

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

Dated : 27th November, 2018

Present:

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

OP No. 141 /2017

BETWEEN :

Welspun Renewables Energy Private Limited,
Hubtown Solaris, 4th floor, 406,
N.S.Phadke Marg,
Andheri East West Flyover,
Mumbai-400 069.

.. **PETITIONER**

[Represented by Navayana Law offices, Advocates]

AND :

- 1) Bangalore Electricity Supply Company Limited,
Corporate Office,
K.R Circle,
Bengaluru-560 001.
- 2) Karnataka Renewable Energy Development Limited,
No.39, Shantigruha,
Bharat Scouts and Guides Building,
Palace Road,
Bengaluru-560 001.
- 3) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
K.G.Road,
Bengaluru-560 009.

.. **RESPONDENTS**

*[Respondent-1 represented by Shetty & Hegde Associates, Advocates,
Respondent-2 represented by Shri. G.S. Kannur, Advocate,
Respondent-3 represented by Justlaw Advocates]*

ORDERS

1) The Petitioner has filed the Petition, under Section 62 read with Sections 64 and 86(1) of the Electricity Supply Act, 2003, in effect, praying to:

- a) Pass an order declaring that the Petitioner is entitled to tariff of Rs.7.09 per unit for the energy supplied by the Petitioner to Respondent -1 during the period between the COD and the Expiry date;
- b) Declare and deem that the effective date as per the PPA as on 4.5.2015 or any date thereafter;
- c) Pass an order approving the supplementary PPA dated 12.2.2016, executed between Petitioner and 1st Respondent;
- d) Declare that the Petitioner is not liable to pay any liquidated damages to the 1st Respondent in view of achievement of the COD within 18 months from the Effective Date under PPA,

or alternatively,

Condone the delay in achieving the COD that occurred purely due to Force Majeure Events and not attributable to the acts or omissions, on the part of the Petitioner; and,

- e) Pass such other and incidental orders, including an order as to costs, as may be deemed appropriate on the facts and in the circumstances of the case.

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- 2) The facts of the case and the grounds urged, in support of its prayers, as submitted by the Petitioner, may be summed up, as follows:
- (a) Pursuant to 2nd Respondent the Karnataka Renewable Energy Development Limited (KREDL), inviting Request for Proposal (RfP), the Petitioner participated in the bid and was issued a Letter of Award (LoA) dated 19.11.2014 by the KREDL for development of 50 MW capacity Solar PV Project at Kusthagi Taluk, Koppal District. Subsequently, the Petitioner requested the KREDL to accept Welspun Solar Kannada Pvt.Ltd, (SPV) as the entity, which shall undertake to perform the obligations under the LoA. Accordingly, the SPV entered into a PPA with the 1st Respondent on 14.01.2015 for the development of the Project, with the effective tariff at Rs.7.09 per unit. The Effective Date of the PPA was the date of its execution by both parties, as per the Article 3.1 of the PPA.
- (b) As per the prevailing procedure followed in the State, the PPA initialled on 14.01.2015 by the Petitioner, was sent to 1st Respondent for initialling and onward submission to the Commission for approval. The 1st Respondent, after initialling the PPA submitted it for approval and the Commission accorded its approval, vide letter dated 04.05.2015.
- (c) Such approval was duly documented in the PPA and the final version of the PPA was executed by the parties. Though, as per law and principles of natural justice, the 'Effective Date' of the PPA can be, any time after 04.05.2015, the Petitioner for the purpose of the present Petition assumes it

to be 04.05.2015. Without valid PPA, no project activity can be taken up and hence 04.05.2015 should be considered as the 'Effective Date', which is also accepted as the 'effective date' by the KREDL and the State Government.

- (d) The Petitioner started searching land at Kushtagi Taluk, Koppal District, but was forced to look for alternative sites, as it was informed by the KPTCL that connectivity will not be available at Belagatti. Subsequently, the Petitioner approached BESCO (1st Respondent) for change in location for complete 100 MW (including another 50 MW capacity allotted to the Petitioner). On approval by the 1st Respondent, a supplemental PPA dated 12.06.2016, was initialled between the Petitioner and the 1st Respondent for transfer of PPA, in the name of the Petitioner and change of location of the 50 MW capacity at Kushtagi Taluk, Koppal District to Bedareddyhalli village, Challakere Taluk, Chitradurga District.
- (e) The project was commissioned on 13.07.2016, despite constraints of approval of location change, change of name of the developer to the Petitioner, land acquisition, delay in evacuation approval and bay allocation, unprecedented heavy rains during October to December, 2015 and obstruction to transmission line construction by local villagers.
- (f) In spite of the commissioning of the project on 13.7.2016, there was a delay of 3 days in injecting the power to the Delivery Point, which was not the Petitioner's fault but due to line fault/line problem of the KPTCL, which

constitutes *Force Majeure* Event and the plant was synchronised on 17.07.2016 as stated by the Executive Engineer of 220 KV sub-station, Hiriur by e-mail dated 20.07.2016.

- (g) In the subsequent bid by the KREDL for 1200 MW Solar Projects, the 'Effective Date' has been taken as the date of approval of PPA by this Commission and therefore, as without a valid PPA no Project activity can be taken up, the Effective Date of the Petitioner's Project should be considered as 04.05.2015. The Petitioner has raised invoices for the months of July, 2016, at the tariff rate of Rs.7.09 per unit, but the 1st Respondent has unilaterally altered the tariff to Rs.6.51 per unit, which was accepted by the Petitioner under protest. Further, the 1st Respondent has also imposed liquidated damages for not achieving COD in terms of the PPA. The Petitioner requested 1st Respondent, by letters dated 14.11.2016 and 21.11.2016, not to penalise it for the delay attributable to various reasons, which were beyond the control of the Petitioner. The Respondent was also requested to consider commissioning of the Project, as deemed commissioned.
- (h) The Petitioner, by letters dated 15.12.2016 and 13.01.2017, submitted to the 1st Respondent the reasons for extension of time for commissioning / COD, on account of force majeure events and requested to consider its reasons for extension of time. The Petitioner, by letter dated 24.04.2017, requested the Additional Chief Secretary to the Government of Karnataka, to give suitable directions to consider the case of the Petitioner and approve the

time extension as deemed commissioned within time schedule. The 1st Respondent in its meeting of the Board of Directors, held on 11.05.2017 has granted approval for extension of the COD, subject to further approval of the Commission.

- (j) Eventhough, the Licensee has approved the time extension, the Commission is the ultimate authority to approve the tariff and condone the delay caused in the Project execution. However, instead of approaching the Commission, for clarity on the tariff, the 1st Respondent has unilaterally started deducting the tariff.
- (k) The tariff discovered through competitive bidding under Section 63 of the Electricity Act 2003, and applied to the project is specifically mentioned as per Article 12.1 as Rs.7.09 per unit, which is valid for the term of the PPA and there is no provision, under the PPA, to revise the tariff, by any party. Therefore, the 1st Respondent's action in revising the tariff to Rs.6.51 per unit is highly unjust, illegal and ultra-vires the PPA. Further, as this tariff of Rs.7.09 per unit is not determined by the Commission, under Section 62 of the Electricity Act 2003, but adopted under Section 63, it cannot be revised by any of the parties or the Commission.
- (l) There is no delay, in achieving the CoD and, even if it is presumed there is delay, there is no provision under PPA to revise the tariff for delay in the CoD beyond 18 months' time schedule agreed under the PPA. The PPA provides for applicable tariff as at the time of the CoD, which is the same

as the tariff agreed under the PPA. As per the PPA, the effective date is when both the parties execute the PPA, which happened subsequent to 04.05.2015. As the Effective Date is to be deemed, as any date on or after 04.05.2015, the Petitioner is not a defaulter, on any of the terms or timelines under the PPA. The PPA becomes legally enforceable, only upon approval by the Commission and the draft of the PPA initialled on 14.01.2015 is not a legally enforceable document and cannot be deemed as executed PPA, which in most of the cases, may vary from the final version of the PPA, approved by the Commission.

- (m) Even if 14.01.2015 is to be construed as effective date, the marginal delay in achieving the COD because of the fault occurred in transmission system of the KPTCL, cannot be a ground for unilateral revision of tariff. The tariff of Rs.6.51 per unit, determined by the Commission in its order dated 30.07.2015, is not applicable to the Projects, whose tariff is discovered through competitive bidding process. Further, the Commission has amply clarified in such order, passed in modification of the order dated 10.10.2013, that the tariff determined in the orders dated 10.10.2013 and 30.07.2015, is not applicable to the Projects, in respect of which tariff is discovered through competitive bidding process.
- (n) The Respondents should not be allowed to levy liquidated damages, as no loss or hardship has ever occurred to the Respondents due to a marginal delay of 2 days in the COD.

- 3) On issuance of notice, the Respondents appeared through their counsel and filed their statements of objections.
- 4) The objections of the 1st Respondent ,as per its statement dated 11.01.2018, may be stated, as follows:
 - (a) The KPTCL authorities, in the letter dated 13.07.2016, have certified that the terminal bays and controlling equipment at 220/66 kV Thallak, pertaining to evacuation of 50 MW solar power project of the Petitioner are idle charged, without any mention of commissioning of the solar plant.
 - (b) The Board of Directors of the 1st Respondent, in its meeting held on 11.05.2017, resolved to submit proposal for extension of the SCOD, in respect of the Petitioner's 50 MW plant, to the Commission. However, as per the directives of the Commission, the Petitioner has filed the Petition, with relevant grounds and documents, for justifying the claims for extension of time under *Force Majeure* clause.
 - (c) The 1st Respondent has prayed the Commission to accord directions in the interest of justice.
- 5) The 2nd Respondent has submitted that, it is for the 1st and 3rd Respondents to counter the averments made by the Petitioner and it has no role to play in the petition. It has, therefore, sought for dismissal of the Petition against it.

- 6) The Objections of the 3rd Respondent may be stated, as follows:
- (a) The contentions of the Petitioner that, it had to change the project location due to non-availability of interconnection facility by the KPTCL (3rd Respondent) and there was delay by the 3rd Respondent, in granting evacuation and bay allocation approvals, are vague and bald statements, without being substantiated. The allegations are denied and it is an attempt to camouflage the inabilities of the Petitioner.
- (b) No communication has been issued, stating that interconnection facility is not available, in the Petitioner's original Project location at Koppal. Therefore, the Petitioner's averment that it was constrained to change its Project location, due to non-availability of interconnection facility, is not tenable. The change of location is only to suit the convenience of the Petitioner's promoter.
- (c) In furtherance to the Petitioner's letter dated 12.01.2016, requesting to grant evacuation approval, the Petitioner was directed on 09.02.2016 to pay the processing fee towards evacuation scheme approval, which the Petitioner paid on 10.02.2016 and tentative evacuation approval, under self-execution basis was granted on 03.03.2016, subject to the condition that evacuation from the Project is to be feasible, only after the commissioning of 220 kV DC line from 400 kV PGCIL, Hiriyyur Sub-station to 220 kV Thallak sub-station by the KPTCL. The Petitioner communicated its acceptance, for the tentative evacuation scheme on 04.03.2016 and the

regular evacuation scheme approval was granted on 23.03.2016, subject to the earlier specified condition. Thus, there is no delay, in granting evacuation approval and it has been given, within a reasonable time. The Petitioner has applied for evacuation approval after a lapse of nearly one year from the execution of the PPA and, therefore, the contention of the Petitioner that there was delay, in granting evacuation approval, is not tenable.

- (d) As per Article of the PPA, the Petitioner was required to obtain evacuation approval, which is one of the Conditions Precedent to be achieved, within one year from the effective date, i.e., by 13.01.2016. However, the act of the Petitioner in applying, after a delay of nearly one year, from the effective date of execution of the PPA, establishes beyond doubt that the Petitioner has not acted diligently, in timely execution of the Project and no delay is attributable to the 3rd Respondent.
- (e) The Petitioner's averment that it could not inject power from the date of the SCOD, due to the fault of the line of the KPTCL is untenable and denied. Even otherwise, the Petitioner has not followed the procedure contemplated, under the PPA, in the event of a *Force Majeure* circumstance. The claim of *Force Majeure* Event raised, for the first time, in the present proceedings, is not permissible and untenable.
- (f) The Petitioner was required to construct dedicated transmission line, from its project pooling station to the Thallak Sub-station with necessary terminal

bays and control equipment, as per the tentative and regular evacuation approvals granted, which is in line with the obligation cast on a generator, under Section 10 of the Electricity Act, 2003. For reasons best known to the Petitioner, the line connecting its project to grid, which was required to be kept ready for evacuation of power, was not ready on the Scheduled Commissioning Date i.e., 13.07.2016. Therefore, the Petitioner's averment that it could not inject power from the scheduled date, due to fault in the line of the KPTCL, is untenable and denied. The Executive Engineer, (Elec), SRS, Hiriyyur has clearly stated that the line could not be synchronised due to line faults. The Petitioner having failed to fulfil its obligations cannot, attribute the failure to the 3rd Respondent.

- (g) As per Article 5.3 of the PPA, the Petitioner was required to obtain all information with regard to interconnection facilities as it is reasonably necessary to enable it to design, install and operate all interconnection plant and apparatus on the developers' side of the delivery point to enable delivery of electricity. Further, as per Article 5.4 of the PPA, the Petitioner was responsible for power evacuation, from its plant to the nearest delivery point. Therefore, the Petitioner's averment, with regard to the alleged cause for the delayed execution, etc., to claim higher tariff, is not tenable.
- (h) The Petitioner was allocated land for construction of two nos. of 66 kV terminal bays on 24.04.2016 itself, pursuant to its request made on

20.04.2016 and hence the contention of the Petitioner that there was delay in this regard is not tenable.

(j) The Petitioner's averment that the Commission does not have power to alter the tariff adopted under Section 63 is untenable and denied. Similarly, the averment of the Petitioner that there is no delay in achieving CoD is untenable and denied and such statement is also contrary to the Petitioner's own admission in the petition.

(k) The 3rd Respondent has accordingly sought for dismissal of the Petition.

7) Subsequently, the 1st Respondent filed additional statement of objections, the gist of which may be stated, as follows:

(a) The 1st Respondent has acted strictly, in terms of the PPA dated 14.01.2015, which stipulates the time frame within which the Petitioner was required to commission the project. Further, from the definition of COD as in the PPA, it is clear that the Project is said to be commissioned, only when it starts injecting power. Power was not injected from the plant, within the stipulated time frame i.e., on or before 14.07.2016 and the Petitioner started injecting total capacity power only from 17.07.2016. The Petitioner has not produced any document to indicate that its plant achieved COD, prior to 17.07.2016 and there is no question of deemed commissioning of the project on 13.07.2016.

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- (b) Article 12 of the PPA clearly states that in the event of delayed execution of the project the Petitioner would be entitled only to a tariff of Rs.6.51, in terms of the Commission's Order dated 30.07.2015. There has been no unilateral modification of the tariff as contended by the Petitioner because, the terms of the PPA were known to the Petitioner at the time when Request for Proposal (RFP) was published by the 2nd Respondent. The Petitioner after accepting all the terms of the PPA in toto, cannot now contend that the tariff derived by bid route, under Section 63 cannot be modified. The claim of the Petitioner that it could not inject power from the date of its SCOD because of *Force Majeure* Event, is not tenable as it does not constitute *Force Majeure*, under Article 14 of the PPA. Further, even otherwise, the Petitioner has not followed the procedure contemplated, under the contract in the event of *Force Majeure* circumstances.
- (c) As per Article 5.3 and 5.4 of the PPA the Petitioner was required to obtain all information with regard to interconnection facilities and was responsible, for power evacuation from the power project to the nearest delivery point. The Petitioner is attempting to take advantage of its own wrong, in failing to fulfil its obligations under the PPA, by claiming a higher tariff, which is not permitted under law.
- (d) As per Article 5.8.1 of the PPA, the Petitioner is required to pay Liquidated Damages for the delay in commencement of supply of power, within the

SCOD and the Petitioner being, admittedly, unable to do so, cannot seek waiver of the Liquidated Damages and other penalties.

- (e) As per Article 3.1 of the PPA, the Effective Date is the date on which parties execute the PPA and the Petitioner being aware of the terms of the PPA, prior to executing the same cannot seek a different interpretation, and thereby alter the terms of the PPA, to suit its needs. The Commission, while examining this issue in OP No.02/2017, has held in the Order dated 17.10.2017, that effective date is the date of execution of the PPA. The Petitioner's claim that the Commission does not have the power to alter the tariff determined by the way of bidding is not tenable as, if the Petitioner's contention is accepted, there would be no adverse consequences for delayed execution of project. Even otherwise, the tariff payable, for power should be commensurate with the rates, payable at the time of commissioning and any other interpretation would be illogical. The Petitioner's contention that the tariff fixed, in the order dated 30.7.2015, is not applicable to the Projects, where tariff is arrived, through bid route is denied, as there is no such bar.
- (f) The Petitioner's claim that in the 82nd Board Meeting of Directors of the 1st Respondent, the Petitioner was given extension of time, to achieve the COD is untenable, as in the meeting it was only resolved that the proposal for extension of time to the Petitioner could be submitted before the Commission, for approval.

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- (g) The Petitioner's averments regarding unprecedented rain, obstruction by local villagers etc., are self-serving statements without being substantiated and therefore, denied. Further, the Petitioner's averment that there was delay of 3 days in injecting power not due to fault of the Petitioner, but due to the KPTCL's fault, is untenable.
- (h) The 1st Respondent has made payments at the rate of Rs.6.51 to the Petitioner, towards the energy supplied, as there was delay in commissioning of the plant.
- (j) The 1st Respondent has accordingly, sought for dismissal of the Petition.
- 8) (a) The Petitioner had filed an application for rejection/dismissal of the additional statement of objections, filed by the 1st Respondent on the ground that it was not filed with the leave of the Commission and there is no provision under Regulations to file such statement against 1st Respondent's own earlier statement of objections. That such statements cannot be allowed to be filed, when the pleadings are complete and the Petitioner has already concluded its arguments. The Petitioner had therefore, sought for rejection of the additional statement of objections dated 12.04.2018, filed by the 1st Respondent.
- (b) In response to the Petitioner's objections to the additional statement of objections filed by it, the 1st Respondent has contended that, it was filed to substantiate the objections, filed earlier on 11.1.2018 in response to the

clarifications sought by the Commission with regard to the stand taken by the 1st Respondent on several issues, involved in the case. That the Commission has the discretion to accept the additional statement of objections and there is no impediment to file additional statement of objections, till the matter is reserved for orders/judgment. That the Petitioner's claim that the 1st Respondent has taken a contradictory stand in the additional statement of objections is denied, as it only substantiates the earlier objections, filed.

- (c) With regard to the issue of the 1st Respondent, having filed additional statement of objections and the Petitioner seeking its rejection, as being not permitted under law and being contradictory to the earlier statement of objections, filed by the 1st Respondent, we find that there are no contradictory statements by the 1st Respondent from its earlier statement, as alleged by the Petitioner. In any case we find that the additional objections of the 1st Respondent only reiterate the stand taken by the 3rd Respondent, to which the Petitioner has submitted its rebuttal. Hence, we reject the Petitioner's application for rejection of the additional statement of objections, filed by the 1st Respondent.

- 9)(a) One of the prayers made by the Petitioner is to approve the SPPA dated 12.02.2016 (ANNEXURE-P4), entered into between the 1st Respondent (BESCOM) and the Petitioner, to modify the PPA dated 14.01.2015, entered into between the 1st Respondent (BESCOM) and 'M/s. Welspun Solar Kannada Private Limited', the Special Purpose Vehicle (SPV), formed

by the Petitioner for developing the 50 MW capacity Solar Power Project. In effect, the SPPA dated 12.02.2016 is executed to evidence the transfer of the Solar Power Project from the SPV to the Petitioner. The Petitioner, a Single Business Entity, was awarded the 50 MW capacity Solar Power Project, as per the Letter of Award (LoA) dated 19.11.2014, and in accordance with the terms of the Request for Proposal (RfP), the Petitioner, in turn, permitted and incorporated the SPV, to develop the Solar Power Project and to enter into the PPA. Accordingly, the SPV has executed the PPA dated 14.01.2015.

- (b) The Petitioner has not made clear, in its pleadings, as to whether the legal relationship of the Petitioner and the SPV is that of a Principal and an Agent, or as to whether the Solar Power Project vests in the SPV, after its formation and execution of the PPA with the 1st Respondent (BESCOM). The recitals in the SPPA, would show that the SPV had requested to transfer the PPA to the Petitioner. A mere request by the SPV, to transfer the Solar Power Project, in favour of the Petitioner, may not be sufficient, unless the same is evidenced by proper legal documents. The Petitioner has not produced any such legal document. Therefore, for the present, we do not approve of the SPPA dated 12.02.2016 (ANNEXURE-P4). The Petitioner is at liberty to produce proper documents, to establish the transfer of the Solar Power Project to it, for getting the SPPA approved by this Commission. We proceed further, to consider the other issues, assuming that the Petitioner would produce such legal documents to evidence the vesting of the Solar Power Project in it.

10) We have heard the learned counsel for the parties and perused the material placed on record. The following issues would arise, for our consideration:

(1) Whether the Petitioner has made out a case for deferment or extension of the scheduled Commissioning Date of its Project?

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

(3) What orders?

11) 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:

12) **ISSUE No.(1):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Project?*

(a) The contention of the Petitioner is that, the PPA in question (ANNEXURE-P3), was executed on a date after 04.05.2015 and, therefore, the 'Effective Date' should be considered as 04.05.2015, the day on which the approval of the PPA was communicated. The Petitioner has stated, in its Petition that, as per the prevailing procedure followed in the State of Karnataka, a PPA is only initialled by the parties and thereafter, it would be submitted to this Commission, for approval and subsequent to the approval by this Commission of the initialled PPA, the parties would execute the PPA. Further, it has stated that, the initialled PPA dated 14.01.2015 was submitted to this Commission, for approval, and this

Commission communicated the approval of the PPA, in the letter dated 04.05.2015 and, thereafter, both the parties have executed the PPA (ANNEXURE-P3). The Petitioner contends that, though the PPA (ANNEXURE-P3) was dated 14.01.2015, as a matter of fact, it was executed on 04.05.2015, after receiving the communication of the approval of the initialled PPA. Therefore, the Petitioner has made a prayer, to declare that, the 'Effective Date' of the PPA is deemed to be 04.05.2015. The Respondents 1 and 3 have denied the above contention of the Petitioner. They have specifically contended that, the PPA has been executed on 14.01.2015, which should be considered as the 'Effective Date', as per the terms of the PPA, and the Project should be commissioned within 18 months from 14.01.2015. The Commission notes that, there is no such procedure, in the State of Karnataka, as stated by the Petition, for approval of a PPA. A PPA, executed between a Generator and a Distribution Licensee, would be submitted for approval of the Commission, and after following due procedure and scrutiny of the terms of the PPA, this Commission approves the PPA, subject to any modification, if required. Subsequently, those modifications, if ordered, would be carried out in the PPA, by way of executing a Supplemental PPA. But, there is no procedure to execute a fresh PPA, after communication of the approval of the PPA. The terms and conditions in a PPA, would become binding from the date of the PPA itself and the approval of the PPA, with or without modifications, would be effective from the date of the PPA. In the PPA dated 14.01.2015 (ANNEXURE-P3), there is a mention that, the Commission has conveyed its approval to this PPA, by its letter dated 04.05.2015. The PPAs are prepared

in two or three sets and it appears, one set of the PPA, would be handed over to the Generator, after receipt of the communication of the approval of the PPA, duly recording, therein, the fact of the approval of the PPA. Therefore, the contention of the Petitioner that the PPA (ANNEXURE-P3) is deemed to have been executed on or after 04.05.2015, cannot be accepted.

- (b) Thus, the Petitioner's Solar Power Project, cannot be taken as commissioned within the Scheduled Commissioning Date. The Petitioner has claimed an extension of time for commissioning of this Unit, under the *Force Majeure* clause of the PPA. Therefore, we may examine, whether the Petitioner has established its claim for extension of time.
- (c) The Petitioner has urged that the Effective Date of the PPA, entered into by it with the 1st Respondent, in respect of its 50 MW Solar Power Project, should be taken as the date of its approval by the Commission. The Respondents have contended that, such claim is contrary to clauses of the PPA, which define the effective date to be the date of signing of the PPA by the parties. They have also contended that the definition of effective date of the PPA, in the later PPAs, cannot be made applicable to the Petitioner's case, as sought by the Petitioner. We note that the RfP does not provide for any change in the definition of 'Effective Date' of the PPA and also that while the Effective Date in the later PPAs was defined, as the date of approval of the PPA, by the Commission, the time allowed for commissioning the Solar Power Projects, was set at 12 months, from the

Effective Date, as compared to 18 months specified in the earlier PPAs. Hence, we find no merit in the Petitioner's claim regarding the effective date of the PPA. We also note that the Petitioner has not cited or elaborated the activities that were adversely affected, in the absence of the Commission's approval to the PPA.

(d) The Petitioner has relied upon the Commissioning Certificate dated 13.07.2016 (ANNEXURE-P5), to contend that its Solar Power Project was commissioned on 13.07.2016. A perusal of the said Commissioning Certificate does not disclose that the Solar Power Project was commissioned on 13.07.2016. This Certificate simply states that '*... two numbers of 66 kV Terminal Bays along with controlling equipments at 220/66 kV Thallak are idle charged & stood ok on 13.07.2016 ...*'. Further, it states that '*.... Two numbers of bulk tariff metering (50 MW) bays at 220/66 kV Thallak KPTCCL Sub-Station bearing RR No.: TLKWRE-30 & TLKWRE-31 are charged at 66 kV voltage level ...*'. One can see that, this Commissioning Certificate (ANNEXURE-P5), would only evidence that the electrical plants, connected to the dedicated line of 220 kV at the terminal bays, along with two bulk tariff meters, were charged and found to be in order. Therefore, this Commissioning Certificate does not establish the commissioning of the Solar Power Project.

(e) The Petitioner has claimed that the commissioning of its Project, within the scheduled commissioning date, as agreed in the PPA was delayed because of delay in evacuation approval and bay allocation,

unprecedented rains, obstruction to transmission line construction by local villagers. The 3rd Respondent has denied the alleged delay in evacuation approval and bay allocation and per contra, pointed out delay on the part of the Petitioner. The 3rd Respondent has given the details of dates of the Petitioner's applications and grant of approval/allocation. We find that there is no delay on the part of the 3rd Respondent, in granting evacuation approval and allocation of land for construction of bays and that time taken for such processes appears reasonable. On the other hand, we find that the Petitioner inordinately delayed in applying to the KPTCL for evacuation approval and allocation of land for bay, because of its own decision to change the location of its solar power plant, for reasons not disclosed by it.

- (f) The Petitioner's claim of unprecedented rains delaying its Project implementation, is not substantiated and in any, case as noted earlier, the project implementation was delayed, mainly because of the Petitioner's own decision to shift the location of its project and inordinate delay in applying for evacuation approval.
- (g) As regards Petitioner's claim of obstruction by local villagers to construction of transmission line is concerned, we find that such claim is not substantiated. Further, admittedly the commencement of construction of the transmission line by the Petitioner, was delayed, because of belated application for evacuation approval, the reasons for which have not been explained by the Petitioner. Had the Petitioner

applied for evacuation approval soon after execution of the PPA and commenced construction of transmission line immediately after grant of necessary approval by the KPTCL, the transmission line could have been constructed much earlier, even with minor delays, due to external factors. Further, we note that it was the obligation of the Petitioner to arrange for inter connection facility, within the time line stipulated in the PPA. We may note here that, the Petitioner participated in the bidding proceedings, for development of 500 MW solar power energy, in the State, through power sector participation, which commenced on 30.5.2014 with the issue of 'Request for Proposal' by the KREDL. It is reasonable to expect that participants like the Petitioner, would have had adequate knowledge and expertise, to plan and arrange for implementing the different stages/ aspects of the Projects, within the timelines, envisaged in the Request for Proposal and the bidding documents by adopting prudent business practices. The Petitioner has not revealed its action plan and demonstrated its earnestness in implementing it.

- (h) It is a settled law that the *Force Majeure* clause in the PPA, has to be strictly interpreted. We note that no Notice, as contemplated under Article 14.5 of the PPA, is stated to have been issued by the Petitioner to the 1st Respondent, describing the particulars of the *Force Majeure* Event, as soon as possible, after its occurrence. The letters statedly written by the Petitioner to the 1st Respondent, giving details of project execution, cannot be taken as Notices, issued under Article 14.5 of the PPA. Further, we have noted that none of the reasons or events, cited by the Petitioner

for the delay in commissioning of its Projects, falls under *Force Majeure* Events, as mentioned in the PPA.

- (j) The claim of the Petitioner that the 1st Respondent in its 82nd meeting of the Board of Directors held on 11.05.2017, granted approval for extension of COD, is denied by the 1st Respondent. The 1st Respondent has contended that it was only resolved that proposal for extension of time to the Petitioner shall be submitted, before the Commission for approval. We find that, there is no extension of time for achieving commissioning of the Petitioner's project, by the 1st Respondent. In any case, as we have held, on this issue in other cases, as per the ratio of the Hon'ble Supreme Court's judgment, in the case of All India Power Engineers Federation Ltd. vs. Sasan Power Ltd, reported in (2017) 15 CC 487, the Commission has the exclusive jurisdiction to consider the validity of extension time, for commissioning of a project, when it affects the tariff payable to a generating company, ultimately passed on to the consumers.
- (k) Hence, we consider that the Petitioner is not entitled to extension of time for commissioning its plant beyond the SCOD, as provided in the relevant clauses of the PPA. Consequently, the Petitioner would be liable for payment of liquidity damages, as per Article 5.8 of the PPA.
- (l) We have held that the Petitioner is not entitled to the extension of time to commission its Project. Admittedly, the Petitioner has not achieved the "Conditions Precedent" within the specified time as required under Article

4.1 of the PPA. The actual dates, on which they were achieved, have not been furnished. For the same reasons, as applicable the rejection of the Petitioner's claim for extension of time for achieving SCOD, any claim of the Petitioner, for extension of time for achieving Conditions Precedent, is liable to be rejected. The Petitioner's claim that the 1st Respondent has waived the consequences of delay in achieving "Conditions Precedent" are not substantiated and rejected.

- (m) 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 liable to pay damages for such delay, as per Articles 4.3 and 5.8 of the PPA.
- (n) The Hon'ble Supreme Court of India, in Civil Appeal No. 3600 of 2018 (*M.P.Power Management Company Ltd. Vs Renew Clean Energy Pvt. Ltd., and another*), decided on 05.04.2018 has held that, for the delay in achieving the Conditions Precedent and commissioning the Project, the generating company is liable to pay damages, stipulated in the PPA. Therefore, we do not find any merit in the Petitioner's argument that such damages cannot be levied, for the delay caused, as it has no cost implication on the 1st Respondent.
- (p) The judgments of the Hon'ble Supreme Court, in the case of *Gujarat Urja Vikas Nigam Ltd. vs. ACME Solar Technologies (Gujarat) Pvt.Ltd., & others, M.P.Power Management Co., Ltd. vs. Renew Clean Energy Pvt.Ltd., and*

another and other cases, cited by the Petitioner, to support its claims, would not apply to the facts of the Petitioner's case.

(q) Therefore, we answer issue No.2 in the negative.

13) **ISSUE No. (2):** *What should be the tariff, for the term of the PPA?*

(a) Article 12.2 of the PPA reads as follows:

"12.2 Provided further that as a consequence of delay in Commissioning of the Project beyond the Scheduled Commissioning Date, subject to Article 4, if there is a change in KERC applicable Tariff, the changed applicable Tariff for the Project shall be the lower of the following:

- i. Tariff at in Clause 12.1 above.*
- ii. KERC applicable tariff as on the Commercial Operation Date."*

(b) The above clause 12.2 of the PPA, 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 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 and commission the Project which, in respect of megawatt scale Solar Power Plants is taken as, between 12 months to 18 months. Any delay or failure in the commencement of the power supply, within the agreed date, would disrupt the operation of the Distribution Licensees, like the Respondent, 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, rapidly, in the recent years, because of the advancement in technology and production efficiency, as well as the economies of scale, because of largescale solar capacity additions 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 Commission's 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 Commission's Order dated 12.04.2017 and now to Rs.3.05 per unit in the Order dated 18.05.2018.

- (c) The Petitioner 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 Petitioner to seek extension of the commissioning date, agreed to in the PPA.
- (d) Article 12.2 of the PPA provides that the tariff, as on the date of the commercial operation, would be applicable for the Project. As we have held in similar cases, in view of the relevant clauses and the definition of the COD in the PPA, the commissioning of solar project or achieving commercial operation, would mean injection of the power generated from the solar power project into the grid. Therefore, the Petitioner's claim that there was no delay in commissioning of the project, but only in injection of power and thereby, the tariff applicable to the Project, as agreed in the PPA is not affected, is not acceptable. Admittedly, power from the Petitioner's 50 MW Solar Power Project was injected into the grid only on 17.07.2016.
- (e) The Petitioner has not furnished any material particulars of the cost incurred in implementing the Project and the period when investments were actually made. From the Petitioner's claim that the alternative location of its 50 MW Project was approved by the 1st Respondent only on 12.02.2016, we may safely infer that, the major part of investments have been made only after February, 2016. In any case, as noted earlier, as per the terms and conditions of the PPA, the tariff payable to the Petitioner is not based on the capital cost incurred by the SPD/Petitioner,

in Project implementation, but the tariff as per the relevant clauses of the PPA.

- (f) 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 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...."

- (g) In the decision of the Hon'ble Appellate Tribunal for Electricity in Appeal No. 221/2016 and others dated 07.05.2018 (*Savitha Oil Technologies Ltd vs KERC & another*), it has been held that the tariff, as on the COD, is

applicable for a project and the tariff should not be linked to the date of signing or approval of the PPA. The relevant portions of the judgment are extracted below:

“xi. Further, it is a settled practice under the Section 62 of the Act that tariff determination process under various regulations for a new project begins from the COD of the said project as per extant regulations of the control period where COD of the project takes place. Subsequently, the tariff of such project is adjusted based on regulations/orders of the subsequent control period and it is not linked to the date of signing/approval of the PPA. If the PPA is approved at a later date or in other control period the tariff is applicable from the COD date as per prevalent regulation at that time.

.....

xiv. In the present case too after carefully considering the provisions of the Act, 2004 Regulations, 2005 Order, 2009 Order, earlier judgement of this Tribunal and keeping in view the interest of the consumers it would be correct to draw a conclusion that the tariff applicable to the Appellants' WPPs would be as per the 2005 Order during which COD of the WPP has happened. The same corollary is applicable to other WPPs having COD is in some other control period.”

- (h) The ratio of the above judgments of the Hon'ble Supreme Court and the Hon'ble Appellate Tribunal for Electricity is applicable to the Petitioner's case.
- (j) Hence, in the circumstances and on the facts of the case, we hold that the Petitioner's 50 MW capacity Solar Power Project, should be governed

by the tariff of Rs.6.51 (Rupees Six and Paise Fifty-One) only per unit, for the term of the PPA, as per the Generic Tariff Order dated 30.07.2015.

(k) Accordingly, we answer Issue No. (2), as above.

15) **ISSUE No.(3)**: *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 shall produce the relevant documents, to establish the transfer of the 50 MW capacity Solar Power Project, from M/s. Welspun Solar Kannada Private Limited, to it for obtaining the approval of this Commission for the SPPA dated 12.02.2016 (ANNEXURE-P4 to the Petition), within 4 (four) weeks from the date of this Order;
- (c) The Petitioner is entitled, for the energy supplied, to a tariff rate of Rs.6.51 (Rupees Six and Paise Fifty-One) only per unit for a period of 25 (twenty-five) years from the Commercial Operation Date; and,
- (d) The Petitioner is liable to pay Liquidated Damages for the delay in commencement of the supply of power to the 1st Respondent (BESCOM), from its Solar Power Project, as per Article 5.8 of the PPA and also damages, as per Article 4.3 of the PPA, for the delay in achievement of the Conditions Precedent.

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

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

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