

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

Dated : 17th September, 2019

Present:

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

OP No. 185/2017

BETWEEN:

Avid Green Energy Private Limited,
No.35/2, Park Manor Building,
Park Road, Tasker Town,
Bengaluru – 560 051.

..

PETITIONER

[Represented by Navayana Law Offices, Advocates]

AND:

Chamundershwari Electricity Supply Corporation Limited,
No.29, Kaveri Grameena Bank Road,
Vijayanagar, 2nd Stage, Hinkal,
Mysuru – 570 017.

..

RESPONDENT

[Represented by Justlaw, Advocates]

ORDERS

- 1) In this Petition filed under Section 62, read with Sections 64 and 86(1)(f) of the Electricity Act, 2003, the Petitioner has prayed for:

-
- (a) Approval of the extension granted by the Respondent to new Scheduled Commissioning Date (SCD), viz., 30.06.2017, vide letter dated 23.02.2017 (ANNEXURE-P1); and,
- (b) Direction to the Respondent to make payment for the energy under the Power Purchase Agreement (PPA) dated 01.07.2015 (ANNEXURE-P3) and the Supplemental Agreement dated 23.06.2016 (ANNEXURE - P7) at the rate of Rs.8.40 per unit, from the Commercial Operation Date (COD) of the Petitioner's Project, for the entire term of the PPA.
- 2) The material facts stated by the Petitioner in the Petition, in support of its prayers, may be stated as follows:
- (a) Karnataka Renewable Energy Development Limited (KREDL), which is the Nodal Agency for implementation of Solar Power Projects in the State of Karnataka, issued a letter dated 16.03.2015 in favour of Shri Ramu G and allotted 3 MW capacity Solar Power Project, to be commissioned at Kuderu Village, Chamarajanagara Taluk and District, under Segment-1, Category-1 of the Solar Policy of the Government of Karnataka, and in compliance of the Government Order dated 26.08.2014, and instructed him to execute a PPA with the Respondent, under the Farmers' Scheme, subject to certain terms and conditions.
- (b) Based on the above allocation letter, Shri Ramu G initialed the PPA dated 01.07.2015 with the Respondent and the PPA was approved by the Commission, vide letter dated 23.07.2015.

-
- (c) The PPA was executed by the parties after approval and since the exact date of execution is not ascertainable by documentary evidence, it could be presumed to be any date subsequent to 23.07.2015, because as per 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' and thus, the Project Proponent was required to commission the Project by 18 months from 23.07.2015, viz., 22.01.2017.
- (d) The Government of Karnataka, Revenue Department, issued a Circular bearing No.RD 69 LGP 2015 dated 01.12.2015, notifying the list of documents to be obtained by the Deputy Commissioner from the Project Proponents, in order to grant the deemed conversion of the agricultural lands for the purpose of installation of the Solar Power Projects. Till this Circular was issued by the State Government, there was no clarity on the policy and legislative framework on the installation of the Solar Power Projects.
- (e) The Petitioner had initiated steps to procure the conversion approval for the agricultural land for the Project from the Deputy Commissioner and for allied permissions. The permission for usage of the land for non-agricultural purpose was granted on 06.02.2017 and the regular Evacuation Approval was granted on 04.08.2017 and since the Line Estimate Approval was not received, the Petitioner addressed a letter dated 02.10.2016 to the Respondent, representing the *Force Majeure* events and sought for time extension for execution of the Project.

-
- (f) The Petitioner had placed Purchase Orders on 02.11.2016 with Mysore Electrical Industries Limited for supply of MEI Make 11 kV 350 MVA outdoor Single Feeder Panels, Annunciator Panels.
- (g) The Project work further slowed down from November, 2016 onwards, due to the demonetization decision taken by the Central Government.
- (h) Subsequently, the Petitioner, the Special Purpose Vehicle (SPV), stepped into the shoes of Shri Ramu G and a Supplemental Agreement (SPPA) dated 23.06.2016, modifying the original PPA to this extent was executed and the said SPPA was approved by the Commission on 29.08.2016.
- (i) The Respondent, by its Official Memorandum dated 23.02.2017, considering the *Force Majeure* events and other circumstances of the Petitioner, approved the extension of time and thus, the Project was to be commissioned within 30.06.2017.
- (j) The Petitioner successfully commissioned the Project on 29.06.2017, as per the Commissioning Certificate dated 09.08.2017.
- (k) The Petitioner supplied the power generated to the Respondent and raised invoices dated 09.08.2017 for the months of June, 2017 and July, 2017 at the rate of Rs.8.40 per unit, claiming Rs.3,360/- and Rs.4,75,440/- respectively.
- 3) The grounds urged by the Petitioner in support of its prayers may be summarized as follows:

-
- (a) The Petitioner is entitled to the tariff of Rs.8.40 per unit as mentioned in the PPA. In all, this Commission has passed three Generic Tariff Orders in respect of the Solar Power Projects, viz., Tariff Orders dated 10.10.2013, 30.07.2015 and 12.04.2017. In the Generic Tariff Order dated 30.07.2015 (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 01.09.2015 to 31.03.2018, for which the PPAs have been entered into and submitted to the Commission prior to 01.09.2015 for approval, the tariff as per the said agreements shall be applicable.
- (b) The Generic Tariff Order dated 12.04.2017 has been made applicable to only the new grid connected Solar Projects entering into PPAs on or after 01.04.2017, but before 01.04.2018 and also those Projects which are commissioned during the period from 01.04.2017 to 31.03.2018, for which the PPAs have not been entered into, prior 01.04.2017. Hence, this Generic Tariff Order also does 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.
- (c) 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 COD. Hence, the Petitioner is entitled to the tariff, as per the PPA.

-
- (d) The Project of the Petitioner has experienced several hurdles, which can be termed as the *Force Majeure* Events, within the meaning of Article 8 of the PPA and this was represented before the Respondent by the Petitioner. The pleas of the Petitioner have been considered and accepted.
- (e) The extension of time granted validly to the Petitioner was given the legal force and would become effective upon the achievement of the SCOD, especially under the circumstances wherein extension requested was before the expiry of the original SCOD, granted under the terms of the PPA, was not affected in violation of any Regulations and well within the act of valid extension with the consent of the Petitioner. The extension of time was granted as per Clause 2.5.6 of the PPA dated 01.07.2015 and as a result of such extension, the SCD and the Expiry Date newly determined shall be deemed to be the SCD and Expiry Date for the purposes of the PPA dated 01.07.2015. Hence, the Respondent is not entitled to any Liquidated Damages without adjudication.
- (f) The extension of time granted by the Respondent by Official Memorandum dated 23.02.2017 does not mention about altering the tariff and specifically clarifies that all other terms and conditions of the PPA remain unaltered. Hence, the Petitioner is entitled to the tariff agreed in PPA dated 06.07.2015, at the rate of Rs.8.40 per unit.
- 4) Upon Notice, the Respondent has appeared through its learned counsel, and filed Statement of Objections as follows:

-
- (a) On 01.07.2015, a PPA was executed with the Respondent in respect of the project. As per Article 1 (xiv) of the PPA, the Effective Date is the date on which the PPA was signed. As per Article 1 (xxxi) of the PPA, the Scheduled Commissioning Date is 18 months from the effective date. Therefore, the Scheduled Commissioning Date for the Petitioner's plant was 01.01.2017. The Commission approved the PPA on 23.07.2015. As the SPD was unable to invest and establish the Solar Power Plant, he found an investor and formed a Special Purpose Vehicle (SPV) namely, Avid Green Energy Ltd., the Petitioner, to invest in the project as permitted under Article 12.11 of the PPA. On 23.06.2016, a SPPA was executed by the Petitioner, making this change and the same was approved by the Commission on 29.08.2016. In the meanwhile, on 01.07.2016, tentative evacuation approval was granted to the Petitioner. Upon acceptance of the tentative approval by the Petitioner, KPTCL granted regular evacuation approval on 04.08.2016.
- (b) On 02.10.2016 the Petitioner requested for extension of Scheduled Commissioning date by six months citing problems in getting financing from various banks due to non-receipt of approval of SPPA. On 02.11.2016, the Petitioner claims to have placed purchase orders for the supply of Outdoor Solar Feeder panels. However, the same has been placed by Relfex Energy Ltd., and not by the Petitioner or the SPD, Sri. Ramu G.
- (c) The Respondent, vide letter dated 21.11.2016 (Annexure R-1) communicated to the petitioner that the request for extension cannot be granted as the same was not approved by the Commission. On

24.11.2016, the Department of Energy, Government of Karnataka issued a Government letter directing a three-member Committee, to be constituted by all Electricity Supply Companies (ESCOMs), to consider grant of extension of time by 6 months to developers establishing solar plants under the farmers' scheme.

(d) On 15.02.2017, the Respondent constituted a 3-member Committee, to look into requests received for extension of time for achieving COD for 1-3 MW Solar Projects allotted to land owning farmers. The proceedings of the Committee dated 16.02.2017 indicates that a 6-month time extension was granted to the Petitioner. On 23.02.2017 an Official Memorandum was issued granting extension of time to commission the plant by 6 months. On 16.03.2017, the Commission addressed a letter to the ESCOMs directing them not to grant extension of time without the consent of the Commission. On 05.04.2017, the Commission addressed a letter to the Respondent directing it to inform the Petitioner to file a petition before the Commission with all the necessary documents to seek approval for extension of time for commissioning the project. The Respondent addressed a letter dated 20.04.2017 to the Petitioner intimating the contents of the letter of the Commission.

(e) On 29.06.2017, the Petitioner's plant was commissioned and a certificate of commissioning was issued on 09.08.2017 by KPTCL. It is contended by the Petitioner that the Petitioner faced numerous problems in executing the project such as demonetization, the delay in obtaining approvals from the Government and its instrumentalities, delay in the Deputy

Commissioner issuing orders for conversion, delay in according approval for evacuation line etc., as a result of which it was unable to achieve the deadline for commissioning on 01.01.2017. Further, it is contended that the Petitioner is entitled for extension of time under Article 2.5 of the PPA. The delay in completing the project within the time frame indicated in the PPA, is not attributable to the Respondent.

- (f) The Petitioner furnished documents to the Committee constituted by the Respondent for consideration of its request for extension of time. The reason assigned for the delayed execution of the project, namely land conversion approval, demonetization, etc., cannot be attributed to the Respondent. The onus of obtaining all necessary approvals was on the Petitioner as per Article 2.1.1 of the PPA. However, the Petitioner was unable to do so. The delay in commissioning of project cannot be due to demonetization, as the same was only implemented in November, 2016. The request for extension of time was made by the Petitioner in October, 2016, i.e., on 02.10.2016 wherein it was mentioned that the basis for seeking extension was delay in obtaining financing from Bankers. The PPA was executed on 01.07.2015 and the plant had to be commissioned before 01.01.2017. Majority of the work involved for establishing the plant ought to have been completed by November, 2016. Therefore, the contention that demonetization delayed the Project is untenable. The delays are wholly attributable to the inaction of the Petitioner. Therefore, the Petitioner is not entitled to extension of time.

-
- (g) With regard to the averments pertaining to applicability of Article 2.5 of the PPA relating to extension of time is concerned, the Petitioner has not made out valid grounds to extend the time for commissioning the Project. None of the grounds set out in Article 2.5 is available to the Petitioner. As per Article 5.1 of the PPA, the Petitioner is entitled to tariff applicable at the time of commissioning. The petitioner having commissioned its Plant on 29.06.2017 is entitled to payment as per the generic tariff order dated 12.04.2017 which is the applicable tariff on the date of commissioning of the plant. The Petitioner's plant was commissioned under the control period of Generic Tariff order dated 12.04.2017. Therefore, the said Order would be applicable and the order dated 30.07.2015 would not be applicable.
- (h) The Petitioner can be excused for not achieving Conditions Precedent, only when it is affected by the *Force Majeure* Event or if any of the activities is specifically waived in writing by the Respondent. The PPA sets out the events which are *Force Majeure* Events in Article 8. The delays sought to be termed as events of *Force Majeure* by the petitioner are not in fact events that come under the purview of the *Force Majeure* clause. Delays in obtaining approvals cannot be considered to be events of *Force Majeure*. Article 4.1 sets out the Obligations of the Developer and provides that it is the responsibility of the Developer to obtain all clearances, consents, etc. Hence, knowing fully well what its obligations under the contract are, the Petitioner is attempting to take advantage of

its own wrong. The same is impermissible in law and ought not to be permitted.

- (i) Article 8.3 (b) states that in the event of a force majeure situation, a notice is required to be issued to bringing to the attention of the other party such force majeure situation. The Petitioner has failed to adhere to 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. Hence, the contentions urged in the contract deserve rejection.
- (j) In response to the averments pertaining to delay in grant of approvals by Government agencies is concerned, the said contentions are untenable and bald. The Petitioner applied for grant of evacuation approval on 22.02.2016. However, fee towards processing the same was only paid on 24.03.2016. The Temporary Evacuation Approval was granted on 01.07.2016. The same was accepted by the Petitioner on 02.07.2016. Thereafter, final evacuation approval was granted by the KPTCL on 04.08.2016. This clearly shows that there has been no delay in grant of evacuation approval by KPTCL.
- (k) Insofar as the allegation of delay in obtaining approval of the Deputy Commissioner for conversion of land, the Petition is bereft of material / dates to indicate that the Petitioner has acted in a timely manner. It is for the Petitioner to show that there has been delay by the authorities on this front. In the absence of any material to indicate the date on which application for conversion was made etc., the said contention has to be

rejected. The Petitioner is attempting to bypass its obligations under the PPA. The Respondent is a public utility and non-receipt of electricity within the stipulated time frame comes at a price. The Petitioner ought not to be absolved of its obligations and duties under the PPA on the ground of delay, which is caused wholly and solely by the Petitioner itself. The decision to encourage solar generation by farmers was taken in order to boost the availability of electricity in the State and to help land owning farmers. Delays such as this are causing numerous problems for all the stakeholders as the distribution company is deprived of the electricity that it is entitled to receive under a firm contract. Hence, such delays ought to be deprecated.

- (l) Article 5.1 of the PPA provides payment of varied tariff, as a consequence of delay in the commissioning of the Project beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein. It is a settled law that, the Commission has the exclusive jurisdiction to determine the tariff for supply of electricity by a Generating Company to a Distribution Licensee and it has to regulate the electricity purchase and the procurement process of the Distribution Licensee, including the price at which the electricity shall be procured from different agencies, through PPAs.

- (m) The averment that the Generic Tariff order dated 12.04.2017 is applicable only to new grid connected solar projects entering into PPA between 01.04.2017 and 01.04.2018 is denied as false and misleading. As per the Commission's Order dated 12.04.2017, the tariff of Rs.4.36 per unit is

applicable to solar PV Plants for which PPAs were entered into before 01.04.2017 but not commissioned within the specified commercial operation date and such plants which achieve COD during the period from 01.04.2017 to 31.03.2018. It is settled law that a generator who has delayed commissioning the plant is eligible to the tariff prevailing on the date of commissioning.

- (n) The Respondent has prayed for dismissal of the Petition.
- 5) We have heard the oral submissions made by the learned counsel for the parties. The following issues would arise, for our consideration:
- (1) Whether the Commission has power to scrutinise if the extension of time granted by the Respondent is proper or otherwise?
 - (2) Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?
 - (3) What should be the tariff for the Project for the term of the PPA?
 - (4) What Order?
- 6) After considering the submissions of the parties and perusing the material placed on record, our findings on the above Issues are as follows:
- 7) **ISSUE No.(1)**: *Whether the Commission has power to scrutinise if the extension of time granted by the Respondent is proper or otherwise?*
- (a) Clause 2.5 of the PPA provides for extensions of time. The contention of the Petitioner is that since the Respondent has accepted the reasons for

delay in commissioning the project as *force majeure* events and granted extension of time by 6 months as provided in the PPA, the tariff for the project should not be altered. We are unable to accept the contention of the petitioner. The extension of time to commission the project has a bearing on the tariff payable. The consumer, ultimately pays for the supply of electricity and is the most affected party. The Commission is required to safeguard such consumers' interest. While upholding the role of the Commission as a regulator and custodian of the interest of consumers, the Hon'ble Supreme Court of India, has, in the case of *All India Power Engineers Federation Ltd v. Sasan Power Ltd.*, reported in (2017) 1 SCC 487, held that, even if parties to a contract (generating company- seller of energy and distribution licensee-buyer of energy) waive a certain term affecting the tariff, the Commission, as a custodian of consumer interest has to intervene and exercise its regulatory power. Therefore, we hold that the Commission has the mandate and powers to scrutinise the correctness and legality of the extension of time granted by the Respondent.

- (b) The Commission has passed a reasoned Order in OP No.65/2017 dated 7th August, 2018 in *Madamageri Solar Power Project LL.P., & another Vs HESCOM*, on this Issue and the same holds good in this case also.
- (c) For the above reasons, Issue No.(1) is answered, in the affirmative.

-
- 8) **ISSUE No.(2):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?*
- (a) We note that, under the Clause 2.5 of the PPA, extension of time for commissioning the Project can be granted, if the SPD is prevented from performing its obligations, due to the BESCO's 'Event of Default' or *Force Majeure* events. The *Force Majeure* events and the requirement of issuing a written Notice are mentioned in Clause 8.3 of the PPA. Under Article 8 of the PPA, it is also necessary to prove that the *Force Majeure* event was not caused by the non-performing party's negligent or intentional acts, errors or omissions. In this backdrop, we need to examine, if the Petitioner or the SPD, in any manner, was negligent in performing its obligations under the PPA.
- (b) The PPA is signed on 01.07.2015. The Conditions Precedent have to be achieved within 365 days from the date of signing the PPA and the Project has 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. It is alleged that, the initialled PPA was sent to the Commission for approval and was approved on 23.07.2015. It is alleged that the signing of the PPA can happen only after approval of the PPA and the approval of PPA was not communicated to the Petitioner, hence, the Effective Date has to be the date of approval of the PPA. The Commission has taken only 23 days for the regulatory process of approval of the PPA from the date of its execution and this period may not have much impact on the commissioning of the project, more so when the

delay in commissioning of the project is not only 23 days but much more. The allegation of the petitioner that the PPA is signed only after approval by the Commission cannot be accepted as the last portion of the PPA mentions that 'the PPA is executed and copies delivered to each part on the day and year first above stated' (i.e., on 01.07.2015). Considering the date of approval of the PPA as the 'Effective Date', would be contrary to the definition in the PPA. Even if the contention of the Petitioner that the time taken for approval of the PPA delayed the Project, it is not demonstrated, as to which event was delayed during this period of 23 days. The Petitioner could have initiated the preliminary works towards implementing the Project, as the approved PPA would be required only at the final stages of loan approval, land conversion approval, etc.

(c) Article 8.3 (b) (iv) of the PPA reads as follows:

"The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence failure to comply with any material Law, or by any material breach or default under this Agreement."

(d) To examine whether the Petitioner was diligent in executing the Project within the time lines mentioned in the PPA, the dates on which the applications made to various authorities for conversion of land and other approvals are to be examined. However, there is no evidence on these aspects in the petition. It is only stated by the petitioner that the conversion order was granted on 06.02.2017 and Regular evacuation approval was granted on 04.08.2017. The dates of the applications are not mentioned

without which it cannot be made out whether the petitioner was diligent in executing the Project.

- (e) The Respondent, in the Objections has furnished a copy of the Minutes of the Proceedings held by the 3 Member Committee on 15.02.2017 in the matter of evaluation of the requests by the land owning farmers/SPVs for extension of time to commission the plants, wherein the petitioner's case is also mentioned. In the said Proceedings, it is mentioned as follows:

".....As per the report of the EE(Elc), O & M Division, CESC, Chamarajanagara vide letter: 6338-40 dtd: 03.12.2016, structure works is under progress. AEE, Chamarajanagar S/d informed that apart from Building work there is no work in progress at site.

Now the developer has submitted the letter dtd: 01.12.2016 for extension of 06 months of time for achieving COD stating delay was attributable due to evacuation approval, Bay allotment by KPTCL authorities, Supplemental Agreement. Further stated delay was due to Cauvery riots, Non availability of labours due to non-payment of salary due to demonetization."

Thus, as on 03.12.2016, which is a few days before the SCD, several works were pending.

- (f) In the Objections, the Respondent has stated that the Petitioner had applied for the evacuation approval to KPTCL on 22.02.2016, after 8 months from the date of the PPA. No explanation is given for this delay on the part of the petitioner. The temporary evacuation approval was granted on 01.07.2016, after payment of fee by the petitioner on 24.03.2016. The regular evacuation approval was granted on 04.08.2016. It is stated by the Respondent that even after grant of regular evacuation

approval, the petitioner has delayed commissioning by 8 months and this delay is not explained. We note that after receipt of the application seeking evacuation approval, the field study has to be conducted by the concerned Engineers of KPTCL and after ascertaining the network feasibility, the tentative evacuation approval is given. After acceptance of the tentative evacuation approval and fulfilment of the conditions mentioned therein by the project developer, the regular evacuation approval is given by KPTCL. In fact, the SPD/SPV has not explained the delays mentioned by the respondent and has sought shelter under the force majeure clause.

- (g) We note that, it is settled law that the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under the clause, is stated to be issued by the Petitioner to the Respondent. As noted above, the Petitioner was not diligent in implementing the project within the stipulated time. Hence, we feel that the petitioner is not entitled to extension of time, as provided in the clauses of the PPA.
- (h) Therefore, we answer Issue No.(2), in the negative.
- 9) **ISSUE No.(3):** *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 Rs.8.40 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) The above clause of the PPA provides that, the tariff on the date of commercial operation will be applicable for the Project. The Project is commissioned on 29.06.2017. It is the contention of the petitioner that the generic tariff orders dated 30.07.2015 or 12.04.2017 are not applicable to the project as the PPA was entered much before the passing of the said orders and that the tariff of Rs.8.40 per unit should be paid for the term of the PPA. It is also stated by the petitioner that in the OM dated 23.02.2017, it is not mentioned by the respondent that the tariff would be reduced. The Respondent has produced a letter dated 21.11.2016, wherein it is mentioned that if there is delay in commissioning of the project, Articles 2.5.7 and 5.1 of the PPA would be invoked. Be that as it may. We note that the project was not commissioned within the time stipulated in the PPA to be eligible for the tariff of Rs.8.40 per unit and the tariff as on the date of commissioning was Rs.4.36 per unit. The generic tariff order dated 12.04.2017 provides that the tariff of Rs.4.36 per unit is applicable to Projects for which PPAs were entered into earlier but not commissioned within the stipulated period. The PPA provides that the varied tariff as on the date of commercial operation is applicable for the Project and the parties, having agreed to such a term have to abide by the same.

- (c) It is noted that the Solar Policy 2014-21 of the State also provides that the tariff determined by the Commission from time to time would be applicable to the Projects. It is also noted that the selection of farmers for setting up solar projects under the land owning farmers' category was done through e-bidding and the tariff was not discovered through the process of bidding under Section 63 of the Electricity Act, 2003. The PPAs were entered into at the tariff of Rs.8.40 per unit as per the generic tariff order dated 10.10.2013, prevalent at the time of execution of the PPAs. As per the terms of the PPA, the varied tariff of Rs.4.36 per unit, as per the generic tariff order dated 12.04.2017 would be applicable for the Project.
- (d) 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 1st respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA:

*'In case, commissioning of solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, **whichever is lower.**'*

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first respondent not being able to commence the generation of electricity within the "control period" stipulated in the 1st tariff order. It is also visualised that for the subsequent control period, the tariffs payable to projects/ power producers (similarly situated as the first

respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1st respondent would be entitled only for lower of the two tariffs....”

- (e) 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.”

In the light of the above decisions and the provisions of the PPA, 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.

- (f) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. 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 Articles 2.2 and 2.5.7 of the PPA.
- (g) The Hon'ble Supreme Court of India in Civil Appeal No. 3600 of 2018 (M.P. Power Management Company Ltd. Vs Renew Clean Energy Pvt. Ltd., and another) dated 05.04.2018 has held that for delay in achieving Conditions Precedent and commissioning the Project, the generating company is liable to pay damages stipulated in the PPA.
- (g) In view of the above discussions, we answer Issue No.(3), in the negative.
- 10) **ISSUE No.(4):** *What Order?*

For the foregoing reasons, we pass the following:

ORDER

- (a) The Petition is dismissed and the Petitioner is not entitled to any of the reliefs sought;
- (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, as fixed by the Commission in the Order dated 12.04.2017, for the term of the PPA, as per Article 5.1 of the PPA; and,

(c) The Petitioner is liable to pay Liquidated Damages, as provided under Articles 2.2 and 2.5.7 of the PPA.

Sd/-

(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-

(H.M. MANJUNATHA)
MEMBER

Sd/-

(M.D. RAVI)
MEMBER