from solar developers, the Government of Karnataka issued an Order dated 24.11.2016 directing all the ESCOMs, to constitute a Committee to consider and dispose of the requests of farmers/developers. Accordingly, a Committee was constituted by the Respondent and the Committee considered requests of the Petitioner. The Petitioner had cited the following reasons, for the delayed execution of the Project.

*Land Conversion:*

Date of Submission of application	:	22.04.2016
Date of Conversion	:	03.02.2017
Delay in getting approval	:	9 months

*KPTCL Evacuation Approval (Regular):*

Date of Submission of application	:	19.01.2016
Date of Approval	:	22.08.2016
Delay in getting approval	:	7 months



The Committee, after detailed discussions and scrutiny of all the documents, opined that, approval may be accorded for extension of SCOD ,by upto 6 months, under Article 2.5 of PPA, as there was delay in issue of approvals by various Government entities.

- (d) The Respondent (MESCOM) addressed a letter in February, 2017 and informed the Petitioner about the extension of time by 6 months, for achieving scheduled commercial operation of the Project.
- (e) The Commission, in its letter dated 16.03.2017, informed all the ESCOMs of the State, not to allow any extension of time to solar generators, beyond the scheduled commissioning date, as per the PPA without obtaining prior opinion of the Commission. Further, vide letter dated 05.04.2017, the ESCOMs were directed by the Commission to advise all land owning Solar Developers/SPVs, to approach the Commission and seek approval of the extension of time. In furtherance to the same, the Petitioner has filed this Petition.
- (f) The Energy Department, vide the letter dated 25.04.2017 addressed to the Commission, has communicated that, it has found acceptable the 6 (six) month's extension of SCOD granted by Respondent (MESCOM), as per Articles 2.5 and 8 of the PPA.

- (g) In respect of extensions of the Project duration of the already awarded Solar Power Projects, the Ministry of New and Renewable Energy, in the letter dated 28.07.2017 addressed to the Principal Secretaries (Power/Energy) of the State Government, has stated as below:

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

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

- (h) The Respondent (MESCOM) has, therefore, prayed for issuance of appropriate directions, in the matter.

- 7) The Petitioners concluded their arguments. The learned counsel for the Respondent (MESCOM) submitted that, it would not specifically object to the pleas raised by the Petitioners and that it would abide by the Orders of this Commission. Therefore, the arguments of the Respondent (MESCOM) were taken as 'concluded'. The written arguments were also filed on behalf of the Petitioners.

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- 8) After considering the submissions of the Petitioners and the evidence on record, our findings on Issue No.(2) are, as follows:
- 9) **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 2<sup>nd</sup> Petitioner submitted that, the arguments submitted in OP No.65/2017, a connected case, may be adopted in this case. 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.
- 10) We shall now discuss Issue Nos.(1), (3) and (4) below.
- 11) **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 MESCOM 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 MESCOM and achieve financial closure and provide a certificate to MESCOM from the lead banker to this effect;

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

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

**2.1.2** SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and MESCOM 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 MESCOM 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 MESCOM 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 MESCOM or due to Force Majeure, the SPD shall pay to MESCOM 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, MESCOM 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 MESCOM as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, MESCOM 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 MESCOM 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 MESCOM.**

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to MESCOM by the scheduled commissioning date, the SPD shall pay to MESCOM , 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 MESCOM 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 MESCOM 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 MESCOM'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 Petitioner or the SPD, in any manner, was negligent in performing its obligations under the PPA and has complied with the provisions of Article 8.3 of the PPA.

- (c) The PPA is signed by the parties on 29.08.2015. 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 Petitioners claim that, the delay in grant of approvals for conversion of the land and for evacuation of the power, have caused the delay in implementing the Project.
- (d) The SPD applied for conversion of the land on 16.02.2016, after a lapse of more than 5 months, 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, 7 & 7A certificates, Mutation, Akarband, PT sheet, in respect of the land, had to be obtained from various authorities and eventhough a request was made to the concerned authorities on 26.08.2015 (as mentioned in the Memo dated 17.04.2018), the same were given during



the period August 2015 to April 2016 with a delay of 246 days. The 1<sup>st</sup> Petitioner has produced the copies of some of the said documents on 05.09.2017. 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 26.08.2015, as mentioned in the Memo dated 17.04.2018 and some of the documents were issued within a few days of the application, as could be seen from the notings on the documents by the concerned authorities. Therefore, the allegation that, there was a delay by the authorities to provide the documents sought for by the Petitioners, cannot be accepted. Consequently, the explanation that, the delay caused by the authorities in providing the above documents resulted in the delay in applying for the land conversion, before the Deputy Commissioner, cannot be accepted. The land conversion charges were paid by the 2<sup>nd</sup> Petitioner on 19.01.2017. The land conversion Order was passed by the Deputy Commissioner, Chitradurga, on 03.02.2017, within a few days after payment of the 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 a delay on the part of the SPD in applying for the conversion and we note that the 1<sup>st</sup> Petitioner has failed to produce the correct information about the dates, before the Commission and, in fact, tried to mislead us, as stated above.

- (d) It is stated by the 1<sup>st</sup> Petitioner in the Memo dated 05.09.2017, that the SPV was formed on 03.05.2016 and the SPPA was signed on 10.02.2017 and is pending before the Commission for approval. It is also stated in the Memo that the loan was sanctioned by the State Bank of India on 28.06.2016, however, inspite of the delay in disbursement of the loan and the land conversion Order, the 1<sup>st</sup> Petitioner started the procurement process in July, 2016 and commenced work relating to the implementation of the Project from its own funds in September, 2016. Therefore, it can be stated that, the Project was not delayed, due to the delay in disbursement of loan or the conversion Order, but due to belated formation of SPV.
- (f) It is stated by the 1<sup>st</sup> Petitioner, in the Written submissions dated 17.04.2018 that the application for grid connectivity was made on 21.01.2016, as per Exhibit 32. The Exhibit 32 is dated 26.02.2016 and is received by KPTCL on 29.02.2016. Therefore, it can be stated that the 2<sup>nd</sup> Petitioner applied for the evacuation approval to the Karnataka Power Transmission Corporation Limited (KPTCL) on 29.02.2016, after about 6 months, from the date of the PPA. No explanation is given for this delay by the Petitioners. The tentative evacuation approval was granted on 13.05.2016. The 2<sup>nd</sup> Petitioner accepted the conditions in the tentative evacuation approval on 25.05.2016 and requested for the regular evacuation approval. The regular evacuation approval was granted on 22.08.2016. The Petitioners have alleged that, the KPTCL caused a delay of 6 months, in granting the evacuation approval. The KPTCL has not been arrayed as

a Respondent. 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 thereafter, attributing the delay to the authorities, cannot be accepted. It is noted that the KPTCL has spared its land for construction of 11 kV terminal bay, with metering arrangement, for which land had to be otherwise procured by the Petitioners. Therefore, the KPTCL has, in fact, facilitated the process of implementation of the project. It could be therefore, inferred that, early acquisition of the land by the Petitioners would have hastened the process of erection of evacuation facility.

- (g) It is also the allegation of the Petitioners that, the breaker was provided by the MEI, after a delay of more than 6 months, from the date of placing the order. It is stated that, the quotation was received from the MEI on 29.10.2016, the Purchase Order for the breaker was placed on 14.11.2016, drawing was submitted on 12.12.2016, but the breaker was delivered on 15.03.2017. It is stated that, the usual period of delivery is 10 to 12 weeks, from the date of 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. Considering the inordinate delay by the 1<sup>st</sup> Petitioner in placing the Purchase Order and the various steps involved later, the period, from 12.12.2016 to 15.03.2017, cannot be termed as 'delay'.

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- (h) It is also alleged that, the inspection of the Project by the CEIG and the grant of the safety approval, was delayed, from 10.02.2017 to 28.06.2017. 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 Petitioner on 09.11.2017. We do not find any delay in grant of approval, considering the sequence of dates mentioned by the 1<sup>st</sup> Petitioner and note that there is no explanation for the belated submission of the drawings by the Petitioner.
- (j) The Project was granted synchronisation approval on 30.06.2017 and commissioned on 30.06.2017, after the grant of the safety approval.
- (k) 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. None of the reasons or events, cited by the Petitioners for the delay in commissioning of its Project, falls under *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 1<sup>st</sup> Petitioner would be liable for payment of the Liquidated Damages, as per Article 2.5.7 of the PPA.
- (l) 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 Petitioners' claim for extension of time for achieving SCOD, any claim of the Petitioners for extension of time for achieving Conditions Precedent, is liable to be rejected. Thus, we hold that, for not complying with the timelines, as mentioned in the PPA, for Conditions Precedent and commissioning of the Project, the 1<sup>st</sup> 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 the delay in achieving the Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages, stipulated in the PPA.
- (n) Therefore, we answer Issue No.(1), in the negative.
- 12) **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 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 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, between 12 months and 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 (MESCOM), 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 extension of the commissioning date, agreed to, in the PPA.
- (c) It is stated in the Memo of submissions, filed by 1<sup>st</sup> Petitioner on 09.11.2017, that the SPV was formed on 03.05.2016. It is also mentioned in the Petition, in Paragraph-11 that, after signing the Deed of Assignment, the 1<sup>st</sup> Petitioner started the Project development work on the site, which includes land levelling, fencing, obtaining of the necessary approvals and sanctions such as, conversion of the land, evacuation line and loan sanctions. We note that, the Purchase Order for construction of the 11 kV transmission line was made on 01.07.2016, the Agreement for purchase of Solar modules was entered into on 09.09.2016, the Purchase Order for inverter was made on 12.10.2016, the Purchase Order for transformer was made on 29.10.2016, the Purchase Order for HTLT was made on 28.02.2017 and for the MMS on 20.03.2017. 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 the tariff 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 30.06.2017.
- (e) Hence, in the circumstances and on the facts of the case, we hold that the Petitioners' Plant is entitled to a tariff of Rs.4.36 per unit, for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017.
- (f) Accordingly, we answer Issue No.(3), as above.



13) **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;
- (c) The Petitioners are also liable to pay damages, as provided under Articles 2.2 and 2.5.7 of the PPA; and
- (d) Office is directed to process the SPPA dated 10.02.2017, for approval of the Commission.

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

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

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