

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY  
COMMISSION SHIMLA**

In the matter of:-

M/s G.R. Enterprises, thro'  
Sh. R.K. Garg its sole proprietor,  
Village & P.O. Bhogpur Simbalwala,  
Tehsil Nahan, Distt. Sirmaur, HP

.....Petitioner

Versus

The HP State Electricity Board Ltd, thro' its  
Chief Engineer (Commercial)  
Vidyut Bhawan, Shimla-171004

.....Respondent

**Petition Nos. 7 and 146 of 2020**

(Decided on 15<sup>th</sup> December,2020)

**CORAM**

**DEVENDRA KUMAR SHARMA  
CHAIRMAN**

**BHANU PRATAP SINGH  
MEMBER**

Counsels: -

for Petitioner:

Sh. R.L. Verma, Advocate

for Respondent:

Sh. Surinder Saklani, Standing Counsel  
a/w Sh. Kamlesh Saklani  
(Authorised Representative)

**ORDER**

(Last heard on 28<sup>th</sup> Novemeber, 2020 and Orders reserved)

M/s G.R. Enterprises, a partnership firm (hereinafter referred as 'the petitioner') which has set up a solar PV Project of 1 MW Capacity at Village & PO Bhogpur Simbalwala, Tehsil Nahan, Distt. Sirmaur (HP) (hereinafter referred as "the project"), has moved the above captioned Petition No.7 of 2020, followed by modified Petition No. 146 of 2020, under section 86 (1) (f), read with section 158 of the Electricity Act, 2003 (hereinafter referred as "the Act") for adjudication of its dispute, in relation to the operation of the aforesaid project, arisen under the Power Procurement Agreement (PPA) executed by it with the Himachal Pradesh State Electricity Board Ltd., (hereinafter referred as "the Respondent Board").

2. The facts in brief, per submissions made by the petitioner in Petition No. 7 of 2020, are as under-

- (a) The petitioner entered into a Power Purchase Agreement (PPA) with the Respondent Board for its Solar PV Project of 1.00MW Capacity at Village Bhogpur Simbalwala, in Sirmour Distt. (HP) on 31.03.2017. Clause 6.2 (b) of the PPA stipulates that if the Project is commissioned on or before 31.03.2018 the rate of saleable energy delivered at the interconnection point shall be Rs. 5.31 per kWh. If the project is commissioned after 31.03.2018, the rate of saleable energy delivered at the interconnection point shall be the rate determined by the Commission for the category under which the total capacity of the Project falls for the financial year(s) immediately preceding respective the financial year(s) in which the project is commissioned, or the rate of Rs. 5.31 per kWh, whichever is lower.
- (b) The dispute has arisen regarding the date of commissioning of the Project. The petitioner invoked the provisions of Clause 13 of the executed PPA and good faith negotiations were held between the parties on 12.03.2019. In the MOM dated 12.03.2019 the Respondent Board i.e. HPSEBL mentioned that the rate of Rs. 5.31 kWh shall be applicable only in the case the entire capacity of the said Project gets commissioned on or before 31.03.2018. But the petitioner could not commission its Project on or before 31.03.2018. Therefore, the tariff of Rs. 4.37/kWh determined under the Commission's tariff Order dated 12.02.2018 for the Solar P.V. Projects on account of the slippage of the commissioning of the Project, and also under agreed Clause 6.2 of the PPA executed shall be applicable.
- (c) The petitioner submits that as the expression "commissioning" is nowhere defined in the PPA dated 31.03.2017, the synchronization should be taken as the date of commissioning of the Project. Since the date of synchronization of the Project falls before the cut-off date of 31.03.2018, the petitioner is entitled for the rate of Rs.5.31 per kWh for the saleable energy delivered by it to the Respondent Board at the interconnection point.

3. With the background, as delineated in the preceding para the petitioner has moved this petition for adjudication of the dispute either by the Commission itself or by a reference to an arbitrator under Sections 86 (1) (f) and 158 of the Act.

4. Since the petitioner in its petition had not disclosed the specific details of facts and events about achieving synchronization and any delay occurred on the part of the concerned agencies, the Commission vide its Interim Order dated 30.07.2020 gave liberty to the petitioner to file a modified petition and the petitioner has now filed the modified petition, bearing No. 146 of 2020, stating that the dispute has arisen out of or relating to the PPA, more specifically in violation of Clause 6.2 and other Clauses, for not making payments @ Rs. 5.31 kWh to the petitioner by the Respondent Board. The condition precedent for making payments @ Rs. 5.31 kWh is that the project should be commissioned and synchronized on or before 31.03.2018. The petitioner's project was commissioned and synchronized on 29.03.2018 and the same was inspected by the Respondent Board on that day. The electricity bills were also paid but at lower rates. The petitioner requested for the payment of the bills @ Rs.5.31kWh instead of @ Rs.4.37kWh and served the Respondent Board with statutory notice for good faith negotiations under Clause 13 of the PPA. Both the parties tried to resolve the dispute regarding commissioning and synchronization of the Project on or before 31.03.2018, As per the minutes of the meeting, the respondent admitted the case of the petitioner/applicant with regard to the commissioning and synchronization of the Project before 31.03.2018, stating that the SE (Design), Power House Electrical, HPSEBL, Sundernagar and the AEE visited the 1 MW Solar Power Project at Bhogpur Simbalwala on 29.03.2018 and 30.03.2018, and it was found that the petitioner's project got synchronized with the HPSEBL Grid.

5. In response to the modified petition, the Respondent Board submits:-

- (a) that the petition is not maintainable and the relief prayed is not legally tenable in the eyes of law;
- (b) that it is wrong to say that the Respondent Board has ever admitted the case of the petitioner qua the commissioning of the Project on or before 31.03.2018. In fact, the petitioner synchronized its unit with the Grid of the Respondent Board on 29.03.2018 and after complying with the provisions regarding commissioning tests and pursuant to letter dated 07.05.2018 of the S.E (Design) Power House Electrical HPSEBL, Sundernagar, the project achieved its commercial operation on 25.04.2018. Since the project has achieved its CoD on 25.04.2018, the tariff as determined by the Commission Tariff Order 12.02.2018, would be applicable;

- (c) that the sale/purchase of the energy is to be governed by the generic levellised tariff, including associated terms and conditions, determined by the Commission in accordance with the HPERC (Promotion of Generation from Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2012. The PPA was executed by the parties on 31<sup>st</sup> March, 2017, after approval of the Commission and it explicitly provided in Clause 6.2 that the tariff @ Rs. 5.31 kWh, which was granted by the Commission vide its Order dated 06.07.2016, would have been applicable only, if the entire capacity of the project was commissioned on or before 31.03.2018;
  - (d) that in the facts and circumstances involved the appointment of the arbitrator in the present matter is not necessary. Section 86 (1) (f) of the Act, gives the discretion to the Regulatory Commission either to adjudicate itself the dispute between the Licensee and the generating Companies or to refer the dispute for arbitration by an arbitrator appointed by it. It is in the domain of the Regulatory Commission to adjudicate it on the basis of the material put forth before it or in the exceptional circumstance, to invoke arbitration Clause. In the present case, the bone of contention is whether the petitioner is entitled to the tariff @ Rs. 5.31 kWh or @ Rs. 4.37 kWh and there is no technicality involved where this Commission cannot adjudicate the dispute in terms of the mandate of section 86 (1) (f) of the Act. As such especially when the dispute does not involve any highly technical issues, the Commission should adjudicate the dispute itself instead of making reference to an arbitrator, as prayed by the petitioner.
6. The petitioner has filed the rejoinder to the response of the Board stating that-
- (a) The instant petition is maintainable, being the available remedy for resolution of a dispute regarding non-payment of electricity Tariff by the Respondent Board to the petitioner @ Rs.5.31/KWh, consequent to failure of the good faith negotiations initiated under Clause 13 of the PPA on account of a dispute having arisen out of or in relation to the PPA, more specifically in violation of Clause 6.2 and other Clauses thereof.
  - (b) The unambiguous entitlement of the petitioner to receive payment of @ Rs.5.31/KWh for the energy supplied by him to the Respondent Board has

been attempted to be scuttled by resorting to non-existent, misleading, frivolous and contradictory plea raised by the Respondent Board and its consistent efforts to unnecessarily complicate the issue by raising the irrelevant technical plea since accrual of the dispute. Hence, the petitioner had to initiate the action for the appointment of an Arbitrator. The petitioner does not dispute the discretion, vested in the Commission, under section 86 (1) (f) of the Act, to either adjudicate itself disputes between the licensee and the generating companies or to refer them for arbitration. The petitioner wholly submits itself to the discretion of the Commission to either decide itself the dispute on merits or refer to an Arbitrator.

- (c) The petitioner has filed a requisite application for amendment/modification in the petition, so as to incorporate the necessary facts and events for a complete and effective adjudication of the real controversy between the parties.
- (d) The petitioner is clearly entitled to receive payment @ Rs.5.31/KWh because the date of Synchronization decides the applicable tariff and the date of the commercial operation only entitles the generating unit to receive payment for deemed supply of energy, i.e. “Net Saleable Deemed Generation” in addition to the payment for the actual delivery of energy at the interconnection point i.e. Net Saleable Energy. The applicable rate of tariff for Net Saleable Energy mentioned in Clause 6.1 was mandated to be @ Rs.5.31/KWh as per Clause 6.2 of the PPA. The said rate shall be applicable if the entire capacity of the project is commissioned on or before 31.03.2018 i.e. 31<sup>st</sup> March of the year immediately succeeding the financial year in which PPA is signed after the approval of the Commission. However, if the commissioning of the project is delayed beyond 31.03.2018 the rate determined by the Commission for the category under which the total capacity of the project falls for the financial year(s) immediately preceding the respective financial year(s) in which the capacities are commissioned for the respective capacity (ies) at the rate of @ Rs.5.31 per unit as above whichever is lower, shall be applicable.

- (e) The terms “Commissioned” has not been defined in PPA, and as such it should be interpreted in line with everyday usage and given its natural ordinary dictionary meaning.
- (f) The contract/agreement needs to be read as a whole considering the nature and purpose of the business. The Golden rule really is to ascertain the language through which the parties have expressed themselves unless the meaning leads to absurdity.
- (g) The Minutes of Meeting/ proceedings held for synchronization of commissioning of 1 MW Solar PV Project of the petitioner at Bhogpur Simbalwala on 30.03.2018 clearly demonstrates that the entire capacity of the generating unit was successfully synchronized with the Grid system and commissioned by the actual flow of energy to the Interconnection point well before 30.03.2018, and, therefore, the petitioners are entitled to payment of Tariff at the rate of @ Rs.5.31/kWh.
- (h) The Respondent Board is deliberately attempting to mislead this Commission by raising inconsistent and untenable plea.
- (i) The Nand Solar PV Project (5MWp) of M/s K.K. Kashyap was synchronized with the grid on 19.03.2018 and its COD is 14.04.2018 i.e. after 31.03.2018 but the Nand Solar Power PV Project is being paid the tariff @ Rs.5.31/KWh and which is being denied to the petitioner, whose case is on an absolutely similar footing. In denying the parity of the treatment, the respondents have adopted an approach of discrimination and are misusing their public office.

7. Before we proceed further, we feel it necessary to consider and decide as to whether the Commission should decide this dispute itself or make a reference to an Arbitrator?

8. The Electricity Act, 2003 is the complete Code, which empowers the Regulatory Commission to adjudicate upon the disputes between the licensees and the generating companies. Clause (f) of sub-section (1) of section 86 and section 158 of the Act, reads as under:-

**“86 Functions of the State Commission.- (1) The State Commission shall discharge the following functions, namely:-**

xxxx                      xxxxxx                      xxxxx                      xxxxx                      xxxxx

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

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*Section 158 of Arbitration: Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996)."*

The Hon'ble Apex Court vide its verdict rendered in the case **Gujarat Urja Vikas Nigam Ltd. Vs. ESSAR Power Ltd. (2008) 4SCC 755**, has clarified that the word "and" occurring for the second time in section 86 (1) (f) of the Act should be read as "or". The relevant extract of the said judgment reads as under:-

*"It may be noted that section 86 (1) (f) of the Act of 2003, is a special provision for adjudication of disputes between the licensees and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitrations. In our opinion, the word "and" in section 86 (1) (f) between the words "generating companies" and "to refer any dispute for arbitration" means "or". It is well settled that sometimes "and" can mean "or" and sometimes "or" can mean "and" in our opinion in section 86 (1) (f) of the Electricity Act, 2003, the word "and" between the words "generating companies" and the words "to refer any dispute" means "or" otherwise it will lead to an anomalous situation because obviously, the State Commission cannot both decide a dispute itself and also refer it to some Arbitrator. Hence the word "and" in section 86 (1) (f) means "or".*

9. Clause 13.2 (a) of the PPA dated 31.03.2017, reads as under:-

*"Except as otherwise provided in the Agreement or in the Electricity Act, 2003, all disputes arising out of or relating to the Agreement as are not resolved during the period as per section 13.1, shall be adjudicated upon or referred to arbitration by the Commission as per section 86(1)(f) of the Electricity Act, 2003 read with section 158 thereof."*

10. In view of the foregoing discussion, the discretion lies with the Regulatory Commission to consider and decide as to whether the dispute should be decided by itself or it should be referred to an arbitrator. There are various reasons as to why the Regulatory Commission may not decide the dispute itself and may refer it for arbitration by an arbitrator nominated/appointed by it. For example, the State Commission may be overburdened and may not have the time to decide certain disputes itself and hence such

cases can be referred to an arbitrator. Alternatively, the dispute may involve some highly technical point which even the State Commission may not have the expertise to decide, and such dispute in such a situation can be referred to an expert arbitrator. There may be various other considerations for which the State Commission may refer the dispute to an arbitrator instead of deciding it itself.

11. In the present case, the bone of contention of the matter is whether the petitioner is entitled to the tariff of @ Rs. 5.31 per kWh or Rs. 4.37 per kWh determined by the Commission vide its tariff Order dated 12.02.2018 for Solar P.V. Projects and there is no such technical aspect involved, where the Commission cannot adjudicate the dispute in terms of the mandate of Section 86 (1) (f) of the Act. Moreover, in view of the Apex Court decision rendered in **Gujrat Urja Vikas Nigam Ltd. V/s ESSAR Power Ltd. (Supra)**, the petitioner through its rejoinder, has submitted itself to the discretion of this Commission to either decide itself the dispute on merits or to refer it to an arbitrator. We, therefore, decide to consider and dispose of this petition ourselves instead of making any reference for arbitration as prayed for by the petitioner.

12. We have heard the learned Counsel, appearing for the petitioner and the learned Counsel appearing for the Respondent Board and have carefully gone through their stand in the written submissions made, arguments put forth during the hearings and after thorough evaluation of the relevant material on record, have found that the sole issue, which needs to be gone into by us, is whether the date of synchronization and the commissioning of the project is the same and if not to which rate petitioner is entitled to?

13. The Commission's Order dated 12.02.2018, issued for the determination of generic levelled tariff for Solar PV Projects of various capacities for the FY 2017-18 under the applicable RE Tariff Regulations, stipulates that where the rate for FY 2017-18 is to be considered in cases involving slippage of the commissioning of the Project, in accordance with the provisions of the PPA, tariff computed under Part-A of that Order, being higher than the tariff computed under Part-B of that Order shall be considered as the rate for FY 2017-18 for the limited purpose of arriving at the reduced rate actually in the slippage cases, as per the provisions of the PPA.

14. The PPA was executed by the parties on 31<sup>st</sup> March, 2017, after approval of the Commission and it is explicitly provided in Clause 6.2 of the PPA that tariff @ Rs.5.31 kWh which was granted by this Commission vide its Order dated 06.07.2016 would have



been applicable only if the entire capacity of the project was commissioned on or before 31.03.2018. The relevant extract of the Order dated 06.07.2016, is as under:-

*“D These tariffs shall be applicable for the Solar PV Projects where PPAs are signed on or before 31.03.2017, after approval of the Commission and the Project are commissioned on or before 31.03.2018”.*

15. To assist the determination of the point in issue it would be necessary to take note of the relevant provisions of the PPA dated 31.03.2017, executed by the parties-

**“2.2.10 “Commercial Operation of the Unit Project”**

*Means the state of a Unit/Project where it is capable of delivering Active Power and Reactive Power on a regular basis after having successfully met the requirements of the Commissioning Tests.*

**2.2.11 “Commercial Operation Date (CoD) of Unit/Projects”**

*means the date(s) on which unit(s) or the Project achieves the Commercial Operation.*

**2.2.66 “Synchronization/Synchronize/Synchronizing”**

*means an act to cause paralleling of two A.C. circuits/ systems when they are within the desired limits of frequency, phase angle and Voltage.*

**2.2.67 “Synchronization Date(s)/ Date of Synchronization”**

*means with respect to each Unit, the date on which such Unit is synchronized and connected for the first time, to the Grid System.*

**4.1 SYNCHRONIZATION**

**4.1.1** *The Company shall give the HPSEBL at-least sixty (60) days advance written notice of the date on which it intends to synchronize a Unit to the Grid system. In case the Company intends to synchronize a Unit earlier than the Scheduled Synchronization Date for the first Unit, such notice shall be given at least 180 days in advance. If power cannot be evacuated smoothly under the regular arrangement envisaged in the Agreement, the Parties may mutually agree to an interim arrangement as per the provisions of Section 4.4.*

**4.1.2** *Subject to section 4.1.1, the Company shall declare a unit to be ready for Synchronization with the Grid System when:-*

- (i) it has been installed in accordance with the required technical specifications and Prudent Utility Practice;*
- (ii) it meets all related conditions prescribed in applicable Indian Standard(s) / Code(s) then in effect and otherwise meets the provisions of the Electricity Act, 2003 and the Rules or Regulations framed thereunder, or any other requirements for Synchronization to the Grid System;*

- (iii) it is capable of being operated safely and the Company has obtained the approval of the Chief Electrical Inspector of the Government for energisation; and*
- (iv) the Company has entered into a separate agreement for execution, operation and maintenance of the Interconnection Facilities as per Section 3.3.*
- 4.1.3 The Company shall notify the HPSEBL, as soon as the requirement of Section 4.1.2 have been met and the Unit is ready to be Synchronized to the Grid System in accordance with the Agreement.*
- 4.1.4 The HPSEBL, and / or its authorized representative(s) shall inspect any Unit which the Company intends to synchronize to the Grid System within five (5) days after being notified in writing by the Company, pursuant to Section 4.1.3, to determine whether the requirements of Section 4.1.2 have been met. The Company shall provide the HPSEBL with such access to the Station as is reasonably required to make such determination.*
- 4.1.5 If the HPSEBL is satisfied that the Unit is ready to be synchronized in accordance with Section 4.1.2 and 4.1.4 it shall within three days of the completion of the inspection of the Unit(s) notify the Company to that effect and provide the Company with all reasonable assistance in synchronizing the Unit and also for conducting Commissioning Tests.*

#### **4.2 Commissioning Tests:**

- 4.2.1 After a Unit has been successfully Synchronized with the Grid System, the Company shall further give at least seven (7) days notice by fax followed by registered mail to the HPSEBL of the exact date(s) on which Commissioning Test(s) will commence. The HPSEBL shall designate its authorized representative to observe these test(s).*
- 4.2.2 The Company shall conduct Commissioning Tests within fifteen (15) days from the Synchronization Date, in the presence of an Independent Engineer appointed by both the Parties and the authorized representative of HPSBEL. The Independent Engineer and the authorized representative of the HPSBEL shall submit a certificate of the Tested Capacity and necessary performance tests of the plant to the Chief Engineer (System Operation), HPSEBL Shimla, or to any other authority as may be designated by the HPSBEL. After successful completion of the Commissioning Tests, trial operation of the Unit(s) shall be carried out by the Company for a period of 15 days to establish the reliability and stability of the Generating Unit(s). The Company shall also furnish a copy of the Test results and the report regarding the trial operation to the HPSEBL.*

### **4.3 Commercial Operation:**

4.3.1 *The Commercial Operation of a Unit shall have occurred as on the date such Unit successfully completes, after having passed Commissioning Test(s) as per Section 4.2.2, the 15 day's trial operation as certified by the Superintendent Engineer (Design) Power House (Electrical), HSPEBL Sundernagar (or any officer as may be designated by the HPSEBL) and accepted by the Chief Engineer (System Operation), HPSEBL, Shimla or any other Chief Engineer designated by HPSEBL for the purpose, under intimation to the Company.*

### **6.1 SUPPLY OF POWER**

*From the date of Synchronization of the first Unit of the Project, the Company shall deliver the electrical energy from the Project at the Interconnection Point. The Company shall sell and the HPSEBL shall purchase at the Interconnection Point, the Net saleable Energy i.e., the Energy received from the Project at the Interconnection Point.*

*During such periods, as may occur from time to time, as the project is partially or totally unable to operate, the Company may draw Energy required for the upkeep and maintenance of the Project from the HPSEBL's system, which shall be metered at the Interconnection Point and adjusted against the Net Saleable Energy in corresponding month's bill in case the quantum of such draws by the Company during a month, the excess draws shall be paid for the Company at the same rate as applicable for Net saleable Energy as per Section 6.2.*

### **6.2 Tariff for Net Saleable Energy**

- (a) *The HPSEBL shall pay for the Net Saleable Energy delivered and sold to it by the Company at the Interconnection Point at a fixed rate of Rs. 5.31 per kWh as determined in the Commission's tariff Order dated 6<sup>th</sup> July, 2016.*
- (b) *The rate of Rs. 5.31 per kWh as per Clause (a) above is firm and fixed and shall not be subject to any indexation, escalations, adjustment or review due to any reason whatsoever except for adjustment on the following line and the specific provisions under Section 8.8.*
  - (i) *The rate given above shall be applicable if the entire capacity of the project is commissioned on or before 31.03.2018 i.e. 31<sup>st</sup> March of the year immediately succeeding the financial year in which PPA is signed after approval of the Commission. However, if the commissioning of the project is delayed beyond 31.03.2018, the rate determined by the Commission for the category under which the total category of the project falls for the financial year(s)*

*immediately preceding the respective financial year(s) in which the capacities are commissioned for the respective capacity(ies) or the rate of Rs. 5.31 per unit as above, whichever is lower, shall be applicable.”*

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16. The Petitioner's main contention is that sale and purchase of Energy is governed by Clause 6.1 of the PPA, which stipulates that from the date of synchronization, the Company shall deliver the electrical energy from the Project at the Interconnection Point and the Company shall sell and the HPSEBL shall purchase at the Interconnection Point, the Net Saleable Energy at the tariff of Rs. 5.31 per KWh as per Clause 6.2 of the PPA and the word "Commissioned" should be interpreted in line with everyday usage and given its natural and ordinary meaning.

17. It is settled Law that a Contract must be read as a whole and the intention of the parties must be, gathered from the language used in the Contract by adopting harmonious construction of all the Clauses contained therein. The cardinal principle is to ascertain the intention of the parties to the contract through the words they have used, which are key to open the mind of the makers. Thus in the present case the Clauses 6.1 and 6.2 should not be read in isolation of the Clause of the PPA and the expressions, synchronization, "Commissioned" and "Commissioning of the Project" require to be interpreted as defined and used in the PPA. Moreover, commissioning is an activity which is well known in the Electrical Industries and hardly needs any special meaning/ definition. In any case, the date of the first synchronization cannot be considered as the date of commissioning of the project, as various Commissioning Tests will essentially have to be conducted before treating the Unit/Project as commissioned.

18. It is amply clear from Clauses 4.1, 4.2 and 4.3 of the PPA, executed on 31.03.2017 by the parties, that the synchronization is connecting the Unit with the Grid on compliance of the conditions under clauses 4.1.2 and 4.1.4 and the Commercial Operation of a Unit occurs as on date such Unit successfully completes, after having passed Commissioning Tests under Clause 4.2.2, the fifteen days trial operation as certified and accepted by the Competent officers under Clause 4.3.1 of the PPA. Thus after the synchronization of the Unit of the Project:-

- (1) 7 day's notice intimating the exact date(s) of the Commissioning Tests is required;

- (2) the Commissioning Tests are required to be conducted within 15 days from the date of synchronization of the Unit in the presence of an Independent Engineer;
- (3) after successful completion of the Commission Tests Trial Operation is to be carried out by the Company for a period of 15 days and the Company is to intimate the result to the Licensee;
- (4) the certificate of tested capacity is to be submitted to the Board by the authorized officer of the Licensee.

In view of the above, the project cannot be considered to be commissioned, unless the Commissioning Tests are successfully conducted and there is no weightage in the plea raised by the Petitioner that the date of synchronization should be considered as the date of commissioning of the Unit/ Project. Moreover, the Petitioner had not disclosed the specific details of facts and events of the delay occurred, thereof.

19. The Solar Power Policy in the State envisages a normal period of 18 to 24 months in commissioning of the project after obtaining statutory clearances depending upon the size of the project. We observe that inspite of knowledge of the extent of the reasonable period normally required for commissioning the Solar PV Projects the petitioner has chosen to agree to the provisions of the PPA to the effect that the lower rate would be applicable in case of delay of commissioning of the Project beyond 31.03.2018. On the joint petition of the parties, the Commission approved the PPA and on request from the generator, the same was executed on 31.03.2017. The petitioner has obviously executed the PPA with the hope that in case he is able to commission the project by 31.03.2018, he shall be able to get a higher rate. Unfortunately, the petitioner failed to achieve the commissioning by the targeted date and is now seeking relief in one of the main conditions to which he had specifically agreed in the PPA. We have however otherwise also applied our mind about the rationale for allowing a lower rate in case of delayed commissioning and observe that such reduction is not attributed to a penalty, but in fact, only suitably accounts for the savings that would accrue to the generator on account of the declining cost of the Solar Projects in case of late procurement of such panels which form a main component of the project cost. As such even if the request of the petitioner were to be permissible under any provisions of law, the same shall only amount to a situation where the generator may get rewarded for the delay in commissioning the project beyond 31.03.2018.

20. The Hon'ble Supreme Court in the case titled- **Gujrat Urja Vikas Nigam Ltd. Vs. Solar Semiconductor Power Company (India) Pvt. Ltd. and another (2017) 16 SCC 498 and (2018 ELR (SC)** has observed that:-

*“ In the present case, admittedly, the tariff incorporated in PPA between the generating Company and the distribution Licensee is the tariff fixed by the State Regulatory Commission in the exercise of the statutory powers. In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a Contractual Contract, is the result of an act of volition of the parties which can in no case, be altered, except by mutual consent. Rather, it is a determination made in the exercise to statutory powers which got incorporated in a mutual agreement between the two parties involved.”*

The Hon'ble APTEL vide its judgment dated 17.05.2018 to the case of **Nabha Power Ltd. Vs. Punjab State Corporation Ltd.** has followed the Apex Court decision in the **Solar Semi-Conductor** case held that the terms and conditions of the PPA are binding and cannot be reopened. In para 9.14 of the said judgment, the Hon'ble Tribunal observed that-

*“We find that the PPA entered into by the parties is a statutory and binding instrument which crystallises the rights and obligations of the involved parties. Accordingly the same would need to be interpreted in the spirit of the agreed terms and cannot be defined or derived in its “implied term”. The Hon'ble Supreme Court in GUVNL case (2017) has also held that PPA are binding and cannot be varied.”*

21. In the GUVNL case the Generator and Discom entered into PPA which contained similar conditions with regard to the applicability to tariff based on the date of commissioning of the Project. The tariff, as incorporated in the PPA based on the tariff order of that State Commission, would have been applicable in case of the commissioning of the project within the cutoff date of 31<sup>st</sup> December, 2011 and in case of delay in commissioning of Solar Power Project beyond 31<sup>st</sup> December, 2011, the Utility was to make payment at the tariff as determined by the Commission for Solar Projects effective on the date of commissioning of the Solar Power Project or the tariff mentioned in the PPA as aforesaid, whichever is lower. However, since the project was commissioned beyond 31.12.2011 i.e. in a subsequent control period. The Hon'ble Supreme Court decided that it was beyond the inherent power of the State Commission to extend the Control Period. The facts of the case before us are similar to the above referred case decided by the Hon'ble Supreme Court. In the present case also, the generator is claiming the rate of Rs. 5.31 per kWh for the power transmitted from the project commissioned beyond the cutoff date of 31.03.2018, as incorporated in the tariff Order.

22. After having considered the matter on merit, we do not find any merit in the contention raised by the petitioner that synchronization of Solar Project and the commissioning of the Project have the same meaning. The petitioner claims that the date of commissioning of the Project is 30.03.2018, but this date has been mentioned only in minutes of the meeting dated 12.03.2019 holding good faith negotiations and this meeting ended without any conclusion. No records to achieve the commissioning of the project on 30.03.2018 have been put forth by the petitioner. It is observed that the requirements to get the project synchronized and commissioned as per agreed terms and conditions of Article-4 have not been placed on record. Since the project has been commissioned after the cutoff date of 31.03.2018, the petitioner is not entitled for a higher rate of Rs.5.31 per kWh for the delay in commissioning of the project beyond 31.03.2018.

23. So far as the denial of parity of treatment and discriminatory approach alleged to be adopted by the Respondent Board is concerned, we observe that Nand Solar PV Project was synchronized on 19.03.2018 and declared successfully commissioned on 27.03.2018 and the COD of the project has been declared on 14.04.2018 by the IPP as per the recommendation of the SE (Design), HPSEBL. The petitioner's project i.e. G.R Enterprises Solar PV Project has been synchronized on 30.03.2018 and commissioning tests by the SE (Design), have been conducted on 10.04.2018 and recommended the COD of the Project, but the IPP has yet to declare the COD. Thus, the petitioner cannot claim parity of treatment with that of the Nand Solar PV Project.

24. In the light of the above discussions, the findings and the express provisions in the PPA executed by the parties on 31.03.2017, we decline to accept the contention raised by the petitioner that the date of synchronization of the project should be taken as the date of the commissioning of the project. Hence the petitioner is not entitled for a rate of Rs. 5.31 per kWh and is only entitled for the rate of Rs.4.37 per kWh, as determined by the State Commission through its tariff order dated 12.02.2018 applicable due to the slippage of the commissioning of the Project and also agreed to vide clause 6.2 of the PPA executed by the parties.

It is so ordered.

**-Sd-**

**(BHANU PARTAP SINGH)  
MEMBER**

**-Sd-**

**(DEVENDRA KUMAR SHARMA)  
CHAIRMAN**