

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

PRESENT:

Thiru. M.Chandrasekar

.... Chairman

and

Thiru. K.Venkatasamy

.... Member (Legal)

M.P. No.25 of 2020 and M.P.No.26 of 2020

M.P.No.25 of 2020

M/s.Ramnad Renewable Energy Ltd.
Adani House
Nr. Mithakhali Six Roads
Ahmedabad – 380 009
Gujarat.
India

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

Versus

1. Tamil Nadu Generation and Distribution
Corporation Ltd.
Represented by its Chairman
No. 144, Anna Salai, Chennai – 600 002.

2. Chief Engineer / Non Conventional Energy Sources (NCES)
2nd Floor, NPKRR Malligai
144, Anna Salai, Chennai – 600 002.

.... Respondents
(Thiru M.Gopinathan
Standing Counsel for the Respondents)

M.P. No. 26 of 2020

M/s.Kamuthi Solar Power Ltd.
Adani House
Nr. Mithakhali Six Roads
Ahmedabad – 380 009
Gujarat
India

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

Versus

1. Tamil Nadu Generation and Distribution Corporation Ltd.
Represented by its Chairman
No. 144, Anna Salai
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2. Chief Engineer / Non Conventional Energy Sources (NCES)
2nd Floor, NPKRR Malligai
144, Anna Salai
Chennai – 600 002.

....Respondents
(Thiru M.Gopinathan
Standing Counsel for the Respondents)

Dates of hearing : 15-09-2020; 06-10-2020; 20-10-2020;
10-11-2020; 08-12-2020; 29-12-2020;
05-01-2021; 06-01-2021; and 12-01-2021;

Date of Order : 20-07-2021

The M.P.No.25 of 2020 and 26 of 2020 came up for final hearing on 12-01-2021. The Commission upon perusal of the petitions and connected records and after hearing the submissions of the both parties, hereby makes the following Common order:-

ORDER

1. Prayer of the Petitioner in M.P.No.25 of 2020:-

The prayer of the petitioner in M.P.No.25 of 2020 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 72 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 72 MW solar power project on or before March 31, 2016; and
- (iii) declare that the Petitioner's solar power project is entitled to a tariff of Rs.7.01 a unit;
- (iv) pass an *ex parte ad interim* order and/or grant interim relief directing TANGEDCO to provide interim connectivity to the Petitioner's project till the substation is ready; and
- (v) pass an *ex parte 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;

2. Prayer of the Petitioner in I.A. in M.P.No.25 of 2020:-

The petitioner has also filed an I.A. with the prayer to pass an *ex parte ad interim* order and / or grant interim relief directing TANGEDCO to provide interim connectivity to the petitioner's project till the new Kumathi substation is ready.

3. Facts of the Case in M.P. No. 25 of 2020:-

This petition has been filed to grant the petitioner a project specific extension of the Control Period from March 31, 2016 to the date of interconnection of the Petitioner's 72 MWs project to the grid, in order for the Respondent to pay the petitioner the tariff of Rs.7.01 a unit and to declare that the petitioner has successfully commissioned its 72 MW solar power project on or before March 31, 2016 and to declare that the petitioner's solar power project is entitled to a tariff of Rs.7.01 a unit.

4. Facts of the Case in M.P. No. 26 of 2020:-

This petition has been filed to grant the petitioner a project specific extension of the Control Period from March 31, 2016 to the date of interconnection of the Petitioner's 216 MWs project to the grid, in order for the Respondent to pay the petitioner the tariff of Rs.7.01 a unit and to declare that the petitioner has successfully commissioned its 216 MW solar power project on or before March 31, 2016 and to declare that the petitioner's solar power project is entitled to a tariff of Rs.7.01 a unit.

5. Having set out the prayers of the petitioners and facts of the case relating to both the cases separately, it is seen that the contentions of the petitioners and respondents and the facts pleaded in the petitions, counter affidavits, rejoinder, written submissions filed by the both sides in both the petitions are identical and more or less similar and the difference lies only with regard to the quantum of MW commissioned in respective case and the date of commissioning and other incidental details, there being no difference in the prayer with regard to the eligibility of tariff and the rate of tariff sought for by the petitioners. Further, the issue being eligibility of the petitioner in both the petitions to a tariff of Rs.7.01 per unit, Commission has proposed to issue this common order in regard to both cases. Hence, for the sake of brevity only the facts relating to M.P.No.25 of 2020 are set out elaborately for appreciation of facts.

6. Common contentions of the Petitioner in M.P.No.25 of 2020 and M.P.No.26 of 2020:-

6.1. The petitioners have entered into an Energy Purchase Agreement ("EPA") for 72 MW capacity in M.P. No. 25 of 2020 and 216 MW capacity in M.P. No.26 of

2020 with the Tamil Nadu Generation and Distribution Corporation Limited ("TANGEDCO") on 4th July 2015, for the implementation of their solar power projects.

6.2. As per Commission's "Comprehensive Tariff Order on Solar Power" dated September 12, 2014 under Order No 4 of 2014 ("Tariff Order") by which it has determined tariff for solar plants, the tariff payable to solar power plants commissioned during the control period of the said order i.e. on or before 11.09.2015 shall 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 March 31, 2016. By virtue of this Order, all solar power projects commissioned on or before March 31, 2016 became entitled to a tariff of Rs.7.01 per unit.

6.3. The Petitioner, which is a part of the Adani group of companies, had in 2015 proposed to set up plants of varied capacity using solar photovoltaic (PV) technology in the State in consonance with the new solar initiative by the State. In terms of the TNERC Power Procurement from New and Renewable Sources of Energy Regulations, 2008, the control period of the tariff was fixed as two years and the format for the Energy Purchase Agreement ("EPA") was to be determined by the Commission after discussions with the generators and the distribution licensees.

6.4. 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. A perusal of the said proceedings establishes that the initial documents to be furnished include.

- (a) a request letter mentioning the project capacity, apart from the duly filed application and a copy of the land document, being either the registered sale deed or lease deed;
- (b) a request letter of the developer mentioning the project capacity, location viz. survey number of the land, Village Taluk, District and option (Sale to Board / Captive / Third party sale);
- (c) Duly filled application format;
- (d) Copy of land document- registered sale deed or lease deed if available;
- (e) Registration fees- Rs.10,000/- per application;
- (f) Load flow study consultation charges: up to project capacity of 15 MW- Rs.2,00,000/- + service tax (For project capacity up to 15 MW and if the transmission feasibility is at 110KV voltage level, then the developer has to pay an amount of Rs.5,00,000/- + service tax). For project capacity greater than 15 MW (Rs.5,00,000/- + service tax)
- (g) 50% of the applicable security deposit.

6.5. The Petitioners company, have issued an expression of interest for the establishment of a 72 MW solar PV and 216 MW solar PV power plants at O.Karisalkulam village, Kamuthi Taluk, Ramnad District and Sengapadai and Pudukottai Villages respectively vide its application dated 26.05.2015. TANGEDCO vide its letter dated 17.06.2015 proposed to interface the above referred power plants with the TANTRANSCO grid at the sanctioned new Kamuthi 400/230-110 KV SS at 110 KV level by erecting 110 KV line for a distance of 8 KM

and 5 KM, as the case may be, by connecting the proposed 72 MW and 216 MW solar PV power plants and the sanctioned Kamuthi 400/230-110 KV SS. The above grid connectivity was to be effected only after commissioning of sanctioned new Kamuthi 400/230-110 KV SS at Kamuthi, Ramnad District.

6.6. Pursuant to the Tariff Order dated 12.09.2014, the energy purchase agreement was approved only on 21.01.2015, and therefore the Commission suo motu extended the control period from 01.04.2015 as provided for under the said Tariff Order to 31.03.2016.

6.7. The Petitioner's proposal was accepted by the 1st Respondent as per its Letter of Approval dated 04.07.2015 and consequently, an Energy Purchase Agreement was entered into between the Petitioners and the 1st Respondent dated 04.07.2015. Subsequent to the execution of the PPA, the Petitioner commenced construction of its 72 MW and 216 MW projects in right earnest fully aware that it had to commission its project on or before 31.03.2016, i.e., before the expiry of the control period, in order to avail the preferential tariff declared by the Commission under its Tariff Order.

6.8. The petitioner immediately after execution of the PPA, started acquiring land in respect of the project and appointed an Engineering, Procurement and Construction ("EPC") contractor. The Petitioner got the requisite permissions and approvals from the local bodies including consent from the Tamil Nadu Pollution Control Board for the commencement of the project. The petitioner also made arrangements for financial assistance from banks and financial institutions for the

project. 70% of the funding was provided by banks and financial institutions and the entire financial projections and estimates were computed on the basis of the Tariff Order dated 12-09-2014.

6.9. In the month of November, 2015, as a result of a cyclone that hit the State of Tamil Nadu and as a result unprecedented rainfall recorded in Kamuthi Taluk, Ramnad District, there was a stoppage of construction work. In fact, such a situation continued for over a month and flooding of the construction site continued even after stoppage of rain. The Petitioner took all steps and measures to continue the construction work. However, despite the Petitioner's best efforts, the entire project was delayed due to the flooding, which was entirely beyond the Petitioner's control. The Petitioner informed the 1st Respondent that the stalling of the construction was on account of force majeure, and was beyond the petitioner's control. Despite the rampant rain and flooding, the Petitioner took all steps possible for completion of construction and commissioning of the plant within the control period as fixed by the Commission in its order dated 12.09.2014.

6.10. By its letter dated 17.06.2015, TANGEDCO approved the Petitioner's proposed project by interfacing it with the TANTRANSCO grid at sanctioned Kamuthi 400/230-110 KV SS at 110 KV level by erecting 110 KV line for a distance of 8KM. The Respondents were entirely responsible for the commissioning of the sub-station and as per the extant regulations, the evacuation facilities for evacuating power from the solar power plant were to be provided by the Respondents. However, TANGEDCO was not acting with the same vigour and speed to enable the completion of the construction of the evacuation facilities. As

per the Energy Purchase Agreement dated 04.07.2015, TANGEDCO was to provide the evacuation facility from the point of generation to the interconnection point which the Petitioner had duly put in place from the point of generation to the interconnection point.

6.11. The Petitioner's plant was ready for commissioning by 22.03.2016. However, the Respondents failed to commission the 110 KV substation at Kamuthi and it was evident to the Petitioner at that point that the project would likely be delayed beyond the 31.03.2016 deadline. This put the commissioning of the Petitioner's project on or before 31.03.2016 at grave risk. In such circumstances, the Petitioner issued a letter dated 24.03.2016 to the Respondents and duly informed them that the Solar PV power plant was ready for commissioning by 22.03.2016 and requested the Respondents to consider their alternate proposal by permitting the Petitioner to evacuate the power through a one circuit of 110 KV D/C Old Kamuthi Substation to New Kamuthi Substation line at New Kamuthi substation end.

6.12. The Chief Electrical Inspector issued a letter dated 22.03.2016 and granted approval for the commissioning of the Petitioners 72 MW project and 216 MW project, in terms of Regulation 43 (2) of the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010. Similar consents for operation of the power plant was issued by the Tamil Nadu Pollution Control Board in accordance with Sections 21 and 25 of the Air (Prevention and Control of Pollution) Act, 1981 and Water (Prevention and Control of Pollution) Act, 1974 respectively on 19.2.2016.

6.13. The Petitioner issued letters dated 25.03.2016 and 31.03.2016 to the 2nd Respondent and Superintending Engineer, Solar Energy/NCES. In these letters, the Petitioner reiterated that it has been ready to commence evacuation of power from its plant since 22.03.2016 and the non-evacuation of power is on account of complete inaction on the part of TANGEDCO.

6.14. However, through its letter dated 15.04.2016, TANGEDCO failed to accede to the Petitioner's request for issuing Deemed Commissioning Certificate as of 31.03.2016. TANGEDCO sought to make an unsubstantiated claim that the petitioner's plant was not ready for commissioning as on 31.03.2016. However, the detailed facts as set out in this Petition clearly demonstrate that such a stand is untenable. In fact, TANGEDCO could have easily provided temporary connectivity for the purposes of commissioning and acceded to the Petitioner's requests for temporary connectivity grid interface proposals.

6.15. The Petitioners have fulfilled all their obligations with respect to commissioning of the plant within the control period and the 1st Respondent ought to have enabled evacuation of the power within the control period. The Respondents have failed to discharge their obligations in terms of the Energy Purchase Agreement dated 04.07.2015 by not commissioning the sub-station before 31.03.2016.

6.16. 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 petitioners to complete construction of their project well before March 31, 2016, and having demonstrably being ready to generate and supply power, the Petitioners could not supply the power solely for reasons attributable to TANGEDCO. As the project was ready and only due to the failure of the Respondent to provide connectivity for evacuation, the petitioners ought not to be denied the benefit of Rs.7.01 tariff available under the Tariff Order.

6.17. TANGEDCO cannot be permitted to take advantage of its own wrong in delaying the commissioning of the Petitioners' project by failing to provide the required infrastructural facilities despite the Petitioners having kept up their obligations solely because the sanction for new Kamuthi 400/230-110 KV SS at 110KV level at Kamuthi, Ramnad to which the Petitioners' project was required to inter-connect had not been ready yet. It is unfortunate that a State undertaking acted 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 when 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 substation, as well as failure to act on the representations dated, 24.03.2016, 25.03.2016 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. In terms of the New and Renewable Sources of Energy Regulations, 2008, the evacuation facilities for

evacuating power from a solar power plant is to be provided by TANGEDCO. The inaction of TANGEDCO is therefore contrary to the regulations.

6.18. 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.

6.19. 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 72 MW and 216 MW are well within the 1500 MWs contemplated by TANGEDCO.

6.20. 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, in order for the projects which have been completed, to obtain the benefit of commissioning before the end of the control period.

6.21. The petitioner has incurred around Rs.1524 Crores on the project and has set up the plant with the funding from banks and financial institutions. The entire financial planning and projection of the petitioner with regard to the project is based on the tariff rate at Rs.7.01 as determined by the Commission. Therefore, if this tariff is not applicable, the petitioner will suffer huge losses. Thus, on grounds of promissory estoppel as well, the petitioner is entitled to a tariff of Rs.7.01 a unit.

6.22. 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.

7. Contentions of the Respondents:-

7.1. In exercise of power conferred under Section 62 of Electricity Act, 2003, Tamil Nadu Electricity Regulatory Commission (herein referred to as 'TNERC') has issued "Comprehensive Tariff Order on Solar Power" vide Order No.7 of 2014 dated 12.09.2014 for procurement of solar power by the Distribution Licensee fixing "Generic/Preferential tariffs" of Rs.7.01 per unit without Accelerated Depreciation (AD) benefit and Rs.6.28 per unit with AD benefit for Solar Photovoltaic plants. The TNERC has been issuing Tariff Order periodically for procurement of solar power by the Distribution Licensee.

7.2. The "Preferential tariff" as determined in TNERC's Order No.7 is applicable for the respective solar PV power plants commissioned during the control period of

that particular Tariff Order in force, irrespective of date of execution of Power Purchase Agreement (herein referred to as PPA). Hence, any solar power plant developer is eligible to avail the tariff rate specified in the said TNERC order, i.e., Rs.7.01 per unit without Accelerated Depreciation (AD) benefit and Rs.6.28 per unit with AD benefit for Solar Photovoltaic plants if they commissioned the proposed solar power plants on or before 31.03.2016.

7.3. Based on the Tamil Nadu Solar Policy 2012, TANGEDCO has implemented the Tariff Order issued by the TNERC in the State for the procurement of solar power. Under the said Preferential Tariff Order, 86 developers with a combined capacity of 1484 MW have executed PPA with TANGEDCO, including the petitioner company, as per terms and conditions of TNERC Order No.7 of 2014 dated 12.9.2014. TANGEDCO is procuring solar power from them at a tariff rate as specified in the relevant orders of TNERC prevailing as on the date of commissioning of the solar plant.

7.4. M/s Adani Green Energy (Tamil Nadu) Limited had given applications for approval of establishment of following 5 solar power plants of combined capacity of 648 MW.

- a. 216 MW solar power plant in Kamuthi Taluk ,Ramanathapuram.
- b. 216 MW solar power plant in Kamuthi Taluk ,Ramanathapuram.
- c. 72 MW solar power plant in Kamuthi Taluk, Ramanathapuram.
- d. 72 MW solar power plant in Kamuthi Taluk, Ramanathapuram.
- e. 72 MW solar power plant in Kamuthi Taluk, Ramanathapuram.

7.5. The parent company of the petitioner, M/s. Adani Green Energy (Tamil Nadu) Limited, was requested to pay applicable registration fee, load flow study charges and 50% of the applicable refundable S.D as per Board Proceedings No. 454 dated 07.10.2014 for all the above five applications. In respect of the 72 MW Solar power plant, for which the petitioner has raised certain disputes, on receipt of the applicable fees, load flow study was conducted. However, M/s. Adani Green Energy (Tamil Nadu) Limited in their letter stated that the 216 MW plant under Phase-4 in Kamuthi Taluk would be developed by their subsidiary company under the name "Ramnad Renewable Energy Ltd.", the petitioner herein. Hence, the study results were communicated to the petitioner vide CE/NCES/SE/Sol/EE/SCB/A1/F.Ramnad Renewable/D762/15 dated 17.6.2015.

7.6. The petitioner was duly informed by the above letter that the power plant could be interfaced with the TANTRANSCO grid at proposed sanctioned Kamuthi 400/230-110 KV SS at 230 KV level by erecting 230 KV evacuation line for a distance of 5 km connecting the proposed 216 MW solar PV power plant and the proposed sanctioned Kamuthi 400/230-110 KV SS with necessary breaker and protection arrangement as per the TANGEDCO norms. The above grid connectivity was to be effected only after commissioning of proposed sanctioned Kamuthi 400/230-110 KV SS. It was also informed that further action would be taken by TANGEDCO, subject to fulfilment of the above said terms.

7.7. M/s Ramnad Renewable Energy Ltd., the petitioner herein paid the balance 50% of the security deposit on 17.6.2015.

7.8. M/s Ramnad Renewable Energy Ltd., on submission of relevant documents, was issued "Noted for Record Letter" vide Lr.No.CE/NCES/SE/Solar/EE/SCB/A1/F M/s.Kamuthi Solar/D871/15 dated 04.07.2015. As per clause (4) of this letter, the petitioner was informed the following:

"Your proposed 216 MW solar power plant can be interfaced with the TANTRANSCO grid at proposed sanctioned Kamuthi 400/230-110 KV SS at 230 KV level by erecting 230 KV evacuation line for a distance of 5 Km connecting your proposed 216 MW solar PV power plant and the proposed sanctioned Kamuthi 400/230-110 KV SS. You should not claim any deemed generation in the event of delay in commissioning of the 400 KV SS and the applicable tariff will be as fixed by TNERC at the time of commissioning of 400 KV SS. In this regard, you are requested to furnish an undertaking".

7.9. M/s.Ramnad Renewable Energy Limited has given an undertaking dated 16-06-2015 that they would not claim any deemed generation or any other benefits whatsoever, from TANGEDCO, in case TANTRANSCO could not commission the proposed 400 KV Substation at Kamuthi, Ramnad District even though the petitioners completed set up of the solar PV power plants well in advance.

7.10. TANGEDCO in its letter dated 21.11.2015, while intimating the petitioner to pay tentative cost towards establishment & supervision charges and testing and commissioning charges have once again informed the petitioner that TANGEDCO/TANTRANSCO would not be responsible for any delay in commissioning of their solar plant in connection with connectivity and establishment of 400/230-110 KV Kamuthi Substation

7.11. TANTRANSCO took all steps on war footing basis for the works related to commissioning of Kamuthi 400 KV SS and after completion of all works, tie-up approval was accorded on 02.09.2016 for parallel operation of 216 MW solar PV

power plant interfacing with TANTRANSCO grid at new Kamuthi 400/230-110 KV SS at 230 KV level.

7.12. M/s.Adani Green Energy (Tamil Nadu) Limited planned to execute the 648 MW solar power project's five subsidiary units and an undertaking has been obtained that it would not claim deemed generation until the commissioning of Kamuthi 400 KV SS.

7.13. Based on technical feasibility, the respondents have provided the following interim arrangement:

The 216 MW solar power plant developed by M/s. Adani Green Energy (Tamilnadu) Limited and 72 MW SPV plant developed by M/s Ramnad Solar Power Ltd were provided with interim arrangement for power evacuation from 110 KV Kamuthi SS based on technical feasibility and load conditions, even though the 400 KV Kamuthi SS was not commissioned and hence both the above plants are availing Rs 7.01/- per unit, in spite of the undertaking given by the respective plants.

7.14. In respect of the petitioner's plant, letter dated 15.04.2016 from TANGEDCO to the petitioner reiterates the furnished undertaking while also elaborating in detail the various discrepancies in the Project and denied that the same was ready for commission by stating that "On a thorough field verification, it was revealed that the project works were not in complete shape and were not ready for commissioning." It also states that due process has to be followed to determine if the project is ready for commissioning and the company's self-declaration would not suffice.

7.15. Further, W.P.No. 8644 of 2019 involving *pari materia* facts and circumstances was filed by M/s Kamuthi renewable Energy Ltd., a sister company of the Petitioner before the Hon'ble High Court of Madras seeking a writ of Certiorarified mandamus calling for records comprised in its order dated 20.9.2016 in Memo No.CE/NCES/SE/Sol/EE/SCB/A1/F/D.1248/16 and the consequential order dated 30.9.2016 in Lr.No.SE/NCES/TIN/Tech/FKREL/D517/2016 directing the petitioner to segregate its 72 MW solar power plant into 25 MW and 47 MW with separate energy meters and seeking to make payment for 47 MW at the tariff of Rs.5.10 per unit and quash the same as arbitrary, illegal. The Hon'ble Madras High Court after hearing both the parties in detail, vide Order dated 07.08.2019, dismissed the petition before granting the writ petitioner liberty to approach the Commission, *inter alia* observed:

" ... this Court is of the opinion that, the petitioner's claim is unsustainable for the following reasons:

(i) *The TANGEDCO vide its letter dated 04/07/2015 has approved the project only on certain conditions. One such condition is that, your proposed 72 MW Solar PV Power Plant can be interfaced with the TANTRANSCO grid at sanctioned Kamuthi 400/230-110 KV SS at 110 KV level by erecting 110 KV line for a distance of 7 KM connecting your proposed 72 MW solar PV power plant and the sanctioned new Kamuthi 400/230-110 KV SS. The above grid connectivity will be effected only after commissioning of sanctioned new Kamuthi 400/230-110 KV SS. You should not claim any deemed generation in the event of delay in commissioning of the 400 KV SS and the applicable tariff will be as fixed by the TNERC at the time of commissioning of 400 KV 55. In this regard, you are requested to furnish an undertaking".*

(ii) *On receiving the undertaking from the petitioner, the respondent has entered into the power purchase agreement with the petitioner.*

(iii) *From the letter of the petitioner dated 09.02.2015 which is extracted above and the counter of the respondents, it could be seen that the respondent has acceded to the request of the petitioner to give temporary*

interface through 110 KV SS to achieve the date of Commercial Operation (COD) in record time (within the span of 6 months from the date of signing EPA). This accommodation was made by the respondent only after ensuring from the respondent that the petitioner will not claim any benefit out of it. Contrary to the undertaking, the petitioner now trying to take advantage of the concession given by the respondent.”

7.16. The petitioner company issued an expression of interest for the establishment of a 72 MW solar PV power plant at O.Karisalkulam village, Kamuthi Taluk, Ramnad District on 26.05.2015. It is admitted that the respondent proposed to interface the said power plant with the TANTRANSO grid at the sanctioned new Kamuthi sub-station by erecting 230 KV line for a distance of 5 kms vide letter dated 17.06.2015.

7.17. The petitioner company paid security deposit of 212.75 lakhs on 02.05.2015 for establishment of the said 72 MW Solar PV power plant.

7.18. An Energy Purchase Agreement (herein referred to as “EPA”) was entered into by the parties herein on 04-07-2015. Under the said EPA, the petitioner company was under an obligation to commission the project on or before 31-03-2016 (expiry of the control period) in order to avail the preferential tariff declared by this Commission.

7.19. Under the EPA, clause 2 provides as follows:-

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 Inter 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."

7.20. Since the petitioner had not made arrangements for evacuation facilities, the respondent had issued "Noted for Record Letter" dated 04.07.2015, and as per clause (4) of the said letter, the petitioner was informed that for the proposed solar power plant, the grid connectivity would be effected only after commissioning of sanctioned Kamuthi 400/230-110 KV SS and that the petitioner should not claim any deemed generation in the event of delay in commissioning of Kamuthi 400 KV SS and the applicable tariff will be fixed by the TNERC at the time of commissioning of Kamuthi 400 KV SS. Based on the same, the petitioner had given the undertaking dated 16.06.2015.

7.21. The respondent issued "Noted for Record Letter" vide Lr.No.CE/NCES/SE/Solar/EE/SCB/AI/F.M/s.Kamuthi Solar/D871/15 dt. 04.07.2015. The petitioner thereafter gave an undertaking dated 16.06.2015 that it would not claim any deemed generation or any other benefits whatsoever, from TANGEDCO, in case the TANTRANSCO could not commission the proposed Kamuthi 400 KV Substation at Kamuthi, Ramnad District even though the petitioner completed set up of the solar PV power plant well in advance. It is reiterated that TANTRANSCO took all steps for the works related to the co-commissioning of the 400 KV SS and after completion of all work, approval was accorded on 02.09.2016 for parallel operation of 216 MW solar PV power plant interfacing with TANTRANSCO grid at new Kamuthi 400/230-110 KV SS at 230 KV level.

7.22. The control period with respect to the “Comprehensive Tariff Order on Solar Power” vide Order No.7 of 2014 dated 12-09-2014 for procurement of solar power by the Distribution Licensee fixing “Generic / Preferential tariffs” of Rs.7.01 per unit without Accelerated Depreciation (AD) was already once extended till 31.03.2016 considering the situation and the Commission also strongly stated that such extension shall not be provided again. Moreover, the Petitioner is misleading the court by not quoting the further developments in the case of Gujarat Urja Vikas Nigam Limited vs. Solar Semi-conductor Power Company (India) wherein the Apex Court unanimously held that, the control period is not something prescribed by Commission under Conduct of Business Regulations. The control period is also not an order by Commission for doing any act. Commissioning of a project is the act to be performed in terms of obligation under PPA and that is between the producer and purchaser. There cannot be any extension of control period under inherent powers of Commission. Commission, being a creature of statute, cannot be asked to assume any powers which are not otherwise conferred on it. Under the guise of exercising its inherent power, Commission cannot be asked to take recourse to exercise of a power, procedure which is otherwise specifically provided under the Act.

7.23. The Petitioner has cherry picked certain clauses from the PPA and the other documents which do not disclose the entire picture. The "Noted for Record Letter" vide Lr.No.CE/NCES/SE/Solar/EE/SCB/A1/F.M/s.Kamuthi Renewable/D871/15 is dated 04.07.2015. As per clause (4) of this letter, the petitioner was informed that *“Your proposed’ 72 MW solar power plant can be interfaced with the*

TANTRANSCO grid at proposed sanctioned Kamuthi 400/230-110 KV SS at 110 KV SS. The above grid connectivity will be effected only after commissioning of sanctioned Kamuthi 400/230-110 KV SS. You should not claim any deemed generation in the event of delay in commissioning of 400 KV SS and the applicable tariff will be fixed by the TNERC at the time of commissioning of 400 KV SS. In this regard, you are required to take an undertaking”.

7.24. The plea of legitimate expectation can be raised only if there is some explicit promise or representation made by the administrative body which is clear and unambiguous and there existed a consistent practice in the past which the person can reasonably expect to operate in the same way.

7.25. The tariff price of Rs.7.01 was not applicable if their site was only ready for commissioning. It has to be read along with the undertaking dated 04.07.2015 which clearly stipulates that the Petitioner is subject to the Tariff Price which is applicable at the time when the 400KV is ready for commissioning.

7.26. The Respondents did all it could within its capacity to make sure TANTRANSCO was carrying out all activities for the erection of Kamuthi 400/230-110 KV SS. The erection of a Kamuthi 400 KV SS involves works of various wings of TANGEDCO/TANTRANSCO such as land procurement, land survey, land leveling, procurement of various power transformers, current transformers, potential transformers, breakers, switches, construction of control room, laying of 230 and 110 KV link lines to nearby stations, construction of communication lines etc.

7.27. The Respondents have not obliged either orally or writing that the erection of Kamuthi 400/230-110 KV SS would be completed before 31-03-2016. A project of such magnitude requires careful selection and allocation of various resources, including time. The Respondent has never failed in its duty to perform its statutory functions. They have in fact, have gone beyond the call of duty to hold their part of their contractual obligations by issuing tie up on 02-09-2016. The Kamuthi 400 KV SS was also diligently commissioned on 07-09-2016 and the said SPV plant was commissioned on 18.09.2016.

8. Rejoinder filed on behalf of the Petitioner:-

8.1. The petitioner is entitled to the extension of the Control Period so as to make the petitioner's project entitled to the tariff of Rs.7.01/ kWh since the project was envisaged and constructed on the assurance of this tariff. Due to no fault of the Petitioner, the tariff of the projects had been reduced by more than 25%, even though the Petitioner was ready to commission its project before 31.03.2016 and could not do so due to the inability of TANGEDCO to provide required evacuation facility.

8.2. The Electrical Inspector issued its certificate on 22.03.2016 certifying that the Petitioner's project was ready for commissioning on 11.03.2016. A copy of this certificate was sent to TANGEDCO also. Further, the Petitioner wrote to TANGEDCO on 24.03.2016, 25.03.2016 and 31.03.2016 asking for connectivity to the evacuation facility. However, TANGEDCO did not respond to the requests of the Petitioner. TANGEDCO finally wrote to Petitioner on 15.04.2016 denying the request for deemed COD, i.e. after the control period of the Comprehensive Tariff

Order was already over. It is significant to state that even in the said letter there is no factual denial of the petitioner's plant being ready. In fact, the admission is that the Respondent's evacuation was not ready.

8.3. The Undertaking dated 16-06-2015 given by the petitioner ceased to have effect since such undertaking never formed part of the PPA which was subsequently entered into and is in a format approved by the Commission. The PPA in fact significantly departs from the terms of the undertaking and states that: *"Whereas the Distribution Licensee has accepted the said proposal and has agreed to buy the solar energy from the SPG from their / his aforesaid generator on the terms and conditions hereinafter agreed to"*. And thereafter proceeds to set forth the entire understanding between the parties. There is no mention of any delay in commissioning of the substation and its impact upon tariff. Thus, clearly the undertaking became non-est with the execution of the PPA which was the only agreement between the parties. It is now settled law that parties to a PPA cannot enter into terms that are different to or enter into arrangements without the approval of the Regulator. In the present case, the TANGEDCO has obtained no approval from the Commission for any amendment to the PPA to incorporate the terms of the undertaking or in any event sought approval for any other tariff that is payable to a generator for delay in commissioning.

8.4. In any event and without prejudice to the above, the undertaking makes only reference to not claiming 'deemed generation' in the event of delay in commissioning of the sub-station. It nowhere states that if there is no

Commissioning of the sub-station then the Solar Power Plant would also not be treated as Commissioned.

8.5. The TANGEDCO is estopped from denying that the plant was commissioned prior to 31.3.2016 as it is clear that, *inter alia*, compliance with Regulation 43 (2) of the CEA (Measures Related to Safety and Electric Supply) Regulations as well as all other compliances were already in place and Chief Electrical Inspector issued letter dated 22.3.2016 and granted approval for commissioning.

8.6. Since the PPA was signed at tariff determined by the Commission and the PPA was also approved/ regulated by the TNERC, the undertaking should also have been approved by the TNERC.

8.7. The reliance by the Respondent on the order passed by the Hon'ble High Court in respect of the undertaking in W.P. No.9644 of 2019 is wholly misplaced since the same were only prima facie views and the Hon'ble Court in the very same judgment has specifically held that it was not deciding on merits and was of the view that the Commission had the jurisdiction to decide the case and even in that very case, the petitioner's case is to be decided on merits and without being influenced by any of the observations.

8.8. The stand that the petitioner had not made arrangements for the evacuation facilities and therefore gave an undertaking is wholly incorrect. In fact, on the date of the undertaking, the EPA was not even executed. Further the Noted for Record and

its contents, namely, that the grid connectivity would be given after the commissioning of the substation would not affect the petitioner's stand since the issue of grid connectivity is not the same as the petitioner's plant having been ready in all respects and commissioned for the purposes of tariff entitlement.

8.9. The relevant clause in the Energy Purchase Agreement regarding tariff, in the present case and in GUVNL case are differently worded. In the GUVNL case, the respective tariff clause specifically provided that in case of delay in commissioning beyond the control period, subsequently determined tariff or erstwhile tariff, whichever is lower, would be applicable. No such qualifying proviso is there in the present case. The tariff provision simply identifies tariff as Rs.7.01 per unit as determined in the Solar Tariff Order No. 7 of 2014 dated 12-09-2014. In fact, this is a specific departure even from the Model EPA as approved by NVVNL. Hence, the Tariff provision in the present case does not limit or qualify the applicability of the Solar Tariff Order No.7 of 2014.

8.10. The case of GUVNL was specifically rejected on the ground that the State Commission cannot grant extension of control period in exercise of its powers under its inherent powers. The Judgment did not, in any manner, bar any other specific remedy available to the generator.

9. Written Submissions on behalf of the Petitioner in M.P.No.25 of 2020:

9.1. The Commission issued the Comprehensive Tariff Order on Solar Power – Order No.4 of 2014 (“Tariff Order”) on 12-09-2014. The said tariff order was to be in force till 11-09-2015 and all solar projects commissioned within the said deadline were to be paid a tariff of Rs.7.01 per unit.

9.2. Due to delay in the approval of the Energy Purchase Agreements (“EPA”), the Commission in right endeavour, extended the control period of the Tariff Order upto 31-03-2016.

9.3. The petitioner diligently commissioned its 72 MW solar power plant in all respects, well in advance of the cut-off date of the Tariff Order, i.e. 31-03-2016. To this end, the petitioner obtained the certificate of commissioning from the Chief Electrical Inspector on 22-03-2016. The petitioner also intimated the respondent TANGEDCO of the readiness of its plant in all respects for commissioning vide letters dated 24-03-2016, 25-03-2016 and 31-03-2016.

9.4. The petitioner issued several letters dated 24-03-2016, 25-03-2016 and 31-03-2016 to the respondent seeking evacuation of power from the petitioner’s power plant. No response was issued by the TANGEDCO to these requests by the petitioner.

9.5. The respondent issued a letter dated 15-04-2016 stating *inter alia*, that the petitioner has not commissioned its power plant within the control period ending 31-03-2016 since the petitioner’s power plant has not been connected with the new Kamuthi substation which was yet to be commissioned. In this letter, the TANGEDCO placed heavy reliance on an Undertaking dated 16-06-2015 signed by the petitioner, in which the petitioner has stated that it would not claim “any deemed generation or other benefits”.

9.6. The order of Hon'ble APTEL in Appeal No. 31 of 2017 is not a simpliciter remand order but it was remand with specific direction. It is therefore incumbent upon the Commission to pass an order, after taking into consideration the findings of the Hon'ble APTEL in its judgement dated 24.09.2019.

9.7. It is pertinent to refer to some of the findings of this Hon'ble APTEL:

“ 8(xvii) The State Commission has not discussed about the following facts of the case:

.....
* *the Chief Electrical Inspector granted approval for the commissioning of the plant on 22.03.2016 but the commercial operation was delayed due to delay in commissioning of Kamuthi sub-station by Respondent No.2.*

.....
* *the fact that the solar plant was set up by the Appellant by making huge investment under the promotional Solar Policy notified by the State Government, wherein a tariff of Rs.7.01 per unit was to be given to the Appellant on completion of the project by 31-03-2016.*

.....
.....
8(xxi) The State Commission, as defined under the Act, is a regulator and performance monitor, a statutory body to oversee the development of power sector in the State so as to evolve sustainable business model to supply electricity to the consumers in the State in the most efficient manner. With this objective in mind, the endeavour of the State Commission while dealing with such mailers should be lenient one, especially in matters relating to promotion of electricity generation from solar power plant under the promotional schemes notified by the State Government. This instant case is one such case wherein the Appellant have invested huge sums of money for generation of electricity through solar plant on the premise that if the plant is completed by 31.03.2016 then it will be paid a tariff of Rs.7.01 per unit. The availability of tariff of Rs.7.01 per unit is the very basis of setting up of this project by the Appellant. In this case the project has been completed before 31.03.2016. The Appellant have submitted the certificate issued by the Chief Electrical Inspector on ground that the evacuation infrastructure to be created by the Respondent No. 2 was not completed and therefore evacuation of power from the solar plant of the Appellant could not take place. It is at this time the Appellant approached the State Commission for exercise of the regulatory powers to accede to their prayer. In view of the facts of the case, the averments made by the Appellant, the grounds given by the Appellant in their appeal and the prayer made by the Appellant, it would be appropriate to treat the Petition of the Appellant as Miscellaneous

Petition and not as a Dispute Resolution Petition because of monetary claims between the licensee and the generator" .

9.8. The Petitioner's plant was ready for commissioning on 15.03.2016. The Chief Electrical Inspector to the Government (CEIG) issued a certificate for commissioning of the plant on 22.03.2016. The said certificate issued by the CEIG records as follows:-

'Approval is hereby accorded temporarily for a period of 3 months (upto 21-06-2016) under Regulation 43 (4) of Central Electricity Authority(Measures Relating to Safety and Electric Supply) Regulations, 2010 to commission the Electrical Installations inspected on 12-03-2016 at the premises detailed in the Annexure... '

'The equipments permitted should be commissioned within three months from the date of issue of this letter failing which fresh permission should be obtained.'

9.9. A certificate issued by the CEIG in terms of Regulation 43(4) of CEA Regulations 2010 is conclusive proof of the project having been duly commissioned. The Hon'ble Appellate Tribunal for Electricity in its judgement dated 24-09-2019 in Appeal No.31 & 32 of 2019 in which the Petitioner herein was the Appellant has quoted the submissions of petitioner in following manner. 4 12 (a) *"The commissioning certificates were issued by the Chief Electrical Inspector under Regulation 43 of the CEA (Measures Relating to Safety and Electric Supply) Regulations, 2010, and the same are conclusive proof that the Appellants' projects were ready for commissioning on 22.03.2016".* These certificates have never been challenged by TANGEDCO.

9.10. The Respondent is conflating two distinct concepts in law, i.e., Commissioning and Commercial Operation Date to deny the Petitioner's right to fall within the Tariff Order dated 12.09.2014. The "Commercial Operation Date" is not

relevant for the present case. It is only 'Commissioning' that is relevant for entitlement to tariff. Clause 5(a) of the EPA expressly provides as follows:-

"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."

9.11. The reckoning date for applicability of the Tariff Order is only the date of Commissioning. This has been adhered to by the Petitioner by intimating TANGEDCO that its plant had been commissioned on 22.03.2016 and this has been given legal sanctity by virtue of the judgement of the Hon'ble APTEL dated 24.09.2019.

9.12. The word "COD" has not been used anywhere in the Tariff Order or in the EPA to be the cut-off date for entitlement of specified tariff. Since the word commissioning has been used, the same must be considered and no other meaning can be imported and this is precisely why the Hon'ble APTEL too has determined that the petitioner had completed its project within the control period and was entitled to the Tariff of Rs.7.01/unit in terms of Tariff Order dated 12.09.2014 since the petitioner's project was duly commissioned and was ready in all respects.

9.13. Once, the plant of the petitioner was ready for commissioning in all respect as on 22.03.2016, i.e., before the cut-off date of 31.03.2016 then, the petitioner cannot be denied the Tariff applicable during that control period for delays by the Respondents in establishing the evacuation facilities which is their exclusive responsibility and duty.

9.14. The Undertaking dated 16.06.2015 signed by the Petitioner has no relevance in the facts of the present case and the relief sought.

9.15. The Undertaking was signed by the Petitioner much prior to the date of execution of the EPA and even prior to the final approval of the Project by TANGEDCO which was given on 04.07.2015. The EPA was executed by the parties on 04-07-2015 and is the only legally binding contract between the parties.

9.16. The final approval for interface of 400 KV Kamuthi Sub-station with the plant was given by TANGEDCO only on 04.07.2015. i.e. on the same date the EPA was signed. Paragraph-4 on page-2 of this letter, *inter alia*, required the Petitioner to furnish an undertaking to the effect that it will not claim any deemed generation in the event of delay in commissioning of the 400 KV SS. However, no such undertaking was ever furnished by the Petitioner after the date of this letter and/or the EPA.

9.17. Under the Electricity Act and the regulations made thereunder all power purchase agreements are regulated contracts which are approved by the State Electricity Regulatory Commissions. If either party wants any specific position or understanding captured in the PPA, the same has to be duly approved by the Commission. Therefore, in a strict interpretation of law, no undertaking can have the effect of modifying or overriding the terms of the PPA unless the same is specifically referred to or incorporated in the PPA and receives the regulatory nod of the Commission.

9.18. The Undertaking relied on by the Respondent was executed prior to the EPA itself. The same has not been incorporated into the EPA either specifically or even through a reference. In the absence of the same, the said Undertaking has no legal enforceability.

9.19. As a matter of fact, no relief of deemed generation or any other benefit is sought for by the Petitioner from TANGEDCO. It is only seeking a declaration that its plant is deemed to have been commissioned within the control period ending on 31.03.2016 and as a result it is entitled to the tariff of Rs.7.01/ unit as specified in the EPA. Enforcement of its rights under the EPA cannot be termed as a benefit sought from TANGEDCO, which is the party solely responsible for failure to commission the specified sub-station in a timely manner to allow connectivity to the Petitioner's plant prior to the cut-off date of 31.03.2016.

9.20. If the petitioners' undertaking executed prior to the EPA is permitted to override and trump the Respondent's obligations under the EPA to pay the specified tariff. then it would amount to encouraging the Respondent to ignore the terms of the EPA or other binding contracts and take advantage of its wrong while delaying the commissioning of the specified Kamuthi sub-station and also denying alternative connectivity to the Petitioner's plant to evacuate power.

9.21. The TANGEDCO's defence is predicated upon an Undertaking which was issued prior to letter dated 04.07.2015 and no further undertaking was furnished by the Petitioner in terms of above referred letter. Therefore, TANGEDCO cannot rely

on this undertaking to insist on payment of reduced tariff on the basis of subsequent tariff order.

9.22. The finding of the Hon'ble Madras High Court in W.P. No. 8644 of 2019 does not bind the Petitioner. The said writ petition was filed by another entity and the issues decided in the judgement and order dated 07.08.2019 only binds the parties therein. It was not a judgment in rem. The findings rendered in the judgement only decides the rights and liabilities of the contesting parties therein: No legal sequitur can be inferred from the same in respect of the Petitioner herein.

9.23. The Hon'ble Madras High Court has passed a *prima facie* order while choosing to not exercise any jurisdiction over the issue, in the following manner:-

“However, if the petitioner resort to clause 11 of the Power Purchase Agreement and approach the TNERC, the same may be decided independently without being influenced by any of the observations made in this writ petition”.

9.24. Erection and Commissioning of transmission facilities is the duty of the Respondent TANGEDCO. Delay in establishing and commissioning the same cannot prejudice the Petitioner. The petitioner has commissioned its power project as early as 22-03-2016 well within the control period of the Tariff Order dated 12-09-2014.

9.25. On 24.03.2016, after obtaining the Commissioning certificate from the CEIG on 22.03.2016, the Petitioner wrote to the Respondents as follows:-

'... we are pleased to intimate you that RREL's 72 MW Solar Power Project is completed in all respects and is ready for commissioning since 22.03.2016.

*The power of the above plant is to be evacuated through sanctioned New Kamuthi 400/230-110 kV SS. You would be aware that the sanctioned New Kamuthi 400/230-110 KV Substation of TANTRANSCO is yet not commissioned. In the absence of this substation, the evacuation of power from RREL's solar project is bottled up though RREL's solar project is ready in all respect
.....”*

9.26. The Petitioner received no response for the same. Once again, the Petitioner wrote to the Respondent on 25.03.2016.

9.27. On 15.04.2016, the Respondent TANGEDCO issued a vague letter stating that the Petitioner has not commissioned its power plant within the control period based on an alleged “field verification” that was conducted by the Respondent. The Respondent makes no reference to the Certificate of the Chief Electrical Inspector Government which is conclusive proof that the project has indeed been established and was fully ready for commissioning within the cut-off date and the Respondent was duly informed of the same.

9.28. The Respondent is seeking to interpret the word 'commissioning' as 'Commercial Operation Date' which is legally / untenable for the reasons set out above.

9.29. The duty to establish and commission necessary transmission facilities for evacuation of power falls within the domain of the Respondent TANGEDCO and the Tamil Nadu Transmission Corporation ('TANTRANSCO'). That being the case, once the power plant of the Petitioner is ready for commissioning, it is eligible to receive the tariff applicable for the relevant control period i.e. Rs.7.01/- per unit.

9.30. The Hon'ble APTEL in its finding on the instant issue in its Judgement dated 04.07.2018 in Taxus Infrastructure and Power Projects P Ltd v Gujarat Electricity Regulatory Commission and Ors. in Appeal No. 131 of 2015 held that in case the plant is ready for commissioning but if the transmission system is not available in that eventuality, it is deemed that the plant is commissioned and the plant developer is eligible to receive the tariff prevailing on the respective date. Making evacuation system available was the responsibility of GETCO.

9.31. In the instant case, the date of commissioning was achieved by the Petitioner well in advance of the cut-off date of the Control Period since the Petitioner had completed its installations by the said date and the Chief Electrical Inspector had certified the readiness of the Petitioner's plant and had accordingly given his permission to commission the plant.

9.32. Due to the failure of the TANGEDCO to ensure proper evacuation facilities in a timely manner, the Petitioner was unable to energise its project. The Respondent TANGEDCO cannot be allowed to benefit from its own wrongs so as to deprive the Petitioner of its rights under the EPA and at law.

9.33. The petitioner even sought for alternate evacuation from the Kavanoor sub-station in its letter dated 24.03.2016, in anticipation that the Kamuthi sub-station may not be commissioned in time. The same is extracted hereunder:-

“..... it is proposed to interface the outgoing S/C 110 kV feeder of 72 MW RREL's Solar Power project with one circuit of 110 kV O/C Old Kamuthi Substation to New Kamuthi Substation line at New Kamuthi substation end.”

9.34. There are other solar projects which were extended this facility and the same has been admitted by the TANGEDCO in their letter dated 15.04.2016. However, for reasons best known to the Respondent, the Petitioner was not provided with necessary alternate evacuation facilities despite repeated requests from the Petitioner.

9.35. It is now a settled position of law that whenever an investment is made in setting up a power plant, the intending investor is in effect, investing in the Tariff Order that is in vogue. The financial framework drawn up by the petitioner's investors is based on the findings in the specific tariff order which is passed taking into consideration the capital cost, fixed costs and variable costs.

9.36. The Hon'ble APTEL in its judgement dated 07.12.2018 in the case of Shalivahana Green Energy Limited v Madhya Pradesh Electricity Regulatory Commission in Appeal No.229 of 2018, has upheld the principle that in a regulatory regime, tariff is determined on the basis of 'when the investment' is made.

9.37. Both in fact and in law the Petitioner has indeed commissioned its power plant within the control period of the TNERC Comprehensive Tariff Order on Solar Power - Order No.4 of 2014 dated 12.09.2014 by investing project cost prior to 31.03.2016. The Petitioner invested in the project after being assured of a tariff Rs.7.01/- per unit as stated in the Tariff Order. That being so, the Petitioner cannot be denied the same for no fault of it.

10. Written Submission filed on behalf of the Respondents:-

10.1. The dates and even with regard to the erection and commissioning of new proposed 400/230/110KV Kamuthi SS is as follows:-

Sl. No.	Description	Date
1	Administrative approval accorded for establishment of 400 KV Kamuthi SS for evacuation of green energy proposed to be established around Ramnad and Kamudhi areas vide (Per) FB TANTRANSCO Proceedings No.84 dated 06.11.2013 & Revised Administrative approval accorded for establishment of 400/230-110KV Kamuthi SS	06-11-2013 and 25-08-2015
2	Floating of Tender for establishment of proposed Kamuthi 400 KV SS	08-03-2015
3	The opening of the bid	11-05-2015
4	Issue of Letter of Acceptance (LOA)	30-06-2015
5	Due date for completion (against the norms of 18 months, 12 months given for the project)	30-06-2016
6	Kamuthi 400 KV substation was commissioned	18-09-2016

10.2. M/s. Adani Green Energy (Tamil Nadu) Limited planned to execute the 648 MW solar power projects through its five subsidiary units and an undertaking has been obtained that it would not claim deemed generation and any other benefits, until the commissioning of Kamuthi 400 KV 55. However based on technical feasibility, the respondents have been provided the following interim arrangement by TANGEDCO / TANTRANSCO even though it is not obligated to do so.

Sl. No.	Name of the generator of Adani group	Capacity	Temporary connectivity provided at	Tariff availed
1	M/s. Adani Green Energy (Tamil Nadu) Limited	216 MW	230 KV Kavanoor SS	Rs.7.01/Unit
2	M/s. Ramnad Solar Power Ltd.	72 MW	110 KV Kamuthi SS	Rs.7.01/Unit
3	M/s. Kamuthi Renewable Ltd.	25 MW out of 72 MW	110 KV Kamuthi SS	Rs.7.01/Unit

10.3. It is vehemently denied that TANGEDCO was not acting with the same vigour and speed to enable the completion of the construction of the evacuation

facilities. It is thus abundantly clear from the documents that the Petitioner, from the beginning, was well aware that it would fall under the tariff fixed by the Commission at the time of commissioning of Kamuthi 400 KV SS. The same has been given also in the form of undertaking and the petitioner is stopped from resiling from the same and setting up a stand to the contrary.

10.4. After having undertaken not to claim benefits and commission only through Kamuthi 400/230-110 KV SS, the Petitioner cannot claim contra to the undertaking, being the basis of the Agreement.

10.5. The letter issued by the Chief Electrical Inspector to Government CEIG dated 22.03.2016 mentioned that the approval is accorded temporarily for a period of 3 months to commission the electrical installations inspected on 12.03.2016 subject to the rectification of defects noted in the plant and also necessary permission should be obtained from Government for the erection of 33KV cable for power evacuation from their 72MW solar plant and for the 33KV cable crossing the public road and the 33KV cable crosses the canal as per the provisions of Electricity Act, 2003 and Central Electricity Authority Regulations, 2010. But the petitioner is claiming that its plant was ready and complete well before 31.03.2016. In any scenario, the aforesaid letter dated 22.03.2016 cannot be construed to mean that the petitioner has commissioned the plant. The Commissioning was eventually achieved only in September 2016.

10.6. The Respondents have not obliged either orally or written that the erection of Kamuthi 400/230-110 KV SS would be completed before 31.03.2016. A project of

such magnitude requires careful selection and allocation of various resources, including time. The Respondent has never failed in its duty to perform its statutory functions. They have in fact, have gone beyond the call of duty to hold their part of their contractual obligations by issuing tie up on 02.09.2016. The Kamuthi 400 KV SS was also diligently commissioned on 18.09.2016 and the said SPV plant was commissioned on 18.09.2016

10.7. The Hon'ble High Court, Madras in W.P. No. 8644 of 2019 vide its Order dated 20.09.2016 was pleased to note that the petitioner therein had undertaken specifically not to claim any benefits, which included the claim for tariff, since the only condition for the determination of tariff was the date of commissioning and had accordingly remanded the matter back to the Commission. Similarly, the petitioner is restrained from making an interpretation contra to the understanding rendered by the Hon'ble Court.

10.8. The operative portion of the Order of Hon'ble APTEL in Appeal No. 31 of 2017 only observes that the petitioner was ready before 31.03.2016 but does not conclude that the petitioner's plant had commissioned. In any event, it is only an *obiter dictum* since the *lis* before the Hon'ble APTEL was different.

10.9. The petitioner had submitted that he was giving up relief no. 1 which seeks for extension of time. In this regard, the entire pleadings of the petitioner read with relief number one indicate the understanding of the petitioner that the plant had not been commissioned until 31.03.2016. Secondly, since all the other reliefs sought for by the petitioner are based upon the consequential to the relief number one, in

the event of giving up the foremost relief, all the other reliefs also fail and thus this petition deserves to be dismissed.

11. Findings of the Member (Legal):

The facts and issues in M.P.No.25 of 2020 and M.P.No.26 of 2020 being identical are dealt together and a Common Order delivered.

11.1. The Petitioner's initial prayers were to grant a Project specific extension of control period to enjoy the tariff of Rs.7.01 per unit that prevailed at the time of entering into the Energy Purchase Agreement (EPA) with TANGEDCO for sale of energy from their 72 MW / 216 MW Solar Power Plants in Kamuthi Taluk, Ramnad District besides declaring that the Petitioner's Solar Power Project has successfully been commissioned on or before 31.3.2016 and is entitled to a tariff of Rs.7.01 per unit. In the course of Arguments, Petitioner has not insisted on extension of control period but to consider the other prayers of reckoning commissioning of the Plant within the control period and declare applicable tariff as Rs.7.01 per unit.

11.2. The Petitioners and other group companies issued an expression of interest to TANGEDCO to establish Power Plants of various capacities totalling to 648 MW on 26.5.2015 under the Preferential Tariff Order No.7 of 2014 dated 12.9.2014. The Respondents, on receipt of payment of requisite charges for the application fee, Part Payment of security deposit and load flow study charges, conducted load flow study and communicated the results on 17.6.2015 to the Petitioner Company duly informing that the Power Plant could be interfaced with the grid at the proposed and sanctioned Kamuthi 400/230-110 KV substation at 230 KV level by erecting a 230 KV evacuation

line for a distance of 5 km. connecting the proposed solar plant to the proposed Kamuthi SS.

- 11.3. On 16.6.2015, the Petitioner gave an undertaking to the Respondent to the effect that they would not claim any deemed generation or any other benefits whatsoever from TANGEDCO in case TANTRANSCO could not commission the proposed 400 KV Kamuthi SS even though they commissioned the solar PV power plant well in advance.
- 11.4. On payment of balance security deposit and submission of relevant documents, respondents issued 'Noted for record letters' dt.4.7.2015 approving the proposal for establishing the solar power plants of 72 MW / 216 MW capacities. On the very same day of issue of "Noted for record letters", the EPAs were entered between the Petitioner and the Respondents on 4.7.2015.
- 11.5. Quoting the CEIG Certificate dt.22.3.2016, the Petitioners addressed the Respondent through letters dt.24.3.2016, 25.3.2016 and 31.3.2016 informing the readiness of the solar power plants for commissioning since 22.3.2016 and sought evacuation of power by proposing interface of the power plant with the D/C circuit of the old Kamuthi SS and to issue deemed commissioning of the plant. Prior to the above, the Petitioner group companies obtained temporary connectivity of its three other plants constituting 313 MW capacity from the old Kamuthi SS.
- 11.6. Respondent in a letter dated 15.4.2016, set out the facts and circumstances and their inability to give any further temporary connectivity after having connected the Petitioner's group company plants of 216 MW and a part capacity of another power plant to the old 110 KV Kamuthi SS and non-

feasibility of connecting the said plants. In the said letter Respondent has referred to the erection of lines without obtaining permission from Government of Tamil Nadu for crossing of roads and a field verification that revealed that the project works were not in complete shape and were not ready for commissioning and hence entitlement to tariff of Rs.7.01 per unit would be unacceptable and has rejected the letters with group companies Ramnad Renewable Energy Ltd. (RREL) and Kamuthi Solar Power Ltd. (KSPL).

11.7. TANTRANSCO after completion of substation works granted tie up approval on 2.9.2016 for parallel operation of the solar plant by interfacing with the Kamuthi 400 KV SS.

11.8. Claims by the Petitioner and Respondent:

I. Petitioner's Contentions:-

- (i) The undertaking sought to be relied upon by TANGEDCO to disentitle the Petitioner of tariff of Rs.7.01 per unit ceased to have effect since the undertaking never formed part of the EPA signed subsequently. In any event the undertaking makes reference only to not claiming deemed generation, and the entitlement to tariff at Rs.7.01 per unit specified in EPA is not a benefit. Since EPA was approved by the Commission, undertaking should also have been approved by Commission.
- (ii) 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 for evacuation and pay at a lower tariff of Rs.5.10. TANGEDCO has sought to make

an unsubstantiated claim that the Petitioner's Plant was not ready for commissioning. TANGEDCO failed to issue deemed commissioning certificate as on 31.3.2016 and failed to provide temporary connectivity.

- (iii) CEIG's Certificate dated 22.3.2016 is proof of plant being ready for commissioning.
- (iv) The tariff order applicable from 1.4.2016 has a reduced tariff of Rs.5.10 per unit. The entire financial planning and projection of the Petitioner is based on the tariff rate of Rs.7.01 per unit. 70% of the Project Cost is funded by loans from financial institutions and if this tariff is not applicable, the project will suffer huge losses.
- (v) The order of Hon'ble APTEL in A.Nos.31 & 32 of 2017 is not a simplicitor remand but remand with specific direction to the State Commission to pass order taking into consideration of findings viz. CEIG approval for commissioning the Plant, delay of evacuation facilities.
- (vi) The order dated 12.9.2014 uses the word 'commissioning' as the threshold to be achieved by investors.
- (vii) The Writ Petition No.8644 of 2019 referred by TANGEDCO was filed by another entity and the Judgement is not in REM. The Hon'ble High Court while choosing not to exercise any Jurisdiction passed a prima facie order for the petitioner to approach TNERC and Commission to decide independently.
- (viii) Reliance was placed on Hon'ble APTEL's findings in A.No.131 of 2015 in Taxus Infrastructure Vs. GERC where CEIG's inspection was

considered for commissioning / energisation and A.No.229 of 2018 in the case of Shalivahana Green Energy Ltd. Vs. MPERC where the tariff determined / applicable is based on when the investment made and not as per tariff applicable during the actual date of commissioning.

II. Respondent's contentions:-

- (i) M/s. Adani Green Energy (Tamil Nadu) Ltd. with its subsidiary units had given applications for establishing 5 Nos. Solar Power Plants of combined capacity of 648 MW. The 216 MW Power Plant of M/s. Adani Green, 72 MW Plant developed by M/s. Ramnad Solar were provided interim arrangement for Power evacuation from the old 110 KV Kamuthi SS based on technical feasibility and load conditions. In the case of part connectivity proposed by TANGEDCO to its other 72 MW Power Plant by M/s. Kamuthi Renewable Energy, Petitioner approached the High Court of Madras in W.P.No.8644 of 2019 where the Hon'ble High Court observed:

"..... the Respondent has acceded to the request of the Petitioner to give temporary interface through 110 KV SS to achieve the date of Commercial Operation (CoD) in record time (within the span of 6 months from the date of signing EPA). This accommodation was made by the Respondent only after ensuring from the Respondent that the Petitioner will not claim any benefit out of it. Contrary to the undertaking, the

Petitioner now trying to take advantage of the concession given by the Respondent”

- (ii) In the case of Gujarat Urja Vikas Nigam Ltd. Vs. Solar Semiconductor Power Company (India), the Apex Court unanimously held that the control period is not something prescribed by Commission under the Conduct of Business Regulations. Commissioning of a Project is the act to be performed in terms of obligation under PPA and that is between the Producer and Purchaser. There cannot be any extension of control period under the inherent powers of the Commission.
- (iii) CEIG's Certificate issued on 22.3.2016 is an approval accorded temporarily for a period of 3 months to commission the electrical installations inspected on 11.3.2016 at the plant premises and is subject to certain conditions one of which is to obtain permission for the 33 KV cable crossing the public road from PV segment 1 and 2. The letter dated 22.3.2016 cannot be construed to mean that the Petitioner has commissioned the Plant.
- (iv) It was never confirmed orally or in writing that erection of Kamuthi 400 KV SS would be completed before 31.3.2016. The normal time for commissioning of a 400 KV sub station is 18 months. The 400 KV SS at Kamuthi was diligently commissioned on 18.9.2016 and the Petitioner's solar plants commissioned on 18.9.2016.
- (v) The operative portion of the order of Hon'ble APTEL in A.Nos.31 & 32 of 2017 is only an observation that the Petitioner was ready before 31.3.2016 but does not conclude that the Petitioner's Plant was

commissioned. In any event, it is only an obiter dictum since lis before the Tribunal was different.

- (vi) The entire pleading of the Petitioner is only for extension of control period which itself shows that the Plant was not ready for commissioning in March 2016 as claimed.

11.9. Issue for consideration:-

Having set out the facts of the case and contentions on either side, the question that is to be answered is whether the Petitioner's prayer to reckon the date of commissioning of the Plant within the control period of the Order No.7 of 2014 that ended on 31.3.2016, and make them entitled to a tariff of Rs.7.01 per unit is to be acceded to. For answering to this question, the following issues are framed for considerations.

- 1) The contention of the Respondent that the petitioners had given up relief No.1 which seeks for extension of time and the entire pleadings of the Petitioner read with relief No.1 indicates the understanding of the respondent that the plant had not been commissioned until 31.3.2016 and secondly, since all the other reliefs sought for by the Petitioners are based upon and consequential to the relief number one, in the event of giving up the foremost relief, all the other reliefs also fail and thus the petition deserves to be dismissed ?
- 2) Whether the order of the Hon'ble Madras High Court in W.P.No.8644 of 2017 is applicable or relevant for adjudication of the instant petition?
- 3) Whether the order of the Hon'ble APTEL in A.Nos. 31 & 32 of 2017 is an absolute finding of the date of commissioning of the Petitioner's Solar Power Plants?

- 4) Will the CEIG's Certificate suffice to reckon the date of commissioning?
- 5) Whether the undertaking dated 16.6.2015 furnished by the Petitioner to the Respondent No.1 before signing EPA prevents the Petitioner from claiming that its project ought to be deemed to have been commissioned on 22.3.2016, the day it received the commissioning approval from the CEIG? Whether the EPA is contingent upon the said undertaking?
- 6) Whether the Petitioner is entitled for the relief of declaration sought for in Prayer No.2 and 3?

11.10. Issue No.1:-

"The contention of the Respondent is that "petitioners had given up relief No.1 which seeks for extension of time and the entire pleadings of the Petitioner read with relief No.1 indicate the understanding of the respondent that the plant had not been commissioned until 31.3.2016 and secondly, since all the other reliefs sought for by the Petitioners are based upon and consequential to the relief number one, in the event of giving up the foremost relief, all the other reliefs also fail and thus the petition deserves to be dismissed" – Whether is it true?"

- (i) Learned Counsel for Respondent argued that the Petitioner had given up relief no.1 which seeks for extension of time. In this regard, it was submitted that the entire pleadings of the Petitioner read with relief No.1 indicates the understanding of the respondent that the Plant had not been commissioned until 31.3.2016 and secondly, since all the other reliefs sought for by the Petitioner are based upon and consequential to the relief No.1, in the event of giving up the foremost relief, all other reliefs also fail and thus this petition deserves to be dismissed.

For answering the above issue, let me see the pleadings of the Petitioner.

- (ii) The pleadings of the Petitioner contain 19 paragraphs and 8 grounds. Para 1 to 13 set out about the dates and events with regard to the Petitioner's application till entering into the EPA on 4.7.2015.
- (iii) In para 14, it is stated that "The Petitioner's Plant was ready for commissioning by 22.3.2016. However, the Respondents failed to commission the 110 KV sub station at Kamuthi. In such circumstances, the Petitioner issued a letter dated 24.3.2016 to the Respondents and duly informed them that the Solar PV Power Plant was ready for commissioning by 22.3.2016 and requested the Respondents to consider their alternative proposal by permitting the Petitioner to evacuate the power through one circuit of 110 KV D/C old Kamuthi sub station to New Kamuthi substation line at New Kamuthi substation end."
- (iv) In para 15, it is stated that " the Chief Electrical Inspector issued a letter dated 22.3.2016 and granted approval for the commissioning of the Petitioner's Project in terms of Regulation 43 (2) of the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations 2010. Similar consents for operation of power plant was issued by the Tamil Nadu Pollution Control Board in accordance with Sec.21 and 25 of The Air (Prevention and Control of Pollution) Act, 1981 and Water (Prevention and Control of Pollution) Act 1974 respectively on 19.2.2016"
- (v) In para 16, it is stated that "the Petitioner issued letters dated 25.3.2016, 31.3.2016 to the 2nd Respondent and SE, Solar Energy / NCES. *In these*

letters, the Petitioners reiterated that it was ready to commence evacuation of power from its plant since 22.3.2016 and the non evacuation of power is on account of complete inaction on the part of TANGEDCO.”

- (vi) Para 17 contains the facts of the letter dated 15.4.2016 issued by TANGEDCO to the Petitioner and the reply letter dated 9.5.2016 issued by the Petitioner to TANGEDCO.
- (vii) In para 18, it is stated that “..... *the Petitioner has fulfilled all its obligations with respect to commissioning of the plant within the control period and the 1st Respondent ought to have enabled evacuation of the power within the control period. The Respondents have failed to discharge their obligations in terms of EPA dated 4.7.2015 by not commissioning the substation before 31.3.2016. Hence, the Petitioner is entitled to the tariff as fixed by this Hon’ble Commission vide its order dated 12.9.2014.*”
- (viii) In para 19, it is stated that “*Aggrieved by TANGEDCO’s failure to inter connect the Petitioner’s project with the grid or recognize the Petitioner’s Project as deemed commissioned on or before 31.3.2016, the Petitioner has no other alternative but to file this Petition on the following among other grounds.*”
- (ix) In Grounds Nos. I to VII it is clearly stated about the failure of the Respondents to provide connectivity for evacuation to the Petitioner’s Plant. Ground VIII is for interim relief only.
- (x) The Petitioner sought 6 reliefs in its petition among these 6 reliefs, the Petitioner gone up relief No.1, i.e. extension of control period. The 2nd and 3rd reliefs are as follows:-
 - ii. “Declare that the Petitioner has successfully commissioned its Solar Power Project on or before March 31, 2016”
 - iii. “Declare that the Petitioner’s Solar Power Plant is entitled to a tariff of Rs.7.01 per unit.

Relief No.4, 5, 6 are the interim reliefs.

On careful reading of the pleadings, it is nowhere stated that the Petitioner's Plant was not ready for commissioning until 31.3.2016, and the other reliefs are consequential reliefs to the relief No.1.

Hence, the contention of the Respondent with regard to this issue is "NOT TRUE".

Accordingly, this issue is answered.

11.11. Issue No.2:-

Whether the order of the Hon'ble Madras High Court in W.P.No.8644 of 2017 is applicable or relevant for adjudication of the instant petition?

- (i) The Learned Counsel for Respondent has sought to rely on an order of the Hon'ble High Court in W.P.No.8644 of 2019 filed by a Sister Company of the Petitioners, seeking a writ of certiorarified mandamus calling for records comprised in its order dated 20.9.2016 in Memo No.CE/NCES/SE/SOI/EE/SCB/A1/F/D 1248/16 and the consequential order dated 30.9.2016 in Lr.No. SE/NCES/TIN/Tech/FKREL/D517/ 2016 directing the Petitioner to segregate its 72 MW Solar Power Plant into 25 MW and 47 MW with separate energy meters and seeking to make payment for 47 MW at the tariff of Rs.5.10 per unit and quash the same as arbitrary, illegal. The Hon'ble High Court dismissed the petition with the following observation.

"... this Court is of opinion that, the Petitioners' claim is un-sustainable for the following reasons.

- i. The TANGEDCO vide its letter dated 4.7.2015 has approved the project only on certain conditions. One such condition is that "your proposed 72 MW Solar PV Power Plant can be interfaced with the TANTRANSCO grid at*

sanctioned Kamuthi 400 / 230 -110 KV SS at 110 KV level by erecting 110 KV line for a distance of 7 km. connecting your proposed 72 MW Solar PV Power Plant and the sanctioned new Kamuthi 400/230-110 KV SS and the applicable tariff will be as fixed by the TNERC at the time of commissioning of 400 KV SS. In this regard, you are requested to furnish an undertaking.”

- ii. On receiving the undertaking from the Petitioners, the Respondent has entered into the PPA with the Petitioners.*
- iii. From the letter of the petitioners dated 9.2.2015 which is extracted above and the counter of the Respondents, it could be seen that the Respondent has acceded to the request of the Petitioner to give temporary interface through 110 KV SS to achieve the date of CoD in record time. This accommodation was made by the Respondent only after ensuring from the Respondent that Petitioners will not claim any benefit out of it. Contrary to the undertaking, the Petitioner now trying to take advantage of the concession given by the Respondent”.*

Since similar relief was denied by the Hon’ble High Court to the Petitioner in that case and therefore, no relief may be given in the instant petition.

- (ii) The Learned Counsel for the Petitioner pointed out that the relief sought for by its group company in that case was on the specific facts and circumstances of that case. For instance, there is no direction in the instant case to segregate the Petitioner’s 216 MW / 72 MW projects in two parts entitled to receive different tariff payments and there is no accommodation provided to the Petitioner in terms of grant of temporary connectivity by the Respondent No.1. Therefore, the two cases are distinguishable on facts. Most importantly, the last paragraph of the Hon’ble High Court makes it amply clear that the Hon’ble High Court has not issued an order on merits of the case which may serve as a binding precedent in other cases.

The last paragraph of the Hon'ble High Court is as follows:

“However, if the Petitioner resort to Clause 11 of the Power Purchase Agreement and approach the TNERC, the same may be decided independently without being influenced by any of the observations made in this Writ Petitions.”

From the above observations, it is clear that these two cases are distinguishable on facts and the order of the Hon'ble High Court is also not passed on merit of the facts of that case and gives liberty to the Petitioners in that case to approach TNERC for adjudication and the TNERC may decide independently without being influenced by any of the observations made in that Writ Petitions. Therefore, I find that the order issued in W.P.No.8644 of 2019 by the Hon'ble High Court has expressly allowed the Commission to pass its independent Judgement without being influenced by the observation made therein.

Hence, the order of the Hon'ble High Court in W.P.No.8644 of 2019 is not applicable / relevant for adjudication of the instant petition.

11.12. Issue No.3:

Whether the order of the Hon'ble APTEL in A.Nos. 31 & 32 of 2017 is an absolute finding of the date of commissioning of the Petitioner's Solar Power Plants?

- (i) The relevant portion of the Order of the APTEL in A.No.31 & 32 of 2017 is reproduced as follows:

“8(xvii) The State Commission has not discussed about the following facts of the case:-

- *the Chief Electrical Inspector granted approval for the commissioning of the Plant on 22.3.2016 but the commercial operation was delayed due to delay in commissioning of Kamuthi substation by Respondent No.2.*

- *the fact that the Solar Power Plant was set up by the Appellant by making huge investment under the Promotional Solar Policy notified by the State Government, wherein a tariff of Rs.7.01 per unit was to be given to the Appellant on completion of the Project by 31.3.2016.”*

“8 (xxi) The State Commission, as defined under the Act, is a regulator and performance monitor, a statutory body to oversee the development of power sector in the state so as to evolve sustainable business model to supply electricity to the consumers in the State in the most efficient manner.

With this objective in mind, the endeavour of the State Commission while dealing with such matters should be lenient one, especially in matters relating to promotion of electricity generation from Solar Power Plant under the promotional schemes notified by the State Government. This instant case is one such a case wherein the Appellant have invested huge sums of money for generation of electricity through Solar Plant on the premise that if the Plant is completed by 31.3.2016, then it will be paid a tariff of Rs.7.01 per unit. The availability of tariff of Rs.7.01 per unit is the very basis of setting up of this Project by the Appellant.

In this case the Project has been completed before 31.3.2016. The Appellant have submitted the Certificate issued by the Chief Electrical Inspector on ground that the evacuation infrastructure to be created by the Respondent No.2 was not completed and therefore evacuation of power from the Solar Plant of the Appellant could not take place. It is at this time the Appellant approached the State Commission for exercise of the regulating powers to accede their prayer. In view of the fact of the case, the averments made by the Appellant, the grounds given by Appellant, it would be appropriate to treat the petition of the Appellant as Miscellaneous Petition and not as a

Dispute Resolution Petition because of monetary claims between the licensee and the generator.”

“Order:

Having regard to the facts and circumstances of the case as stated above the Appeal No.31 of 2017 and Appeal No.32 of 2017 filed by the Appellant are allowed.

The impugned orders dated 16.11.2016 passed by the 1st Respondent / the State Commission in the pre registration case No.2 and pre Registration Case No.3 are hereby set aside.

The matter stands remitted back to the 1st Respondent / the State Commission with the direction to pass the order in the light of the observations made in the preceding paragraphs above in accordance with law as expeditiously as possible within a period of three months after receiving the copy of this Judgement.”

- (ii) The Learned Counsel for the Petitioner argued that the Appellate Tribunal has prima facie accepted the Petitioner’s contention that its project was commissioned before 31.3.2016 based on the CEIG certificate.
- (iii) The Learned Counsel for the Respondent argued that the operative portion of the Hon’ble APTEL in Appeal Nos. 31 & 32 of 2017 only observes that the Petitioner was ready before 31.3.2016 but does not conclude that the Petitioner’s Plant had been commissioned. In any event it is only an obiter dictum since the lis before the Hon’ble APTEL was different.
- (iv) The prayer of the Appellant in A.Nos. 31 & 32 of 2017 was to set aside the impugned order of the Commission i.e. the order issued in Pre-Registration Case No.2 of 2016 and Pre Registration Case No.3 of 2016 and direct the Respondent Commission to examine the petition of the Appellant in exercise of its regulatory powers.

(v) In PRC 2 & 3 of 2016, the Commission only dealt with the issue of treating the petition filed by the Appellants as a DRP or MP and ruled that the issue contested was in the nature of DRP and directed the Petitioners to remit the required fee for a DRP in accordance to the provisions in TNERC (Fees and Fines) Regulations in order to list the case for hearing.

(vi) The issue dealt by APTEL in the Appeal is whether the matters involved required the exercise of Commission's Regulatory Powers or adjudicatory powers and not whether the Petitioner was eligible for a tariff of Rs.7.01 per unit. The following paragraph of Hon'ble APTEL's order would justify to the above effect.

“(xx) The Appellant in their prayer have asked the State Commission to exercise their regulatory powers. In the interest of natural justice and equity, the State Commission besides elaborating on the nature of dispute regulation should also have discussed the other aspects of regulatory nature of the prayer. There is absolutely no discussion on this aspect of regulatory nature of the prayer sought by the Appellant.”

and goes on to state the following

“(xxi) This instant case is one such case wherein the applicant have invested huge sum of money for generation of electricity through Solar Plant on the premise that if the Plant is completed by 31.3.2016 then it will be paid a tariff of Rs.7.01 per unit. The availability of tariff of Rs.7.01 per unit is the very basis of setting up of this project by the Appellant. In this case the project has been completed before 31.3.2016. The Appellant have submitted the certificate issued by the Chief Electrical Inspector on ground that the evacuation of infrastructure to be created by the Respondent No.2 was not completed and therefore evacuation of power from the Solar Plant of the Appellant could not take place. It is at this time the Appellant approached the State Commission for exercise of

the regulatory powers to accede to this prayer. In view of the facts of the case, the averments made by the appellant, the ground given by the appellant in their appeal and prayer made by the appellant, it would be appropriate to treat the petition of the Appellant as Miscellaneous Petition and not as a Dispute Resolution Petition because of monetary claims between the licensee and the generator.”

(vii) A careful reading of the order of Hon'ble APTEL in A.Nos.31 & 32 of 2017 would show that the references of CEIG letter dated 22.3.2016 and of the commissioning of the plant are part of a narrative of the case brought out in the submissions made by the Petitioner before the Judicial forum and the statements in the penultimate paragraphs are incidental observations of the Tribunal and cannot be concluded as its findings in the case.

(viii) It was under the aspect of whether the Commission has to exercise regulatory or Judicial power that Hon'ble APTEL rendered its findings and set aside the orders passed in PRC No. 2 & 3 / 2016 and remitted the case back to the State Commission.

“..... to pass the orders in the light of the observations made in the preceding paragraphs above in accordance with law as expeditiously as possible within a period of 3 months after receiving the copy of the Judgement.”

(ix) The contention of the Petitioner itself with regard to the observation of the Hon'ble APTEL is that “Appellate Tribunal has prima facie accepted the Petitioners' contentions that its project was commissioned before 31.3.2016. The Respondent side also admitted in their contention that the operative portion of the order of the Hon'ble APTEL only observes

that the Petitioner was ready before 31.3.2016 but does not conclude that the Petitioner Plant had commissioned.

On careful reading of the operative portion of the order of the Hon'ble APTEL it is only an observation and not an absolute finding of the date of commissioning of the Petitioner's Plant. But at the same time, Hon'ble APTEL directed the Commission to pass the order in the light of the observations made in its order in accordance with law. Hence this Commission is bound to discuss and dispose the petitions in the light of the observations made by Hon'ble APTEL in its order in accordance with law. Accordingly, this issue is answered.

11.13. Issue No.4:

Will the CEIG's certificate suffice to reckon the date of commissioning?

- (i) The Chief Electrical Inspector to Government inspected the Petitioner's Solar Power Plants on 11.3.2016 under Regulation 43 of Central Electricity Authority (Measures Relating to Safety and Electric Supply) Regulations, 2010 and issued approval letter on 22.3.2016.

The CEIG's approval states as follows:

"Approval is hereby accorded temporarily for a period of 3 months (upto 21.6.2016) under Regulation 43 (2) Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010 to commission the Electrical Installations inspected on 11.3.2016 at the above premises as detailed in Annexure subject to the following conditions complying with the terms and conditions of the supplier.

Permission should be obtained for the 33 KV cable crossing the public road / canal / band from PV segment 1 and 2 as per the provision of Electricity Act 2003 and Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulation,2010.

The defects item No.1(iv), 1 (xxiv) and 1 (xxv) as communicated in the Office letter under reference 3 cited should be rectified and an item wise rectification report should be reached this office on or before 21.6.2016.

The date of energisation of the installation should be intimated to this office.

The equipments permitted to be commissioned within three months from the date of issue of this letter failing which fresh permission should be obtained.

The Electricity Tax should be remitted into Government account for captive consumption as well as for sale of Electricity under the Provision and Tamil Nadu Tax on consumption or Sale of Electricity Act, 2003”.

- (ii) Learned Counsel for Responded argued that the letter issued by the Chief Electrical Inspector to Government (CEIG) dated 22.3.2016 mentioned that the approval is accorded temporarily for a period of three months to commission the electrical installations inspected on 12.3.2016 subject to the rectification of defects noted in the plant and also necessary permission should be obtained from the Government for the erection of 33 KV cable for power evacuation from their Solar Power Plant for the 33 KV cable crossing the public road / canal as per the provisions of Electricity Act, 2003, Central Electricity Authority Regulations 2010. But the Petitioner is claiming that its Plant was ready and complete well before 31.3.2016. In any scenario, the aforesaid letter dated 22.3.2016 cannot be construed to mean that the Petitioner has commissioned the Plant. The commissioning was eventually achieved in September 2016. And further argued that on thorough field verification, it was revealed that the projects were not in a complete shape and were not ready for

commissioning. This fact was already informed to be Petitioner by a letter dated 15.4.2016.

(iii) The Learned Counsel for the Petitioner argued that the Petitioner diligently commissioned its Project in all respects on 15.3.2016 well in advance of the cut off date for the 2014 Tariff Order. To this end, the Petitioner obtained the certificate of commissioning from Chief Electrical Inspector on 22.3.2016. The Petitioner also intimated the Respondent No.1 of the readiness of its Project in all aspects for commissioning vide letters dated 23.3.2016, 28.3.2016, 30.3.2016 and 31.3.2016.

(iv) To demonstrate the readiness of the project for commissioning on 7.3.2016 the Petitioner issued a letter to the Respondent No.1 seeking temporary evacuation arrangement from an alternate substation located at Kavanoor, anticipating a delay in the commissioning of new Kamuthi 400/230-110 KV substation by the Respondent No.1. The Petitioner followed up on this request by letters dated 23.3.2016, 28.3.2016, 30.3.2016 and 31.3.2016. However, there was no response received from the Respondent No.1.

(v) It is further pertinent to submit that the Petitioner was also willing to demonstrate its commissioning by effecting transmission of power from its generating facility if temporary connectivity was provided by the Respondent No.1 which was provided to some other similarly situated projects. The Respondent No.1, however, for reason best known to itself and in a completely self serving manner did not provide such temporary connectivity to the Petitioner. Thus, the Respondent is estopped from claiming that the Petitioner's Project were not ready prior to the cut off

date. In fact, as soon as the evacuation facilities was provided, the Petitioner was able to generate and transmit electricity thereby establishing that it was always ready and had completed all of its obligations in a timely manner.

(vi) The Learned Counsel for the Petitioner, further argued that it is a settled position of law that a Certificate issued by CEIG in terms of Regulation 43 (4) of CEA Safety Regulations, 2010 is conclusive proof of the project having been duly commissioned.

(vii) The Learned Counsel for the Petitioner has placed strong reliance on the Judgement of the Hon'ble APTEL in A.No.131 of 2015 in the matter of Taxus Infrastructure and Power Projects (P) Ltd. (Vs.) Gujarat Electricity Regulatory Commission and Ors. wherein the Appellate Tribunal accepted a Solar Power Plant to be deemed to have been commissioned on the date it was granted approval for energisation by the CEIG but could not be energised due to non availability of transmission system to be commissioned by GEDCO.

(viii) After careful analysis on the submission of both sides and CEIG Certificate dt.22.3.2016 and the letter dated 15.4.2016 issued by Respondent No.1 to the Petitioners, the first contention of the Respondent is that the CEIG gave an approval temporarily for 3 months only and not a permanent approval, let me see the meaning of the words "Approval is hereby accorded temporarily for a period of three months" in the CEIG Certificate dated 22.3.2016. The meaning of the above said word is available in the CEIG Certificate itself *i.e.*, "*The equipments permitted should be commissioned within three months from the date of issue of this letters failing which fresh permission should be obtained*" "*the owner of the installation shall maintain and operate the*

installation in a condition free from danger and as recommended by the manufacturer or by the relevant codes of practices of the Bureau of Indian Standards.”

(ix) From these lines we can easily understand that if the equipments permitted were not commissioned within three months, it may be affected by some repairs or moisture, etc. and it may cause danger, so the approval is accorded temporarily for three months only. If the equipments permitted were not commissioned within 3 months, then fresh permission should be obtained, at that time CEIG again inspect the plant and check all the equipments then will give permission.

(x) The second contention of the Respondent is that CEIG letter dated 22.3.2016 is subject to the rectification of defects noted in the plant and also necessary permission should be obtained from Government for the erection of 33 KV cable for power evacuation from their plant and for 33 KV cable crossing the public road / canal as per the provision of Electricity Act, 2003, Central Electricity Authority Regulations, 2010.

(xi) In the Annexure of the CEIG letter dated 22.3.2016, there are 75 items mentioned, checked by CEIG and found correct. Rectification was sought for only Item No.1 part only. In the said letter it was nowhere stated that 33 KV cable for power evacuation from the Plant and 33 KV cable crossing the public road / canal were not erected, but only mentioned as necessary permission should be obtained from the Government. In all aspect if the Power Plant is ready for commissioning then only the CEIG will accord approval.

(xii) *The third contention of the Respondent is that “on a thorough field verification, it was revealed that the Project works were not in a complete*

shape and were not ready for commissioning.” With regard to this contention, no material has been placed on record by the Respondent No.1 to substantiate its assertion that its field visit revealed that the project works were incomplete and not ready for commissioning. No particulars have been submitted before this Commission as to in what aspects the project works were not complete. Further, the Respondent No.1 has not denied or contraverted the CEIG approval dated 22.3.2016 issued to the Petitioner.

- (xiii) With regard to the contention of the Petitioners that *“the Petitioner was also willing to demonstrate its commissioning by effecting transmission of power from its generating facility if temporary connectivity was provided by the Respondent No.1 which was provided to some other similarly situated projects, the Respondent No.1, however, for the reasons best known to itself and in a completely self serving manner did not provide such temporary connectivity to the Petitioner”*. On perusal of the letter dated 15.4.2016 issued by the Respondent No.1 to the Petitioner, in page-6 at para-3 and 4, it is stated as follows:

“Even in your group companies fourth and fifth letters, dated 7.3.2016, the request to the TANGEDCO were to consider the temporary connectivity grid interface proposals and to convey TANGEDCO’s concurrence early to achieve the CoD in respect of those Projects. More so, knowing fully well the non feasibility and that your group companies have already availed the facility to the maximum extent possible, you had made these requests, perhaps, for some oblique motives.

Notwithstanding the same, interim arrangement of alternative grid connectivity requests were considered by the TANGEDCO and the same revealed that the earlier request in respect of your group companies, M/s. Kamuthi Renewable Energy Ltd. for connectivity to Kamuthi 110 KV SS at 110 KV level was restricted to 25 MW only as it was connected to Kavanoor 230 KV SS and also an interim arrangement at alternate grid connectivity request of your another group company M/s. Ramnad Solar Power Ltd. 72 MW was already considered favourably and connectivity was accorded to Kamuthi 110 KV SS at 110 KV level fed of Kavanoor

230 KV SS as interim arrangement. Thereby, 230 KV Karaikudi – Karambayam line was already overloaded. The non-feasibility of your requests was also informed to you.”

(xiv) From the above portion of the letter dated 15.4.2016 we came to understand the reason for non-providing the alternate interim connectivity to the Petitioners by the Respondent No.1, since Kavanoor 230 KV SS is already overloaded.

(xv) *In GUVNL (Vs) ACME Solar Technologies (Gujarat) Private Ltd. (2017) 11 SCC 801 wherein Hon'ble Supreme Court concluded that the switchyard was ready to energised by solely relying on the Report of the Electrical Inspector. The relevant extract has been reproduced hereunder:*

“7. However, in this regard, we have taken note of the communication / certificate issued by the Office of the Chief Electrical Inspector dated 31.12.2011 (a mandatory requirement under Clause 3 schedule 2 extracted above) to the first Respondent which goes on to recite that upon inspection of the electrical installation and associated equipments at switchyard of the 1st Respondent at the new site, permission is granted to energise the electrical installations along with associated equipments. This would indicate that the switchyard of the first Respondent was ready for being energised on 31.12.2011.”

(xvi) *In Taxus Infrastructure and Power Projects P Ltd. (Vs) Gujarat Electricity Regulatory Commission and ors., Appeal No.131 of 2015 in APTEL wherein the Hon'ble APTEL given the following observation.*

“It is also observed that the State Commission in the impugned order at para 10.29 has emphasised that in Petition No.1126 of 2011 and allied matter, GUVNL admitted that in case of the Plant is ready for commissioning but if the transmission system is not available in that eventuality, it is deemed that the Plant is commissioned and the Plant developer is eligible to receive the tariff prevailing on the respective date. Making evacuation

system available was the responsibility of GEDCO. This is also evident from the schedule 3 of the PPA and observation in the impugned order.

The relevant para from Impugned order is reproduced below:

“10.28 The Commission passed the Order No.2 of 2010 in which the Commission has decided that it is the duty of the Power Producers and GEDCO to create the necessary transmission network from the Power Producers i.e. Solar Power Project to the GEDCO’s substation for evacuation of power. Thus the duty has been cast upon the GEDCO to create necessary infrastructure of transmission line for evacuation of power generated from the power plant. Any delay in providing necessary transmission system for evacuation of power can, therefore be not allowed to adversely affect the interests of the Power Producer. In the present case, we note that the Petitioners Plant was ready for commissioning energisation as per the CEIG Inspection, however, the same was not energised for commission on 31.3.2013 due to non availability of transmission system.”

“(J) In view of our discussion as above, we are of the considered opinion that there is no legal infirmity in the decision of the State Commission in considering 31.3.2013 as the deemed date of commissioning for the Solar Project.”

(xvii) In view of the above findings on discussions and the case laws decided by the Hon’ble Apex Court and the Hon’ble APTEL, it is clear that the CEIG certificate is suffice to reckon the date of commissioning of the Power Plant.”

Accordingly this issue is answered.

11.14. Issue No.5:

Whether the undertaking dated 16.6.2015 furnished by the Petitioner to the Respondent No.1 before signing EPA prevents the Petitioner from claiming that its project ought to be deemed to have been commissioned on 22.3.2016, the day it received the

commissioning approval from the CEIG? Or whether the EPA is contingent to the said undertaking?

- (i) The Respondents stated that the event of commissioning of the Plant and applicable tariff based on date of commissioning are contingent to the undertaking furnished by the Petitioners. But the Petitioner questions the validity of the undertaking which was not approved by the Commission and even if the undertaking is considered, the term 'not to claim any other benefits' does not imply tariff for the generated power.
- (ii) The Respondents, after conducting the load flow study considering transmission network conditions in 2015-2016, conveyed vide letters dated 17.6.2015 to the Petitioner that the referred Power Plant could be interfaced with TANTRANSCO grid with the proposed and sanctioned Kamuthi 400/230-110 KV SS and that grid connectivity shall be effected only after commissioning of proposed Kamuthi 400/230 KV SS.
- (iii) On 16.6.2015, Petitioners furnished an undertaking to Respondent No.1 which read;

".....whereas the TANGEDCO, after having conducted the Load flow study informed the solar generator that the proposed solar PV power plant can be connected to the sanction 400 KV substation at Kamuthi, Ramnad District subject to commissioning of 400/230 KV Kamuthi SS and accordingly issued connectivity approval.

Whereas, we M/s. Ramnad Renewable Energy Ltd have requested TANGEDCO to enter into PPA for the power to be generated and to be sold to TANGEDCO from the said proposed 72 MW Solar Power Plant, we hereby agree to give the following undertaking:-

1. *That we will not claim any deemed generation or any other benefits whatsoever, from TANGEDCO, in case the TANTRANSCO could not*

commission the proposed 400 KV substation at Kamuthi, Ramnad District even though we complete 72 MW PV Power Plant well in advance.”

(iv) On 4.7.2015 TANGEDCO issued Noted for record letter to the Petitioners. In the said Noted for record letter in page 2 it is stated as follows:

“4) Your proposed 72 MW Solar Power PV Plant can be interfaced with the TANTRANSCO grid at sanctioned Kamuthi 400/230 – 110 KV SS at 110 KV level by erecting 110 KV line for a distance of 8 km connecting your proposed 216 MW Solar PV Power Plant and the sanctioned new Kamuthi 400/230 – 110 KV SS. The above said grid connectivity will be effected only after commissioning of sanctioned Kamuthi 400/230-110 KV SS. You should not claim any deemed generation in the event of delay in commissioning of the 400 KV SS and the applicable tariff will be as fixed by the TNERC at the time of commissioning of 400 KV SS. In this regard you are requested to furnish an undertaking.”

On the same day i.e. 4.7.2015 the EPA has been entered between the Petitioner and Respondent No.2

(v) The arguments of the Respondents are constructed to the effect that the entire EPA was contingent upon the erection of the new substation at Kamuthi and that the Petitioner has submitted itself to the same through an undertaking.

(vi) On the other hand, the Petitioner submits that such an argument is patently wrong in as much as the Petitioner never gave an undertaking to that effect. The only undertaking furnished by the Petitioner is one dated 16.6.2015, in which the Petitioner was not permitted to claim ‘deemed generation and other benefits’. In fact after the final approval of the Petitioner’s project on 4.7.2015 and interface through the Kamuthi substation, the Respondent sought another undertaking from the

Petitioner to disclaim its right to receive preferential tariff as per the EPA terms, but no such undertaking has been provided by the Petitioner. Therefore, the undertaking given prior to the EPA effective date is of no consequence in law.

- (vii) The Petitioner side further argued that the undertaking relied on by the Respondent was executed prior to the EPA, and the same has not been incorporated into the EPA either specifically or even through a reference. In the absence of the same, the said undertaking has no legal enforceability. Without prejudice to the aforesaid, assuming for sake of argument that such undertaking can be relied upon, it would have no applicability to the relief sought in the instant petition since the undertaking only states the petitioner would not seek any “deemed generation or other benefits” in the event of delay in commissioning of the 400 KV Kamuthi SS by TANGEDCO. As a matter of fact, no relief of deemed generation or any other benefit is sought for by the Petitioner from TANGEDCO, it is only seeking a declaration that its plant is deemed to have been commissioned within the control period ending on 31.3.2016 and as a result it is entitled to the tariff of Rs.7.01 per unit as specified in the EPA. Enforcement of its rights under the EPA cannot be termed as a benefit sought from TANGEDCO. If the Petitioner’s undertaking executed prior to the EPA is permitted to override and trump the Respondent’s obligations under the EPA to pay the specified tariff, then it would amount to encouraging the Respondent to ignore the terms of the EPA.

- (viii) To check the validity of the undertaking and the contract being contingent to the undertaking, reference made in the Indian Contract Act, 1872 brings to light the following:

Under Section 31 of the Indian Contract Act 1872, contingent contracts are defined as follows:

“If two or more parties enter into a contract to do or not do something, if an event which is collateral to the contract does or does not happen, then it is a contingent contract.”

In this case, the contract between the Petitioner and Respondent No.1 is the EPA. In page 2 of the said EPA, it is mentioned as follows:

“Whereas the SPG has sent a proposal to the distribution licensee to sell solar energy generated from its Solar PV Power Plant as detailed below having total capacity of 72 MW ac.

And whereas the Distribution Licensee has accepted the said proposal and has agreed to buy the solar energy from the SPG from their aforesaid generator vide Lr. No. CE/NCES/SE/Solar/EB/SCB/A1/F. Ramnad Renewable / D.871/15 dated 4.7.2015 on the terms and conditions herein after agreed to.”

- (ix) From the above, we can easily understand that both Petitioner and Respondent No.1 are agreed the terms and conditions mentioned in the EPA. The said EPA was approved by the Commission.

- (x) In Clause 1(e) of the EPA it is stated that “Effective Date” means the date of execution of agreement between the distribution licensee and the solar power developers and the date on which the agreement shall come into effect. Accordingly, the effective date is 4.7.2015.

In Clause 4 (f) :- “expiry date” means the date of occurring after 25 years from the CoD.

In Clause 1 (c) "Date of Commercial Operation or CoD" means CoD as defined in the regulation 2 (m) of the TNERC (Terms and conditions for the Determination of Tariff) Regulations 2005.

In Clause 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 12.9.2014 shall be Rs.7.01 per unit without AD benefit.

(xi) The above clauses in the EPA are relevant to decide this issue. On careful perusal of entire EPA, in nowhere stated the contention of the Respondent that "the grid connectivity will be effected only after commissioning of sanctioned Kamuthi 400/230-110 KV SS and the Petitioner should not claim any demand generation in the event of delay in commissioning of the 400 KVSS and the applicable tariff will be as fixed by the TNERC at the time of commissioning of 400 KV SS. In this regard you are requested to furnish an undertaking."

(xii) But the Petitioner not furnished the above said undertaking. This condition does not find any mention either in the 2014 Tariff Order issued by the Commission allowing tariff of Rs.7.01 per unit for projects commissioned upto 31.3.2016 or in the EPA signed between the Petitioner and the Respondent No.1. The Respondent No.1 could not have imposed unilateral condition on the Petitioner that the tariff payable to the Petitioner would be the tariff applicable at the time of commissioning of the 400 KV SS. We also find that asking such an undertaking is a request on the part of the Respondent and not a condition to the contract.

- (xiii) But Clause 5(a) of the EPA says that “The Solar Power tariff for the SPG commissioned during the control period of Order No.7 of 2014 dated 12.9.2014 shall be Rs.7.01 / unit without A.D. benefit.”
- (xiv) The Commission has done detailed working for arriving at the tariff based on several factors. If the Petitioner has completed the Project within the time limit prescribed by the Commission, then automatically the tariff fixed by the Commission will prevail. If the project is commissioned within the control period, then it means full investment made within the control period. Hence the unilateral condition of the Respondent No.1 in its letter dated 4.7.2015 that “applicable tariff will be fixed by the TNERC at the time of commissioning of 400 KV SS” is contrary to law and natural justice. In a contract a defaulting party cannot claim compensation from non-defaulting party for delay in fulfilling its obligation.
- (xv) In view of the above findings, it is clear that the EPA is not contingent to the said undertaking.
- (xvi) The Petitioner has not given any undertaking on or after 4.7.2015 accepting to receive the tariff that would be applicable at the time of commissioning of 400 KV SS. Therefore, there is no merit in the argument of the Respondent that the Petitioner had accepted to the tariff applicable as at the time of commissioning of New Kamuthi 400 KV SS.
- (xvii) Now coming back to the effect of undertaking dated 16.6.2015 furnished by the Petitioner, we find merit in the contention of the Petitioner that the EPA contains the final understanding between the parties in relation to sale, purchase of power from the project and payment of tariff for the same. Terms of the said undertaking have not been incorporated in the

EPA which is a standard form approved by this Commission and cannot be altered or modified by any party without approval from the Commission. Therefore, the undertaking by itself cannot override the provision of EPA.

(xviii) I also find merit in the Petitioner's submission that even if it were to be assumed that the undertaking is to be given effect to in addition to the provision of EPA, then it has no applicability to the relief sought in the instant Petition. The said undertaking states that the Petitioner would not seek any "deemed generation or other benefits" in the event of delay in commissioning of the 400 KV Kamuthi SS by the Respondent No.1. As a matter of fact, the Petitioner has not asked for the relief of deemed generation or any other benefit from the Respondent No.1, it has only sought a declaration that its Plant is deemed to have been commissioned on 22.3.2016 i.e. prior to the cut-off date of 31.3.2016 in order to receive the tariff of Rs.7.01 per unit. Enforcement of its rights under the EPA cannot be termed as a benefit from the Respondent No.1.

(xix) Giving effect to the undertaking to deny tariff entitlement to the Petitioner even it had done everything in its control to commission the Project on 22.3.2016 would also mean that the Respondent No.1 can unilaterally impose additional conditions over and above those contained in the EPA and the tariff orders of this Commission on the generator and deny payment of tariff to which they are entitled to under the relevant EPAs. I am of the view that such an approach would be illegal and inequitable and also discourage generators from setting up of Solar Power Projects in the State in reliance on the tariff orders approved by this Commission.

(xx) Therefore, to answer this issue the undertaking dated 16.6.2015 furnished by the Petitioner to the Respondent No.1 before signing EPA would not prevent the Petitioner from claiming that its project ought to be deemed to have been commissioned on 22.3.2016, the day it received the Commissioning approval from the CEIG and EPA is not contingent to the said undertaking, but at the same time Petitioner is not entitled for deemed generation benefits from 22.3.2016 to the date of commissioning of 400 KV Kamuthi SS as agreed by the Petitioner in the said undertaking.

11.15. Issue No.6:-

Whether the Petitioner is entitled for the relief of declaration sought for in Prayer No.2 and 3?

Prayer No.2:-

Declare that the Petitioner has successfully commissioned its Solar Power Projects on or before March 31, 2016 (M.P.Nos.25 & 26 of 2020)

Prayer No.3-

Declare that the Petitioners Solar Power Project is entitled to a tariff of Rs.7.01 per unit.

- (i) In 2012, the Government of Tamil Nadu came out with Solar Energy Policy with a vision to lead the Country by generating 3000 MW of solar power by 2015 through a Policy conducive to promoting solar energy in the State. This Commission issued a Comprehensive Tariff Order on Solar Power on 12.9.2014 vide Order No.4 of 2014 and the tariff was fixed at Rs.7.01 per unit. 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.

- (ii) In response to the above, the Petitioners issued an expression of interest for the establishment of Solar PV Power Plant. The Petitioners proposal was accepted by the 1st Respondent as per its letter of Approval dated 4.7.2015 and consequently, an EPA was entered into between the Petitioners and the Respondent No.1 dated 4.7.2015. The CEIG issued approval letter No.118/SPP/CEIG/D5/SC/2015-2 dated.22.3.2016 to the Petitioner for the commissioning of the Petitioner's Power Plant. Similarly the petitioner obtained the consent for operation of the Power Plant from Tamil Nadu Pollution Control Board in accordance with S.21 and 25 of the Air (Prevention and Control of Pollution) Act, 1981 and Water (Prevention and Control of Pollution) Act 1974 respectively on 19.2.2016. Thereafter the Petitioners issued letters dated 23.3.2016, 28.3.2016, 30.3.2016 and 31.3.2016 to the Respondent No.1 intimating the readings of its project in all respects for commissioning. To demonstrate the readiness of the Project for commissioning, on 7.3.2016 the Petitioner issued a letter to the Respondent No.1 seeking temporary evacuation arrangement from an alternate substation located at Kavanoor. These are all admitted facts on both sides.
- (iii) On 15.4.2016 Respondent No.1, issued a letter to the Petitioner stating *inter alia* that Petitioner has not commissioned its power plant within the control period ending 31.3.2016. In this letter, the Respondent No.1 placed heavy reliance on an undertaking dated 16.6.2015 furnished by Petitioner to the Respondent No.1 which states that the Petitioner would not claim "any deemed generation or other benefits" and also stated that CEIG letter dated 22.3.2016 is subject to Rectification of defects noted in the Plant and also necessary permission should be obtained from the Government from the 33 KV cable crossing the public road / canal. But the Petitioners denied these contentions of the Respondent and filed this petition before this Commission for solution.
- (iv) In this case Respondents have raised the above said two defences. Having set out the facts of the case and contentions on either side, the question that is to be answered is whether the Petitioner's prayers to reckon the date of commissioning of the Plant within the control period of the Order

No.7/2014 that ended on 31.3.2016 and make them entitled to a tariff of Rs.7.01 per unit is to be acceded to.

- (v) For answering to this question, 6 issues were framed, in which Issue No.4 is with regard to the CEIG letter dated 22.3.2016 and Issue No.5 is with regard to the undertaking dated 16.6.2015. After analysing all aspects and after detailed discussions the Issue No.4 and 5 were decided in favour of the Petitioner.
- (vi) In Appeal No.131 of 2015 in the matter of Taxsus Infrastructure and Power Project P. Ltd. (vs.) Gujarat Electricity Regulatory Commission wherein the Hon'ble APTEL accepted a Solar Power Plant to be deemed to have been commissioned on the date it was granted approval of energisation from CEIG.
- (vii) In GUVNL (vs.) Acme Solar Technologies (Gujarat) P. Ltd. (2017) 11 SCC 801 the Hon'ble Supreme Court concluded that the switchyard was ready to be energised by solely relying on the report of the CEIG.
- (viii) So now it is well settled position of Law and facts that CEIG approval is the conclusive proof for readiness of the Power Plant for commissioning. In this case also CEIG issued an approval letter dated 22.3.2016 for commissioning of the Petitioner's Solar Power Plants.
- (ix) In the course of argument Respondent side raised a contention that the word "commissioning" means "Commercial Operation Date". Denying this contention, Petitioner's side argued that these two are distinct concepts. CoD is not relevant for the instance case, it is only "commissioning" that is relevant for entitlement to tariff.
- (x) In this regard I have perused the EPA and Tariff Order 2014. The word CoD has not been used anywhere in the 2014 Tariff Order or in the EPA to be the cut off date for entitlement of specified tariff. Clause 5 (a) of the EPA expressly provides as follows:
"The Solar Power Tariff for the SPG commissioned during the control period of Order No.7 of 2014 dated 12.9.2014 shall be Rs.7.01 per unit without AD benefit". It is therefore, evident that the reckoning date for applicability of the 2014 Tariff Order is only the date of commissioning.

- (xi) From the above findings it is concluded that the Petitioner is entitled for the relief of declaration sought for in Prayer No.2 and 3. Accordingly this issue is answered.

In the result

In view of the above findings on all issues the Petitioners in both petitions are entitled for the relief of declaration that the Petitioner's Solar PV Plants (mentioned in both petitions) are deemed to be commissioned on 22.3.2016, the day it received the approval letter from CEIG and to get the tariff fixed by the Commission under the Tariff Order No.7 of 2014 dated 12.09.2014. But at the same time, the Petitioner in both petitions are not entitled for deemed generation benefits from 22.3.2016 to the date of commissioning of Kamuthi 400 KV new SS as agreed by the Petitioner in the undertaking dated 17.6.2015.

Sd/-XXXX
(K.Venkatasamy)
Member (Legal)

12. Findings of the Chairman:

12.1 The main prayer of the petitioners are;

- (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 72 MWs project to the grid, in order for the respondent to pay the petitioner the tariff of Rs.7.01 per unit;
- (ii) declare that the petitioner has successfully commissioned its 72 MW Solar Power project on or before March 31, 2016 and;
- (iii) declare that the petitioner's solar power project is entitled to a tariff of Rs.7.01 per unit.

12.2. The petitioners and other Group companies issued an expression of interest to TANGEDCO to establish power plants of various capacities totalling to 648 MW on 26.5.2015 under the preferential tariff Order No.7 of 2014 dt.12.9.2014. The Respondents, on receipt of payment of requisite charges for the application

fee, part payment of security deposit (refundable) and load flow study charges, conducted load flow study and communicated the results on 17.6.2015 to the petitioner company duly informing that the power plant could be interfaced with the grid at the proposed and sanctioned Kamuthi 400/230-110 KV Sub- Station at 230 KV level by erecting a 230 KV evacuation line for a distance of 5 Km connecting the proposed solar plant to the proposed Kamuthi SS and asked to give an undertaking to that effect.

12.3. On 17.6.2015, the petitioner gave an 'UNDERTAKING' to the effect that they would not claim any deemed generation or any other benefits whatsoever from TANGEDCO in case TANTRANSCO could not commission the proposed 400 KV Kamuthi SS even though they complete the solar PV power plant well in advance.

12.4. On payment of balance security deposit and submission of relevant documents, respondents issued 'Noted for record letters' dt.4.7.2015 approving the proposal for establishing the solar power plants of 72 MW and 216 MW capacities. In the said letters dt.4.7.2015, the provisions of interfacing the solar power plants only on commissioning of Kamuthi SS was once again conveyed. On the very same day of issue of 'Noted for record letters', the EPAs were entered between the petitioner and the Respondents on 4.7.2015.

12.5. When the matter stood thus, respondent TANGEDCO has intimated the cost towards establishment and supervision charges to be paid by the petitioner and in the said letter has informed once again that TANGEDCO/TANTRANSCO will not be responsible for any delay in commissioning of Kamuthi SS.

12.6. The petitioner addressed the respondent at the end of March 2016 through letters dt.24.3.2016, 25.3.2016 and 31.3.2016 informing readiness of the solar power plants for commissioning since 22.03.2016, quoting the CEIG certificate

dt.22.3.2016, and sought evacuation of power by proposing interface of the power plants with one D/C circuit of the old Kamuthi SS and to issue deemed commissioning of the plant.

12.7. Prior to the above, the petitioner's group companies obtained temporary connectivity of its three other plants constituting 313 MW capacity from the old Kamuthi SS.

12.8. Respondent in letter dt.15.04.2016 set out the facts and circumstances of having signed the EPA, their inability to give any further temporary connectivity after having connected the petitioner's group company plants of 216 MW and a part capacity of another power plant to the old 110 KV Kamuthi SS and non feasibility of connecting the said plants. In the said letter Respondent also has referred to the erection of lines without obtaining permission from Government of Tamil Nadu for crossing of roads and a field verification that revealed that the project works were not in complete shape and were not ready for commissioning and hence entitlement to tariff of Rs.7.01 per unit is unacceptable and has rejected the letters of Group Companies Ramnad renewable Energy Ltd.(RREL) and Kamuthi Solar Power Ltd.(KSPL).

12.9. TANTRANSOCO after completion of Sub station works granted tie up approval on 02.09.2016 for parallel operation of the solar plant by interfacing with the Kamuthi 400 KV SS.

12.10. I have carefully examined the materials adduced as records before the Commission. I have also considered the rival submissions. The facts and issues in M.P.No.25 of 2020 and M.P.No.26 of 2020 being identical, I deal both of them together and issue this common order. On a careful examination of both oral submissions and written submissions of the parties, I find that the following issues arise for consideration.

- (i) Whether the order of Hon'ble APTEL in Appeal No.31 & 32 of 2017 is an order of simplicitor remand and the Commission is required to pass orders on the date of commissioning of the plant on the basis of CEIG's approval which finds place in the observations of the APTEL, as contended by the petitioner?
- (ii) Whether the order of Hon'ble High Court of Madras is an order in rem or order in personam?
- (iii) Whether the control period or scheduled date of commissioning can be extended by invoking inherent powers of the Commission or by exercise of regulatory jurisdiction for granting relief to the petitioner?
- (iv) Whether the stand of the respondent that the entire pleading of the petitioner is only for extension of control period and the plant was not ready for commissioning by March 2016 and the fact that the giving up of relief for extension of control period would render all the other reliefs untenable is sustainable?
- (v) Whether the plant was ready for commissioning before 31.3.2016 and whether the CEIG's certificate can be taken as a conclusive proof of the commissioning of the plants?
- (vi) Whether the undertaking signed by the petitioner will have a bearing in the case in the light of the stand taken by the petitioner that the undertaking is meant for waiver of deemed generation alone and not to entitlement of tariff?
- (vii) Whether the respondent was at fault at any stage in failing to provide required infrastructure and if so, can the respondent take the advantage of its own wrong as contended by the petitioner?

(viii) Whether the contention of the petitioner that the entire financial planning and projection is based on a tariff rate of Rs.7.01 per unit and the petitioner would suffer loss if the same is not granted is tenable?

(ix) Whether the decisions of Hon'ble APTEL rendered in A.No.131 of 2015 and A.No.229 of 2018 are applicable to the case on the hand?

(x) Whether the petitioner is entitled to any relief and if so, to what extent?

12.11 Issue-1:

Before proceeding to delve into the facts of the case it is necessary to first settle the issue as to whether the order of remand made to the Commission in the Appeal No.31 and 32 of 2017 is a specific remand or general remand. I am of the view that unless the said issue is settled first I cannot go into any other issues at all for the reason that in case of specific remand, there is no scope for liberty to examine the issues afresh and a lower forum / court will have to confine itself to the remanded issue and act according to the findings rendered by the higher court / forum. In the case of general remand, the lower court / forum can decide the issue afresh as there is a liberty to examine all issues. The liberty to lower courts / forum, at times, is not specifically stated in the order of remand and in such circumstances, it can be inferred only from the language employed in the order of remand. Now let me re-produce the order of remand of Hon'ble APTEL in the above said appeals to decide whether this case is a specific remand or general remand.

“xx) The Appellant in their prayer have asked the State Commission to exercise their regulatory powers. In the interest of natural justice and equity, the State Commission besides elaborating on the nature of dispute resolution should also have discussed the other aspects of regulatory nature of the prayer. There is absolutely no discussion on this aspect of regulatory nature of the prayer sought by the Appellant”

“xxi)This instant case is one such case wherein the Appellant have invested huge sums of money for generation of electricity through solar plant on the premise that if the plant is completed by 31.03.2016 then it will be paid a tariff of Rs. 7.01 per unit. The

availability of tariff of Rs. 7.01 per unit is the very basis of setting up of this project by the Appellant. In this case the project has been completed before 31.03.2016. The Appellant have submitted the certificate issued by the Chief Electrical Inspector on ground that the evacuation infrastructure to be created by the Respondent No.2 was not completed and therefore evacuation of power from the solar plant of the Appellant could not take place. It is at this time the Appellant approached the State Commission for exercise of the regulatory powers to accede to their prayer. In view of the facts of the case, the averments made by the Appellant, the grounds given by the Appellant in their appeal and the prayer made by the Appellant, it would be appropriate to treat the Petition of the Appellant as Miscellaneous Petition and not as a Dispute Resolution Petition because of monetary claims between the licensee and the generator.

It may be seen from the above that the issue that was dealt with by the Hon'ble Tribunal was whether the subject matter required the exercise of regulatory jurisdiction or adjudicatory jurisdiction by this Commission. The Commission rejected the petition filed before the Commission with the prayer as a Miscellaneous Petition and directed the petitioner to file it as a Dispute Resolution Petition (D.R.P.) for the reason that the matter involved exercise of adjudicatory jurisdiction and required fees as applicable to D.R.P. should be paid. The Appeal before the Hon'ble Tribunal was on the ground that the subject matter involves regulatory jurisdiction and the petition should be classified only as M.P. Therefore, the issue as to whether the prayer of the petitioner was of regulatory nature or adjudicatory nature was only settled in the above order of the Tribunal and the issue requires no further examination and it is no longer res integra . There is no iota of doubt that the direction in the order of Hon'ble APTEL to treat the petitioner's petition as M.P. is a case of specific remand. But, in the same breath, I have to hold categorically that there is no specific remand to the effect that the petitioner's prayer of tariff at Rs.7.01 shall be allowed by the Commission. The reasoning given by the APTEL for specific remand on the classification of the petition, in my opinion, is sought to be given an extended meaning by the petitioner to even the matters relating to the tariff. This in my view, is not sustainable at all. The reference made by APTEL to CEIG's Certificate and that the project had been deemed to have been completed before 31.3.2016, in my view is a mere observation not amounting to conclusive findings during the course of hearing for the purpose of arriving at the conclusion that the matter before it was one of regulatory power to be exercised by the Commission and such observations can, at best, be said to be an obiter dicta and not a ratio decidendi as there was no

authoritative pronouncement that the CEIG certificate shall entitle the petitioner to the tariff of Rs.7.01. It is needless to emphasize here that it is only the observations of a court which are directly on the point in issue which can be taken as ratio decidendi and the casual observations or statement merely constitute obiter dicta. The point in issue in the said appeals not being entitlement to tariff of Rs.7.01, the observations made by the Tribunal on the date of completion of project before 31.03.2016 is obiter dicta and cannot be relied upon by the petitioner to contend that there was specific remand on the tariff related issue. In my view, the specific remand in the Appeal before the Tribunal was limited only to the question of classification of the petition as a Miscellaneous Petition (M.P.) and in other aspects such as tariff, the issue was left wide open and hence the Commission is at liberty to decide those issues including tariff afresh.

12.12 Issue No.2

On this issue, it is necessary to see whether the observations of the Hon'ble High Court of Madras in W.P.No.8644 of 2019 is an order in rem or order in personam. It is the case of the petitioner that the order of the High Court relied upon by the respondent is an order in personam as it relates to a different case. I now proceed to examine the contentions of the petitioner. Let me re-produce the extract of the order of the Hon'ble High Court in W.P.No.8644 of 2019 for taking a considered view as to whether the said order is an order in rem or order in personam.

“17. Heard the learned counsel for the petitioner and the learned Additional Advocate General appearing for the respondents.

18. It is an admitted fact by the petitioner company as well as the respondents. They have entered into the power purchase agreement on 07/04/2015. As per clause 5 of the agreement, the solar power tariff for the Solar Power Generation (SPG) commissioned during the control period of order 7 of 2014 dated 12/09/2014 shall be Rs 7.01 per unit without Accelerated Depreciation (AD) benefit. The control period is upto 31/03/2016.

19. While the petitioner claims that, it has commissioned the plant before 31/03/2016 and the same been acknowledged by the respondents. Therefore the respondents are liable to pay Rs 7.01 per unit for their entire generation of 72 MW. The respondents claim that as per the terms of the agreement the rate as applicable on the date of commissioning the Kamuthi 400/230-110 KV SS alone is payable. The petitioner has committed in its letter of undertaking dated 16/06/2015 that they will not claim any deemed generation or any other benefits whatsoever from TANGEDCO in case TANTRANSCO could not commission the proposed 400 KV Sub-station at Kamuthi, Ramanad district even though they complete 72 MW PV power plant well in advance. Therefore the prayer in the writ petition to pay Rs.7.01 per unit as per the TNERC tariff order dated 12/09/2014 is not sustainable.

20. While the learned Additional Advocate General appearing for the respondents states that if the petitioner is aggrieved by the tariff fixed, the remedy is before APTEL to resolve the dispute and High Court under Article 226 of the constitution is not the appropriate forum. The petitioner counters this submission saying only an existing dispute can be redressed before APTEL. The refusal of the respondent to pay the agreed tariff is contrary to the agreement and existence of dispute is only spurious, hypothetical and illusory.

21. To appreciate these rival submissions, the communication between the parties prior to the agreement, the terms of agreement and undertaking letter given by the respondents are to be scrutinised.

22. The proposal of the petitioner company to establish 72 MW Solar PV Power plant at Karisalkulam Village, Kamuthi, Ramanad District was considered by the first respondent and finalised the transmission scheme on 17/06/2015 and communicated it to the petitioner. One of the terms found in the said communication is that, 'the above referred power plant can be interfaced with the TANTRANSCO grid at proposed sanctioned Kamuthi 400/230-110 KV SS at 110 KV level by erecting 110 KV evacuation line for a distance of 7KM connecting your proposed 72 MW solar PV power plant and the proposed sanctioned Kamuthi 400/2300110 KV SS with necessary breaker and protection arrangement as per the TANGEDCO norms. The above grid connectivity shall be effected only after commissioning of proposed sanctioned Kamuthi 400/230-110 KV SS.'

23. In the above said communication, it is also stated that, (TNERC order No. 7 dated 12/09/2014) "Comprehensive tariff order on solar power" shall be applicable for the solar projects commissioned within the control period of this order. The proposal was subsequently approved by TANGEDCO vide letter dated 04/07/2015. In this letter, the TANGEDCO has made it clear to the petitioner that, they should not claim any deemed generation in the event of delay in commissioning of the 400 KV SS and the applicable tariff will be fixed by the TNERC at the time of commissioning of 400 KV SS. In this regard, the petitioner has to furnish an under taking

24. Pursuant to this communication, the petitioner has executed an undertaking on 16.06.2015, in which, it has been stated as follows:

"Whereas the TANGEDCO, after having conducted the load flow study, informed the Solar Generator that the proposed 72 MW Solar PV Power Plant can be connected to the sanctioned 400 KV Sub-Station at Kamuthi, Ramnad District, subject to commissioning of 400/230/110 KV Kamuthi SS and accordingly issued connectivity approval. Whereas we, M/s. Kamuthi Renewable Energy Ltd., have requested TANGEDCO to enter into Power Purchase Agreement for the power to be generated and to be sold to TANGEDCO from the said proposed 72 MW solar PV Power Plant. We hereby agree to give the following undertaking: 1. That we will not claim any deemed generation or any other benefits whatsoever, from TANGEDCO, in case the TANTRANSCO could not commission the proposed 400 KV Sub-station at Kamuthi, Ramnad District even though we complete 72 MW PV Power Plant well in advance."

25. On the same day, the petitioner and the first respondent had entered into the power purchase agreement. In which, the parties have agreed the price of Rs.7.01 per unit for the solar power generated during the control period of order number 7 of 2014 dated 12/09/2014.

Clause 1 (d) of the agreement defines the word 'disputes:

(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.”

Clause 11 provides for settlement of disputes:

“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 at Chennai alone shall have jurisdiction.”

26. In deviation to the agreed terms regarding evacuation of power generated, the request to evacuate power through 110 KV SS at Kamuthi before the commissioning of 400/230-110 KV Sub-station at Kumuthi has emanated from the petitioner through its letter dated 09/02/2016 a month prior to the expiry of the control period the date which is very crucial to fix the tariff. This letter of the petitioner reads as below:

“In furtherance of our letter cited under reference 2 above, we are pleased to intimate you that substantial progress has been achieved in establishment of KREL's 72 MW Solar Power Project at Kamuthi Taluka, District Ramanathapuram and is on the verge of completion in all respects and shall be ready for commissioning by 20.02.2016. We also wish to inform you that this project is being commissioned in a shortest period of 6 months from the date of signing of EPA.

Since, there is a system constraint for evacuation of power to be generated from KREL's solar power plant, we request your good offices to consider the grid interface arrangement proposed vide our letter cited above favorably by permitting to evacuate KREL's power through existing 110KV Kamuthi substation. Through this arrangement, it is proposed to interface the outgoing S/C 110 KV feeder of 72MW KREL's Solar Power project with the circuit of 110KV D/C existing Kamuthi substation to 400 KV new Kamuthi Substation Transmission line at 400KV Kamuthi substation end. A brief sketch is attached herewith for ready reference.

We request you to kindly consider our grid interface proposal for KREL's 72MW Solar Power Plant evacuation and convey your concurrence on the above at the earliest which will enable us to achieve the COD for KREL's 72MW Solar Power Project and also to set a record of commissioning of this project in short span of 6 months from the date of signing of EPA.”

27. From these portion of the documents it is clear that the power purchase agreement has been entered between the parties only after the undertaking given by the respondent. In the undertaking letter the petitioner has agreed not to claim any benefit whatsoever in case of delay in commissioning of 400/230-110 KV SS at Kamuthi. The petitioner company was

permitted to evacuate upto 25 MW of power through 110 KV SS as a temporary measure and on the request of the petitioner based on the undertaking that it will not claim any benefit whatsoever. Having agreed to claim the tariff prevailing on the date of commissioning of 400/230-110 KV Substation at Kamuthi , the petitioner is estopped from saying that claim of tariff at the rate of Rs 7.01 per unit is not a benefit but a lawful claim. The respondents have accepted the request of the petitioner on temporary basis and accommodated the evacuation of energy upto 25 MW through 110 KV SS interface. This will not confer any right on the petitioner to claim the tariff prevailing on the date of the commission of 400/230-110 KV SS. The present claim of the petitioner is contrary to the terms of the agreement and its own undertaking.

28. Therefore, this Court is of the opinion that, the petitioner claim is unsustainable for the following reasons:

.....

29. For the said reasons, the writ petition is dismissed. However, if the petitioner resort to Clause 11 of the Power Purchase Agreement and approach the TNERC, the same may be decided independently without being influenced by any of the observations made in this writ petition. No costs.

Consequently, connected miscellaneous petitions are closed.”

It is clear from the above extracted portions of the order of the Hon'ble High Court of Madras that there is a conclusive finding in an identical issue. It is true that the order relates to the issue pertaining to the petitioner's sister companies and the petitioner was not a party in the said proceedings. But, can the said factor alone would be construed to mean that it would not bind the petitioner? I am unable to agree to the said contention. The petitioner might not have been party to the said proceedings. But the issues in both case, in my view, are identical and strikingly similar. I cannot therefore, ignore the said observations merely for the reason that the petitioner was not a party before the said proceedings. On the other hand, I am convinced that the order of the High Court is an order in rem. It may be seen that the crucial issue as to whether the undertaking given by the petitioner therein not to claim deemed generation or tariff of Rs.7.01 was dealt with extensively in the said order and I see no reason as to why I am not bound by the observations of the Hon'ble High Court. There is no doubt of whatsoever nature on my part to hold that the order passed by the Hon'ble High Court in W.P.No.8644 of 2017 is order in rem and binds the petitioner herein as well. But still I have to strictly go by the direction of the High Court to examine the issue without being influenced by any of the observations made therein as the High Court itself directed so in para-29 of the said order. In such context, I have to place on record that the

primary requirement is the invocation of Clause-11 of the PPA and approaching the Commission for adjudication as seen in the order of the High Court. However, the petitioner has not chosen to do so. Still the question which requires consideration is whether the exercise of regulatory jurisdiction is permissible in cases involving extension of control period or extending the CoD of the generating plants and is required to be decided by this Commission.

12.13 Issue No.3:

During the course of arguments, the Learned Counsel for the petitioner has sought to give up the prayer with regard to grant the project specific extension of control period from March 31, 2016 to the date of inter-connection of the petitioner's project to the grid. But neither the prayer has been amended nor any memo / petition has been filed in this behalf by the Learned Counsel. The Learned Additional Advocate General appearing for the respondent has pointed out that once this prayer is given up, the other prayers in the petition which are consequential also fail. Also the said prayer has not been deleted by means of filing proper petition, it remains on record and to decide other issues on the merit is only academic. I have to point out that when the petitioner himself has sought extension of control period it goes without saying that it is an admitted fact on the part of the petitioner that the project of the petitioner was not commissioned before the expiry of the control period i.e., 31.03.2016.

On the question of law, I have to observe that there is nothing in the Electricity Act which explicitly deals with the extension of time limit for the power projects by the State Commissions.

Further, in the New and Renewable Sources of Energy Regulations, 2008 also the question of extension of the control period for extension of time for a project has not been dealt with, though the said Regulations provide for a control period of 2 years for the tariff fixation in regard to the non-conventional sources. Thus, I find that there is no provision either in the Electricity Act, 2003, or in the Regulations for acceding to the relief sought for herein. If at all such power is to be exercised, it is to be done only by way of invocation of inherent powers vested with the TNERC Commission in the Conduct of Business Regulations, 2004. The issue of the powers of the Commission to extend the control period or the extension of date of commissioning of the project by invocation of inherent power is no longer

res integra and has been well settled by the Hon^{ble} Supreme Court in Gujarat Urja Vikas Nigam Ltd. Vs. Solar Semi Conductor Power Company (India) Pvt. Ltd. and others in Civil Appeal No. 6399 of 2016 dated 25-10-2017 wherein it has been held as follows:-

“The control period is not something prescribed by the Commission under the Conduct of Business Regulations. The control period is also not an order by the Commission for doing any act. Commissioning of a project is the act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser, viz., the respondent No.1 and appellant. Hence, the Commission cannot extend the time stipulated under the PPA for doing any act contemplated under the agreement in exercise of its powers under Regulation 85”.

Therefore, there cannot be an extension of the control period under the inherent powers of the Commission. The above decision will equally apply to the case on hand. When a time limit is prescribed in the PPA for commissioning of the project, the Commission has no power to extend such time limit. The Commission could only examine the rights and liabilities of the parties within the frame work of the contract i.e. PPA and can grant relief to the affected parties only as per the provisions contained in the PPA. It is to be observed here that the Hon^{ble} Supreme Court was categorical on the point that the control period cannot be extended by exercise of inherent powers and such an exercise of power can be done only with reference to the specific powers conferred by the Act or a Regulation. Needless to say that if at all an extension is to be granted it can be done only by invocation of inherent powers of the Commission. As the ratio laid down by the Hon^{ble} Apex Court has deprecated the extension of control period by exercise of inherent powers, the Commission cannot invoke its inherent powers conferred in the Regulations. Also it may be noted that the extension of control period and the extension of date of commissioning of a project, though, factually stand on a different footing, the principle with regard to the extension in both the cases, in my view, cannot be differentiated and stand on the same footing. It is so because, the extension of a project, as per the Apex Court verdict cannot be done in project specific cases in the absence of express statutory provisions. In view of

the same, I cannot agree to the plea of the petitioner to direct the Respondents to extend the commissioning of the project.

From the above, it is clear that it is only the provisions of the PPA which governs the extension of time for commissioning of plants. A combined reading of Judgement of Hon'ble Supreme Court, APTEL and Order of High Court of Madras makes it clear that insofar the present case is concerned, the issue requires resolution only in terms of the relevant clauses in the PPA and not otherwise. In other words I have to emphatically state here that neither the relief for deemed generation nor the relief for entitlement to tariff at Rs.7.01 is sustainable on the grounds of extension of control period. Hence it is not necessary to further elaborate as to whether regulatory jurisdiction could be exercised for extension of date of commissioning of a plant as the issue has been well settled by the Hon'ble Supreme Court itself.

Having said that, I proceed to examine the issue within the contours of PPA and the circumstances leading to the execution of PPA and from the point of view of express and implied conduct of the parties. Though the petitioner seeks to contend that the order of the High Court of Madras in W.P.No.8644 of 2017 is not applicable to the instant case, I find it as an order of rem atleast on the question of invoking the Clause-11 of the PPA which has not been done. I say so because, after the decision of Hon'ble Supreme Court in Gujarat Semi-Conductor case, the prayer of the petitioner can be heard only in adjudicatory jurisdiction and in all fairness, the provisions relating to PPA ought to have been relied upon as it is the governing document. However, I find the petitioner placing reliance on the conduct of the respondent on pre-evacuation issue which cannot be a matter of regulatory jurisdiction. Therefore, I hold that the prayer of the petitioner to extend the control period of the project fails.

12.14 Issue No.4 & 5;

As regards the fourth issue, I have to observe that there are two parts to it, namely,

i) whether all other connected prayers are predicated upon the prayer for extension of control period;

ii) whether the entire pleadings of the petitioner is only for extension of control period but the plant was not ready by 31.03.2016.

As regards the first part, I am not in agreement with the respondent that when the prayer for extension of control period is given up orally, all the other reliefs are not sustainable. It is to be understood that even when there is no case for extension of control period by invocation of inherent powers, still there exists a fair case for resolution of the dispute through PPA. It is not as if, all the other reliefs sought will fall like pack of cards once the relief for extension of control period is given up. Presumably, the said relief has been given up in view of the subsequent judgement of Hon'ble Supreme Court in Gujarat Semi-Conductor case according to which the Commission cannot extend the control period by exercising its regulatory power but can only adjudicate the issues arising within the frame work of PPA. However, the remedy under the PPA is still available and if the petitioner establishes within the framework of PPA that there is a case for granting relief, it can be given. Hence, this argument of the respondent is rejected. Let me examine the other part, as to whether the entire pleading was relating to extension of control period but the project was not ready by 31.03.2016. I have to say that the respondent has a valid point on this issue which requires examination. A careful reading of the prayer of the petitioner suggests that it is an admitted fact that the plant was not ready by March 2016 and there is no dispute on that score. It is only for the said reason that the petitioner seeks to pass the onus of commissioning the plant in time to the alleged delay on the part of the respondent in commissioning the plant. I cannot, at this stage, come to an irresistible conclusion based on the contentions of the respondent that the very first prayer seeking extension of control period is a proof that the plant was not ready for commissioning. It would be too

pre-mature to make such conclusion based on such proposition. The question as to whether the plant was ready for commissioning requires to be examined with reference to the evidences adduced before the Commission and not solely with reference to the prayer for extension of time. Such pre-determined approach or pre-conceived notion cannot be entertained in matters relating to adjudication. Further, the extension of control period in project specific cases cannot be done as per the legal position today and hence no decision can be rendered based on the same. Therefore, it is necessary to examine the facts of the case further to see whether the plant was ready for commissioning before 31.03.2016.

In order to decide issue herein, it is necessary to briefly set out the details of the communication exchanged between the parties. It is seen that the petitioner addressed the respondent in the end of March 2016 through letters dt.24.3.2016, 25.3.2016 and 31.3.2016 informing readiness of the solar power plants for commissioning since 22.03.2016, relying on the CEIG certificate dt.22.3.2016, and sought evacuation of power by proposing interface of the power plants with one D/C circuit of the old Kamuthi SS and to issue deemed commissioning of the plant.

Prior to the above, the petitioner's group companies obtained temporary connectivity of its three other plants constituting 313 MW capacity from the old Kamuthi SS.

Respondent in letter dt.15.04.2016 set out the facts and circumstances of having signed the EPA, their inability to give any further temporary connectivity after having connected the petitioner's group company plants of 216 MW and a part capacity of another power plant to the old 110 KV Kamuthi SS and non feasibility of connecting the said plants. In the said letter Respondent has referred to the erection of lines without obtaining permission from Government of Tamil Nadu for

crossing of roads and a field verification that revealed that the project works were not in complete shape and were not ready for commissioning and hence entitlement to tariff of Rs.7.01 per unit is unacceptable and has rejected the letters of Group Companies Ramnad renewable Energy Ltd.(RREL) and Kamuthi Solar Power Ltd.(KSPL).

TANTRANSCO after completion of Sub station works granted tie up approval on 02.09.2016 for parallel operation of the solar plant by interfacing with the Kamuthi 400 KV SS.

It is the contention of the petitioner that 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 for evacuation and pay at a lower tariff of Rs.5.10. TANGEDCO has sought to make an unsubstantiated claim that the Petitioner's plant was not ready for commissioning. TANGEDCO failed to issue deemed commissioning certificate as on 31.3.2016 and failed to provide temporary connectivity. CEIG's certificate dt.22.3.2016 is proof of plant being ready for commissioning.

Per contra it is the contention of the respondent that CEIG's certificate issued on 22.3.2016 is an approval accorded temporarily for a period of 3 months to commission the electrical installations inspected on 11.3.2016 at the plant premises and is subject to certain conditions one of which is to obtain permission for the 33 KV cable crossing the public road from PV segment 1 and 2. The letter dt.22.3.2016 cannot be construed to mean that the Petitioner has commissioned the plant.

It was never confirmed orally or in writing that erection of Kamuthi 400 KV SS would be completed before 31.3.2016. The normal time for commissioning of a

400 KV Sub Station is 18 months. The 400 KV SS at Kamuthi was diligently commissioned on 18.9.2016.

The operative portion of the order of Hon'ble APTEL in A.Nos.31 & 32 of 2017 is only an observation that the petitioner was ready before 31.3.2016 but does not conclude that the petitioner's plant was commissioned. In any event it is only an *obiter dictum* since the *lis* before the Tribunal was different.

The entire pleading of the petitioner is only for extension of control period which itself shows that the plant was not ready for commissioning in March 2016 as claimed.

On perusal of records, I find that as contended by the respondents, the CEIG's approval is purely temporary and subject to condition, inter alia that permission is to be obtained from the GoTN for the 33 KV cable crossing public Road. The said fact has not been disputed by the petitioner and surely it is not the case of the petitioner that the State Government's approval was obtained before March 2016 but still the respondents refused to recognize the same. Hence, the contention that the CEIG's approval is the conclusive evidence to the effect that the plant was ready for commissioning before 31.03.2016 does not find favour and such contention is not sustainable. Having said so, I have to look beyond the CEIG's approval and see whether there existed any case for the petitioner to say cut-off date was based on the assurances given by the respondent. It is needless to say that any cut-off date for claiming the benefit of deemed generation or tariff should be based on a mutually agreed cut-off date and in my view, a cut-off date cannot be foisted on a party merely for the purpose of advancing its own business interests without having regard to the feasibility of completion of required infrastructure within the said cut-off date. It is seen that there have been

communication dated 24.03.2016, 25.03.2016 and 31.03.2016 informing of readiness for commissioning before 31.03.2016. But the moot question that arises for consideration is the basis for determination of the said cut-off date. For this purpose, there must be an explicit agreement between the parties on the said date. Rather I find that the respondent seeks to contend that it never agreed orally or in writing that the erection of Kamuthi 400 KV would be completed before 31.03.2016. There must be something on record to prove that the cut-off date for commissioning was mutually agreed as 31.03.2016. But I find nothing on record to prove the cut-off date. In such case, I cannot repel the contention made by TANGEDCO that there was nothing agreed on the cut-off date orally or in writing. Besides, I cannot totally reject the submission that the normal time for commissioning is 18 months and the 400 KV SS at Kamuthi was commissioned after due diligence. I cannot disbelieve the said contention as commissioning of 400 KV SS indeed requires a period of 18 months and the petitioner has also not disputed the said contention. It may be further seen that the date of commissioning of 400 KV SS and the petitioner was same which was on 18.09.2016. Hence, I find that there is diligence on the part of the respondents in extending help to the petitioner for commissioning its plant as well on the same of the commissioning of the 400 KV SS and hence, if at all there was any delay attributable to commissioning 400 KV SS, I have to conclude that it might have been only due to operational difficulties and not due to wilful lethargy. That fact that one side expressed its readiness on the basis of CEIG certificate to commission the plant without there being a firm agreement on the cut-off date from the other side, cannot lead to a conclusion that the plant was ready for commissioning to the advantage of the party who declared it. It is only when both sides agreed on the date 31.03.2016 and there was failure on the part of

one party, it can be said that one party fulfilled its part of commitments and it can seek damages or benefits from the other side. In view of the foregoing discussion, I hold that the plant was not neither ready by 31.03.2016 as the basic requirement of Government's approval was missing nor was required to be commissioned by 31.03.2016 as no such agreement on the cut-off date was subsisting between the parties.

12.15 Issue No.6:

In order to settle the issue, the relevant portions of the undertaking executed by the petitioner is required to be re-produced as follows;

“Whereas the TANGEDCO, after having conducted the load flow study, informed the Solar Generator that the proposed 72 MW Solar PV power plant can be connected to the sanctioned 400 KV Sub station at Kamuthi, Ramnad District subject to commissioning of 400/230/110 KV Kamuthi SS and accordingly issued connectivity approval.

Whereas We M/s. Ramnad Renewable Energy Limited have requested TANGEDCO to enter into Power Purchase Agreement for the power to be generated and to be sold to TANGEDCO from the said proposed 72 MW Solar PV Power plant , we hereby agree to give the following undertaking:

That we will not claim any deemed generation or any other benefits whatsoever, from TANGEDCO, in case the TANTRANSCO could not commission the proposed 400 KV Sub station at Kamuthi,Ramnad district even though we complete 72 MW PV power plant well in advance.”

It may be seen that the petitioner has not only waived deemed generation but also any other benefit. It is to be seen here that the expression “ any other benefit” is too broad and cannot be constricted. The undertaking has a direct nexus to the commissioning of 400 KV SS and it is explicitly clear that the petitioner waived all benefits arising out of inability of TANTRANSCO to Commission the 400 KV SS for any reason whatsoever. I find that the waiver was done with full consciousness mindful of all the likely consequences. The contention that the said

undertaking is invalid in the light of the non-approval of the Commission has no legal legs to stand for the simple reason that the approval of the Commission is required only for the PPA and not for pre-commissioning agreements which is governed by the law of contract. But, I have to state at the same time, that there cannot be doubt whatsoever on the power of the Commission to adjudicate such pre-commissioning agreement as any dispute between a generator and licensee falls within the adjudicatory jurisdiction of the Commission as held by the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Vs Essar Power Limited. That is to say while for giving validity to PPA the prior approval of the Commission is mandatory, the prior approval of the Commission is not necessary for pre-PPA agreements but still such disputes can be brought before the Commission for adjudication. Now let me turn to the contention whether the tariff would fall within the scope of "any other benefit". In my view, surely, it does. Any benefit or claim arising out of the inability of TANTRANSCO to commission the project would include tariff as well. If it is negated, it would render the undertaking given by the petitioner to absurdity. The very purpose of obtaining the undertaking would be set at naught if the plea of the petitioner is acceded to and it would permit the petitioner to wriggle out of the undertaking given voluntarily and consciously to which I cannot agree. Therefore, the absence of regulatory approval by the Commission for the undertaking which is essentially a pre-commission agreement cannot come to the rescue of the petitioner. Further the subsequent Note-on-Record explicitly required the petitioner to give an undertaking that the tariff would be as fixed by the Commission at the time of commissioning of 400 KV SS. But such undertaking was not given by the petitioner but the petitioner executed PPA dated 4.7.2015 which has a reference to the Notes on Record. Hence, the very factum of signing the EPA dated 4.7.2015 with the same having reference to Note on Record requiring the fixation of tariff from the date of commissioning lead me to an unassailable view that the petitioner has acquiesced to the tariff only from the date of commissioning of 400 KV SS by TANTRANSCO. Any other view or proposition would hit the very fabric of frame work under which the contractual obligations are governed and such differing perception or view would only enable the party who waived a benefit voluntarily to re-stake its claim through subtle means to which I am not agreeable. The other dimension of the case is that the control period of Tariff

Order No.7 of 2014 was to expire on 31.03.2016. As stated above, the load flow studies Report was communicated to the petitioner on 17.06.2015. The remaining period during which the said order No.7 of 2014 would be effective was slightly more than 8 months. It is the common knowledge of every one and accepted position of fact that no sub-station could be operationalized within the above said period of 8 months. Therefore, knowing well, that the said Kamuthi sub-station would not be established before the expiry of the control period of 31.03.2016, the undertaking given by the petitioner on 16.06.2015 plays a major role. The said undertaking given by the petitioner forms integral part of the EPA entered by the petitioner and the respondent. Therefore, the tariff applicable to the petitioner's project is from the date of commissioning of Kamuthi Sub-Station irrespective of the date of commissioning of the project. As per the contractual provisions, the tariff applicable on the date of commissioning of Kamuthi Sub-Station is to be paid to the petitioner as per the undertaking given by the petitioner which forms part of the contract. Therefore, the issue is decided against the petitioner.

12.16 Issue No.7;

Having scrutinized the material records, I find no force in the submission of the petitioner. It is seen from the records that at no point of time the respondent gave any false hope of commissioning before 31.03.2016 to the petitioner. On the contrary, I find that the respondent was categorical in stating that the completion of the 400 KV SS would take a minimum of 18 months and completion before 31.03.2016 was not feasible. Having known its constraints, the respondent also obtained undertaking that neither deemed generation or any other benefit would be claimed. The respondent went a step ahead to ensure clarity by explicitly seeking an undertaking that tariff as applicable on the date of commissioning of Kamuthi SS and would be paid. I have to place on record here that the respondent crafted its strategy very well. Keeping the likely consequences arising out of the fall-out in the delay in commissioning 400 KV SS, it attempted to ensure that its position on the issue is made clear. But the petitioner, I find simply toed the line suggested by

the respondent without coming out on its stand categorically at the relevant and required point of time only to take a different posture at this stage, which is too late. Except for the failure to give undertaking on the tariff, I find that the petitioner was agreed to all the conditions imposed by the TANTRANSCO. Even on the question of tariff, the petitioner willingly executed EPA having a reference to notes on record and tariff related issues. Hence, gleaned from any angle, the petitioner has no case for tariff of Rs.7.01 as at every stage, it was acting consciously without demur and it is too late at this stage to set up a defence that the fault lies on TANTRANSCO when everything was explained to the petitioner and undertaking was signed. Also, I find that there is no averment that the agreement is vitiated by fraud or misrepresentation. The stand of the petitioner that the undertaking sought to be relied upon by TANGEDCO ceased to have effect and that the undertaking never formed part of EPA signed subsequently, in my view, does not help the petitioner as the subsequent Note-on-Record forms part of the EPA. Hence, I do not find any mistake on the part of TANGEDCO much less wrong to say that it has taken advantage of its own wrong.

12.17 Issues No.8 & 9;

On this issue, I have to observe that I am unable to be of any help to the petitioner for the reason that the micro managing the finances of a firm cannot have a bearing on the issue of adjudication. If at all the petitioner was of the view that its business and its financial planning was solely based on the tariff of Rs.7.01 per unit I see no reason as to why the petitioner agreed to the conditions imposed by TANTRANSCO on the waiver deemed generation or executed PPA having reference to Notes on Records prescribing tariff to be determined by the Commission at the time of commissioning of S.S. I find that the tariff as applicable

on the day of commissioning was good enough to sustain its operations and only in the said context the deemed generation was waived and the EPA having reference to notes on Records prescribing that tariff on the date of commissioning was signed with due knowledge of the likely consequence. Hence, the contentions in this regard cannot be accepted and fails.

In this connection, I have to observe that in contracts such as the present one, the party endeavouring to seek the benefits has to take a clear stand without any demur or hesitation and there is no scope for afterthought. In the exercise of adjudication, it is only the agreement which spells out the minds of the parties. If there is consensus ad idem or meeting of minds, the adjudication has to take place within the contours of such consensus ad idem until the contrary is pleaded or proved. Having inked the agreement with the consensus ad idem and thereafter seeking to challenge the same on extraneous grounds outside the purview of the Clauses in the agreement, cannot be permitted. The onus is on the party who seeks to take a different position from the executed contract to prove that there was no consensus ad idem and recourse to any other default on the part of the other side, which is not germane to the contract is impermissible. Though I agree in principle that there is no delay in commissioning of 400 KV SS, even assuming that there is a delay still, the same cannot frustrate the consensus-ad-idem reflected in the agreements in regard to acceptance of conditions of tariff either explicitly or implicitly. I cannot transgress the limits of adjudicating mechanism and provide equitable relief on financial consideration when the agreements have the element of consensus-ad-idem. The other issue connected to this issue is whether the decision of APTEL rendered in AP No.131 of 2015 in Taxus Infrastructures Vs.

GERC and AP No. 229 of 2018 M. Shafivahana Green Energy Ltd. Vs MPERC are applicable to the case on hand as contended by the petitioner.

I have gone through the aforesaid judgement relied upon by the petitioner. In regard to APTEL No. 131 of 2015 I have to observe that it is a case where the developer produced the CEIG certificate as a proof of commissioning and there was delay on the part of the licensee in creating evacuation facilities. I do not find anything such attendant conditions attached to the CEIG's certificate in the said case as we see in the present case. Further, it is on record that in the present case the CEIG certificate is only for temporary connectivity with conditions attached to the same such as obtaining Govt. approval for road crossing. I find that the CEIG certificate in the present case is not similar to the one referred to in the judgement of the Tribunal. It is also to be noted that there was no reference to any undertaking given by the generator waiving to claim deemed generation or any other benefits in the said case unlike the case on hand. I do not find any reference in the said judgement to the developer having executed an agreement with full knowledge of the likelihood of delay in commissioning such as the present case. It is true that CEIG certificate was considered by the Tribunal in the said case for deciding the readiness as the part of the generator to inject energy. But here the facts of the case is entirely different. The generator had knowledge of the likely time to be taken for commissioning of 400 SS KV by TANTRANSCO. Hence, no parallel can be drawn between these cases and any mechanical application of the said ratio to the present would result in miscarriage of justice. I will be committing a serious error if I do so.

As regards the other decision relied upon by the petitioner, namely, AP 229 of 2018 it is to be noted that it was case where there was lack of diligence on both sides. The generator failed to commission the project in time. So also the licensee which, except for stating that the tariff applicable to a generator is dependent on the date of commissioning, did not prove that it was in diligent in fulfilling its part of obligation in commissioning. The State Commission invoked its inherent power to balance the interest of both sides and allowed fixed charges. The said case, is not applicable to the present case for the reason that I do not find any lack of diligence on the part of the licensee at any stage. Here, the genuine difficulties in commissioning were expressed and made known to the generator. It was reduced to writing to the effect that time will be required to commission the 400 KV SS and so deemed generation or any other benefit cannot be claimed. In such circumstances, I find that the ratio relied upon by the petitioner cannot be made applicable to the instant case. The fact that the undertaking was given itself an indication that the delay experienced in commissioning of 400 KV SS was due to practical constraints and petitioner too has understood the same in the right perspective in the initial stage. Whileso, I cannot agree to the proposition advanced by the petitioner at this stage that the time taken for commissioning the plant be treated as delay in the part of the Respondent for entitlement of higher tariff.

12.18 Issue No.10:

In view of the foregoing discussion, I am of the well considered view that no relief can be given to the petitioner and the decision of the respondent to consider

the date of commissioning of the petitioner's plant in the next control period is upheld.

I find no reason to allow the petition accordingly the petition is dismissed.

**Sd/-XXXX
(M.Chandrasekar)
Chairman**

13.0 Orders of the Commission:

As there is a equality of votes between the Chairman and Member (Legal), I hereby exercise my casting vote under sub-section (3) of section 92 of the Electricity Act, 2003 (Central Act 36 of 2003). Accordingly, the findings of the Chairman shall be the orders of the Commission.

In the result, the M.P.No.25 of 2020 and M.P.No.26 of 2020 are dismissed.

**Sd/-XXXX
(M.Chandrasekar)
Chairman**

//True Copy//

**Secretary
Tamil Nadu Electricity
Regulatory Commission**