

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:-

Thiru S.Akshayakumar Chairman

Thiru.G.Rajagopal Member
and

Dr.T.Prabhakara Rao Member

P.R.C.No.1 of 2016

SEI Kathiravan Power Private Limited
10th Floor, Meon Eternity
Old No.110, New No.165, St. Marys Road
Alwarpet, Chennai – 600 018.
Tamil Nadu – India

... Petitioner
(Thiru Rahul Balaji,
Advocate for the Petitioner)

Vs.

1. The TANGEDCO
Rep. by its Chairman
No.800, Anna Salai
Chennai – 600 002.
2. Chief Engineer / Non-Conventional
Energy Sources (NCES)
II Floor, Eastern Wing
NPKRR Maligai
144, Anna Salai
Chennai – 600 002.

... Respondents

Date of hearing: 02-06-2016

Date of Order: 01-08-2016

ORDER

The P.R.C.No.1 of 2016 came up for hearing as to maintainability on 02-06-2016. The Commission upon perusal of the Petition and all other connected

records and after hearing the arguments of the Petitioner hereby makes the following:

ORDER

1. Prayer of the Petitioner:

(a) Prayer of the Petitioner in PRC No.1 of 2016:-

The prayer of the Petitioner in the above P.R.C.1 of 2016 is to -

- (i) grant the Petitioner a project specific extension of the Control Period from March 31, 2016 to the date of inter-connection of the Petitioner's 50 MWs project to the grid, in order for the Respondent to pay the Petitioner the tariff of Rs.7.01 a unit;
- (ii) declare that the Petitioner has successfully commissioned its 50 MW solar power project on or before March 31, 2016;
- (iii) declare that the Petitioner's solar power project is entitled to a tariff of Rs.7.01 a unit;
- (iv) pass an exparte ad-interim order and / or grant interim relief directing TANGEDCO to provide interim connectivity to the Petitioner's project till the New Muthuramalingapuram substation is ready;
- (v) pass an exparte ad-interim order and / or grant interim relief in terms of prayer (iii) directing TANGEDCO to pay the Petitioner a tariff of Rs.7.01 per unit upon commissioning of its project pending disposal of this petition;
- (vi) pass such other and further orders, as this Commission deems fit and proper in the facts and circumstances of the case.

(b) Prayer of the Petitioner in I.A.No.1 of 2016:-

The prayer of the Petitioner in the above I.A.No.1 of 2016 is to pass an exparte ad interim order and / or grant interim relief directing TANGEDCO to pay the

Petitioner a tariff of Rs.7.01 per unit upon commissioning of its project pending disposal of this petition;

2. Contentions of the Petitioner:-

2.1. The Petitioner is a developer of 50 MW photovoltaic solar power project ("Solar PV Project") in the state of Tamil Nadu. The Petitioner has entered into a two Power Purchase Agreements ("PPA") of 25 MWs capacity each with the Tamil Nadu Generation and Development Company ("TANGEDCO") on 06-07-2015 and 08-07-2015, respectively, for the implementation of its 50MW Solar PV Project.

2.2. The Petitioner states that one of the main reasons for executing the PPAs with TANGEDCO was the Commission's "Comprehensive Tariff Order on Solar Power" dated 12-09-2014 under Order No 4 of 2014 ("Tariff Order") by which it has determined the tariff payable to solar power plants commissioned during the control period of the said order at the rate of Rs.7.01 per unit. By an Order dated 01.04.2015, the Commission extended the control period of solar power tariff till 31-03-2016. By virtue of this Order, all solar power projects commissioned on or before 31-03-2016 became entitled to a tariff of Rs.7.01 per unit.

2.3. Consequent upon such Tariff Order, the Respondent issued proceedings contained in CMD TANGEDCO Proceedings No.454 dated 7.10.2014, laying down instructions for the processing of applications for establishment of solar power plants under the Preferential Tariff Scheme.

2.4. In response to the above, the Petitioner's holding company in India-Sun Edison Solar Power India Pvt. Ltd. ("SunEdison") - issued an expression of interest

for the establishment of a solar power plant at Tiruchulli, Virudunagar district. TANGEDCO informed SSPIPL of the step-wise procedure for application for the same in a detailed letter dated 06-11-2014.

Step 1: Payments such as security deposit (50% of the total amount), registration fee, load flow study fee, and service tax to be made, and documents to be furnished by SunEdison.

Step 2: On receipt of the above, TNEB to conduct load flow study and communicate the result to SunEdison, along with request for balance 50% of the security deposit to be made by SunEdison.

Step 3: On receipt of the balance payments, TNEB to issue a Noted for Record Letter accepting Sun Edison's proposal to sell the solar power at the tariff rate fixed by the Hon'ble TNERC in its Order dated September 12, 2014.

Step 4: The power purchase agreement to be signed after issuance of the noted for Record Letter, and the commissioning period to be 10 months from the issuance of this Noted for Record Letter.

2.5. On the very next day, i.e. on 07-11-2014, SunEdison, made the requisite payments, as instructed by TANGEDCO. In a letter dated 08-11-2014, SunEdison informed TANGEDCO of the payments made seeking connectivity from the proposed 230/110/33 kV Sub-station at Tiruchulli, Virudunagar District. SunEdison also provided details of the lands already tied-up in Panayur Village for the 50MW project, and requested it to convey its approval of evacuation of 50MW through the above Substation.

2.6. Thereafter, by a letter dated 27-01-2015, SunEdison informed TANGEDCO of the details of four Special Purpose Vehicles created for TANGEDCO projects and requested it to issue the load flow approvals in their names. It also enumerated the shareholding pattern of the Singapore holding company [SunEdison Energy Holding (Singapore) Pvt. Ltd.] in its Indian subsidiary (SunEdison Solar Power India Private Limited) and the four SPVs for TNEB's reference. The Four SPVs that were created for such purpose included the Petitioner herein, i.e. SEI Kathiravan Power Pvt. Ltd.

2.7. Subsequently, a letter dated 06-02-2015 was sent to the Petitioner containing the approval for the establishment of a 50 MW Solar PV Power plant at Tiruchulli Village and Taluk, Virudhunagar District under the preferential tariff scheme. The letter also stated that the load flow study had been conducted for the year 2015-16 network condition to determine the transmission system for the connectivity and evacuation of power from the 50 MW solar PV power plant for selling the power to TANGEDCO, and the transmission scheme wherein the proposed power plant would be connected to New Muthuramalingapuram 230/110 kV SS (Thiruchilli) at 110 kV level by erecting a 110 kV evacuation line for a distance of 1.5 km with necessary breaker and protection arrangement as per TANGEDCO norms subject to the commissioning of the above said sub-station had been finalized. In addition, the letter also notified the Petitioner to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines apart from paying the O&M charges for the 110 kV bay as provided under section 10(1) of the Electricity Act, 2003. The Petitioner was further directed to provide the following at its cost:

- (i) The erection of the 110-kV bay extension with breaker at New Muthuramalingapuram 230/110 kV SS (Thiruchulli) with control room extension;
- (ii) Breakers and necessary protection arrangement at the proposed plant as per TANGEDCO norms;
- (iii) ABT meter for recording supply of power at plant end;
- (iv) Cost towards provision of data as Ethernet data at Jurisdiction LD Centre (JLDC) end either by V5AT or any other communication;
- (v) Payment of Rupees three lakhs to TANTRANSCO towards terminal equipment to be provided by TNEB at JLDC.

Additionally, the Petitioner was requested to execute an undertaking to the effect that it would not claim any compensation or responsibility for any unforeseen outage or scheduled maintenance outage of the 110 kV line connecting the project and New Muthuramalingapuram 230/110 kV SS (Thiruchulli). The letter also requested to ensure that harmonics were maintained within the prescribed limit as per CEA norms to maintain grid discipline. Having already paid an amount of Rs.1,68,75,000/- towards 50% of the applicable refundable security deposit, the letter further informed the Petitioner in order to further consider the proposal, the remaining 50% of the applicable security deposit for an amount of Rs.1,68,75,000/- by way of Demand Draft along with a Notary attested copy of the land document (registered sale deed or lease deed for period not less than 25 years) must be paid within 15 days of the date of issue of the particular letter, and if not paid, the application would stand cancelled, and lastly, that the tariff rate fixed by the Commission's Tariff Order dated September 12, 2014 would be applicable only for the solar projects commissioned within the control period of the Order. The Petitioner duly paid the balance security

deposit of Rs.1,68,75,000/- and informed TANGEDCO of the same vide its letter dated February 20, 2015.

2.8. Subsequently, on June 22, 2015, the Petitioner issued a letter to TANGEDCO requesting issuance of a "Noted on Record" letter to enable execution of the PPA at the earliest as it had already secured land for the project and had completed the "Registered agreement to sale with possession paying full consideration for the same. By its letter dated 30-06-2015, TANGEDCO approved the Petitioner's proposal to set up a solar power plant and further sell the entire energy generated at Rs.7.01 per unit without accelerated depreciation benefit as per the terms and conditions of the Commission's Tariff Order subject to the conditions set out therein. This was followed by another letter on the same stating that the Power Purchase Agreement (PPA) for the establishment of the 50 MV Solar Power Plant under Preferential tariff scheme was in progress and that the agreement would be issued in a week's time.

2.9. Thereafter, the Petitioner issued another letter dated 06-07-2015, to TANGEDCO stating that it had received the Noted for Record Letter for the 50 MW project under preferential tariff and further giving consent to the splitting up of the 50 MW capacity into two PPAs of 25 MW each with all other terms and conditions remaining the same as provided in the Noted for Record letter. On the same day, Phase-I of the PPA was executed and Phase-II of the PPA was executed two days later, i.e. on 08-07-2015.

2.10. Subsequent to the execution of the PPAs, the Petitioner commenced construction of its 50 MW project in right earnest, fully aware that it had to

commission its project on or before 31-03-2016, i.e. the expiry of the control period, in order to avail the preferential tariff declared by the Commission under its Tariff Order.

2.11. With regard to the bay extension works, TANGEDCO issued a letter dated 18-08-2015 to the Petitioner requesting payment of Rs.30 lakhs towards tentative establishment and supervision charges in respect of 110 kV bay extension works sanctioned at New Muthuramalingapuram 230/10 kV SS for evacuating power from the 50 MW solar power plant at Virudhunagar district. The letter further stated that this payment shall be made by way of a demand draft in favour of TANGEDCO Collection Account to be adjusted against the actual 22% of establishment and supervision charges after sanctioning the estimate for the 110 kV Bay extension. The Petitioner duly made this payment.

2.12. Thereafter, TANGEDCO issued a letter dated 24-11-2015 to General Construction Circle (GCS), Madurai notifying that the Petitioner had requested TANGEDCO to entrust the 110 kV bay extension works sanctioned at New Muthuramalingapuram 230/110 kV SS (Thiruchulli) to them.

2.13. The Petitioner proceeded with great alacrity in completing construction of its 50 MW project. The Petitioner achieved financial closure by executing a facility agreement dated 13-11-2015 with PTC India Financial Services Limited for an amount of Rs.336 crores. The Petitioner also completed acquisition of approximately 282.03 acres of land for its Project under four different sale deeds executed in December, 2015. Engineering, Procurement, and Construction ("EPC") contracts

were executed with Larson & Tubro Limited and a "Notice to Proceed" was issued on 15-11-2015 in this regard.

2.14. While the construction of the Petitioner's project was in progress, it became increasingly apparent that TANGEDCO was not acting in the same vigour and speed in completing construction of the evacuation facilities. Anticipating that TANGEDCO would not be able to complete construction of evacuation facilities in time for inter-connection with the Petitioner's project by March 31, 2016, the Petitioner engaged in a series of correspondence with TANGEDCO continuously informing TANGEDCO of the progress of its construction and requesting TANGEDCO to expedite the completion of construction of the new substation. TANGEDCO was informed well in advance that the Petitioner was aiming to complete construction and be ready for commissioning in the latter half of March, 2016. The Petitioner completed construction of its project, well before the expiry of the control period of March 31, 2016. Thereafter, the Petitioner submitted a "Completion Report" to the Chief Electrical Inspector to Government ("CEIG") on March 19, and requested the CEIG to certify the safety of the Petitioner's project. The CEIG first inspected the Petitioner's project site on March 22, 2016 and noted certain defects that needed to be rectified. These defects were promptly rectified within 48 hours and a "Compliance of Defects" report was submitted to the CEIG on March 24, 2016.

2.15. Meanwhile, the Petitioner was dismayed to learn that the completion of the New Muthuramalingapuram substation, to which the Petitioner's project was to be interconnected, would be delayed by approximately 2 months beyond the March 31, 2016 deadline. This put the commissioning of the Petitioner's project on or before 31-03-2016 at grave risk. In the absence of connectivity to New

Muthuramalingapuram substation, the Petitioner requested TANGEDCO to provide it with alternate or interim connectivity to the nearby 110 kV network (in particular 110/33 kV Tamilpadi substation). The Petitioner's project received CEIG approval on 29-03-2016.

2.16. However, all requests on TANGEDCO to provide interim connectivity in the absence of connectivity to the New Muthuramalingapuram substation on or before 31-03-2016 did not yield any result. Given that the Petitioner was in real danger of losing its tariff of Rs.7.01 per unit if it did not inter- connect on or before 31-03-2016, the Petitioner issued another letter TANGEDCO dated 31-03-2016 informing that since the Petitioner fully geared up and ready for commissioning and interconnection with the grid requested TANGEDCO to issue a deemed CoD/commissioning letter effective any date between March 28, 2016 and March 31, 2016 in lieu of temporary connectivity. It also enclosed a detailed project completion report in this regard.

2.17. TANGEDCO failed to provide connectivity to the Petitioner's project despite the project being fully constructed and ready for commissioning before 31-03-2016. TANGEDCO has also failed to accede to the Petitioner's request of issuing a deemed CoD/commissioning letter as requested.

2.18. Sun Edison group developed four other projects under the same preferential tariff scheme and successfully commissioned all the four projects. Details of these projects are as follows:-

- (a) 10 MWs solar power project developed by SEI Adityashakti Private Limited at Mangoon commissioned on 30-10-2015;

- (b) 50 MWs solar power project developed by SEI Phoebus Private Limited at Virudhunagar commissioned on 08-02-2016.
- (c) 15 MWs solar power project developed by RT Renewable Energy Private Limited at Virudhunagar commissioned on 28-03-2016.
- (d) 50 MWs solar power project developed by SEI Aadhavan Private Limited at Virudhunagar commissioned on 31-03-2016.

Of the above, the 50 MW projects developed by SEI Phoebus and SEI Aadhavan were to be interconnected to the same New Muthuramalingapuram sub-station. Given that the evacuation arrangements have not yet been made, both SEI Phoebus and SEI Aadhavan were granted interim connectivity. However, despite repeated requests, no interim connectivity was granted to the Petitioner's project.

2.19. On 31-03-2016, after it became clear that TANGEDCO was not ready to interconnect the project with the grid, the Petitioner, along with (a) Larsen & Tubro Limited, the EPC contractor; (b) TMEIC Industrial Systems (India) Pvt Ltd, the inverter manufacturer which supplied 50 MW inverters (67 in number) to the Petitioner's project; and (c) GENSOL Consultants Private Limited, a reputed third part independent project management consultant, decided to adopt an independent testing methodology to demonstrate the readiness of the installed inverters in the Petitioner's project using a temporary power source, i.e. a Diesel Generator ("DG") Set and a temporary Load Bank. This setup was conceived to demonstrate readiness of the project in the absence of grid power. The tests were carried out from March 31, 2016 to April 8, 2016 in the presence of all the parties mentioned above and it was determined the inverters were installed successfully, and ready for

commissioning of the project when connected to the grid. A joint declaration was also signed to this effect by all the parties.

2.20. Vide its letter dated 23-04-2016, TANGEDCO has not acceded to the Petitioner's reasonable request for issuing COD / Deemed Commissioning Certificate as of 31-03-2016. In this letter, TANGEDCO however clearly admitted that it had failed to construct the New Muthuramalingapuram substation in time. Therefore, this singular reason would suffice to grant reliefs sought for, including the extension of the control period. TANGEDCO has sought to make an unsubstantiated and self-serving claim for the first time, that the Petitioner's plant was not ready for commissioning as of 31-03-2016. However, the detailed facts set out in this petition clearly demonstrate that such stand is untenable. In fact, the TANGEDCO could have easily provided temporary connectivity for purposes of Commissioning as after the Commissioning of the other plants which were also forced to use the same lines on a temporary basis to achieve commissioning, the same could have been extended to this plant as well by taking one of the other plants off the grid. Further, it is loosely claimed that the Petitioner had not taken permission from the government for laying lines across a road. The records show such stand to be demonstrably untenable. TANGEDCO's letter dated April 23, 2016 clearly demonstrates that it had no serious dispute to the Petitioner's claim as to readiness of the plant prior to 31-03-2016. The Petitioner promptly replied to this letter denying that the Petitioner's plant was incomplete.

2.21. This Hon'ble Commission has Inherent Powers to Extend the Control Period for the Petitioner on a project specific basis:-

The Commission has powers to extend the control period for the Petitioner on a project specific basis to meet the ends of justice. Clause 48 (1) of TNERC

(Conduct of Business) Regulations, 2004 provides that – “Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission.” In the instant case, despite all efforts put in by the Petitioner to complete construction of its project well before March 31, 2016, and having demonstrably being ready to generate and supply power, the Petitioner could not supply the power solely for reasons attributable to TANGEDCO. As the project is ready and only due to the failure of the Respondent to provide connectivity for evacuation, the Petitioner, it ought not to be denied the benefit of Rs.7.01 tariff available under the Tariff Order. Indeed, regulatory commissions in the past have invoked such inherent powers vested in them and granted project specific extension of the control period to project developers whose project commissioning had been delayed for no fault of theirs. For example, the Gujarat Electricity Regulatory Commission, vide its Order dated 05.04.2014 in Petition No.1188 of 2012 has extended the Control Period for applicability of tariff of RS.15/unit for Solar PV Power Project of M/s Solar Semiconductor Power Company (India) Private Limited. Similarly Maharashtra Electricity Regulatory Commission, in its Order in Case No. 124/2014 extended the control period with respect to MSPGCL's Solar Project at Sakri, where the project commissioning was delayed beyond the control period for reasons not attributable to the project developer. It is pertinent to note that in the MSPGCL's case, one of the reasons for the delay in commissioning was on account of delay in making evacuation arrangements by the procurer.

2.22. TANGEDCO cannot be permitted to benefit from its own wrong

TANGEDCO cannot be permitted to take advantage of their own wrong in delaying the commissioning of the Petitioner's project by failing to provide the

required infrastructural facilities despite the Petitioner having kept up its obligations solely because the New Muthuramalingapuram sub-station to which the Petitioner's project is required to inter-connect is not ready yet. It is unfortunate for a State undertaking to act in such an arbitrary and illegal manner despite there being a firm statutory mandate under Section 86(1)(e) of the Electricity Act, 2003 and even the Government of Tamil Nadu has launched the Tamil Nadu Solar Energy Policy 2012 to promote solar energy. TANGEDCO's lethargic attitude in both delaying construction of the new Muthuramalingapuram 230/110 kV substation, as well as failure to act on the representations dated 10.02.2016, 24.02.2016, 03.03.2016, 14.03.2016, 28.03.2016, 29.03.2016, and 31.03.2016 smacks of illegality and has been done with a view to scuttle the benefit of the tariff rate of Rs.7.01/- as per the Tariff Order and is clearly calculated to unfairly gain advantage.

2.23. The Petitioner had legitimate expectations that its Project would be Inter-connected on or Before March 31, 2016:

The Petitioner has invested over Rs.427 crores in constructing its 50 MW solar power plant based on the state government's solar power policy and expectation of a tariff of Rs.7.01 per unit. The Petitioner executed its PPA with TANGEDCO only after the control period was extended from September 11, 2015 to March 31, 2016 by the Commission's order dated 01-04-2015. The Petitioner had a legitimate expectation which was reasonable under the circumstances that TANGEDCO, a public authority, would act in a rational and prudent manner in carrying out its obligations and construct the sub-station in time for the Petitioner to evacuate power from its plant on or before March 31, 2015. Indeed, while TANGEDCO could grant interim connectivity to two other projects developed by the

SunEdison group, there was no reason to deny interim connectivity to the Petitioner's project.

2.24. TANGEDCO will not suffer prejudice if the Petitioner is granted a Tariff of Rs.7.01 a Unit.

As per TANGEDCO's preferential tariff scheme, TANGEDCO claimed that it would contract and commission upto 1500 MWs in Tamil Nadu under the Tariff Order. It follows that TANGEDCO made a budget allocation for purchasing 1500 MWs of solar power at Rs.7.01 a unit. However, the total capacity commissioned prior to March 31, 2016 in Tamil Nadu under the tariff order does not even cross the 1000 MW mark. In other words, the total capacity commissioned is less than two-thirds of what TANGEDCO claimed that it would contract and commission. Therefore, granting a project specific extension of the control period in the Petitioner's case is not going to upset any financial commitments made by TANGEDCO, much less cause any prejudice to it as its capacity of 50 MWs is well within the 1500 MWs contemplated by TANGEDCO.

2.25. TANGEDCO cannot arbitrarily discriminate between projects that would result in prejudice to equally situate persons:-

TANGEDCO, being a State owned body, is expected act in a just fair and reasonable manner even in the sphere of contractual relationships. TANGEDCO has allowed commissioning of other projects where the permanent evacuation facilities were yet to be readied by allowing for interim connectivity. Several projects have been granted this in order for the projects which have been completed to obtain the benefit of commissioning before the end of the control period. In fact, two other

projects developed by the SunEdison group were granted such connectivity and there was no reason to deny interim connectivity to the Petitioner's project.

2.26. TANGEDCO's Actions have the potential to seriously and detrimentally affect the very viability of the Petitioner's Project:-

The Petitioner's project is predicated upon the applicability of the tariff order. The financial closure, cash flows, investment and debt commitments are all on the basis of the applicability of such tariff. The Petitioner, having complied with all of its obligations, has a vested right that has already accrued in its favour and it becomes entitled, in law and in fact, to the benefit of the tariff order. Significantly, the tariff order applicable from 01-04-2016 for solar projects in the State has seen a reduction of tariff which if made applicable to the Petitioner's project wherein the entire investment was made on the basis of the position prevailing during the relevant time, the Petitioner would be put to grave and irreparable hardship. Thus on grounds of promissory estoppel as well, the Petitioner is entitled to a tariff of Rs.7.01 a unit.

2.27. The extension of the applicability of the tariff of Rs.7.01 to the Petitioner's project is also essential to satisfy the statutory mandate and policy applicable.

It is universally acknowledged that conventional source of energy, in particular coal and hydrocarbon, result in significant environmental degradation and adverse impact. The last few decades have seen a global recognition of the adverse environmental impact (externality) of conventional energy (particularly coal and hydrocarbons) and the need to promote gradual but steady development of renewable energy sources to substitute conventional power. These stated legislative and policy objectives of environment protection and sustainable development are

now well established in our jurisprudence in context of Articles 48-A, 51, 51-A (g) and 21 of the Constitution of India. India is a party to the global move on climate change-committed to sustainable development, viz.,- The United Nation's Framework Convention on climate Change ("UNFCCC") signed by India on 10.06.1992 and ratified on 01.11.1993. Adoption of Protocol to the UNFCCC adopted in Kyoto, Japan on 11.12.1997 ("Kyoto Protocol") acceded to by India on 26.08.2002. The Electricity Act, 2003, the National Electricity Policy and National Tariff Policy mandate encouragement to be provided to non-conventional energy sources. The consequence of TANGEDCO's default would have a direct effect of negating such mandate and therefore on this ground also, the Petitioner's project is entitled to the relief sought for.

2.28. Prima facie case and balance of convenience lie entirely in its favour for the grant of the interim reliefs as sought for, since it is of urgent necessity that it is provided temporary connectivity to achieve commissioning. The Respondent has provided such connectivity for other projects and can therefore have no objection. Further, not only is the Petitioner losing precious revenue on account of lack of inter-connectivity, the State of Tamil Nadu too is being deprived of precious green energy to the extent of 50 MWs at a time when it is facing drought conditions and severe power shortage. Inasmuch as the PPA is a long term contract, the balance of convenience would be to continue to pay at Rs.7.01 pending adjudication and the equities could be balance, if required at the time of final disposal. No hardship or prejudice would be caused to the Respondent by grant of the interim reliefs. However, if the same are not granted, it would cause grave and irreparable hardship and prejudice to the Petitioner.

3. Findings of the Commission:-

3.1. The above petition was taken up for hearing on 02-06-2016 to decide on the maintainability of the petition with the above prayers as a Miscellaneous Petition. The Counsel for the Petitioner vehemently argued that the Commission has inherent power to extend the control period for the Petitioner on a project specific basis to meet the ends of justice. The Counsel heavily relied on the decision of the Hon'ble APTEL in Appeal No.170 of 2014 dated 11-05-2016 hereinafter called "Gujarat Urja". Relevant extracts in para 10 of the order of the Hon'ble APTEL in Appeal No.170 of 2014 are reproduced below:-

"10. OUR CONSIDERATION AND CONCLUSION:

10.1 Having described the facts of the matter, rival contentions of the parties and the relevant part of the impugned order, we, now, proceed towards our consideration and conclusion on the sole issue involved in this appeal.

10.2 The Respondent No.2/petitioner, a solar energy generator, filed a petition on 20.1.2012, being Petition No. 1188 of 2012 (impugned petition), before the State Commission seeking extension of control period as determined by the State Commission in its Tariff Order, dated 29.1.2010. The impugned petition was filed at the stage when other 39 petitions, filed by the other solar power developers, were pending for consideration seeking extension of control period beyond 28.1.2012, were almost at concluding stage. The State Commission, vide its order, dated 27.1.2012, had rejected the prayer in those 39 petitions for general extension of control period during the exercise of inherent powers and directed each solar power developer to come in case of individual grievances through a petition under Section 86 (1) (f) of the Electricity Act, 2003.

10.3 The impugned petition filed by the Respondent No.2 was also dismissed; vide State Commission's order, dated 22.2.2012, on the same grounds as mentioned in the State Commission's order, dated 27.1.2012. The Respondent No.2, a solar energy generating company, being aggrieved by the State Commission's order, dated 22.2.2012, filed an Appeal, being Appeal No. 130 of 2012 before this Appellate Tribunal and this Appellate Tribunal, vide its judgment and order, dated

2.1.2013, directed the State Commission to consider each individual case separately by exercising its inherent power.

10.4 The Appellant feeling aggrieved against the judgment, dated 2.1.2013, of this Appellate Tribunal, had filed a Civil Appeal, being Civil Appeal No. 2542 of 2013 before the Hon'ble Supreme Court under Section 125 of the Electricity Act, 2003. The Hon'ble Supreme Court, while dismissing the Appeal, vide its order, dated 1.4.2013, did not interfere with the order passed by this Appellate Tribunal and dismissed the Civil Appeal making it clear that the State Commission shall decide the whole issue without being influenced by the observations made by the Appellate Tribunal for Electricity in accordance with law. After the order of the Hon'ble Supreme Court, dated 1.4.2013, the State Commission reheard the impugned petition, being petition no. 1188 of 2012, and vide impugned order, dated 5.4.2014, extended the control period for the solar project of the Appellant up to 30.4.2012 for its 10.08 MW capacity solar project directing the parties to consider the same and act accordingly. The impugned order has been passed by the State Commission in exercise of its inherent powers as provided under Regulations 80, 81 & 82 of the Conduct of Business Regulations, 2004 in addition to Regulation 85 dealing with the extension or abridgment of time prescribed, which is analogues to Section 151 of CPC, 1908.

10.5 x x x x

Thus, the Hon'ble Supreme Court directed the State Commission to ignore or bypass all the observations made by this Appellate Tribunal in its judgment, dated 2.1.2013, in Appeal No. 130 of 2012 and, at the same time, upheld the order of remand made by this Appellate Tribunal where this Appellate Tribunal remanded the matter back to the State Commission for rehearing on merits of each individual case for decision according to law.

10.6 We may make it clear here that the impugned petition, being Petition No. 1188 of 2012, filed by the Respondent No.2 was dismissed by the State Commission for the first time, vide its order, dated 22.2.2012, on the similar grounds, on which, the State Commission's another order, dated 27.1.2012, was passed in Case No. 1126 of 2011. Thus, the State Commission, vide its order, dated 27.1.2012, had rejected the prayer of all the petitioners in the said petitions for general extension of control period by exercising its inherent powers and directed each solar power developer to file petition for individual grievances under Section 86(1)(f) of the Electricity Act, 2003. Thus, it is evident from the record that the State Commission's order, dated 27.1.2012, had never been challenged before this Appellate Tribunal or before the Hon'ble Supreme Court. Thus, the order, dated 27.1.2012,

regarding other 39 petitions, had become final which means that each petitioner was required to file separate petition for individual grievances under Section 86(1)(f) of the Electricity Act, 2003. The State Commission, vide impugned order, dated 5.4.2014, as mentioned above, has allowed the impugned petition, being Petition No. 1188 of 2012, for extension of control period as specified by the State Commission in its tariff order, dated 29.1.2010, passed in Order No. 2 of 2010. Thus, so far as the Respondent No.2 is concerned, the control period upto 30.4.2012 for 10.08 MW capacity solar project of the Appellant was extended.

10.7 The main contention of the learned counsel for the Appellant is that the Respondent No.2/petitioner was required to establish Force Majeure as per Article 8 of the PPA for seeking extension of the control period and the said petition seeking extension of control period was filed by the Respondent No.2 with an intention to avoid the lower tariff of the next control period, even though, the prevailing project cost was much lower.

x x x x

10.10 After considering the merits and substances in the aforesaid contentions of the Appellant and going through the aforementioned facts and circumstances including the impugned order, we do not find any merit or substance in the contentions of the Appellant. The Hon'ble Supreme Court, while not interfering with the judgment of this Appellate Tribunal and while dismissing the Civil Appeal filed against the judgment of this Appellate Tribunal, clearly directed the State Commission to decide the matter according to law without being influenced by the observations made by this Appellate Tribunal. Thereafter, the State Commission, after going through the merit and contentions of the parties and dealing with the impugned petition, which was filed under Regulation 80 of the Conduct of Business Regulations, 2004 read with Section 86 of the Electricity Act, 2003, has passed the impugned order and extended the control period as stated above.

10.11 x x x x The State Commission has liberty to exercise its inherent powers if the exercise of inherent power is not in any way in conflict with what has been expressly provided in the Civil Procedure Code or against the intentions of the legislature which means that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the code.

x x x x

10.14 We observe that the Respondent No.2/petitioner was striving to procure land and commission its' project in the Control Period provided by the Tariff Order, 2010 despite all hurdles faced by it and for this reason the Respondent No.2 did not raise the issue of extension of

control period before the State Commission before 13.1.2012. However, the Respondent No.2 was prevented from commissioning of the said project during the control period solely on account of the aforesaid reasons which are not attributable and beyond the control of the Respondent No.2 and for the same Respondent No.2 cannot be penalized for the delay by way of payment of lower tariff. We, further, find that the Respondent No.2 had committed its investments and ordered most of the equipments for its project well before the issuance of discussion paper in November, 2011. The Appellant had already recovered substantial part of the amount from the power supply bills from the Respondent No.2 towards liquidated damages prescribed in Article 2.3 of the Supplemental PPA. Further, the Respondent No.2, on the basis of the tariff order No. 2 of 2010 had already spent the capital cost for its project and made substantial investments/expenditures in the project during the control period of the Tariff Order, 2010. Apart from it, the Respondent No.2 had placed orders for capital equipments, etc. in May, 2011 and had, in fact, committed expenditure to the extent of approximately 78% of total project cost during the midst of the control period of Tariff Order, 2010 and well before the end of the control period. The Respondent No.2 also did not get the benefit of capital cost relevant for the next control period.

10.15 According to the Respondent No.2, 36 other developers could not complete their projects within the control period of the Tariff Order, 2010 and also approached the State Commission for extension of control period on various grounds. We find that despite all the hurdles faced by the Respondent No.2, 8.68 MW capacity of the Respondent No.2's project was ready for evacuation on 1.2.2012 only after 4 days from the closing date of the control period i.e. 28.1.2012 and an additional 1.40 MW capacity was ready for evacuation on 21.2.2012 only after 24 days from closing of the control period. Thus, the learned State Commission, in the impugned order, only extended the period of 24 days in the control period considering the grounds for the said delay in their proper perspective after adopting a correct and legal approach.

10.16 We may observe here that the non-availability of evacuation facility by GETCO was the major reason for delay of 24 days in commissioning of the project after readiness, especially the 10.08 MW capacity which is attributable to GETCO. Failure of GETCO to fulfil its obligations under the Electricity Act, 2003 and Solar Power Policy, 2009 of the Government of Gujarat cannot be attributed to the change in project site of the Respondent No.2. GETCO was informed of the change in project site on 19.4.2011, however, GETCO, after a lapse of almost 4 months, expressed its inability to erect the transmission line on time. At that stage, the Respondent No.2 had to undertake the work of erection of 66 KV transmission line from the project to the proposed Chitrod Sub-

Station and completed the entire transmission line within the least possible time i.e. 4 months by 28.1.2012 after obtaining the requisite approval for supply of materials and the contractor from GETCO, except for the railway crossing for which GETCO was required to obtain permission from Railway Authorities. We may further mention here that the aforesaid capacities were commissioned on 30.4.2012, with the temporary arrangements made by GETCO without erection of substation at Chitrod as per sanctioned scheme. GETCO was able to provide regular evacuation facility only in September, 2012 i.e. six months after completion of 10.08 MW and 3 months after commissioning of balance 9.92 MW.

10.17 This Appellate Tribunal, in its judgment, dated 2.1.2013, in Appeal Nos. 96 & 130 of 2012, held that the State Commission has been vested with inherent powers to meet the end of justice and to prevent abuse of the Code and such powers can be exercised by the State Commission to extend the control period of a tariff order when any project developer, like the Respondent No.2 herein, faces problem, due to reasons beyond its control, in completing its project in the said control period in the interest of justice after examining each case on its merits.

10.18 In view of the above discussions, while approving the views taken by the State Commission in the impugned order, this issue is decided against the Appellant. *We clearly hold and observe that the State Commission is legally justified in extending the control period by exercising its inherent powers and the present Appeal merits dismissal.”*

3.2. On perusal of the order in Gujarat Urja, it is found that the facts and circumstances of the said case and that of the Petitioner are not similar. It is further seen that the GERC on remand of the matter by APTEL has taken a view on the merits of the case and based on undisputed facts. The Commission is fully conscious of its inherent powers to extend the control period of an order passed by the Commission.

3.3. The Commission made the comprehensive order on solar tariff vide Order No.7 of 2014 on 12-09-2014 with a control period of one year. Review Petitions were filed by M/s. Hindustan Clean Energy Limited, M/s. Acme Solar Private Limited,

M/s.Welspun Renewable Private Limited and M/s.Vaibhav Jyothi Power Utility Services Private Limited with the prayer to extend the control period of the said Order No.7 of 2014 dated 12-09-2014 by one more year. The said Review Petitions were not admitted by the Commission for the following reasons:-

“4. Findings of the Commission:-

4.1 Para 11.6.1 and 11.6.2 of the Order No.7 of 2014 providing for the control period of the said order is reproduced below:

“11.6.1. Regulation 6 of the Power procurement from New and Renewable Sources of Energy Regulations, 2008 of the Commission specifies as follows:

“The tariff as determined by the Commission shall remain in force for such period as specified by the Commission in such tariff orders and the control period may ordinarily be two years”.

11.6.2. Since the capital cost of solar modules is volatile, the Commission proposed one year control period in its consultative paper. Some of the stakeholders have recommended a control period of two years. CERC approved a capital cost of Rs.8 crores per MW in the order for the FY 2013-14. However, in the latest order dated 15/5/2014, the CERC has adopted a capital cost of Rs.6.91 crores per MW for the year 2014-15. There is a 14% variation in the capital cost in a single year. Therefore the Commission decides to retain the one year control period in this order as proposed in the consultative paper in view of the rate of change of capital cost.

Thus, the Commission has consciously prescribed the control period in the above Order No.7 of 2014.

4.2 Regulation 43(1) of the Tamil Nadu Electricity Regulatory Commission – Conduct of Business Regulations, 2004 provides that the Commission may on its own or on the application of any of the persons or parties concerned within 30 days of the making of any decision, direction or order review such decision, direction or order on the ground that such decision, direction or order was made under a mistake of fact, ignorance of any material fact or any error apparent on the face of the record. Since the Commission prescribed the control period in Order No.7 of 2014 only after considering all material facts and since there is no error apparent on the face of the said Order No.7 of 2014 with regard to the prescription of control period, none of the grounds for review as contemplated in the said Regulation 43(1) is made out in the matter warranting review of the control period. Therefore, the Commission is not inclined to interfere in the matter to review control period prescribed in Order No.7 of 2014. Moreover the Commission sees no reason to condone the delay in filing the above Review Petitions. All the above R.Ps along with the I.As therein are not admitted.”

3.4. However, by majority order of the Commission vide Order No.4 of 2015 dated 01-04-2015 for the reasons stated in the said Order No.4 of 2015, the Commission

pleased to extend the control period of the said Tariff Order No.7 of 2014 till 31-03-2016 vide Order No.4 of 2015 dated 01-04-2015 . Relevant portion of the said Order No.4 is extracted below:-

“The Government of Tamil Nadu issued a Tamil Nadu Solar Energy Policy, 2012. With the object of implementing the said solar policy of the Government, the Commission issued Order No.1 of 2013 dated 07-03-2013 in the matter of Issues Related to Tamil Nadu Solar Policy, 2012 prescribing among others, Solar Purchase Obligation (SPO) starting with 3% SPO till December 2013 and 6% SPO from January 2014 applicable to HT Consumers (HT Tariff I to V) and to LT Commercial Consumers (LT Tariff V) with certain exceptions. However, Tamil Nadu Electricity Consumers Association and the Tamil Nadu Spinning Mills Association filed Appeal No.92 of 2013 and Appeal No.109 of 2013, respectively, challenging the order of the Commission before the Hon’ble Appellate Tribunal for Electricity (APTEL). In order dated 21-01-2014, the Hon’ble Appellate Tribunal for Electricity set aside the said order of the Commission. Thereafter, with the object of optimal exploitation of the solar energy for the sustainable energy base, the Commission after issuing a consultative paper for public view inviting comments from stakeholders, after obtaining the views of the Members of the State Advisory Committee and after considering the views of all the stakeholders and the State Advisory Committee Members made a Comprehensive Tariff Order on solar power in exercise of the powers conferred by sections 181, 61(h), 62 and 86 (1) (e) of the Electricity Act, 2003 (Act 36 of 2003) read with the National Electricity Policy, the National Tariff Policy and the power procurement from New and Renewable Source of Energy Regulations, 2008 of the Commission vide Order No.7 of 2014 dated 12-09-2014.

Review petitions were filed by the solar power developers, namely, (1).M/s.Hindustan Clean Energy Limited; (2).M/s.Emami Cement Ltd., Kolkata; (3).M/s.Raasi Green Earth Energy (P) Ltd., Bangalore; (4) M/s.Moser Baer Engineering and Constructions Limited, New Delhi; (5) M/s.Welspun, Mumbai; (6) M/s.Green Infra Ltd., New Delhi; and (7) M/s.Auroville Consulting, Auroville with a prayer to review the said Solar Order dated 12-09-2014, so that the control period may be specified as two years instead of one year on account of time consuming procedures involved in setting up of solar projects. The Commission however could not admit those petitions for the technical reason that none of the grounds for review were made out in those petitions. However, while hearing the arguments of the Counsel for the said review Petitioners, the Commission felt that there was substance in their arguments that their prayer need to be addressed in its proper perspective.

In para 11.5 of the said Solar Order, it has been mandated that the format of Energy Purchase Agreement (EPA) shall be evolved as specified in the Commission’s “Power Procurement from New and Renewable Source of Energy Regulations 2008” as amended from time to time. Regulation 7 of the said Regulations provides that the Distribution Licensees shall file a model Energy Purchase Agreement / Energy Wheeling Agreement after discussions with the generators / open access customers for the approval of the Commission within one month of the issuance of tariff order by the Commission. The Distribution Licensee, TANGEDCO submitted the model Energy Purchase Agreement in the matter of Solar Power on 10-12-2014. The Commission after scrutiny could approve the said model EPA on 21-01-2015. It is obvious that the solar power generators could move towards financial closure only after their having executed

the Energy Purchase Agreements in the form duly approved by the Commission with the Distribution Licensee.

Even after the approval of the PPA by the Commission, there was no tangible growth in the solar capacity in the State. The Commission noticed that after the approval of EPA by the Commission, the balance period left in the original control period is less than 8 months though the intention of the Commission was to give clear one year as control period. The Commission feels that within the said balance period of less than 8 months out of the control period of one year, execution of individual EPA by the prospective developers, achieving financial closure thereafter, procurement, erection, testing and the commissioning of the solar plant will be very difficult. As a result, additional solar power generation in the State may not happen even to the level of a reasonable RPO obligation which is being advocated in the National Action Plan for Climate Change and National Tariff Policy.

Therefore considering the date of approval of the Energy Purchase Agreement by the Commission on 21-01-2015 and the time that would be required by the Generator / Licensee thereafter for execution of the agreements and other subsequent activities, the Commission considers that the ends of justice will be met if the control period specified in the said order is modified suitably to bring out the intention of the Commission to provide one full year in clear terms.”

3.5. A perusal of the order of the Hon'ble APTEL in Gujarat Urja amply demonstrates that the Commissions have inherent powers to meet the ends of justice. Likewise the action of the Commission in having issued the above Order No.4 of 2015 dated 01-04-2015 would demonstrate that the Commission did not hesitate to invoke its inherent power to meet the ends of justice when such an exercise of inherent power was required. The Commission had already exercised its inherent power by extending the control period of the solar tariff order.

3.6. Even before the extended control period of Tariff Order No.7 of 2014 was due to expire on 31-03-2016, by Order No.2 of 2016 dated 28-03-2016, the Commission passed a comprehensive tariff order on solar power effective from 01-04-2016 and said order is in vogue wherein a tariff of Rs.5.10 has been fixed for Solar PV Projects. The above tariff order has been passed by the Commission in a

comprehensive manner after considering all the relevant normative factors prevailing on the date of making the said order.

3.7. The Petitioner, in para 24 of its petition has contended that TANGEDCO has sought to make a unsubstantiated and self-serving claim for the first time, that the Petitioner's plant was not ready for commissioning as on 31-03-2016. The Petitioner also contends that the TANGEDCO's letter dated 23-04-2016 clearly demonstrates that it had no serious dispute to the Petitioner's claim as to readiness of the plant prior to 31-03-2016. In the same breath, it has further been stated that the TANGEDCO has not acceded to the Petitioner's reasonable request for issuing COD/Deemed Commissioning Certificate as of 31-03-2016. All the above contentions contradict the stand of the Petitioner that its project has been completed prior to expiry of the control period. As such, the question whether the project of the Petitioner has been completed prior to the expiry of the control period or not is in dispute.

3.8. The Commission distinguish the question of invoking inherent power to meet the ends of justice from that of using such inherent power on a project specific basis where dispute as to the date of completion of the project exists.

3.9. The Petitioner has entered into a bilateral Power Purchase Agreement with TANGEDCO on 06-07-2015. The following provisions in the said P.P.A. are relevant:-

1.(d) *"Dispute" means any dispute or difference of any kind between the SPG and the Distribution Licensee in connection with or arising out of this Agreement including but not limited to any issue on the interpretation and scope of the terms of this Agreement"*

“Force Majeure” or Force Majeure Event” shall have the meaning prescribed thereto in Article 12 of this agreement”.

“2. Interfacing and Evacuation facilities:-

(a) Evacuation facilities from the point of generation to the interconnection point including the required metering, protection arrangement, and related other equipments and the entire interface line shall be provided by the SPG at their / his cost as per the Commission’s Intra State Open Access Regulations, the Central Electricity Authority (Technical Standards for connectivity to the Grid) Regulations and the Tamil Nadu Electricity Grid Code, in force and as amended from time to time.”

xxxxx

“(c) The SPG shall comply with the safety measures contained in Central Electricity Authority Regulations, 2010 and as amended from time to time.”

“5. Tariff and other Charges:

(a) Energy Charges:

The Solar Power Tariff for the SPG commissioned during the control period of Order No.7 of 2014, dated 12-09-2014 shall be Rs.7.01 per unit without AD benefit.

(b) Reactive Power Charges:

The reactive power charges shall be as specified in the order on Open Access and as amended from time to time by the Commission.

(c) Start-up Power Charges:”

“11. Settlement of Disputes:

If any dispute or difference of any kind whatsoever arises between the parties relating to this agreement, it shall, in the first instance, be settled amicably, by the parties, failing which either party may approach the Commission for the adjudication of such disputes under section 86 (1) (f) of the Electricity Act, 2003 in accordance with the Conduct of Business Regulations, 2004 and Fees and Fines Regulations, 2004 of the Commission. This agreement shall be governed by the laws of India and the Courts of Chennai alone shall have jurisdiction”.

“12. Force Majeure:

Both the parties shall ensure compliance of the terms of this agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of this agreement to the extent that such failure is due to force majeure events as defined hereunder. Any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event(s) by giving notice to the other party in writing within 15 days from the occurrence of such Force majeure.

“Force Majeure” events means any event which is beyond the control of the parties involved which they could not foresee or with a reasonable amount of diligence could not have been foreseen or which

could not be prevented and which substantially affect the performance by either party such as but not limited to:-

- (i) Acts of natural phenomena, including but not limited to floods, droughts, earthquakes, lightning and epidemics;*
- (ii) Acts of any Government domestic or foreign, including but not limited to war declared or undeclared, hostilities, priorities, quarantines, embargoes;*
- (iii) Riot or Civil Commotion; and*
- (iv) Grid / Distribution System's failure not attributable to parties to this agreement."*

3.10. The PPA entered into between the Petitioner and the Licensee dated 06-07-2015 is the controlling document of the contract and it constitutes a binding contract. Section 50 of the Indian Contract Act, 1872 is reproduced below:-

"50. Performance in manner or at time prescribed or sanctioned by promise. – The performance of any promise may be made in any manner, or at any time which the promise prescribes or sanctions."

The above section clearly states that the performance of any promise may be made in any manner or at any time which the Promisee prescribes or sanctions. Section 50 therefore embodies the oft quoted legal principle that when the contract expressly provides that a particular thing relating to furtherance of contract has to be done in particular manner then it has to be done in that manner and in no other manner.

In the instant case, the binding contract namely the PPA dated 06-07-2015 provides an inbuilt mechanism for settlement of disputes vide Article 11 of the PPA which stipulates that if any dispute or difference of any kind whatsoever arises between the parties relating to this agreement, it shall, in the first instance, be settled amicably, by the parties, failing which either party may approach the Commission for adjudication of such disputes.

In the said circumstances, the Petitioner can take recourse to the manner provided in Article 11 referred above i.e. to the dispute resolution mechanism as available therein since there exists a dispute as to the date of completion of the project of the Petitioner.

3.11. It is not the case of the Petitioner that the Licensee refused connectivity on all circumstances. The Petitioner himself admits in para 22 of the petition that the Licensee TANGEDCO has granted interim connectivity on a temporary basis to some of the completed projects namely that of SEI Phoebus and SEI Adhavan during the extended control period. It is obvious that in such cases eventhough the designated evacuation facilities were not in place, the temporary interconnection was offered by the Licensee with the intention to evacuate the power generated. Considering the facts and circumstances of the present case, in the light of the decision of Hon'ble APTEL in Gujarat Urja and the contradicting stand of the TANGEDCO as has been put forth by the Petitioner himself, the Commission does not see any reason to entertain the above P.R.C. as it lacks maintainability. Accordingly, the Commission is not inclined to admit the above petition as a Miscellaneous Petition.

4. Appeal:-

An appeal against this order shall lie before the Appellate Tribunal for Electricity under section 111 of the Electricity Act, 2003 within a period of 45 days from the date of receipt of a copy of this order by the aggrieved person.

(Sd)
(Dr.T.Prabhakara Rao)
Member

(Sd.....)
(G.Rajagopal)
Member

(Sd.....)
(S.Akshayakumar)
Chairman

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission