

**No.: N/199/2018**

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**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**

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

**Dated : 03.12.2019**

**Present:**

Shri Shambhu Dayal Meena	..	Chairman
Shri H.M. Manjunatha	..	Member
Shri M.D. Ravi	..	Member

**OP No.73/2018**

**BETWEEN:**

M/s Solvis Energie India Private Limited,  
#13/14, Venkateshwara Building,  
Reservoir Street, Kumara Park West,  
Bengaluru-560 020.

*[Petitioner represented by Sri. Ravi. C.S  
and Shiva. K.V, Advocates]*

...

**PETITIONER**

**AND:**

- 1) The Principal Secretary to Government  
of Karnataka,  
Energy Department,  
2<sup>nd</sup> Floor, Vikasa Soudha,  
Dr.B.R. Ambedkar Veedhi,  
Bengaluru-560 001.
- 2) The Managing Director  
Bangalore Electricity Supply Company Limited,  
K. R. Circle,  
Bengaluru – 560 001.

- 3) The Chief Engineer  
Karnataka Power Transmission Corporation Limited,  
Hiriyur, Chitradurga District. ... **RESPONDENTS**  
*[Respondent-1 represented by Sri. G.S. Kannur, Advocate]*  
*[Respondent-2 represented by Just Law, Advocates]*

### **ORDERS**

- 1) This Petition is filed under section 86(1)(f) of the Electricity Act, 2003, in effect, praying to:
- a) Approve the Supplementary Power Purchase Agreement (SPPA) dated 06.09.2017 at the rate of Rs.6.51 per unit, as per the Order issued by the Government of Karnataka;
  - b) Direct the Respondent to make payment for the delivered energy under supplemental agreement dated 28.04.2017 and SPPA dated 06.09.2017 at Rs.6.51 per unit from the Commercial Operation Date of the project for the entire term of the PPA; and
  - c) Pass such other and incidental orders, including an order as to costs as may be deemed appropriate in the facts and circumstances of the case.
- 2) The facts submitted by the Petitioner, in support of the prayers, may be summed up, as follows:
- a) The Government of Karnataka with an intention to increase generation of Solar Power and encourage farmers to set up solar

power plants, issued a Notification dated 26<sup>th</sup> August, 2014 in terms of the Solar Policy of the State. Bids were called by KREDL, the Nodal agency, for selection of farmers. Pursuant to bids called, one Smt. R. Gayathri, involved in farming, applied online, to establish a solar power plant of 2 MW capacity. KREDL, after evaluation of the Applications received, accepted her Application for allotment of the Solar Project and issued a letter dated 17<sup>th</sup> March, 2015 to set up 2 MW capacity Solar Power Project at Sy. No. 159/1, 160/1, 173/1, 211/1, 211/2, 211/3 and 211/4 of Haralalu Village, Kasaba Hobli, Kanakapura Taluk, Ramanagara District, under 1- 3 MW Farmers Scheme, subject to certain terms and conditions. Smt. Gayathri (SPD) executed a Power Purchase Agreement (PPA) dated 02.07.2015 with the 2<sup>nd</sup> Respondent. The PPA was approved by the Commission vide letter dated 31.08.2015. As per the PPA, the Effective Date is defined as the date of signing of the PPA. The Scheduled Commissioning Date (SCD) is defined as 18 months from the Effective Date. Thus, the project proponent was supposed to commission the project by 01.01. 2017.

- b) It was found that the said land at Kanakapura Taluk was technically unsuitable to establish the solar power plant, due to minimal solar irradiation and unsuited topography. Due to this, the SPD purchased alternative land at Challakere Taluk, Chitradurga

District, by making considerable investment. Immediately thereafter, the SPD approached the 1<sup>st</sup> Respondent by representation dated 02.09.2015 seeking permission to shift the project site from Kanakapura Taluk, Ramanagara District to Challakere Taluk, Chitradurga District. The Government of Karnataka, vide Cabinet decision dated 18.01.2017, considered the Representation of the SPD and other similarly situated farmers for change of project location. The Tariff was revised from Rs. 8.40 per unit to Rs.6.51 per unit and extension of time by six (6) months' was granted for completing the project, vide GO dated 21.1.2017. The SPD initiated steps to apply for necessary permissions, but was shocked to receive a letter dated 04.02.2017 by KREDL informing that Challakere Taluk had crossed the limit of 200 MW capacity and that she had to procure alternate land. Immediately, the SPD approached KREDL and the State Government explaining her difficulty in identifying another alternate land as she had to invest huge amount on the land once again. After a lapse of two months, the State Government vide letter dated 17.04.2017 accorded permission to the SPD to execute the project in the land procured at Challakere Taluk. The KREDL vide letter dated 19.04.2017 accorded permission to the SPD to go ahead with project at Challakere Taluk.

- c) The SPD thereafter applied for and obtained all the necessary permissions, licenses, etc., as per the terms of PPA. The Special Purpose Vehicle (SPV) was formed under the name 'SOLVIS ENERGIE INDIA PRIVATE LIMITED' the Petitioner. An SPPA dated 28.04.2017, was executed modifying the original PPA to indicate the formation of SPV. This SPPA was approved by the Commission vide letter dated 23.05.2017. The project work was completed and the Respondent No.3 issued the Work completion report on 01.07.2017. The 2<sup>nd</sup> Respondent issued the Commissioning Certificate certifying the commissioning of the project on 01.07.2017, which is well within the SCD assigned by the Respondent, pursuant to GO dated 21.01.2017.
- d) The 2<sup>nd</sup> Respondent released payment for the delivered energy for three months at Rs.6.51 per unit. Another SPPA dated 06.09.2017 was executed between the Petitioner and Respondent-2 indicating reduction in tariff and modification of SCD to 01.07.2017. The SPPA was forwarded to the Commission for approval. Pending approval of this SPPA, the Petitioner received a letter dated 04.05.2018 calling upon to submit consent letter for reduced tariff of Rs.4.36/- per unit. Hence, this petition.
3. The Grounds urged by the petitioner are:
- a. The Commission has passed three generic tariff orders in respect of solar power projects viz.; Generic tariff orders

dated 10<sup>th</sup> October, 2013, 30<sup>th</sup> July, 2015 and 12<sup>th</sup> April, 2017. In the tariff order dated 30<sup>th</sup> July, 2015 (passed in modification of the earlier tariff order), it is clearly stated that in respect of projects that are commissioned during the period from 01<sup>st</sup> September, 2015 to 31<sup>st</sup> March, 2018 for which, the PPAs have been entered into and submitted to the Commission prior to 01<sup>st</sup> September, 2015 for approval, the tariff as per the said agreements shall be applicable. Hence, the Petitioner is entitled to the tariff of Rs.6.51 per unit as mentioned in the SPPA.

- b. The PPA executed between the parties not only provides for the time period within which the SCD has to be achieved, but also provides for the right of the Respondent to grant extension of time. Accordingly, the Petitioner has commissioned the project within the mutually agreed SCD. The Letter dated 03.08.2017 reflects that on the Commercial Operation Date (COD), i.e., 01.07.2017, the project has imported and exported power. Hence, the Petitioner is entitled to the tariff of Rs.6.51 per unit, as per the SPPA.
- c. Without the fault of the SPD, two months was consumed by KREDL and the State Government to accord permission to execute the project and approve the change in location. As

per the GO dated 21.1.2017, six months' more time was accorded to complete the project. But, the SPD could not initiate any steps due to the Letter issued by the KREDL dated 04.02.2017. Thus, the two months' delay should be attributable to KREDL and the State Government. The project of the Petitioner experienced hurdles which are force majeure events within the meaning of the Article 8 of the PPA. Therefore, the petitioner has prayed to allow the petition.

- 4) Upon issuance of Notice, the Respondents 1 and 2 entered appearance through their Counsel and filed Objections.
- 5) The gist of the Statement of Objections filed on behalf of Respondent No. 1 is as follows:
  - a. The SPD vide letter dated 02.09.2015 requested the Government of Karnataka to change the project location from Kanakapura taluk to Challakere taluk as the land in Kanakapura was fertile and trees had to be cut to put up the solar project. The petitioner cannot blame the Respondent for the delay in execution of the project, as the SPD's request for change of location of the project was being considered to benefit her, even though the change of location was not permissible. It was clearly informed at the time of online

applications and instructions were given to the land owners, that *“Change in Survey Number will not be allowed. If different Survey Nos. are provided during submission of hard copy, such applications will be rejected”*. Hence, any change in location was not permissible as per Guidelines and Instructions. The petitioner cannot ask the Government to relax certain conditions and turn around to say that the respondent did not act within time. The SPD ought to have selected appropriate and suitable land with good radiation, evaluation facility etc., at the time of applying for selection under the scheme.

- b. The Government of Karnataka had issued Solar Policy vide Notification No. EN 21 VSC 2014 dated 12.01.2017, with the following stipulation:

*“Minimum program targets: Solar generation would be limited to 200 MW per Taluk from all sources of generation excluding projects implemented on solar roof tops. Such projects shall be allocated based on first come first serve basis for various categories of projects identified under this clause of the Solar Policy, with a priority for projects under the State Programme”*.

- c. As the changed location sought had crossed 200 MW capacity fixed for solar power projects, KREDL sought

clarification from the Government with regard to the capacity restriction of 200 MW for a Taluk. The Government vide letter dated 17.04.2017 clarified that the capacity of 200 MW would not be applicable to the land owing farmers scheme and hence the SPD was eligible to commence the project in the changed location sought by her. The KREDL informed the SPD about the clarification given by the Government vide letter dated 19.04.2017. The Government while considering the request for change of location has made it clear in the letter dated 21.4.2017 (Annexure-R 2) that the SPD would be entitled to Rs.6.51 per kWh with an extension of 6 months' time from 01.01.2017. The revised SCD would be 01.07.2017.

- d. On 21.04.2017, KREDL accorded approval for change of project location to Channamangathihalli Village, Challakere Taluk, Chitradurga District. On 28.04.2017, a Supplementary PPA was executed between the Respondent No.2 and the SPD and based on the GO dated 21.01.2017, SCD was changed to 01.07.2017. The tariff was reduced from Rs.8.40/kWh to Rs.6.51/kWh and it was also clarified that for any delay in commissioning the project beyond 01.07.2017, the Petitioner would only be eligible to varied tariff prevalent

on the date of commissioning. Further, it was also mentioned in the SPPA that the parties agree not to invoke the provisions of Article 2.5.2 of the PPA.

- e. The SPD transferred the PPA to Solvis Energy India Limited, the SPV, to execute the project. Hence a Supplementary PPA dated 06.09.2017 was entered into between the parties indicating that the Petitioner has taken over all rights, obligations, liabilities, etc., of the SPD. The Respondent-2 sought approval of SPPA dated 06.09.2017. The Commission requested the Respondent to submit additional documents to indicate that the Petitioner had injected energy on 01.07.2017 (the revised SCD). Further, it was communicated by the Commission that if the Petitioner has injected energy after 01.07.2017, it will be entitled to tariff of Rs.4.36 per unit as per the Generic tariff order dated 12.04.2017.
- f. As per the terms of the PPA, the petitioner is responsible for the completion of the project and commissioning the project within the time stipulated. For any violation of the terms, the petitioner is liable to pay the penalty and damages.
- g. Although the project was commissioned on 01.07.2017, as per the Commissioning certificated, the Project started injecting

power on 10.07.2017. The log extract of KPTCL dated 01.07.2017, reveals that the Petitioner's project is not even mentioned in the log extract. The Generic Tariff order dated 12.04.2017 passed by the Commission provides for tariff at Rs.4.36/- per kWh. Hence, the petitioner is entitled to a tariff of Rs.4.36/- per kWh and not Rs.6.51/- per kWh. The terms of the PPA were known to the SPD and after accepting the terms of the PPA in toto, it is not open to the Petitioner to contend that the tariff cannot be modified and that the modification of tariff is unilateral or opposed to the agreed terms.

- h. With regard to delay in obtaining approvals and treating them as force majeure events, the Petitioner has not made any objectionable averments against KREDL or the Government in the Petition. Therefore, the averments attributing the delay to KREDL or State Government must not be considered. The PPA clearly sets out the force majeure events in Article 8 of the PPA. Delay in obtaining approvals cannot be considered to be force majeure events. Article 4.1 sets out the obligations of the Developer. It clearly states that it is the responsibility of the Developer to obtain all clearances, consents, approvals, etc. Hence, knowing what its obligations under the contract are, the Petitioner is

attempting to take advantage of its own wrong and the same is impermissible in law. Further, Article 8.3 (b) states that in the event of a force majeure situation, a notice has to be issued. The Petitioner has failed to adhere this procedure set out in the contract. It is settled law that when the contract sets out a procedure to be followed in order to invoke the force majeure clause, non-adherence of the same vitiates the claim. The Respondent-1 has prayed for dismissal of the petition.

6) The gist of the Statement of Objections on behalf of Respondent No. 2 is as follows:

a) The Respondent has acted strictly in terms of the PPA dated 02.07.2015 and Supplemental PPA dated 28.04.2017. The terms of the PPA stipulate the time frame within which the Petitioner is required to commission the project as 18 months from the date of execution of the PPA. The SCD was revised to 01.07.2017 as per the Supplementary PPA dated 28.04.2017. Clause 4.1(c) which deals with the obligations of the generating company states that it is the Obligation of the company to commission the project and make it commercially operational within 18 months from the effective date. Similarly, Clause 6.1 stipulates that the obligation to pay tariff arises on achievement of commercial operation and commencement of

supply of power. The definition of COD as per Article 1.1 (vii) of the PPA is as under:

*“Commercial Operation Date with respect to the Project shall mean the date on which Project is available for commercial operation as certified by BESCO/KPTCL as the case may be”*

- b) As per Articles 6.1 and 4.1(c) of the PPA, as on the COD, the plant should achieve commercial operation and also commence supply of power. Achievement of Commercial Operation Date and commencement of supply are pre-requisites that have to be achieved as per the terms of the PPA, for payment of tariff. From the perusal of the definition of COD and the other provisions of the PPA, it is clear that the project is said to be commissioned only when plant is available for commercial operation. The plant is commercially available only when there is generation of power and the same is injected to the grid. In this case, admittedly, power was not injected from the plant within the stipulated time frame, i.e. on or before 01.07.2017, although the plant was claimed to be commissioned on 01.07.2017. The project has not started injecting any power from 01.07.2017. The same is evident from the log extracts of KPTCL sub-station (Annexure R-3). The Petitioner has been injecting power from 10.07.2017. No document is produced by the Petitioner to indicate that the plant had injected power on 01.07.2017 or any date earlier

to 10.7.2017. Hence, the Petitioner has failed to commission the project within the SCD.

c) Article 5.1 of the SPPA dated 28.04.2017 states that in the event of delay in commissioning of the project beyond the SCD and during such period if there is variation in the KERC Tariff, then the applicable tariff for the project would be the lower of the rates mentioned in the PPA, namely Rs.6.51/kWh or the varied tariff applicable as on the date of commercial operation. As the project has started injecting power from 10.07.2017, the Petitioner would be entitled to tariff of Rs.4.36/kWh in terms of the Generic Tariff order dated 12.04.2017, which is applicable at the time when the Petitioner commenced injection of power from the project. The Respondent-2 has prayed for dismissal of the petition.

7) We have heard the learned Counsel for the parties. During arguments, the Counsel for Respondent-2 relied on the order of the Commission in OP No. 28/2018 and the Judgment of Hon'ble Supreme Court of India in Civil Appeal Nos. 9218-19/2018 dated 25.7.2019 to contend that the tariff as on the date of injection of power would be applicable for a project. From the pleadings and the submissions by the parties, the following issues arise for our consideration:

(1) Whether the petitioner was prevented by force majeure events in completion of the project within the revised SCD?

(2) Whether injection of power into the State Grid, from a Solar Power Project is essential, in order to declare that the Project is commissioned?

(3) Whether 'Commissioning of the Project' and 'Commercial Operation of the Project' are one and the same or different concepts as per the terms of the PPA?

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

(5) What Order?

8) After hearing the learned Counsel for the parties and considering the material placed on record, our findings on the above issues are, as follows:

9) Issue No.1: Whether the petitioner was prevented by force majeure events in completion of the project within the revised SCD?

a) It is the case of the Petitioner that, initially the project was intended to be established in Kanakapura Taluk but as the land was unsuitable, the SPD decided to change the location to Challakere Taluk. It is also alleged by the petitioner that the

Government rejected the Petitioner's request for change of location as Challakere Taluk had exceeded the 200 MW capacity, but later permitted the project to be established in the changed location and due to this, the Petitioner lost valuable time of 2 months in executing the Project. It is contended by the Respondents that the Guidelines and Instructions which were available while inviting bids for selecting the farmers, clearly mentioned that change in survey numbers would not be allowed. It is also contended that the Solar Policy had imposed a restriction of 200 MW per Taluk and hence, a clarification was required from the Government on whether the petitioner could be permitted to execute the project in Challakere Taluk, which had exceeded the limit.

- b) We note that the decision of the SPD to change the project location was not taken at the behest of or on the advice of KREDL or the Government. The decision of the SPD was unilateral and was not at the instance of any of the Respondents. In the letter dated 02.09.2015, requesting for change of location, the reason given is that, the original location in Kanakapura Taluk is fertile land with coconut, arecanut, mango trees and coffee plantation producing good yield and that the SPD had lands in her name in the new location at Challakere, which is barren

land, suitable for setting up Solar Power Plant. In the petition, it is stated that the land at Kanakapura Taluk was unsuited due to low irradiation. So also, in the petition, it is stated that the SPD purchased land at Challakere Taluk by making huge investment, whereas, in the letter dated 2.9.2015, it is stated that she owned lands at Challakere Taluk. There is inconsistency in the reasons given for change of location and as to whether she owned the land or purchased the same at Challakere Taluk. Be that as it may. It is only after allotment of the project and entering into the PPA, the SPD sought change of location. The SPD, who voluntarily chose to set-up Solar Project in the fertile lands at Kanakapura Taluk, by participating in the selection on first-come-first-served basis, has in fact, denied opportunity of allotment of solar projects to other eligible farmers possibly owning unfertile lands. She could not have expected the permission to change the location of her plant, in view of the specific mention in the Guidelines and Instructions that such change would not be permitted. Initially, her request was rejected as Challakere taluk had exceeded 200 MW capacity. Thereafter, certain correspondences have taken place between the KREDL and Government and the letter dated 21.4.2017 was issued to the SPD by KREDL, permitting establishment of the project at Challakere taluk. Admittedly, the

Solar Policy and the guidelines issued for allotment of Solar Power Projects to the land owning farmers, did not provide for change of the location of the Projects from the land mentioned in the applications submitted for allotment. It was also declared that, the Solar Power Projects would be entitled to the tariff determined by the Commission and that the Orders and Regulations of the Commission would take precedence over any of the conflicting provisions of the Policy.

c) We note that the Government took steps to allow the change of location to benefit the farmers and also granted extension of time. Accepting the extension of time granted to commission the project, the SPD executed a modified PPA on 28.04.2017, at a tariff of Rs.6.51 per unit and agreeing to commission the project within 01.07.2017, the extended SCD. The force majeure events alleged by the petitioner are events preceding the execution of the modified PPA dated 28.04.2017. Therefore, the alleged force majeure events are not relevant to claim extension of time under the modified PPA. The petitioner has not claimed any force majeure event occurred subsequent to the modified PPA dated 28.04.2017.

c) Hence, we answer Issue No.1 in the negative.

10) Issue No. (2) Whether injection of power into the State Grid, from a Solar Power Project is essential, in order to declare that the Project is commissioned?

11) Issue No.(3) Whether 'Commissioning of the Project' and 'Commercial Operation of the Project' are one and the same or different concepts as per the terms of the PPA?

a) As these two Issues are interconnected, we deem it appropriate to consider them together.

b) The Scheduled Commissioning date (SCD) is defined as 18 months from the effective date, which is the date of execution of the PPA. Commercial Operation Date (COD) is defined as the date on which the project is available for commercial operation as certified by BESCOM/KPTCL. Article 4.1 (c) mentions that the SPD shall achieve *scheduled date of completion and commercial operation* within 18 months from the effective date. Article 5.1 of the PPA mentions that *the tariff has to be paid from the COD*, and if there is delay in *commissioning of the project*, beyond the SCD, and if there is any variation in the KERC tariff, then the tariff for the project shall be lower of the agreed tariff or the varied tariff applicable as on the COD. Article 2.5.7 of the PPA provides that, the SPD is liable for payment of the Liquidated Damages for not being able to

*commence supply of power by the SCD.* Although commissioning of the project is not defined in the PPA, a conjoint reading of these provisions of the PPA, indicates that a Project can be said to be 'commissioned', only when it starts injecting/supplying power to the Grid. The definition of the COD implies the meaning of the 'Commissioning of the Project', which pre-supposes injection of power from the Project to the Grid. In other words, if there is no injection of power from the Project into the Grid, there cannot be any 'Commissioning' or 'Commercial Operation' of the Project. The definition of SCD does not describe the 'Commissioning of the Project', but only states the period specified for 'Commissioning of the Project'. Therefore, we are of the considered opinion that, the 'Commissioning of the Project' and the 'Commercial Operation of the Project' are one and the same, and are used interchangeably in the PPA. Hence, 'Commercial Operation' requires 'Commissioning of the Project', whereupon, the solar project starts injecting power to the Grid. There is no separate provision in the PPA for declaring the achievement of the 'Commercial Operation' of the Solar Power Project, prescribing any performance tests. The provisions of the PPA would show that supply of power to the Respondent was essential by the SCD. This Commission had earlier passed an Order dated 29.05.2018 in OP No.28/2018 interpreting the

terms 'Commissioning' & 'Commercial Operation' of a project. The same view is being taken in the present case.

- c) The question is, whether without verifying the injection of power into the Grid from a Solar Power Project, can such Project be declared as commissioned. In this regard, we hold that, the verification of the injection of power into the State Grid is very much essential, in order to declare the commissioning of the Project. Any new Solar Power Plant, entering into commercial agreement with a Distribution Licensee or an Open Access consumer, requires Grid connection. The different utilities, managing the Grid, such as KPTCL, SLDC, Distribution Licensee, have to accept and certify the safe operation and compliance of the other requirements by the Solar Power Plant before effecting the interconnection with the grid. Therefore, the Solar Power Plant's commissioning, explicitly and invariably requires performance verification of all the electrical plants and apparatus. Such performance verification is not possible, unless the Solar Power Plant is in generation mode and injects sufficient energy into the Grid. The commissioning authority should not merely depend upon the results of the pre-commissioning tests, assuming a guarantee positive outcome. It could also be seen that, the Developer has to provide the necessary facilities for voice and data communication and transfer of online operational data, such as voltage, frequency,

etc., and other parameters prescribed by the SLDC. This requires injection of sufficient power into the Grid. Therefore, we are of the considered opinion that, injection of power into the Grid from a Solar Power Project is essential, in order to declare that such Project is commissioned.

- d) The other controversy between the parties is regarding the date, on which the Solar Power Project started injecting power into the Grid. According to the petitioner, the Solar Power Project was commissioned on 01.07.2017. The petitioner has relied on the issuance of the Commissioning Certificate by the authorities, certifying the commissioning of the Project on 01.07.2017 and the letter dated 03.08.2017 along with B form for the month of July 2017. On the other hand, the Respondents have contended that, though the commissioning of the Project was shown to have been done on 01.07.2017, the injection of power into the Grid has taken place only from 10.07.2017, as per the log extracts of the KPTCL sub station to which the project is connected. Thereby, the Respondents contend that the actual commissioning or the commercial operation of the Solar Project has taken place only on 10.7.2017, and there is delay in injection of power to the grid.
- e) Now, we may consider the documentary evidence produced to decide whether there was injection of power into the Grid from the

Solar Power Project on 01.07.2017. On the basis of the minutes of the meeting held on 01.07.2017 between the Project Developer and the officers of the Respondents 2 and 3, the commissioning of the project was declared, as per the Certificate dated 01.07.2017. In other words, the Solar Power Project was interconnected to the sub-station on 01.07.2017. The B form for July 2017, is not a document which shows injection of power on 01.07.2017. Only after getting the confirmation of the injection of the power into the Grid, the commissioning/COD should have been declared. It is for the Developer to establish the injection of power from the Solar Project to the Grid, to claim the commissioning of the Project, on a particular time and date. In this case, there is no injection of power from the project till 10.07.2017. Therefore, we are of the considered opinion that the Developer has failed to prove the commissioning of the Solar Project on 01.07.2017. The evidence on record would show that, the injection of power from this Solar Power Project, into the Grid started from 10.07.2017.

- f) The contention that, the Commissioning Certificate showing the date of commissioning, would lead to a presumption that power was injected into the Grid on the said date, is rebutted, from the other available contra-evidence on record. The letter dated 03.08.2017 of the Respondent-2 or the B form does not mention that

power was injected on 01.07.2017 and the log extracts of the sub-station show injection of power from 10.07.2017.

g) For the above reasons, we hold that, the Solar Project started injection of power into the Grid on 10.7.2017; that injection of power into the Grid from a Solar Project is essential, in order to declare that the Project is commissioned; that, the meaning of 'Commissioning of the Project' and 'Commercial Operation of the Project' is one and the same in a Solar Project, and injection of power into the Grid from the Project is essential, to certify the commissioning of the Project. In the result, the Commissioning Certificate, certifying or declaring the commissioning of the Solar Project, is not legally valid.

h) We answer Issues No. 2 and 3 accordingly.

11) Issue No. 4: What should be the tariff for the Project for the term of the PPA?

(a) The Petitioner has alleged that, the Commission's Generic tariff Order dated 30.07.2015, reducing the tariff of the Solar Power Projects to Rs.6.51 per unit, is not applicable to the project, as the Order is applicable to Projects which have entered into PPAs on or after 01.09.2015; that, since the SPD had signed the PPA on 02.07.2015, this order is not applicable; that, the PPA provides for the SCD and right of Respondent No.2, to grant extension of time by six months;

that as the petitioner has commissioned the project within the mutually agreed SCD, the tariff as per the PPA should be paid and cannot be reduced. On the other hand, it is the contention of the Respondents that, as there is no injection of power on the SCD, the petitioner is entitled to the varied tariff as per Article 5.1 of the PPA. The Respondent-2 has relied on the judgment of the Hon'ble Supreme Court of India in Civil Appeal Nos.9218-19/2018 dated 25.07.2019 in support of its contention that injection of power into the grid is necessary for a project to be entitled to a particular tariff.

(b) We have held while answering Issue No. 1 that the petitioner's contention that it was prevented by force majeure events, to commission the project within the SCD, is not acceptable. Article 5.1 of the PPA provides that, the tariff on the date of commercial operation will be applicable for the Project. The Project though commissioned on 01.07.2017, has injected energy on 10.07.2017 and we have held that 10.07.2017 is the COD.

(c) The Hon'ble Supreme Court of India, in Civil Appeal No.1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), dated 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 1<sup>st</sup> 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 31<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> respondent would be entitled only for lower of the two tariffs...."*

(d) In the light of the above decision and the provisions of the PPA, we hold that the Petitioner's Plant is entitled to the tariff of Rs.4.36 per

unit for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017, which is the varied tariff as on the COD of the project.

(e) We answer Issue No. 4 accordingly.

12) ISSUE No.(5):

For the foregoing reasons, we pass the following:

ORDER

- (a) The Petition is dismissed.
- (b) The Petitioner is entitled to the reduced tariff of Rs.4.36 (Rupees four and Paise thirty six) only per unit for the term of the PPA. Consequently, the receipts and payments towards the energy injected shall be settled between the Petitioner and Respondent-2.
- (c) The Petitioner shall pay damages for delay of 10 days in commencement of supply of power, as per Clause 2.5.7 of the PPA.

Sd/-  
(SHAMBHU DAYAL MEENA)  
CHAIRMAN

Sd/-  
(H.M. MANJUNATHA)  
MEMBER

Sd/-  
(M.D. RAVI)  
MEMBER