

N/06/2019

OP No.03/2019

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**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**

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

**Dated: 12.12.2019**

**Present:**

<b>Sri Shambhu Dayal Meena</b>	<b>..</b>	<b>Chairman</b>
<b>Sri H.M. Manjunatha</b>	<b>..</b>	<b>Member</b>
<b>Sri M.D. Ravi</b>	<b>..</b>	<b>Member</b>

**OP No.03/2019**

**BETWEEN:**

Tachocline Renewables Pvt Ltd,  
#44A, 3<sup>rd</sup> floor, Datta Prabhas,  
1<sup>st</sup> main Road, 3<sup>rd</sup> phase, JP Nagar,  
Bengaluru-560 100 ...  
(Represented by Navayana Law Offices, Advocates)

**PETITIONER**

**AND**

1.Karnataka Renewable Energy Development Limited,  
No.39, Palace Road,  
Bengaluru-560 052.  
(Represented by its Managing Director)

2.Bangalore Electricity Supply Company Ltd,  
K.R.Circle, Bengaluru-560 001.  
(Represented by its Managing Director)

3. Karnataka Power Transmission Corporation Ltd,  
Kaveri Bhavan, Bengaluru-560 009. ...  
(Represented by its Managing Director)

**RESPONDENTS**

(Respondent-1 represented by Sri Murugesh V Charati, Advocate;  
(Respondents-2 & 3 represented by Just Law, Advocates)

## ORDERS

1. The Petitioner has filed this petition under Section 86(1) of the Electricity Act, 2003 seeking the following reliefs:

- (i) To set aside the communication dated 8.9.2017, issued by the 2<sup>nd</sup> Respondent and consequently set aside the letter dated 16.08.2017 (Annexure P-2) unilaterally revising the tariff applicable to the Petitioner's project;
- (ii) Direct the 2<sup>nd</sup> Respondent to apply the correct tariff applicable to the Petitioner;
- (iii) Pass such other orders including an order as to costs to meet the ends of justice and equity.

2. The facts of the case are:

- a) Pursuant to the Solar Policy 2014-21 the Land Owning Farmers were allotted solar power projects of 1-3 MW capacity after inviting applications. One D.Ramalingaiah applied for the solar project and was selected to establish a 3 MW solar project. The allotment letter dated 17.03.2015 was issued to the SPD. The project was intended to be set up in Margonahalli village, Kikkere Hobli, K.R. Pet Taluk, Mandya District. A PPA was executed on 01.07.2015 with Respondent-2. The SPD applied for conversion of agricultural land at K.R. Pet Taluk, Mandya District. In response thereto, the Deputy Commissioner (DC),

Mandya, issued an endorsement assigning various reasons rejecting the request for setting up the solar project in the said land. The SPD submitted a representation to the 2<sup>nd</sup> Respondent on 29.03.2016 seeking permission to change the location of the solar project from the originally allocated place to some other suitable location within the State. Considering such representations by various land owners, the Government issued a G.O. dated 21.01.2017 permitting the land owners, who had sought change of location to establish the project by granting extension of time by 6 months from the original deadline of the SCD at the reduced tariff of Rs.6.51 per unit. After the issuance of the aforesaid G.O, the SPD submitted a representation dated 29.01.2017 to the 2<sup>nd</sup> Respondent seeking permission to change the location of the project to his land at Challakere Taluk. The 1<sup>st</sup> Respondent vide letter dated 04.02.2017 did not permit the change of location, as Challakere Taluk had exceeded the limit of 200 MW fixed under the Policy dated 12.01.2017. Thereafter, pursuant to the request of the SPD, a clarification was issued by the Government on 24.04.2017 according permission to the SPD to execute the project in the land at Challakere Taluk, as requested.

- b) Mr. Ramalingaiah, the original allottee died on 18<sup>th</sup> February, 2017 leaving behind a Will dated 17<sup>th</sup> February, 2017. Mrs. A.

Savitha, the legal representative of the original allottee, submitted a representation to the Respondent intimating the death of the original allottee and reporting certain other subsequent developments. In view of the changed circumstances, a Supplemental Power Purchase Agreement (SPPA) dated 28<sup>th</sup> April, 2017 was executed between Mrs. A. Savitha, the legal representative and 2<sup>nd</sup> Respondent. As per the SPPA, the Project Developer was entitled to receive a tariff of Rs.6.51 per unit based on the generic tariff order dated 30<sup>th</sup> July, 2015 read with the G.O. dated 21<sup>st</sup> January, 2017 in respect of the projects that had changed the location. The Commission accorded approval to the SPPA vide letter dated 23<sup>rd</sup> May, 2017.

c) M/s. Tachocline Renewable Private Limited, incorporated under the Indian Companies Act, 1956/2013, a legal entity was created as SPV with the object of constructing, maintaining and operating the Solar Power Project allotted to the SPD. The SPV had taken over all the rights, responsibilities, obligations, liabilities, etc. of Smt. A. Savitha for some valid consideration as per the document dated 31<sup>st</sup> May, 2017. To reflect the revised understanding between the parties, another SPPA dated 17<sup>th</sup> June, 2017 was executed between the Petitioner and the 2<sup>nd</sup> Respondent.

d) After executing all the works, the Petitioner commissioned the project within the revised deadline of 30<sup>th</sup> June, 2017. The SPPA dated 17.06.2017 was sent to the Commission for approval vide letter dated 24<sup>th</sup> July, 2017. The Commission by letter dated 16<sup>th</sup> August, 2017, reduced the tariff to Rs.4.36 per unit, on the premise that no injection of energy had taken place on 30.06.2017. The Petitioner filed Writ Petition No. 51696/2017 (GM-KEB) in the Hon'ble High Court of Karnataka, challenging the letter dated 16.08.2017 issued by the Commission. After hearing all the parties, the Hon'ble High Court disposed of the Writ Petition by Order dated 05<sup>th</sup> April 2018 directing the Petitioner to appear before this Commission within a period of two weeks for adjudication.

e) Aggrieved by the Order dated 05<sup>th</sup> April 2018 in WP No. 51696/2017 the petitioner filed Writ Appeal No. 1438/2018 before the Hon'ble High Court. The Writ Appeal was dismissed as withdrawn on 30<sup>th</sup> November 2018. Thereafter, this petition is filed.

3. The grounds urged by the petitioner are:

a) The action of this Commission in issuing the letter dated 16<sup>th</sup> August, 2017 (Annexure-P2) behind the back of the Petitioner is untenable, arbitrary, unilateral and liable to be set aside. The Petitioner was

merely marked with a copy of the letter. No opportunity of hearing was provided. Thus, the principles of natural justice were violated by the Commission. Even though in the case of Clean Solar, the Hon'ble High Court had remanded the matter for fresh consideration, the Commission corrected its mistake only in the case of Clean Solar but not in this case. In the letter dated 16<sup>th</sup> August, 2017, the Commission has made certain unilateral factual observations on actual injection of energy, based on the Joint Meter recording in Form B and Log extract of the 3<sup>rd</sup> Respondent's Sub-Station. Based on these documents, the Commission has unilaterally arrived at a conclusion that the Commercial Operation Date (COD) of the Petitioner's project ought to be reckoned as 1<sup>st</sup> July, 2017 and consequently, the tariff of Rs.4.36 per unit has to be applied as per the generic tariff order dated 12<sup>th</sup> April, 2017.

- b) As per Article 1.1 (vii) of the PPA, the Commercial Operation Date (COD) shall mean the date on which the project is available for Commercial Operation as certified by BESCO/KPTCL as the case may be. The COD defined under the PPA does not contemplate the actual generation of the energy. This Commission on the one hand has approved this term in the PPA but on the other hand, has deviated from the approved definition.

c) It is not the fault of the Petitioner that Solar energy cannot be generated after sun-set. Having regard to the special circumstances of Solar Energy Projects, the PPAs of the Solar Projects have the specific definition of the COD to mean that the projects should be available for operation irrespective of the actual delivery of energy. The actual injection of energy from the plant is not a material consideration for determining the COD of the project. The Commission cannot direct a contracting party to insert, modify or alter a contractual term. At the most, the Commission can allow / disallow the tariff in the contract.

d) The Petitioner is entitled to the tariff of Rs.8.40 per unit as mentioned in the PPA. The Commission has passed three generic tariff orders in respect of solar power projects viz.; tariff order dated 10<sup>th</sup> October, 2013, 30<sup>th</sup> July, 2015, and 12<sup>th</sup> April, 2017. In the generic tariff order dated 30<sup>th</sup> July, 2015 (passed in modification of the earlier tariff order), it is clearly held that in respect of the 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. The generic tariff order dated 12<sup>th</sup> April, 2017 has been made applicable to the new grid connected solar project entering into PPA on or after 1<sup>st</sup> April, 2017 but before 1<sup>st</sup> April, 2018 and also those

which are commissioned during the period from 1<sup>st</sup> April, 2017 to 31<sup>st</sup> March, 2018 for which PPAs have not been entered into, prior to 1<sup>st</sup> April, 2017. The Petitioner's PPA was entered into prior to 01<sup>st</sup> April, 2017. Hence, the tariff order dated 12.4.2017 also does not revise the tariff of the Petitioner's project.

4. Upon issuance of Notice, the Respondents 1 and 2 entered appearance through their Counsel and filed Objections.

5. The gist of the Objections filed by Respondent-1 is as follows:

a) The petitioner is not justified in attributing the delay in completion of the plant on the Respondent, as the SPD's request was being considered to benefit him. The petitioner cannot at one breath ask the respondent to relax certain conditions and then turn around to say that the respondent did not act within time. The SPD vide letter dated 29.03.2016 requested the Energy department, Government of Karnataka to change the project location from Maragonahalli Village, Kikkeri Hobli, K.R. Pet Taluk, Mandya District to Belegere Village, Parashurampura Hobli, Chalakere Taluk, Chitradurga District as the land in Mandya district was fertile.

b) The Government of Karnataka had issued Solar Policy vide Notification No. EN 21VSC 2014 dated 12.01.2017 which is as hereunder:



“Minimum program targets: “Solar generation would be limited to 200MWs 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) The petitioner was aware that change of location to Challakere Taluk, Chitradurga District was not possible as the total solar power project capacity had crossed 200 MW for Challakere Taluk as per the amendment issued to Solar policy 2014-21 dated 12.01.2017.
- d) It was clearly informed in the Guidelines & Instructions in the bids invited for selection of the land owners, that “Changes in Survey Number will not be allowed. If different Survey Numbers are provided during submission of hard copy, such application will be rejected”. Hence any change in location was not permissible as per the Guidelines & Instructions.
- e) The petitioner ought to have selected appropriate and suitable land with good radiation, evacuation facility etc., at the time of applying. The petitioner cannot make a grievance as the change sought is an afterthought, which is not permissible. The petitioner cannot purchase land at a later stage, after getting the allotment and seek

change of location. In such case, the new land purchased would not be in the petitioner's name as on the time of applying online. This would result in violation of guidelines, as many applications were rejected on the ground that the land details were not given properly/ correctly.

- f) The KREDL sought clarification from the Government with regard to the cap of 200 MW for each Taluk. The Government vide letter dated 17.04.2017 clarified that the cap of 200 MW would not be applicable to the land owing farmers and the SPD was eligible to commence the project in the changed location. 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 that the SPD would be entitled to Rs. 6.51 per unit with an extension of 6 months' time to commission the project from the date of expiry of SCD agreed in the PPA.
- g) The petitioner is not entitled to the tariff of Rs.8.40 per unit as the request for change of location was allowed by granting extension of time by 6 months for commissioning the project with reduction of tariff to Rs.6.51 per unit.
- h) After the change of location was permitted, SPPA was executed between the Petitioner and the respondent No. 2 on 28.04.2017.

- i) The project is commissioned on 30.06.2017, but as injection of energy has not happened on this date, the generic tariff order dated 12.04.2017 is applicable for the project. Article 5.1 of the PPA provides that, the tariff as on the date of commercial operation, will be applicable if the project is commissioned belatedly. The petitioner is responsible for the commencement of the project and commissioning the project within the time stipulated. For any delay, the petitioner is liable to pay the penalty and damages.
- j) The SCD was revised to 30.06.2017 as per the Supplementary PPA dated 28.04.2017. Clause 4.1 (c) of the PPA which deals with the obligations of the Generator mentions that the obligation is 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 only arises on achievement of COD and commencement of supply of power of thereon.
- k) The PPA provides that in the event of delayed commissioning of the project, the Petitioner would be entitled to the agreed tariff or the varied tariff at the time of commercial operation, whichever is lower. Hence, the petitioner is entitled to Rs.4.36 per unit.
- l) With regard to delay in obtaining approvals and force majeure conditions the Petitioner has not made any objectionable averments in respect of KREDL in the Petition. Therefore, the

averments attributing the delay to KERDL or State Government must not be considered. The PPA clearly sets out the events which are force majeure events in Article 8. Delays in obtaining approvals cannot be considered to be events of force majeure. The Petitioner has failed to adhere the 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 said claim. The Petitioner ought not to be absolved of its obligations and duties under the PPA on the ground of delay.

6. The gist of the Statement of Objections filed on behalf of Respondent Nos. 2 and 3 is as follows:

a) The extended SCD of the project was 30.6.2017, as per SPPA dated 28.4.2017. On 30.06.2017, the Petitioner has interconnected its project to KPTCL's grid without injecting power. Actual injection of the energy has taken place on 01.07.2017 as per the B-Form and Log Extract of KPTCL sub station. Therefore, the Petitioner has not commissioned the project within the SCD and the project was not commercially operational on 30.06.2017. On 01.07.2017, the Petitioner has started to generate electricity and injected power to the State grid. The Commission communicated to Respondent No.2 vide letter dated 16.08.2017 that the Petitioner will only be entitled to tariff at Rs.4.36 per unit in view of the delayed commissioning of plant.

b) Clause 4.1 (c) of the PPA which deals with the obligations of the Generator mentions that the obligation is 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 only arises on achievement of COD and commencement of supply of power of thereon. 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 a BESCO/KPTCL as the case may be”.*

c) Clauses 6.1 and 4.1 (c) of the PPA would indicate that not only the plant should achieve commercial operation but should also commence supply of power on the SCD. Achievement of COD and commencement of supply are pre-requisites that have to be achieved as per the terms of the PPA. From the perusal of definition of COD and the other provisions of the PPA, it is clear that the project is said to be commissioned only when the plant is available for commercial operation. The Plant can be said to be commercially available only when there is generation of power and 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 30.06.2017. The Commissioning Certificate

only states that the Petitioner's Plant was interconnected to the KPTCL grid on 30.06.2017. The Petitioner started injecting total capacity of power only from 01.07.2017. The plant was commissioned to the Grid at 20.15 hrs on 30.06.2017 and the Petitioner could not have injected any power into the Grid on 30.06.2017.

- d) The averment made by the petitioner that the Order of the Hon'ble High Court of Karnataka dated 14.12.2016 in W.P. No. 27799 of 2016 (Clean Solar case) is relevant to the present matter is denied as false and untenable. The factual matrix of the said case does not have any relevance to the present petition.
- e) The averment of the petitioner that the letter dated 16.08.2017 was issued by the Commission behind the back of the Petitioner, and hence liable to be set aside is denied as false and untenable. The letter dated 16.08.2017 was also marked to the Petitioner.
- f) The averment that no regulator can direct contracting party to modify the contractual tariff and the Commission has overstepped its jurisdiction is denied as untenable. It is settled law that tariff determination is within the exclusive jurisdiction of the Commission.

- g) The judgment dated 25.10.2017 in Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company, cited by the petitioner is of no relevance to the present petition.

7. The Respondents have prayed for dismissal of the petition.

8. We have heard the learned Counsel for the parties and perused the records. 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, in terms of the PPA?

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

(5) What Order?

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

10. 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 K.R. Pet Taluk but as the conversion land was rejected, the SPD decided to change the location and made a request for change of location. It is stated that after the DC, Mandya, rejected the permission for conversion on 28.03.2016 the petitioner requested the Government for change of location on 29.03.2016. Considering the requests by several allottees, the Government issued G.O. dated 21.01.2017 permitting the change of location but reduced the tariff to Rs.6.51 per unit and granted 6 months more time. It is alleged by the petitioner that the Government initially rejected the Petitioner's request for change of location as Challakere Taluk, to which the change was sought, had exceeded the 200 MW capacity, but later, on 24.04.2017 permitted the project to be established in the changed location and in the meanwhile, the work of execution of the project came to a stand-still. 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. The letter dated 28.03.2016, of the DC, Mandya rejecting permission for conversion of land at K R Pet Taluk, reveals that a portion of the said land had coconut, and Niligiri trees and another portion was B Kharab land reserved for public purpose. Such being the case, the SPD could not have applied for setting up the solar plant under the farmers' scheme. Be that as it may. It is only after allotment of the project, entering into the PPA, receiving the endorsement of the DC, the SPD sought change of location. The SPD, who voluntarily chose to set-up Solar Project in such land at K.R. Pet Taluk by participating in the selection on first-come-first-served basis, had in fact, denied opportunity of allotment of solar projects to other eligible farmers possibly owning suitable lands. The SPD could not have expected the permission to change the location of the plant, in view of the specific mention in the Guidelines and Instructions that such change would not be permitted. The SPD had addressed a letter dated 29.01.2017 to Respondent -2 seeking change of location to the land owned by him at Challakere Taluk. A letter dated

04.02.2017 was issued to the SPD by KREDL, rejecting the request for change of location of the project to Challakere Taluk, as the total allotted capacity of solar projects was more than 200 MW in the said taluk. Thereafter, the Government clarified, vide letter dated 17.04.2017 that the limit of 200 MW was not applicable to projects allotted under farmers' scheme. This was informed to the SPD vide letter dated 19.04.2017 and the change of location to Challakere Taluk was permitted on the conditions that the project had to be commissioned within the extended period of 6 months and the tariff would be Rs.6.51 per unit.

- c) Admittedly, the Solar Policy and the guidelines/instructions 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.
- d) 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 the tariff of Rs. 6.51 per unit and agreeing to commission the project

within 30.06.2017, 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 subsequent to the modified PPA dated 28.04.2017.

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

11. 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?

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

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

b) It is the contention of the petitioner that the definition of COD in the PPA does not contemplate generation of energy or recording of injection of energy in the meter and it is sufficient if the project is available for operation. On the other hand, the respondents have contended that the injection of energy from the project to the grid is relevant to declare the COD.

c) We note that 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 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 a 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 03.12.2019 in OP No.73/2018 interpreting the term "commissioning" and "commercial operation" of a Solar project. The same view is being taken in the present case.

- d) 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 guaranteed 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.

- e) According to the petitioner, the Solar Power Project was commissioned on 30.06.2017 as per the Commissioning Certificate issued by the authorities, certifying the commissioning of the Project on 30.6.2017. On the other hand, the Respondents have contended that, though the commissioning of the Project was

shown to have been done on 30.6.2017, the injection of power into the Grid has taken place only from 01.07.2017. Thereby, the Respondents contend that the actual commissioning or the commercial operation of the Solar Project has taken place only on 1.7.2017, and there is delay in injection of power to the grid.

- f) Now, we may consider whether there was injection of power into the Grid from the Solar Power Project on 30.6.2017, the revised SCD. On the basis of the minutes of the meeting held on 30.6.2017 between the Project Developer and the officers of the Respondents 2 and 3, the commissioning of the project was declared to be done at 20.15 hours on 30.6.2017. In other words, the Solar Power Project was interconnected to the sub-station on 30.6.2017, during night hours. 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 on 30.6.2017. We are of the considered opinion that, when ample time of 18 months with extended period of 6 months was provided to the Developer for commissioning of the Solar Project, there is no reason why the project was commissioned on the last day, that too during night hours, when naturally no solar power could have been

generated. It could be seen from clause 5.1 of Supplemental PPA dated 28.04.2017 wherein it is clearly mentioned that the newly determined SCD is 30.06.2017. If there is delay in commissioning of the project beyond the SCD, then there would be a variation in the Tariff. This fact cannot be denied by the petitioner. While commissioning the project on 30.06.2017, the petitioner should have commissioned the project and injected energy to the grid on or before 30.06.2017 to claim the tariff of Rs.6.51 per KWh. The Counsel for the petitioner has relied on the judgment of Hon'ble ATE in Appeal Nos. 332 and 333/2018 dated 08.05.2019, to contend that there is no delay in commissioning of the project. We note that in those cases, the question was, when the period of 12 months within which the project had to be commissioned would come to an end, and whether the date on which the injection of energy took place was within the period of 12 months. It was held that the date on which injection of energy had taken place was within the period of 12 months. In this case, it is clear that the period of 18 months along with extended time of 6 months would end on 30.06.2017 and this date is agreed between the parties in the revised SCD in the SPPA dated 28.04.2017. Admittedly, no injection of energy has taken place on this date. Hence, the judgment cited above has no application to the facts of this case. The petitioner has also relied on the order of the Commission in OP No.169/2017 dated 25.09.2018. In OP No.169/2017 the project was a SRTPV



project and the question was how the period of '180 days' had to be computed. In this case, the SCD is specifically agreed as 30.06.2017. Hence, this decision also does not apply to the facts of this case.

g) For the above reasons, we hold that, the Solar Project started injection of power into the Grid on 1.7.2017; 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.

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

(a) The Petitioner has alleged that, the project is entitled to the tariff of Rs.6.51 per unit, as per the G.O. dated 21.01.2017 and that the Generic Tariff Order No.S/03/1 dated 12.04.2017 is not applicable as the PPA was entered into prior to 01.04.2017. On the other hand, it is the contention of the Respondents that, as there is no injection of power on the SCD, i.e.,30.06.2017, the petitioner is entitled to the varied tariff

as per Article 5.1 of the PPA. The petitioner was aware of this fact while signing Supplemental PPA dated 28.04.2017 as per Article 5 of the SPPA. The contention of the petitioner that the Generic Tariff Order dated 12.04.2017 is not applicable cannot be accepted. The Generic Tariff Orders passed by the Commission from time to time apply to projects commissioned within the control period mentioned in the Generic Tariff Orders. However, in this case, Article 5.1 of the PPA specifically provides for applicable tariff, if there is delay in commissioning. When the contract contains such a specific clause, the term of the contract prevails. Hence, Generic Tariff Order dated 12.04.2017 is applicable to the petitioner's project.

(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 and SPPA provides that, in the event of delay in commissioning beyond the SCD, the lower of the agreed tariff or the varied tariff on the date of commercial operation will be applicable for the Project. The Project though commissioned on 30.06.2017, has injected energy on 01.07.2017 and we have held that 01.07.2017 is the COD.

(c) We rely on the Judgment of the Hon'ble Supreme Court of India on this issue in Civil Appeal No.1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), dated 02.02.2016, wherein it is 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 visualized 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) We also rely upon the judgment of the Hon’ble Supreme Court of India dated 25.07.2019 in Civil Appeal Nos. 9218-19/2018 (Madhya Pradesh

*Power Management Co. Ltd & another vs M/s Dhar Wind Power Projects Pvt. Ltd. & others*), wherein it is held that a project is stated to be commissioned on a date, if, on that date injection of power into the grid takes place and, the tariff applicable on such date will apply to the project.

- (e) In the light of the above decisions and the provisions of the PPA and SPPA, 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.
- (f) We answer Issue No. 4 accordingly.

14. ISSUE No.(5): What Order?

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.

Sd/-  
(SHAMBHU DAYAL MEENA)  
CHAIRMAN

Sd/-  
(H.M. MANJUNATHA)  
MEMBER

Sd/-  
(M.D. RAVI)  
MEMBER