

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

**Dated : 16<sup>th</sup> July, 2019**

**Present:**

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

**OP No.03/2018**

**BETWEEN :**

- 1) Smt. Lakshamma  
Sriranga, 6<sup>th</sup> Cross  
Vidya Nagar  
Tumakuru – 572 103.
- 2) G.A. Renewable Energy Pvt. Ltd.,  
Makhnu Majra, P O Bhud,  
Baddi, Solan  
Himachal Pradesh – 173 206.

..

**PETITIONERS**

*[Petitioner No.1 represented by Navayana Law Offices, Advocates,  
Petitioner No.2 impleaded vide Order dated 17.04.2018]*

**AND :**

- 1) The Managing Director,  
Bangalore Electricity Supply Company Ltd.,  
Corporate Office, K R Road,  
Bengaluru – 560 001.
- 2) The Additional Chief Secretary to  
Government of Karnataka,  
Department of Energy,  
Dr. B. R. Ambedkar Street,  
Bengaluru – 560 001

- 3) The Managing Director,  
The Karnataka Renewable Energy Development Limited,  
No.39, "Shanthigruha",  
Bharath Scouts and Guides Building,  
Palace Road,  
Bengaluru – 560 001.
- 4) The Managing Director,  
Karnataka Power Transmission Corporation Ltd.,  
Kaveri Bhavan,  
K. G. Road,  
Bengaluru – 560 009.

.. **RESPONDENTS**

*[Respondents 1 and 4 represented by Shri Shahbaaz Husain, Advocate,  
Respondents 2 and 3 represented by Shri G.S. Kannur, Advocate]*

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### **ORDERS**

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003, praying to:
- (a) Approve the extension granted by the Respondent No.1 to new scheduled commissioning date viz., 31<sup>st</sup> October, 2017, vide its Official Memorandum dated 11<sup>th</sup> September, 2017, produced as **ANNEXURE-P22;**
- (b) Direct the Respondent No.1 to make payment for the delivered energy under the PPA dated 1<sup>st</sup> July, 2015 produced, at Rs.8.40 per unit from the Commercial Operation Date of the Petitioner's Project for the entire term of the PPA;
- (c) Pass such other and incidental orders, including an order as to costs, as may be deemed appropriate under the facts and circumstances of the present case.

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- 2) The facts of the case, as mentioned in the Petition, are as follows:
- (a) KREDL had invited applications online on 19<sup>th</sup> September, 2014 for selection of applicants for setting up solar projects under the land owning farmers' scheme. After evaluation of the applications received, KERDL issued letter of Award dated 17<sup>th</sup> March, 2015 to Smt. Lakshamma, and instructed to execute a Power Purchase Agreement (PPA) with the 1<sup>st</sup> Respondent-Bangalore Electricity Supply Company Limited (BESCOM). Accordingly, the PPA was executed between BESCOM and Smt. Lakshamma on 1<sup>st</sup> July, 2015.
  - (b) As per the PPA dated 1<sup>st</sup> July 2015 scheduled commissioning date is 18 months from the effective date, the effective date being date of execution of the PPA. Hence, the project had to be commissioned within 31<sup>st</sup> December 2016. The Commission has approved the PPA on 25<sup>th</sup> August 2015.
  - (c) The Petitioner, by its letter dated 04<sup>th</sup> February, 2016, applied for conversion of the land.
  - (d) The 4<sup>th</sup> Respondent - Karnataka Power Transmission Corporation Limited (KPTCL), by its letter dated 1<sup>st</sup> September, 2016, communicated to the Petitioner, the Tentative Evacuation Scheme to be executed by the Petitioner, under Self-execution, for the proposed 1 MW Solar Project. The Petitioner, by its letter dated 12<sup>th</sup> September, 2016, acknowledged the receipt of the Tentative Evacuation Approval and requested for Bay allocation. The Petitioner, by its letter dated 23<sup>rd</sup> January, 2017, requested the 1<sup>st</sup> Respondent for extension of time, by 6 months, citing *Force Majeure*, stating that she was ready to implement the Project; that, she had applied for land conversion; and that, the Respondent-4 had granted the Tentative Evacuation Approval, since the regular evacuation would be provided only

upon submission of land conversion order. The 4<sup>th</sup> Respondent, by its letter dated 28<sup>th</sup> January, 2017, accorded the regular Evacuation Approval.

- (e) The Petitioner could not commission the Project within 31<sup>st</sup> December 2016, as land conversion order was not granted and the regular Evacuation Approval was granted on 28<sup>th</sup> January, 2017. Since Petitioner did not receive any response from the Respondent No.1 to the request for extension of the Scheduled Commissioning Date (SCD), the Petitioner once again, by letter dated 13<sup>th</sup> February, 2017, invoking the *Force Majeure* clause, requested Respondent No.1 for extension of the Commercial Operation Date (COD), by six months, stating that bay allotment was not granted for want of augmentation of the transformer. The Project work was further slowed down during November, 2016, onwards, on account of demonetization by Central Government. Respondent No.1 convened a meeting dated 03<sup>rd</sup> March 2017 to consider the extension of the SCD of various Projects of the SPDs / SPVs.
- (f) The Petitioner, by its letter dated 08<sup>th</sup> March, 2017, once again requested for extension of the SCD for its Project. Respondent No.1, by its letter dated 15<sup>th</sup> April, 2017, communicated that any extension of the commissioning date, granted by the Electricity Supply Companies (ESCOMs), are subject to validification of the Commission.
- (g) The KPTCL, by letter dated 14<sup>th</sup> June, 2017, communicated to Superintending Engineer (EI), Tumkur, that it was willing to spare its land, on lease basis, for construction of 11 kV ODS, for erection of switch gear. Respondent No.1, by its letter dated 16<sup>th</sup> June, 2017, granted approval to commission the said Project within 30<sup>th</sup> June, 2017 and requested the Petitioner to file a Petition before the Commission.
- (h) The Additional Chief Secretary to Government of Karnataka, Energy Department, by letter dated 23<sup>rd</sup> June, 2017, requested the Commission to

consider approval to the extension of the COD of the Solar Power Projects of capacity of 1 to 3 MW, under the land owing farmers category.

- (j) The Petitioner had requested for the extension of SCD on 12<sup>th</sup> September, 2016, 23<sup>rd</sup> January, 2017, 13<sup>th</sup> February, 2017 and 08<sup>th</sup> March, 2017, but Respondent No.1 granted the same and directed the Petitioner to commission the Project within 30<sup>th</sup> June, 2017, without considering dates of the request.
- (k) The Chief Electrical Inspectorate, by its letter dated 30<sup>th</sup> June, 2017, granted approval of the electrical installation of the Project.
- (l) The KPTCL, by letter dated 30<sup>th</sup> June, 2017, granted the provisional interconnection approval, for evacuation of power from the Project.
- (m) The Petitioner had successfully completed the execution of work and was ready for commissioning of the Project on 30<sup>th</sup> June, 2017. However, as it was beyond 6 p.m in the evening, the actual Solar Energy, fed into the Grid, could not be shown as generation. Therefore, the Petitioner, on 1<sup>st</sup> July, 2017, requested Respondent No.1 to complete the commissioning and synchronization formalities of the project with the Grid. However, the commissioning of the Project did not happen, as the 1<sup>st</sup> Respondent insisted to take further extension of approval to commission the Project, as it was beyond 30<sup>th</sup> June, 2017.
- (n) Thus, Petitioner by its letter dated 1<sup>st</sup> September 2017 and 05<sup>th</sup> September 2017 requested the 1<sup>st</sup> Respondent for another four months' extension of the SCD.
- (p) In the meanwhile, the Commission, by letter dated 07<sup>th</sup> July, 2017, had directed the ESCOMs, not to send any Supplemental PPAs (SPPAs), for approval of the Commission, till the Petitions filed by the SPDs/SPVs before the

Commission are disposed of. Therefore, by not signing the SPPA, the Respondent No.1 is harassing the Petitioner and negating the irrevocable right granted to the Petitioner under Clause 12.11 (i) of the PPA with regard to formation of SPV.

- (q) The Ministry of New and Renewable Energy, Government of India, by its letter dated 28<sup>th</sup> July, 2017 directed Principal Secretaries of all State Governments, Energy / Power Department, to provide extension of time for SCD, considering the delays on the part of the State Government Authorities/ PSUs, like land allotment, transmission/evacuation facilities, connectivity permissions or force majeure strictly as per the Contractual Agreement.
- (r) The Respondent No.1, by its letter dated 11<sup>th</sup> September, 2017, considering the requests of the Petitioner, in the letters dated 1<sup>st</sup> September 2017 and 05<sup>th</sup> September 2017, accorded approval to commission the Project on or before 31<sup>st</sup> October, 2017, subject to the tariff applicable as per Clause 5.1(ii) of the PPA and further stated that, the tariff would be as per the KERC Tariff Order dated 12<sup>th</sup> April, 2017 and Liquidated Damages would be applicable as per Clause 2.2.1 and 2.5.7 of the PPA.
- (s) Thereafter, the revised provisional interconnection approval was granted by the KPTCL on 15<sup>th</sup> September, 2017.
- (t) The Deputy Commissioner, by Official Memorandum dated 07<sup>th</sup> October, 2017, granted NA approval / conversion in respect of the land, for developing the Solar Project.
- (u) The Project was commissioned on 17<sup>th</sup> October, 2017.
- (v) As per Clause 12.11 (i) of the PPA, the SPD shall have an irrevocable right to form a Special Purpose Vehicle (SPV) at any time after the date of execution of the PPA, under intimation to the BESCO, and as such, G A Renewable

Energy Private Limited, incorporated under the Indian Companies Act, 1956/2013, a legal entity, was created, with the object of constructing, maintaining and operating the Solar Power Project, allotted to the SPD.

- (w) The SPD submitted the documents, regarding formation of the SPV, at the Corporate Office, BESCO, on 18<sup>th</sup> October, 2017. On 19<sup>th</sup> October, 2017, the SPD requested for assignment of the Project to the SPV and requested to enter into a SPPA with the SPV. However, the 1<sup>st</sup> Respondent, rejecting the request of the Petitioner, directed the SPD to approach the Commission for the same.
- 3) The Grounds, urged by the Petitioner, are as follows:
- (a) The Petitioner is entitled to the tariff of Rs.8.40 per unit as mentioned in the PPA. In the Order dated 10<sup>th</sup> October, 2013, the KERC has held that the said tariff is applicable to the Solar Power generators entering into PPA on or after 01.04.2013 and upto 31.03.2018 other than those where tariff is discovered through bidding process. In tariff order dated 30<sup>th</sup> July, 2015 (passed in modification of the earlier tariff order), it is stated 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. Even the tariff order dated 12<sup>th</sup> April, 2017 has been made applicable to only the new grid connected solar projects entering into PPAs 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. Hence, these Tariff Orders also do not revise the tariff of the Petitioner's Project. Consequently, the Petitioner is entitled to the tariff of Rs.8.40 per unit, as agreed to under the PPA.

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- (d) The PPA executed between the parties not only provides for the time period within which the Scheduled Commercial Operation Date (SCOD) 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 commercial operation date. Hence, the Petitioner is entitled to the tariff as per the PPA.
- (c) The Project of the Petitioner has experienced several hurdles, which can be termed as the force majeure events within the meaning of the Clause 8 of the PPA and the pleas of the Petitioner have been considered and accepted by the Respondent while granting the extension of time. The extension of time was granted, as per Clause 2.5.6 of the PPA and, as a result of such extension, the SCD and the Expiry Date, newly determined, shall be deemed to be the SCD and the Expiry Date. Hence, the Respondent is not entitled for the Liquidated Damages, without adjudication by the Commission.
- (d) The extension of time, granted by Respondent, vide Official Memorandum dated 11<sup>th</sup> September, 2017, does not mention about altering the tariff and specifically clarifies that, all other terms and conditions of the PPA remains unaltered. Hence, the Petitioner is entitled to the Tariff of Rs.8.40 per unit.
- (e) The PPA is a binding contract, within the meaning of Article 299 of the Constitution of India. Hence, on the basis of promise provided in terms of PPA, the Petitioner has claimed under *promissory estoppel*, in view of valid extension of time, granted by the Respondent, under the relevant statutory powers. Alternatively, the Petitioner has established a fit case under the doctrine of *legitimate expectation*, as the extension allowed is in reasonableness and fairness.
- (f) The Hon'ble Supreme Court of India in the case of *Bangalore Electricity Supply Company Limited Vs. Konark Power*, has held that, once the tariff has been agreed upon in the PPA, even the Regulator cannot change it. Further,



the Apex court, in the case of *Gujarat Urja Vika Nigam Limited Vs. Solar Semi Conductor Power Company (India) Limited*, has clearly held that, once the tariff is agreed upon under the PPA, the same cannot be altered by exercising the inherent power vested in the Commission *de hors* the one conferred under the Statute.

- 4) Upon issuance of Notice, the Respondents appeared through their counsel. The Respondents 1 to 3 have filed the Statement of Objections.
- 5) The Respondent -1 has submitted the Objections as follows:
  - (a) The Petitioner has contended that, the delay in commissioning of the Project is on account of lapses of Government authorities in sanctioning the required permissions to commence the Project. However, the delay is primarily attributable to the negligent acts of the Petitioner and not otherwise. The Petitioner and its assignor are responsible for the delay in commissioning the Project, for the following reasons:
    - (b) The PPA was executed on 01.07.2015 and the SPD made no efforts towards commencement of project till 04.02.2016, when she applied for land conversion. No explanation or no reason is attributed in the Petition, as to why the SPD delayed more than 7 months in submitting such an application to the Deputy Commissioner. The SPD's inaction for 7 months led to a series of delays and such inaction cannot be attributed to reasons beyond the control of the SPD.
    - (c) The Karnataka State Power Transmission Corporation Limited (KPTCL) accorded Tentative Evacuation approval vide letter dated 01.09.2016. The Petitioner submitted a letter on 23.01.2017, almost 5 months after receiving the approval, stating that she is ready to implement the Project. The KPTCL could not have given the regular evacuation approval without NA land

conversion. As the delay in obtaining NA land conversion is attributable to the Petitioners' inaction for 7 months, invoking *Force Majeure* clause, citing the delay in obtaining NA and regular evacuation approval, is an attempt to mislead the Commission.

- (d) The Respondent-1, considering the repeated requests of the Petitioners granted approval to commission the Project within 30.06.2017 vide its letter dated 16.06.2017 and directed the Petitioner to file a Petition before the Commission. The Petitioner has referred to a letter dated 23.06.2017, issued by the Additional Chief Secretary to Government of Karnataka, Energy department, in which a request is made to the Commission to consider the approval to the extension of the COD of Solar Power Projects of capacity 1 to 3 MW, under land owing farmers category. However, the Petitioner has failed to mention that the Additional Chief Secretary has issued the letter, after taking into account the practices being followed by the ESCOMs in approving extension of the COD. The letter clearly elucidates that the extension of the COD would be subjected to Clause 8.3(b) of PPA. Hence, reference to this letter serves no purpose, as the delay in getting necessary approvals is clearly attributable to the negligent acts of the Petitioner.
- (e) The Petitioner has failed to commission the Project even 6 months after the SCD. The Petitioner claims that, she was ready to commission the Project on 30.06.2017, and that she was unable to do so, as the sun has already set by the time everything was ready. A Solar Power Plant cannot generate electricity at night and the Petitioner knowingly or unknowingly is trying to misguide this Commission by claiming that she was ready to commission the Project on 30.06.2017. The Respondent has then directed the Petitioner to seek further extension of time before commissioning the Project, as the Petitioner failed to commission it within 30.06.2017.

(f) The Respondent, after considering repeated requests by the Petitioner, has, in its letter dated 11.09.2017, accorded approval to commission the Project on or before 31.10.2017, subject to the following conditions:

(i) The tariff applicable is as per Clause 5.1 (ii) of PPA. The prevailing varied tariff applicable is as per KERC Tariff Order dated: 12.04.2017;

(j) The Liquidated Damages as per PPA Clause 2.2.1 and 2.5.7 are applicable.

(g) The above stipulations are as per Clause 5.1(ii) of the PPA, which provides that,

*“However, subject to Clause 2.5 if there is a delay in commissioning of the Project beyond the Scheduled Commissioning Date and during such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects shall be the lower of the following:*

*(i) Rs.8.40 per kwh*

*(ii) Varied tariff applicable as on the date of Commercial Operation”.*

(h) The Generic Tariff Order dated 12.04.2017 states as follows:

*“This tariff determined shall also be applicable to those grid connected megawatt scale Solar PV Plants for which PPAs were entered into before 1<sup>st</sup> April, 2017 but are not commissioned within the specified commercial operation date (COD) and achieve COD during the period from 1<sup>st</sup> April, 2017 to 31<sup>st</sup> March, 2018.”*

(j) The Clauses of the PPA, read with the Order dated 12.04.2017, would make it clear that, in the case of the Petitioner, the varied tariff of Rs.4.36 per unit, as per the Order dated 12.04.2017, is applicable. In this Petition, by making the

new tariff applicable to the Petitioners, the Commission will merely be giving force to the provisions of the PPA and would not be altering the terms of PPA, as claimed by the Petitioner. Hence, any reference to the principles of *promissory estoppel* is unsubstantiated.

(k) The letter of the Respondent-1, granting extension of time, makes it clear that the Liquidated Damages, as per Clause 2.2.1 and Clause 2.5.1 of the PPA, are applicable. Though the Project needs to be commenced within 18 months from the date of signing the PPA (01.07.2015), all the permits, clearances and approvals were to be obtained within 365 days (12 months) from the Effective Date of the PPA, as per Clause 2. The Petitioner has failed in abiding by the said Clause of PPA on account of its own delays and is liable for damages as laid out in Clause 2.2 of the PPA.

(l) The Petitioner has committed default under Clause 9.2.1 (b) of the PPA, which reads this:

*“Occurrence of any of the following events at any time during the terms of this agreement shall constitute an event of default by SPD:*

*XXX*

*XXX*

*XXX*

*(b) failure or refusal by SPD to perform any of its material obligation under this agreement.”*

(m) Under Clause 4, the material obligation of commissioning the project was cast on the Petitioner within 18 months, which she has failed to comply with.

(n) The contention of the Petitioner that she has commissioned the Project within the SCD, is factually incorrect. The Petitioner managed to commission the Project, only after the Respondent provided the extension of time twice, subject to certain conditions. The petitioner is under a mistaken belief that the extended time period would be deemed to be the new SCD. The SCD is

clearly defined in the PPA, as 18 months from the day the PPA was signed by both the parties.

- (p) The Respondent-1 has prayed for dismissal of the Petition.
- 6) The Respondent No.2 has filed the Statement of Objections, as follows:
- (a) The Petition is liable to be dismissed *in limine* for the following reasons:
- (i) The Petitioner cannot blame the Respondent for the delay in commissioning of the project. 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.
- (ii) The Petitioner is not entitled for Rs.8.40 per unit, as the Petitioner's request for extension of time was granted, subject to the condition that she would get Rs.4.36 per kWh and since the Petitioner has not completed the work within the 18 months' time, she would now be entitled for tariff, prevalent on the date of commissioning.
- (iii) The Petitioner is neither entitled for grant of extension of time nor for the tariff of Rs.8.40 per unit, as the Petitioner is responsible for the delay.
- (b) The Government neither extended the time nor granted the tariff, as requested by the Petitioner. The Petitioner is responsible for the delay and will have to face the consequences.
- (c) As per Clause 5.1 of the PPA, the Solar Power Developer shall be entitled to receive the tariff of Rs.8.40 per kWh, based on the KERC Tariff Order dated 10.10.2013. However, subject to Clause 2.5, this tariff is applicable, only if the Project gets commissioned within the SCD.

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- (d) The Petitioner has entered into a PPA with Respondent No.1. Therefore, it is for Respondent No.1 to counter the averments made by the Petitioner and state, as to whether the *Force Majeure* clause is applicable and if the Project is eligible for extension of time.
- (e) The Respondent-2 has sought for dismissal of the petition, as against it.
- 7) In the Statement of Objections filed by Respondent No 3, it is stated as follows:  
  
The Petition is liable to be dismissed, insofar as Respondent No.3 is concerned, as there is no prayer against the Respondent and there is no role played by it, after the Letter of Award is issued and it is for the Respondent -1 to counter the averments made by the Petitioner.
- 8) 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 Plant?
- (2) What should be the tariff for the Project, for the term of the PPA?
- (4) What Order?
- 9) **ISSUE No.(1):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?*
- (a) We note that, in this case, the Respondent has granted extension of more than 10 months' time to commission the project. The Commission has the exclusive jurisdiction to consider the validity of the extension of time, when it affects the tariff payable to a generating company, ultimately passed on to consumers. The *Force Majeure* Events and the requirement of issuing a

written Notice, are mentioned in Clause 8.3 of the PPA. Under Clause 8 of the PPA, it is also necessary to prove that, the *Force Majeure* Events were not caused by the non-performing party's negligent or intentional acts, errors or omissions. Considering these, we need to examine, if the Petitioner, in any manner, was negligent in performing its obligations under the PPA.

- (b) The PPA is dated 01.07.2015. The Conditions Precedent had to be achieved within 365 days, from the date of signing the PPA and the Project had to be commissioned within 18 months from the date of signing the PPA. The achievement of the Conditions Precedent would include, obtaining of all the approvals by the SPD.
- (c) The SPD applied for the deemed conversion of land to the Deputy Commissioner, Tumakuru on 06.02.2016 (Annexure P-4), after more than 7 months from the date of the PPA. No explanation is given for this delay on the part of the SPD, in applying for the conversion of land. In the Conversion order of the Deputy Commissioner, Tumakuru dated 07.10.2017 (Annexure P-24), the date of the application is mentioned as 30.12.2016. It cannot be made out whether another application dated 30.12.2016 was filed by the petitioner after taking back the earlier application dated 06.02.2016. There is no averment in the Petition, on this aspect. We note that the Karnataka Land Revenue (Amendment) Act, 2015 was enacted on 12.08.2015, amending Section 95 by introducing sub section (10) which reads as follows:

*“(10) If any occupant of any agriculture land assessed or held for the purpose of agriculture wishes to divert such land or part thereof for the purpose of setting up of solar power generation in accordance with Karnataka Solar Policy 2014-21 issued in G.O EN 21 VSC 2014 dated 22.05.2014 which has been approved by State and Central Government and which has been approved by the Competent Authority, the permission applied for conversion of such land shall be deemed to have been granted for that purpose so long as they use for purpose for which permission is granted subject to payment of the conversion fine and all such other fees payable if any, in this regard.”*

- (d) Pursuant to this, the Government of Karnataka issued a Circular dated 01.12.2015, providing that any person intending to establish a solar power project under the Government Policy, after approval by the concerned authority, has applied for conversion of land with the documents mentioned in the Circular and paid the conversion charges/penalty, the conversion has to be considered as deemed conversion. The circular also mentions that the DC has to complete the proceedings of deemed conversion within 15 days after receipt of the conversion charges/penalty.
- (e) The Hon'ble High Court of Karnataka, in the Order dated 04.07.2017 , in WP Nos.27418-20/2017 (*Ravindra Energy Ltd & another vs State of Karnataka & others*), in paras 10 and 15, has held, as follows:

*"10. As per the provisions contained in the Act as amended by the Karnataka Act No.31 of 2015 by which Clause no.10 of Section 95 has been inserted, 'if any occupant of any agriculture land assessed or held for the purpose of agriculture wishes to divert such land or part thereof for the purpose of setting up of solar power generation in accordance with Karnataka Solar Policy 2014-2021 issued in G.O.No.EN 21 VSC 2014, dated 22.05.2014 which has been approved by the Competent Authority, the permission applied for conversion of such land shall be deemed to have been granted for that purpose so long as they use for purpose for which permission is granted subject to payment of the conversion fine and all such other fees payable if any, in this regard.' This provision inserted by way of amendment has come into effect from 13.08.2015. Petitioner has filed application on 05.11.2016. The Deputy Commissioner was required to consider the application in the light of the amended provision introduced as per Act No.31 of 2015. The requirement as spelt out in clause no.10 of Section 95 of the Act, is that the applicant must show that he was an occupant of the agricultural land. If he desired to divert such land or part thereof for setting up solar generation and that such desire should be in accordance with the Karnataka Solar Policy 2014-2021 issued vide Government Order dated 22.05.2014 and also that the same ought to have been approved by the competent authority. In that event, the permission applied for*



*conversion of such land shall be deemed to have been granted. ..."*

XXX

XXX

XXX

*"15. It is also necessary to notice that as long as Petitioners satisfy the requirement spelt out in clause no.10 of Section 95 as amended, Petitioners are entitled for an order regarding deemed conversion. Merely because objections were raised by some of the devotees, it cannot be said that request for deemed conversion cannot be granted. If the applicants or any other devotees of the deity or the Mutt intend to establish their rights or claims as asserted in their objections, they are required to approach the Competent Court seeking appropriate declaration in that regard pertaining to the lands in question. The said question cannot be decided in this proceedings nor the Deputy Commissioner can embark upon an inquiry into the same. Hence, as all the requirements of clause 10 of Section 95 of the Act having been complied with by the Petitioners in this case, they are entitled for a declaration that benefit of deemed conversion shall accrue to them in view of the application filed by them."*

- (f) Therefore, it can be said that if the Petitioner had submitted the required documents and paid the conversion charges, the provision of deemed conversion would apply and thus, on the ground that land conversion order was delayed, the extension of time to commission the Project could not have been granted. It is also noted that the project was not delayed on this account and the petitioner has failed to prove the same. Hence, this cannot be considered as force majeure event.
- (g) The petitioner has alleged that the delay in granting evacuation approval delayed the execution of the project. A copy of the application made to KPTCL for evacuation approval is not produced by the Petitioner and it cannot be made out as to when the application was given to KPTCL. There is no averment in the petition as to when the application was made. It cannot

be made out whether the petitioner was diligent in applying for evacuation approval within reasonable time, or whether there was any delay. The KPTCL has not filed any Objections. In the Objections filed by Respondent-1, it is stated that KPTCL granted the tentative evacuation approval on 01.09.2016 but the same was accepted by the petitioner on 23.01.2017. It appears that this is not correct. The date of acceptance is mentioned as 12.09.2016 in the Regular evacuation approval dated 28.01.2017 (Annexure P-7). It is also stated by Respondent-1 that the non-production of land conversion order delayed the grant of regular evacuation approval. The tentative evacuation approval was granted on 01.09.2016. The Petitioner, gave acceptance to the evacuation scheme on 12.09.2016. Thereafter, the regular evacuation approval was granted on 28.01.2017, even before the land conversion order. The Regular evacuation scheme mentions several correspondences, indicating the actions taken at various levels by KPTCL which required some time. It is safe to state that, had the Petitioner applied for evacuation soon after entering into the PPA, the same would have been granted much earlier. Hence, we are unable to accept the Petitioner's claim that there was delay in grant of evacuation approval, and that it delayed commissioning of the Project and also that it was a *Force Majeure* Event.

- (h) It is stated by the Petitioner that the work was completed on 30.06.2017 late in the evening but due to lack of radiation, the generation could not take place. That due to this, the Project could not generate energy on 30.06.2017 up to which date the extension of time had been granted by the BESCOM. Even assuming that the project was ready for commissioning on 30.6.2017, the tariff as per the generic tariff order dated 12.4.2017 would have been applicable.
- (j) We note that, it is a settled law that, the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under clause 8.3 (b), is stated to have been issued by the Petitioner to the Respondent describing

the particulars of any *Force Majeure* Event, as soon as practicable, after its occurrence. Further, the reasons quoted by the Petitioner, do not fall under the Events of *Force Majeure* mentioned in the PPA, as held in the preceding paragraphs. Hence, we hold that the Petitioner is not entitled to the extension of time, as provided in the clauses of the PPA.

(k) Therefore, we answer Issue No.(1), in the negative.

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

(a) Clause 5.1 of the PPA reads, as follows:

***"5.1 Tariff Payable:***

*The SPD shall be entitled to receive the tariff of Rs8.40 per kWh based on the KERC tariff order S/03/1 dated 10.10.2013 in respect of SPD's solar PV projects in terms of this agreement for the period between COD and the expiry date. However, subject to clause 2.5, if there is a delay in commissioning of the project beyond the Scheduled Commissioning Date and during such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects shall be the lower of the following:*

- i. Rs.8.40/- per kWh*
- ii. Varied tariff applicable as on the date of commercial operation."*

(b) It is the Petitioner's case that, the Tariff Orders dated 30.07.2015 and 12.04.2017, are not applicable to the Project, as the project has been commissioned within the extended period of commissioning, granted by the Respondent-1 (BESCOM). It is the submission of the Petitioner that the Respondent (BESCOM) has granted extension of time, after considering the *Force Majeure* Events, as provided in the PPA and hence, the tariff of Rs.8.40

per unit, should not be altered. The Respondent has contended that the petitioner was responsible for the delays alleged and hence, cannot take shelter under the force majeure clause in the PPA. It is stated by the Petitioner that, the Respondent (BESCOM), while granting extension of time, vide letter dated 11.09.2017, had not mentioned about altering the tariff and had stated that all other terms of the PPA remain unaltered. We note that, this is not correct. The 1<sup>st</sup> Respondent (BESCOM), in the letters dated 16.06.2017 (Annexure P-12) and 11.09.2017 (Annexure P-22), while granting extension of time, has stated that, the tariff applicable and the Liquidated Damages to be paid, is subject to the approval of the KERC / Government of Karnataka.

- (c) The Project is commissioned on 17.10.2017. The Generic Tariff Order dated 12.04.2017, is applicable for the Projects, commissioned during the period from 01.04.2017 to 31.3.2018. The PPA provides that, the tariff, as on the date of commercial operation, would be applicable for the Project, if it is commissioned beyond the Scheduled Commissioning Date, subject to Force Majeure events.
- (d) The Hon'ble Supreme Court, 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 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 Respondent would be entitled only for lower of the two tariffs...."*

- (e) Further, 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."*

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- (f) The learned counsel for the Petitioner has relied upon the decision of the Hon'ble Supreme Court, reported in 2016 (3) SCC 515, in the case of *Bangalore Electricity Supply Company Limited –Vs- Konark Power Projects Ltd., and Another*, to contend that, the tariff agreed to in a PPA, cannot be altered during the term of the PPA. The principle stated in the said case is not applicable to the case on hand, because, in this case, the terms of the PPA, itself provided for a reduced tariff, subject to force majeure events. It is also held by the Hon'ble Supreme Court, in the case of *Gujarat Urja Vikas Nigam Ltd. –Vs- Tarini Infrastructure Ltd., & Others*, reported in AIR 2016 SC 5580, that the decision rendered in the *Konark* case was confined only to the facts of that case.
- (g) The learned counsel for the Petitioner has relied upon the decision of the Hon'ble Supreme Court, in the case of *Gujarat Urja Vikas Nigam Limited –Vs- Solar Semiconductor Power Company (India) Private Limited and Others*, to contend that, this Commission has no power, to alter the tariff or the other terms and conditions, agreed to in a PPA. In the said case, the question that arose for consideration was, 'whether the Commission could extend the Control Period in respect of a Solar Power Project, under its inherent jurisdiction.' This question was answered in the negative. The principle stated, in the said decision is not applicable to the case on hand, as this Commission is not exercising its inherent powers, but is exercising its power to determine the tariff and interpret the clauses of the PPA to resolve the question involved in this case.
- (h) The parties are bound by the terms of the PPA and the timelines mentioned therein. The Petitioner had to plan sufficiently in advance, allowing adequate time to obtain the required clearances, approvals and consents of various authorities keeping in mind the different milestones stated in PPA to comply with the Conditions Precedent that need to be achieved and obligations of the SPD that need to be fulfilled. Further, she had to coordinate all these

activities in an efficient manner. The PPA provides 12 months for achieving Condition Precedent and 18 months for achieving SCOD, from the date of executing PPA.

- (j) We note that, the Petitioner took the steps for implementation of the Project, after several months of execution of the PPA, with barely few months left for its scheduled commissioning, and could not do it, for certain reasons and events, which we have held to be not falling under the *Force Majeure* clause of the PPA. The Petitioner has not explained the reasons for delay in initiating the implementation of the project without which she cannot succeed. Had the SPD/Petitioner initiated the implementation of the project, soon after execution of PPA, the project could have been commissioned much earlier. Hence, we hold that, the Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit, for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017, prevalent on the date of commissioning of the Project.
- (k) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. Admittedly Conditions Precedent were not fulfilled within 365 days. Thus, for not complying with the timelines for Conditions Precedent and commissioning of the Project, as mentioned in the PPA, the Petitioner is required to pay damages for such delay, as per the Clauses 2.2 and 2.5.7 of the PPA. The Hon'ble Supreme Court, in its judgment dated 05.04.2018, in Civil Appeal No.3600 of 2018 (*M.P. Power Management Company Ltd Vs. Renew Clean Energy Pvt.Ltd., and another*), has held that, for delay in achieving the Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages, as stipulated in the PPA.
- (l) It is stated that Petitioner-2, which came on record during the course of proceedings by an I A for impleading, is the SPV and that the Respondent-1 did not sign the SPPA, incorporating the SPV, relying on the letter of the Commission dated 07.07.2017 (Annexure P-20). Now that this case is decided,

the parties have to submit the duly signed SPPA for approval of the Commission along with relevant documents regarding incorporating the name of SPV.

(m) Therefore, we answer Issue No. (2), as above.

11) **ISSUE No. (3):** *What Order?*

For the foregoing reasons, we pass the following:

**ORDER**

- (a) It is declared that the Petitioner is not entitled to any of the reliefs, sought for, in the Petition;
- (b) The Petitioner is entitled to a tariff of Rs.4.36 (Rupees four and Paise thirty-six) only per unit, the varied tariff, as applicable on the date of commissioning of the Petitioner's plant, fixed by the Commission in the Order dated 12.04.2017, for the term of the PPA, as per Clause 5.1 of the PPA;
- (c) The Petitioner is also liable to pay damages, as provided under Clauses 2.2 and 2.5.7 of the PPA; and,
- (d) The parties are directed to submit the Supplemental PPA, for approval of the Commission.

Sd/-  
(SHAMBHU DAYAL MEENA)  
CHAIRMAN

Sd/-  
(H.M. MANJUNATHA)  
MEMBER

Sd/-  
(M.D. RAVI)  
MEMBER