

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 21st February, 2019

Present:

Shri Shambhu Dayal Meena .. Chairman
Shri H.D. Arun Kumar .. Member
Shri H.M. Manjunatha .. Member

OP No. 122 /2017

BETWEEN :

Smt. Sharada Doddi,
W/o Dasharath Doddi,
Resident of LIG-131,
KHB Colony,
BIDAR.

.. **PETITIONER**

[Represented by CrestLaw Partners, Advocates]

AND :

Gulbarga Electricity Supply Company Limited,
Corporate Office,
Station Road,
Kalaburagi – 585 102.

.. **RESPONDENT**

[Represented by Shri G.S. Kannur, Advocate]

ORDERS

1) This Petition is filed, under section 86(1)(f) of the Electricity Act, 2003, in effect, praying to:

(a) Approve the extension of time granted by the Respondent herein by an Order dated 10.03.2017 (ANNEXURE-P to the Petition); and,

- (b) Pass such other Order or further reliefs, as this Commission may deem fit and proper in the facts and circumstances of the case, in the ends of justice.
- 2) The facts submitted by the Petitioner, in support of her prayers, may be summed up, as follows:
- (a) The Petitioner is a farmer and was allotted a Solar Power Project of 1 MW under Segment-1, Category-1 of the Solar Power Policy 2014-21 of the Government of Karnataka. The Karnataka Renewable Energy Development Limited (KREDL) issued a Letter of Award (LoA) dated 16.03.2015 and instructed the Petitioner to execute a Power Purchase Agreement (PPA) with the Gulbarga Electricity Supply Company Limited (GESCOM), the Respondent within 120 days. Accordingly, a PPA dated 01.07.2015 was entered into between the Petitioner (Solar Project Developer/SPD) and the Respondent. As per the said the PPA, the Effective Date would be 01.07.2015 and the Scheduled Commissioning Date (SCD) is 01.01.2017.
- (b) The Solar Power Plant was proposed to be established in the land bearing Sy.No.97/3, measuring 5 acres 24 guntas, situated at Hamilapur Village, Bidar Taluk, granted under the Inams Abolition Act, 1977, in favour of the father-in-law of the Petitioner. The Petitioner applied for conversion of the said land on 17.07.2015, under Section 109 of the Karnataka Land Reforms Act, 1964, in the Office of the Deputy Commissioner, Bidar. However, the Petitioner was directed to file an application under Section 95 of the Karnataka Land Revenue Act, once again. Accordingly, the Petitioner filed an application dated 08.03.2016.
- (c) The Deputy Commissioner, Bidar, acting on the application of the Allottee (Petitioner), addressed a letter dated 28.04.2016 to the Principal Secretary, Revenue Department, Government of Karnataka, seeking permission for conversion of land under the provisions of The Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978 (PTCL Act). On 06.05.2016, in reply to the abovementioned letter, the

Principal Secretary addressed a letter to the Deputy Commissioner, Bidar, stating that the application for conversion has to be made under Section 4(2) of the PTCL Act. Further, the Principal Secretary, Revenue Department, Government of Karnataka, addressed a letter dated 20.06.2016 to the Deputy Commissioner, Bidar, stating that, if the land is granted under the Inams Abolition Act, then the provisions of the PTCL Act are not applicable.

- (d) After several correspondences, the Petitioner was granted conversion, by an Order dated 01.09.2016. Thus, there is a delay of about 14 months in granting the conversion of land.
- (e) On 23.04.2016, the Karnataka Power Transmission Corporation Limited (KPTCL) addressed a letter to the Petitioner, requesting her to make payment towards the processing fee for evacuation approval. The said fee was paid by the Petitioner, immediately. On 27.05.2016, the KPTCL accorded approval for the tentative evacuation scheme, for the proposed Solar Power Plant Project of the Petitioner. The Petitioner submitted the drawings to the KPTCL on 29.09.2016, for approval and the KPTCL accorded its approval on 07.10.2016, with a few corrections and observations.
- (f) On 20.10.2016, the KPTCL addressed a letter to the Petitioner regarding the evacuation scheme, requesting her to comply with the terms and conditions stated therein. The KPTCL addressed another letter on 05.11.2016, regarding the Supervisory Control and Data Acquisition (SCADA) integration of the Solar Power Plant of the Petitioner, requesting the Petitioner to integrate the Bay Energy Meter with the SCADA system. On 14.11.2016, the KPTCL addressed a letter to the Petitioner for payment of supervision charges of Rs.2,08,136/- for construction of a 11 kV terminal bay at 110/33 kV Sub-station, Habsikote, for evacuation of the proposed 2 MW power generated by the Solar Power Plant of the Petitioner. (We note that the correct capacity is 1 MW.) The Petitioner placed an order for the breaker on 07.09.2016. The breaker

was delivered only in the month of March, 2017. There is a delay of about 5 months in delivering the same.

- (g) On 16.12.2016, the Chief Electrical Inspector to the Government accorded approval for the drawings pertaining to the electrical installation of 1 MW Solar Power Plant of the Petitioner.
 - (h) In the meanwhile anticipating the delay in commissioning of the Solar Power Plant, the Petitioner had requested the Respondent for extension of time for commencement of the Project, vide letters dated 27.06.2016 and 18.07.2016, citing the reason of delay in conversion of the land. On 26.06.2017, the Petitioner addressed another letter to the Respondent, requesting for extension of time for commencement of the Plant, citing the above-mentioned delays, which were not in the control of the Petitioner (Here itself, we may note that a copy of such letter dated 26.06.2017 is not produced by the Petitioner and that the date of the letter appears to have been quoted wrongly). The extension of time was granted by the Respondent, invoking Articles 2.5 and 8 of the PPA, by an Order dated 10.03.2017. Subsequently, the Petitioner and the Respondent entered into a Supplemental PPA (SPPA) on 18.03.2017.
 - (j) The Petitioner commenced the operation of the plant on 29.04.2017, after obtaining the Safety Approval, even though the extension was given for a period of six months upto 30.6.2017.
- 3) The grounds urged by the Petitioner, in support of her prayers, may be summarized as follows:
- (a) The Petitioner could not complete the Project within the specified timeframe on account of the delay in grant of the Land Conversion Order and due to the delays in procurement of equipment from Mysore Electrical Industries Ltd.(MEI). There was delay on account of demonetization as well, with respect to payments to the labourers. The above-mentioned events being beyond the control of the Petitioner, she

sought for extension of time on 26.06.2016. However, the same was granted only on 10.03.2017.

- (b) The Respondent has extended the time for commissioning of the Solar Power Plant, in view of Articles 2.5 and 8 of the PPA. The Petitioner could not commission the Plant within the Scheduled Commissioning Date, due to the delay in obtaining the legal approvals, which is a *Force Majeure* Event, under Article 8.3(a) of the PPA. The same is admitted by the Respondent, in its letter dated 10.3.2017, granting extension of time.

The Petitioner has prayed to approve the extension of time granted by the Respondent.

- (c) During the course of the proceedings, the Petitioner filed certain documents along with an affidavit on 30.10.2018 and the Memo dated 20.11.2018 in support of the grounds urged.

- 4) Upon issuance of Notice, the Respondent entered appearance through its Counsel and filed Objections, which may be stated, as follows:

- (a) As the Petitioner was unable to execute the Project in a timely manner, a letter dated 30.01.2017 was addressed by the Petitioner to the Respondent, seeking extension of time by six months for commissioning the Project under the *Force Majeure* conditions. As several requests for extension of the Scheduled Commissioning Date were received from the Solar Developers, the Government of Karnataka issued an Order dated 24.11.2016, directing all the Electricity Supply Companies (ESCOMs) to constitute a 3-Member Committee, to consider and dispose of the requests of the farmers/ developers. In furtherance to the said direction, a Committee was constituted by the Respondent, to consider the requests for extension sought for by the 1 to 3 MW Solar Generators, under the land-owning farmers' category. The said Committee held a meeting on 27.01.2017, wherein the causes for the delayed achievement of the Scheduled Commercial Operation of the Projects were considered in respect of ten Generators, including the Petitioner and a decision was

taken to accord extension of six months to achieve the Scheduled Commissioning Date.

- (b) A letter was addressed to the Additional Chief Secretary, Energy Department, Government of Karnataka, regarding the extension of the Scheduled Commissioning Date upto six months, in respect of the Solar Power Developers (SPDs) / Special Purpose Vehicles (SPVs), who had requested for extension of time, under the farmers' category.
- (c) On 16.03.2017, this Commission addressed a letter to all the ESCOMs in the State, in the matter pertaining to the extension of time granted and informed them, not to allow any extension of time beyond the Scheduled Commissioning date, if any, as per the original PPA, without obtaining the prior opinion of the Commission. Further, vide letter dated 05.04.2017, the ESCOMs were directed by this Commission, to advise all the land owning Solar Power Developers / Special Purpose Vehicles, to approach this Commission and seek for approval of the extension of time.
- (d) The Additional Chief Secretary, Government of Karnataka, vide letter dated 25.04.2017, addressed to this Commission, has stated that the Energy Department, Government of Karnataka, has recommended the approvals in respect of the extensions of the Commercial Operation Date, by the Respondent (GESCOM), for six months from the date of the Scheduled Commercial Operation Date, as per Articles 2.5 and 8 of the PPA.
- (e) In respect of extension of the Project duration of the already awarded Solar Power Projects, the Ministry for New and Renewable Energy (MNRE), Government of India, has issued a letter, vide No.30/106/2014-15/NSM dated 28.07.2017, addressed to the Principal Secretaries (Power / Energy) of the State Governments, which is as stated below:

“Ministry has requested not to give time extension if all the obligations are fulfilled by the concerned State Government Authorities/PSUs, etc., in a project. However, if there are delays of any kind on the part of State Government Authorities/PSUs like land allotment, transmission/Evacuation

facilities, connectivity permission or force majeure, the competent authority in the State/SECI, NTPC, etc., may consider providing extension of the time duration strictly as per the Contractual Agreement.

It is also to be clarified that if in a project equipment/materials have been purchased/ordered and substantial advances paid as per original completion date, and there is a delay on part of the state organizations regarding land, transmission or any such reasons, the extension of the project may be allowed."

- (f) The Respondent has, therefore, prayed that this Commission be pleased to accord directions in the present Petition.
- 6) We have heard the learned counsel for both the sides and considered the respective pleadings and documents produced by the parties. The following issues would arise, for consideration:
- (1) Whether this Commission has jurisdiction, to call upon the Petitioner to prove the *Force Majeure* Events, relied upon by her by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondent admitting or not denying the occurrence of such *Force Majeure* Events?
 - (2) Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of the Petitioner's Plant?
 - (3) What should be the tariff for the Project, for the term of the PPA?
 - (4) What Order?
- 7) **ISSUE No. (1):** *Whether this Commission has jurisdiction, to call upon the Petitioner to prove the Force Majeure Events, relied upon by her, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondent admitting or not denying the occurrence of such Force Majeure Events?*

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- (a) We have passed a reasoned Order and given our findings on the above Issue, in OP No.65/2017 dated 7.8.2018 and held that this 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 same reasoning and findings would apply to this case also.
- (b) Therefore, we answer issue No. (1), 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 the Petitioner's Plant?*
- (a) Under Article 2.5 of the PPA, extension of time for commissioning the Project can be granted by GESCOM upto a maximum period of 6 months, if the SPD is prevented from performing its obligations, due to the ESCOM's 'Event of Default' or the *Force Majeure* Events. The *Force Majeure* Events and the requirement of issuing a written Notice, are mentioned in Article 8.3 of the PPA. Under Article 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 or the SPD, in any manner, was negligent in performing its obligations under the PPA, or was affected by force majeure events, as per the clauses of 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) We note that the Solar Policy dated 22.5.2014 in para 18 provides as follows:

“Conversion of agricultural land for setting up of solar projects:

Developers will be allowed to start project execution without waiting for formal approval on filing application for conversion of agricultural land for setting up of solar power projects on payment of specified fees.”

Admittedly, in pursuance of such provision, the KPTCL or GESCOM have not insisted on land conversion approval while processing the Petitioner's applications/requests for various preliminary approvals/ clearances connected to project implementation.

- (d) Apart from the above, the parties are bound by the terms of the PPA (Annexure A). Under Article 2.1.1 (ii) (b) of the PPA, it is the obligation of the SPD to obtain all consents, clearances and permits required for supply of power from the project. The time provided under Article 2.1 of the PPA to achieve the Conditions Precedent is 365 days from the date of signing of the PPA. It is the case of the Petitioner that the delay in granting conversion of land delayed the commissioning of the project. It is not in dispute that the land was granted to the father-in-law of the Petitioner under the Inams Abolition Act, 1977. The SPD applied for the conversion of land to the Deputy Commissioner, Bidar on 17.7.2015 (Annexure B). It is stated by the Petitioner that she was directed to file another application and that she filed the same on 8.3.2016. It cannot be made out as to which authority directed her to file another application for conversion of land, for what reasons and when she was informed of this aspect. Admittedly, before the Petitioner sought for conversion of agricultural land for setting up solar power project, she had sought permission for the sale of such land, but thereafter withdrew rather belatedly her request for permission for sale of land and such withdrawal of request was accepted by the Principal Secretary to Govt., Revenue Department only on 18.01.2016. Therefore, the date of correct and complete application of the Petitioner for land conversion can be taken as 8.3.2016. There were correspondences in the matter between the Deputy Commissioner, Bidar and the Government as the land in question was granted under the Inams Abolition Act and the

Petitioner belonged to the Scheduled Caste. Thus, as the Petitioner has submitted application for land conversion on 8.3.2016, there is a delay of 8 months after executing the PPA, in making the application and such delay can be solely attributed to the Petitioner because of her ambiguous action of seeking both permission for sale of land and also conversion of land for non-agricultural purposes. The time taken by the authorities for processing the subsequent application of the Petitioner for land conversion cannot be termed as delay or unjustified, considering the facts of the Petitioner's case. It is noted that had the Petitioner withdrawn in time her application submitted to the authorities requesting permission for sale land and thereafter sought for conversion of agricultural land for non-agricultural use, the process of grant of land conversion would have been quicker and happened within 12 months from the date of execution of the PPA as agreed in the PPA.

- (e) We note that the Karnataka Land Revenue (Amendment) Act, 2015 was enacted on 12.08.2015, amending Section 95 by introducing sub section (10), providing for deemed conversion of land 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."

- (f) 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.

- (g) The object of the amendment made to the Land Revenue Act has been clarified by Hon'ble High Court of Karnataka, in its 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, 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. ..."

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"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."

- (h) Therefore, it can be said that, if the Petitioner had submitted the required documents and paid the conversion charges, the provision of deemed conversion as per the aforesaid amendment would have applied.
- (i) Thus, we are unable to accept the Petitioner's plea that there was delay in grant of land conversion resulting in delayed commissioning of the Petitioner's project. Therefore, on the ground that land conversion order was delayed, the extension of time to commission the Project could not have been granted by the Respondent in the Petitioner's case. The Solar Policy extracted above specifies that the developers of the solar projects have to commence work without waiting for the land conversion process. As we have held on considering all the aspects, that there is no delay in grant of land conversion and the Petitioner alone responsible for belatedly initiating the process, the Petitioner's contention that it has to be treated as a *Force Majeure* event is liable to be rejected.
- (j) The other allegation of the Petitioner, for causing delay in commissioning the project, is that the delivery of bay equipment was delayed by MEI from 7.9.2016 to March 2017. We note that, the breakers have to be tailor-made, based on the drawing submitted, tested and certified by the TAQC and thereafter, despatched. The Petitioner has not produced the details

as to when the requisite inspection charges were paid by the Petitioner pursuant to the letters dated 1.12.2016 demanding the payment of charges. Considering the various steps involved, the period of about 3 months from 1.12.2016 for supply of breakers, cannot be termed as 'delay'. It is also not explained, as to why there was a delay on the part of the Petitioner, in placing the Purchase Order for the breaker. We note that the Government of Karnataka had instructed KPTCL and ESCOMs to provide temporary feeders to facilitate the commissioning of the Projects and the Petitioner could have availed such facility extended by approaching the said authorities if there was any inordinate delay in delivery of breakers.

(k) 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 the clause, 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. The Respondent(GESCOM) should have considered these aspects, before granting the extension of time to the Petitioner.

(l) 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) Article 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) Article 5.1 of the PPA provides for reduction of the tariff, as a consequence of delay in commissioning of the Solar Power Project beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein. This is in view of the fact that, this Commission periodically determines the generic tariff for supply of electricity generated from various sources to the Distribution Licensees, based on among other parameters, mainly Capital Cost of the generating plant. Such generic tariff is made available for a period, called as 'Control Period', during which the generating plants get implemented and commissioned at the normative Capital Cost adopted in the generic Tariff Order, generally after execution of a PPA with a Distribution Licensee. Such a PPA also has a clause stipulating the time, within which the power supply should commence, so that the Distribution Licensee can plan further supply to its consumers. The time stipulated for completion of the Project takes into account the time ordinarily required to complete various pre-commissioning activities, which, in respect of Megawatt Scale Solar Power Plants, is taken as between 12 months to 18 months. Any delay or failure in the commencement of power supply within the agreed date would disrupt the operation of the Distribution Licensees, like the Respondent (GESCOM) herein, which could also result in their power procurement from alternative expensive sources, leading to higher retail tariff to the consumers or short supply, revenue loss to them, and even to imposition of penalties for not meeting the Renewable Purchase Obligation fixed by this Commission. The Capital Cost of Solar Power Plants has been coming down very rapidly in the recent years, because of the advancement in technology and production efficiency as well as economies of scale in

the backdrop of largescale solar capacity addition across the globe. Thus, the generic tariff for the Megawatt Scale Solar Power Plants, which was fixed at Rs.14.50 per unit in the Commission's Order dated 13.07.2010, has been successively reduced to: (i) Rs.8.40 per unit in the Commission's Order dated 10.10.2013; (ii) Rs.6.51 per unit in the Commission's Order dated 30.07.2015; (iii) Rs.4.36 per unit in the Commission's Order dated 12.04.2017; and (iv) Rs.3.05 per unit in the Commission's Order dated 18.05.2018.

- (c) It is now 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 to regulate the purchase of electricity and the procurement process of the Distribution Licensees, including the price at which electricity shall be procured from different agencies through PPAs. The Respondent (GESCOM) does not deny the Petitioner's grounds for seeking extension of the commissioning date. As any such extension of the commissioning date would have an impact on the tariff payable to the Petitioner, we are of the considered opinion that, the Commission is required to examine the correctness of the Petitioner's request for extension of the time for commissioning its Solar Power Plant, even in the event of the Respondent (GESCOM) not opposing the request or in the absence of a provision in the PPA for such legal scrutiny by the Commission. It needs to be ensured that, the consumers' interest and thereby, public interest, is not allowed to be affected by payment of a tariff higher than what is due to the Generating Company, because of any action or inaction of the Respondent-Distribution Licensee. It can be easily inferred that the Petitioner's capital investment in her solar plant is much lower than the normative cost assumed in the Generic Tariff Order dated 10.10.2013 and even the Generic Tariff Order dated 30.07.2015.
- (d) It is the submission of the Petitioner that the Respondent (GESCOM) has granted extension of time by 6 months, 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. We note that the Respondent (GESCOM),

while granting extension of time, vide Order dated 10.3.2017 had mentioned about application of tariff in line with Article 5.1 of the PPA, and as per KERC's Order.

- (e) The Project is commissioned on 29.4.2017. 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.
- (f) 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 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 Respondent would be entitled only for lower of the two tariffs...."

- (g) 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.

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

- (h) The ratio of the above judgments of the Hon'ble Supreme Court and of the Hon'ble Appellate Tribunal for Electricity, is applicable to the Petitioner's case also. 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.
- (i) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. Admittedly, the 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 Articles 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.

(j) We have seen from the records in this office that the SPPA dated 18.3.2017 was not processed for approval of the Commission. The Respondent shall submit the same for approval of the Commission.

(k) Therefore, we answer Issue No. (3), as above.

10) **ISSUE No. (4):** *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, 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;
- (c) The Petitioner is also liable to pay damages, as provided under Articles 2.2 and 2.5.7 of the PPA; and,
- (d) The Respondent shall submit the SPPA dated 18.03.2017 for approval of the Commission.

Sd/-
(SHAMBHU DAYAL MEENA)
CHAIRMAN

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

Sd/-
(H.M. MANJUNATHA)
MEMBER