IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 135 of 2021

Date: 07.02.2025

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

IN THE MATTER OF:

M/s. G. R. Enterprises,
Village Bhogpur,
Simbalwala, Tehsil Nahan,
District Sirmour,
Himachal Pradesh – 173030. **…Appellant**

Vs.

1) Himachal Pradesh Electricity Regulatory Commission,
Through its Secretary,
Vidyut Aayog Bhawan,
Block No. 37, SDA Complex,
Kasumpti, Shimla,
Himachal Pradesh – 171009.

2) Himachal Pradesh State Electricity Board Ltd.
Through its Executive Director (Personnel),
Kumar House, Shimla,
Himachal Pradesh – 171004.

3) The Chief Engineer (Comm),
HPSEBL, Vidyut Bhawan,
Shimla, Himachal Pradesh – 171004. **…Respondent(s)**

Counsel for the Appellant(s) : Mr. Neeraj Kumar Jain, Sr. Adv.
Mr. Aniket Jain
Mr. R. L. Verma
Mr. Shivam Sharma

Counsel for the Respondent(s) : Mr. Pradeep Misra
Mr. Manoj Kumar Sharma for R-1

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Amal Nair
Mr. Jai Dhanani
Mr. Harsha Manav
Ms. Sugandh Khanna for R-2 & 3

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. M/s G. R. Enterprises has filed this Appeal challenging the order dated 15.12.2020 (in short "Impugned Order") passed by the Himachal Pradesh Electricity Regulatory Commission (in short "HPERC" or "Commission") passed in Petition Nos. 7 and 146 of 2020 whereby the State Commission has dismissed the petition of the Appellant.

Description of the Parties

2. The Appellant, M/s G.R Enterprises is a partnership firm that has set up a solar PV Project of 1 MW Capacity Village Bhogpur, Simbalwala, Tehsil Nahan, District Sirmour, Himachal Pradesh.

3. Respondent No. 1, the Himachal Pradesh Electricity Regulatory Commission, is the regulatory body for the state of Himachal Pradesh.

4. Respondent No. 2 is the HP State Electricity Board Ltd. (in short "HPSEBL") and is responsible for the supply of uninterrupted & quality power to all consumers in Himachal Pradesh.

Factual Matrix of the Case

5. The Appellant entered into a Power Purchase Agreement (in short "PPA") with the HPSEBL for its Solar PV project on 31.03.2017.

6. The dispute arises out of the violation of Article 6.2 and other clauses for not making payment @ Rs. 5.31/kWh to the Appellant by the HPSEBL, condition precedent for making payment @ Rs. 5.31/KWH is that the project should be synchronized on or before 31.03.2018, the Appellant's project synchronized on 30.03.2018, and the pre-commissioning test was performed on 29.03.2018 (Letter NO. PDS/GR Enterprises/2017-18/ 998-1004) by the various teams of HPSEBL.

7. The Chief Electrical Inspector, HP Govt., granted tentative approval vide letter No. (HIMVIN/GRE/Kalaamb/2018/0099-1003) on 26.03.2018 and also final approval to energize the 1MW solar PV Power Plant along with other equipment on 30.03.2018. After asserting all the operational aspects of the Appellant's 1MW Solar PV Project, it was found ready for synchronization with the HPSEBL Grid.

8. The Net Saleable Energy bill of 31.03.2018 based on joint measurement reading duly certified by HPSEBL was also paid but at a lower rate of Rs. 4.37/KWH instead of Rs. 5.31/KWH. Appellant prayed for the payment of bills @ 5.31/KWH instead of Rs. 4.37/KWH and served Respondents with statutory notice as required under clause 13 of PPA for 'Good Faith Negotiation', both parties tried to resolve the dispute regarding the commissioning and synchronizing of the project on or before 31.03.2018 and concluded without any conclusion.

9. HPSEBL issued a Net Saleable Energy bill for March 2018 at Rs.5.31/kWh. The bill for March 18 was paid at Rs. 4.37/kWh as per the rate determined by the Commission for projects commissioned after 31.03.2018, and the same rate is still being paid today.

10. Thereafter the Appellant submitted an application to the HPSEBL stating that an independent arbitrator has to be appointed in terms of clause 13 of the PPA read with provisions of the Arbitration and Conciliation Act, 1996 to resolve the dispute invoking clause 13 (Good Faith Negotiation) between the Appellant and HPSEBL failing which the Appellant will have to approach the competent court of law for the appointment of arbitrator. The Appellant reminded HPSEBL of the appointment of an arbitrator but no arbitrator was appointed.

11. Against the inaction on the part of the Respondent Board, the Appellant preferred a petition before the State Commission for the appointment of an independent arbitrator under Section 86(1)(f) and Section 158 of the Electricity Act,2003 and as per Article 13.2 of PPA numbered as Petition No. 7 of 2020.

12. The HPERC vide its order dated 30.07.2020 directed the Appellant to modify the petition containing the specific details of the facts and events about achieving synchronization and any delay that occurred on the part of the concerned agencies and the Respondent. On the direction of the Commission, the Appellant had filed an application on 19.08.2020 for amendment in the petition with specific details of achieving synchronization on 30.03.2018, which was taken on record by Respondent No.1 on 17.10.2020 and numbered as Petition No. 146 of 2020. Reply to amended petition was filed by Respondent No. 2 on 12.10.2020 on which stand was taken that Commercial Operation Date (COD) will decide the tariff.

13. The Appellant filed the rejoinder to the reply of the Respondent with the averments that the plea being raised by the Respondents is inconsistent, confusing, and misleading the Commission which may also be noticed from the fact that whereas HPSEBL Letter No. HPSEB/CE(SO)/PSP/Energy Solar Bill/2018-19/1798-1801 dated 19.07.2018 mentions that the Commercial Operation Date of the project has no role in deciding the applicability of Tariff, the stand now sought to be taken is that tariff is determined by the COD being on 25.04.2018, i.e. after 31.03.2018. The point raised by the Appellant with regard to Nanda Solar PV Project (5MWp) of M/S K.K. Kashyap which was synchronized with the grid on 19.03.2018 and its COD was 14.04.2018, after 31.03.2018, but the Nanda Solar PV Project (5MWp) is being paid the tariff @ Rs. 5.25/KWH (above 1 to 5 MW category), which is denied to the Appellant whose case is similar in nature.

14. However, on 28.10.2020 whereby Respondent No. 2 filed a sur-rejoinder to the rejoinder filed by the Appellant without any previous order of the HP State Commission, converted its stand from Commercial Operation Date to Commissioning test, and replied that now commissioning test will decide the tariff. The Appellant objected on the ground that HPERC has no power to allow the same plea taken by the HPSEBL in surrejoinder but the Commission allowed the sur-rejoinder and reserved its orders.

15. On 15.12.2020 petition Nos. 7 and 146 of 2020 were dismissed by the State Commission and it came to the conclusion that the Appellant is not entitled to tariff @ Rs. 5.31 and declined to accept the contention raised by the Appellant that the date of synchronization of the project should be taken as the date of the commissioning of the project.

16. Aggrieved by the above-referred order of the State Commission passed in Petition Nos. 7 and 146 of 2020 on 15.12.2020, the Appellant has preferred the present Appeal.

Submissions of the Appellant

17. The Appellant submitted that the core issue is whether the Appellant is entitled to the tariff of ₹5.31/kWh under Clause 6.2 of the PPA. As per Clause 6.2(b)(i), the Appellant qualifies for this tariff only if the entire project capacity is commissioned on or before 31.03.2018, failing which a lower tariff applies.

18. The Appellant claimed that the Commissioning Date when the project was fully commissioned and synchronized with the HPSEBL grid is 30.03.2018, with no commissioning tests conducted thereafter.

19. Further, in accordance with the Testing Compliance, all commissioning tests were completed by 30.03.2018, as acknowledged in the Respondents' official documents, the Appellant asserted that, in solar power projects, no post-synchronization commissioning tests are required, unlike hydro or thermal power projects. This position is consistent with SECI guidelines and industry practice, even if the PPA (adapted from HPSEBL's hydropower model) suggests otherwise.

20. From 30.03.2018, the project started supplying energy to the grid, and invoices were raised accordingly, with no further commissioning-related activities required or undertaken.

21. The Appellant argued that **t**he Respondents have failed to specify any commissioning tests conducted after 30.03.2018, supporting the Appellant's contention that no such tests were required or performed.

22. The Appellant submitted that the project met all technical and procedural conditions for timely commissioning under Clause 6.2, thereby justifying its claim for the higher tariff of ₹5.31/kWh.

23. In the context of solar power plants, no "commissioning tests" are required after synchronization and the commencement of energy flow into the grid. Clause 2.2.16 of the PPA defines "Commissioning Tests" as tests prescribed under relevant standards. However, no national or state standards, including those of Himachal Pradesh or the Respondents, mandate any post-synchronization commissioning tests for solar power projects. As per the commissioning procedure of the Solar Energy Corporation of India (SECI), a solar PV project is deemed commissioned once:

- All equipment as per the rated capacity is installed, and
- Energy starts flowing into the grid.

24. This industry-standard approach was followed in the present case, where all necessary tests were completed before synchronization on 30.03.2018, and energy flow into the grid began on the same date. The procedure prescribed under the PPA, which appears to have been adapted from hydro/thermal power protocols, does not apply to solar power projects. Hence, the Appellant has met all requirements for commissioning in accordance with both industry norms and practical operational standards.

25. HPSEBL's letters dated 26.03.2018, 29.03.2018, and 30.03.2018 all indicate that relevant tests were performed before synchronization and energization. Specifically, the content of the Letter dated 26.03.2018 is clear – it has subject *"Pre commissioning and testing of 1MW"* and states *"It is intimated that the pre commissioning protection testing of 1 MW. Solar power plant and inter-connection point has been carried out by the testing team of this office on dated 29.03.2018 and all installed equipments checked."*

26. The Minutes of Meeting dated 06.06.2018 explicitly identify the tests conducted as "commissioning tests" necessary for the declaration of the Project's Commercial Operation Date (COD). This classification is supported by specific references within the minutes. The document serves as a formal acknowledgment of the tests' completion, marking a key milestone toward the project's operational readiness. The relevant portion of these minutes is as follows:

> *"The team of SE (Designs), Power House, Electrical, HPSEBL, Sundernagar* ***also conducted the Commissioning test*** *for testing capacity and performance report of the Solar Plant & actual process of Synchronization of the solar plant with grid in presence of members of Electrical Division, Nahan, HPSEBL as per PPA* ***on 30.03.2018*** *and* ***scrutinized the 12 days w.e.f 30-03-2018 to 10-04-2018 & 15 days w.e.f 10-04-2018 to 24-04-2018 trial run to ensure the reliability and stability of the grid as per relevant PPA.****"*
>
> *(Emphasis supplied)*

27. The Minutes of Meeting dated 06.06.2018 confirms that Respondents 1 and 3, along with officials from the Directorate of Energy and Himurja, were

aware that commissioning tests were completed before 30.03.2018. Despite this, the activities conducted from 30.03.2018 to 10.04.2018 (alleged commissioning tests) and from 10.04.2018 to 24.04.2018 (stability and reliability review) were identical, described as "trial run to ensure the reliability and stability of the grid." As per Clause 4.3 of the PPA, this trial run is relevant only for determining the COD. However, for entitlement to tariff, the relevant provision is Clause 6.2 of the PPA, which does not depend on the COD. Thus, reliance on the 10.04.2018 readings as a milestone to deny the tariff entitlement appears arbitrary and legally untenable.

28. The Minutes of the Meeting on 30.03.2018 (synchronization of the project) confirm that all testing, including commissioning, was already completed by this date. The use of terms like "commissioned" and "commissioning" in the minutes reflects a shared understanding among the parties regarding the completion of commissioning tests as of 30.03.2018. The recognition of 30.03.2018 as the date by which commissioning was completed challenges the Respondents' claim that commissioning tests were ongoing until 10.04.2018. The clear evidence of earlier completion strengthens the Appellant's position regarding the timeline for tariff entitlement under Clause 6.2 of the PPA.

29. The document notes that various officials visited the project on 29.03.2018 and 30.03.2018 (when the project was synchronised), and relevant extracts from this document are as follows:

> "***Following were present during the synchronization and commissioning of Solar Power Plant 1 MWp.***
> *"The detailed documents and test reports of the various equipments installed at project site such as 0.380/33 KV*

> *transformer, DC/AC invertor, Control panels etc. were reviewed, verified and found in order.*
>
> ***"After ascertaining all operational aspects of the 1 MWp Solar power project of M/s G R Enterprises, it was found ready for synchronization with HPSEBL grid. ..."***
>
> *(Emphasis supplied)*

30. Thus, all tests were acknowledged to have been performed before synchronisation, and no tests were performed after the supply of energy to the grid began.

31. A review of the document referred to as the "commissioning test" dated 10.04.2018 reveals that it merely contains a tabulation of certain readings recorded on that date. These readings, which are routinely transmitted to HPSEBL via email on a daily basis and are generally accessible to HPSEBL through remote means, do not necessitate any form of testing. The nature and purpose of this tabulation are further clarified by the 'Certificate of the Independent Engineer' dated 10.04.2018, which was issued following the recording of the said readings. The certificate confirms that the process was part of the broader reliability and stability monitoring, rather than a formal commissioning test. The Certificate states that:

> *"It is certified that the Capacity and Performance Tests of GR Enterprises PV Solar Power Plant (1MW), Distt. Sirmaur, HP were carried out on dated 10th April, 2018 … The plant has been synchronised with HPSEBL's Grid and checked for its capacity and performance and found generally in order.*

> *"The G R Enterprises PV Solar Power Plant (1MW) is therefore hereby declared to be ready for Commercial Operation."*

32. The Certificate dated 10.04.2018 establishes that only a performance review of the Project was conducted on that date, with no commissioning tests being carried out. It further records that the Project was "declared to be ready for Commercial Operation," a status that, as per Clause 4.2.2 of the Power Purchase Agreement (PPA), can only be attained following a successful trial run. This evidences that the data collected on 10.04.2018 was intended to assess the reliability and stability of the Project. It follows that the so-called "commissioning tests" on this date were, in essence, indistinguishable from the trial run mandated under the PPA.

33. The Respondents' claim that the period from 30.03.2018 to 10.04.2018 was for commissioning tests, and the period from 10.04.2018 to 25.04.2018 was for reliability and stability review, is untenable. Unless the Respondents can specifically demonstrate what distinct tests were conducted on 10.04.2018 and how they differed from the monitoring required to establish reliability and stability under Clause 4.2.2 of the PPA, their stance cannot be sustained. Notably, no further review of the Project's reliability and stability was conducted after 10.04.2018, reinforcing the conclusion that the tabulation of readings on that date was, in fact, part of the stability and reliability review.

34. Furthermore, the principles laid down by the Hon'ble Supreme Court in All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487, support this position. The Court drew a clear distinction between the stages of synchronization and commissioning, with specific testing required post-synchronization before power supply could commence. In the present case, no

such testing was required or conducted after 30.03.2018, the date on which electricity supply and billing began. Hence, 30.03.2018 must be regarded as the commissioning date.

35. The established position, as per the Solar Energy Corporation of India (SECI), is that a solar power plant is deemed "commissioned" when all equipment corresponding to the rated project capacity is installed and energy has flowed into the grid. This definition has been consistently adopted in Request for Selection/Proposal (RFS/RFP) documents for solar power projects across multiple states, including Rajasthan, Tamil Nadu, Andhra Pradesh, Karnataka, Maharashtra, Haryana, Assam, and Mizoram. It is also reflected in the guidelines issued by the Ministry of New and Renewable Energy (MNRE), Government of India. To the Appellant's knowledge, no state-level agreements or regulations diverge from this understanding of "commissioning" for solar power projects.

36. Reference may also be made to CERC's 'Procedure for Registration of Renewable Energy Generation Project' under the 'Central Electricity Regulatory Commission (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010' which also considers "Commissioning Certificate" and "Synchronization Certificate" as interchangeable, requiring:

> *"The application for registration shall contain the following information as submitted for Accreditation of the RE Generation project or Distribution Licensee, as the case may be : (i) Owner details (ii) RE Generating Station details, (iii) certificate of accreditation by the State Agency, (iv) Commissioning/ Synchronization Certificate or*

commissioning schedule, as applicable (v) Declaration as per Section F, (vi) any other relevant information as per the enclosed format …"

THE WORD 'COMMISSIONED' IN CLAUSE 6.2 MEANS A STATE WHERE PROJECTS BEGIN TO SUPPLY ENERGY

37. The Appellant further argued that the Respondent's interpretation of the word 'commissioned', as being the date on which "commissioning tests" are complete, is incorrect. The word 'commissioned' has been used to simply describe a project that has begun supplying energy to the grid.

38. The Respondents' contention proceeds on the basis that the word "commissioned" in Clause 6.2(b)(i) has been drafted and inserted into the PPA with reference to other provisions of the PPA. However, this is erroneous.

PPA DID NOT LINK CUT-OFF DATE TO ANY OF THE NUMEROUS DEFINED TERMS AND MILESTONES, BUT TO THE WORD "COMMISSIONED", WHICH WAS NOT DEFINED

39. Clause 6.2(b)(i) of the PPA refers to the term "commissioned," which is not defined within the PPA, nor linked to any specific technical milestones like "completion of commissioning tests" or "Commercial Operation Date" (COD). Had the parties intended to tie the cut-off date to such defined milestones, the PPA would have explicitly referenced these terms. Instead, the undefined terms "commissioning" and "commissioned" were deliberately used. This language originates from the Himachal Pradesh Electricity Regulatory Commission's (HPERC) order dated 06.07.2016, which drew from the Central Electricity Regulatory Commission's (CERC) Renewable Energy Tariff Regulations, 2012.

40. Notably, HPSEBL's Model PPA for Small Hydro Projects did not use the term "commissioned" in its tariff clause, nor did it differentiate tariffs based on the commissioning date. Therefore, the terms "commissioned" and "commissioning" in Clause 6.2(b)(i) are not linked to other technical milestones defined in the PPA. Consequently, these terms must be interpreted independently, taking into account the regulatory context and intent behind their incorporation.

"COMMISSIONED" INTERPRETED ACCORDING TO THEIR ORDINARY COMMERCIAL AND COMMONLY UNDERSTOOD MEANING IN THE SOLAR POWER INDUSTRY

41. In the solar power industry, a project is generally regarded as "commissioned" once it begins supplying power to the grid. Applying this industry-standard definition, the Project in question was effectively commissioned on 30.03.2018, the date on which it commenced power supply to the grid. This interpretation aligns with the ordinary and widely accepted understanding of the terms "commissioned" and "commissioning" in the context of solar power projects.

PURPOSIVE INTERPRETATION OF THE WORD "COMMISSIONED"

42. The Appellant submitted that the Hon'ble Supreme Court of India in *DLF Universal Limited v. Director, Town and Country Planning Department, Haryana*, (2010) 14 SCC 1 explained how any contract must be interpreted which is as follows:

> *"13. It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises the joint intent of the parties. … It is not the intent of a single party; it is the joint intent of both the parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation."*

43. Thus**,** the word "commissioned" has to be interpreted in light of the purpose of the clause in which the word has been used. This intent behind providing different tariffs depending on the date of 'commissioning' was explained in HPERC's order dated 06.07.2016 relevant extract from which is as follows:

> *"In the proposal/draft order dated 29.04.2016, it was envisaged that the Commission shall determine the generic levellised tariffs for solar PV projects every year for the control period under RE Tariff Regulations, 2012 and the tariff so determined in respect the current financial year shall apply for the FY 2017-18 also in cases where PPA is signed by 31.03.2017 and the capacity covered by the PPA is commissioned on or before 31.03.2018. The Commission however observed that since there can be situations in which the PPA for a particular capacity is signed by 31.03.2017, but the capacity covered by the PPA may not be commissioned fully or partly on or before 31.03.2018, it may be appropriate to address the matter as a part of conditionalities attached with the tariff. The Commission felt*

> *that in case, the PPA rate (tariff) is allowed beyond 31.03.2018 for delay in the Commissioning of the project, it may amount to incentivizing the inefficiencies, keeping in view the fact that- the tariff of solar PV projects may witness a downward trend in next few years due to technological advancement. It was proposed that in case such a project is not commissioned by 31.03.2018, the developer shall be allowed the rate, determined for the year, preceding the year in which the commissioning of solar PV project takes place, or the tariff given in the PPA, whichever is lower."*

44. The purpose of introducing differential tariffs was to incentivize the timely commencement of power supply to the grid from solar power projects. This objective is achieved once energy begins flowing into the grid, which, in the present case, occurred on 30.03.2018. The purported "commissioning test" conducted on 10.04.2018, which was not a commissioning test in substance, did not serve this objective.

45. Therefore, interpreting "commissioned" in Clause 6.2(b)(i) as the date of completion of commissioning tests (which are not required for solar projects) would be illogical, baseless, and contrary to the intent of the provision. The term "commissioned" appears throughout the CERC Renewable Energy Tariff Regulations, 2012, including in Regulation 8, which was cited by the HPERC in its order dated 06.07.2016. This regulatory framework directly influenced the drafting of Clause 6.2(b)(i) of the PPA, further supporting the view that "commissioned" refers to the date power supply begins, not the completion of commissioning tests. Regulation no. 8 is as follows:

> *"(2) Notwithstanding anything contained in these regulations,*
>
> *a) the generic tariff determined for Solar PV projects based on the capital cost and other norms applicable for any year of the control period shall also apply for such projects during the next year; and*
>
> *b) the generic tariff determined for Solar thermal projects based on the capital cost and other norms for the any year of the control period shall also apply for such projects during the next two years,*
>
> *Provided that (i) the Power Purchase Agreements in respect of the Solar PV projects and Solar thermal projects as mentioned in this clause are signed on or before last day of the year for which generic tariff is determined and (ii) the entire capacity covered by the Power Purchase Agreements is commissioned on or before 31st March of the next year in respect of Solar PV projects and on or before 31st March of subsequent two years in respect of Solar thermal projects."*

46. The CERC Renewable Energy Tariff Regulations, 2012, provide no indication that the term "commissioned" refers to achieving a specific technical milestone distinct from the date on which the power supply begins. On the contrary, the context and usage of the term suggest that "commissioned" should be understood in its ordinary sense, as the date when the project begins operations and power starts flowing into the grid. Applying a purposive interpretation, the term "commissioning" in Clause 6.2(b)(i) must be construed in line with this understanding, ensuring it aligns with the regulatory intent and the objective of incentivizing the timely commencement of power supply.

INTERPRETING THE WORD "COMMISSIONED" BY REFERENCE TO OTHER PLACES WHERE THE SAME WORD HAS BEEN USED IN THE PPA.

47. The PPA itself indicates how the word "commissioned" is to be understood, by the context in which it is used elsewhere in the PPA. Reference may be made to Clause 4.4 of the PPA, which is as follows:

> "*4.4 Interim arrangement for evacuation of power:*
> *In case power cannot be evacuated from the Project at the Interconnection Point due to non-commissioning of the Project Line, non-availability of evacuation system beyond the Interconnection-Point or any other technical constraints, the Parties may mutually agree, to an interim arrangement, alongwith the terms and conditions thereof, for evacuation of power from the Project till such time the same can be evacuated under the regular arrangement envisaged in the Agreement. …"*

48. This clause uses the term "non-commissioning" to describe a situation where power cannot be evacuated. Thus, the term "commissioning" has directly been linked to the supply of power in this clause, which is how the words "commissioned" and "commissioning" are commonly understood.

UNDERSTANDING INTENT OF THE WORD "COMMISSIONED" FROM 'COMPLETION SCHEDULE' OF THE PROJECT IN THE PPA

49. The Appellant submitted that the construction schedule annexed as Schedule-I to the PPA indicates that the final activity for completing the 1 MW

solar power plant is the "Construction of 33 KV Bay at Sub Station Commissioning," scheduled for February and March 2018.

50. Notably, HPSEBL is responsible for constructing the 33 KV line and bay under the PPA. If this activity was to be completed by March 2018, the Respondents' assertion that "commissioning tests" were to be conducted thereafter would make it practically impossible for the Appellant to achieve the commissioning date before 31.03.2018, thereby disqualifying it from the tariff rate of ₹5.31/kWh under Clause 6.2(a).

51. Such an interpretation is manifestly unreasonable and contrary to the purpose of the tariff provision. The logical conclusion, therefore, is that the terms "commissioned" and "commissioning" in Clause 6.2(b)(i) must be interpreted to mean the date on which the project begins supplying power to the grid. In the present case, this occurred before 31.03.2018, entitling the Appellant to the agreed tariff rate.

NO LEGAL BASIS TO ASSERT OR FIND THAT COMMISSIONING TESTS TOOK PLACE ON A PARTICULAR DATE, WHEN IN REALITY NO COMMISSIONING TESTS TOOK PLACE ON THAT DATE

52. The Appellant further argued that in the present case, both parties were aware that commissioning tests were to be conducted before synchronization and the commencement of energy supply, even though the PPA originally contemplated these tests being conducted afterward. Recognizing practical and operational necessities, the parties mutually adjusted their conduct and completed the commissioning tests before synchronization, with no commissioning tests conducted after the energy supply began. Nothing in the law prevents parties from practically implementing a contract in a manner that

deviates from its original terms, especially when strict adherence would be impractical or impossible.

53. The Respondents cannot now claim that an event that occurred earlier should be deemed to have occurred later, solely because the PPA originally envisaged it that way. Despite repeated assertions, the Respondents have failed to identify any specific commissioning tests (defined as “applicable tests as detailed in relevant standards”) that were conducted on 10.04.2018.

54. Their claim that commissioning tests occurred on this date rests solely on the PPA’s original timeline, which is contrary to the admitted facts. There is no legal principle that supports accepting such a baseless contention, especially when it is inconsistent with the actual sequence of events and the conduct of the parties.

Submissions of the Respondent No. 1, HPERC

55. Respondent No. 1 submitted that the PPA was executed between the Appellant and Respondent Nos. 2 and 3 after the approval from the Respondent No. 1 Commission. The relevant Clauses of PPA are as follows:

> *“2.2.10 "Commercial Operation of the Unit Project"*
> *means the state of a Unit/Project where it is capable of delivering Active Power and Reactive Power on a regular basis after having successfully met the requirements of the Commissioning Tests.*
>
> *2.2.11 "Commercial Operation Date (CoD) of Unit/Projects"*
> *means the date(s) on which unit(s) or the Project achieves the Commercial Operation.*

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

2.2.67 "Synchronization Date(s)/ Date of Synchronization" means with respect to each Unit, the date on which such Unit is synchronized and connected for the first time, to the Grid System.

6.1 SUPPLY OF POWER

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

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

6.2 Tariff for Net Saleable Energy

(a) The HPSEBL shall pay for the Net Salable Energy delivered and sold to it by the Company at the Interconnection Point at a fixed

rate of Rs. 5.31 per kWh as determined in the Commission's tariff Order dated 6th July, 2016.

(b) The rate of Rs. 5.31 per kWh as per Clause (a) above is firm and fixed and shall not be subject to any indexation, escalations, adjustment or review due to any reason whatsoever except for adjustment on the following line and the specific provisions under Section 8.8.

(i) The rate given above shall be applicable if the entire capacity of the project is commissioned on or before 31.03.2018 i.e. 31st March of the year immediately succeeding the financial year in which PPA is signed after approval of the Commission. However, if the commissioning of the project is delayed beyond 31.03.2018, the rate determined by the Commission for the category under which the total category of the project falls for the financial year(s) immediately preceding the respective financial year(s) in which the capacities are commissioned for the respective capacity(ies) or the rate of Rs. 5.31 per unit as above, whichever is lower, shall be applicable."

56. The Chief Electrical Inspector granted tentative approval to energize the Project's installation on 26.03.2018 and issued final approval on 30.03.2018, which was a mandatory precondition for synchronization with the grid under Article 4.1.2 of the PPA. According to the Minutes of Meeting (MoM), the Project was synchronized with the grid on 30.03.2018. On the same date, the Appellant was authorized to conduct commissioning tests and instructed to submit the tested capacity and performance report of the Solar Project to the

Superintending Engineer (Design), Power House Electrical, HPSEBL, Sundernagar, for further witnessing of the commissioning test of the 1 MWp Solar Power Plant. For synchronization the following provisions have been made in PPA:

> *"4.1 SYNCHRONIZATION*
>
> *4.1.1 The Company shall give the HPSEBL at-least sixty (60) days advance written notice of the date on which it intends to synchronize a Unit to the Grid system. In case the Company intends to synchronize a Unit earlier than the Scheduled Synchronization Date for the first Unit, such notice shall be given at least 180 days in advance. If power cannot be evacuated smoothly under the regular arrangement envisaged in the Agreement, the Parties may mutually agree to an interim arrangement as per the provisions of Section 4.4.*
>
> *4.1.2 Subject to section 4.1.1, the Company shall declare a unit to be ready for Synchronization with the Grid System when:-*
>
> *(i) it has been installed in accordance with the required technical specifications and Prudent Utility Practice;*
>
> *(ii) it meets all related conditions prescribed in applicable Indian Standard(s) / Code(s) then in effect and otherwise meets the provisions of the Electricity Act, 2003 and the Rules or Regulations framed thereunder, or any other requirements for Synchronization to the Grid System;*
>
> *(iii) it is capable of being operated safely and the Company has obtained the approval of the Chief Electrical Inspector of the Government for energisation; and*

(iv) the Company has entered into a separate agreement for execution, operation and maintenance of the Interconnection Facilities as per Section 3.3.

4.1.3 The Company shall notify the HPSEBL, as soon as the requirement of Section 4.1.2 have been met and the Unit is ready to be Synchronized to the Grid System in accordance with the Agreement.

4.1.4 The HPSEBL, and / or its authorized representative(s) shall inspect any Unit which the Company intends to synchronize to the Grid System within five (5) days after being notified in writing by the Company, pursuant to Section 4.1.3, to determine whether the requirements of Section 4.1.2 have been met. The Company shall provide the HPSEBL with such access to the Station as is reasonably required to make such determination.

4.1.5 If the HPSEBL is satisfied that the Unit is ready to be synchronized in accordance with Section 4.1.2 and 4.1.4 it shall within three days of the completion of the inspection of the Unit(s) notify the Company to that effect and provide the Company with all reasonable assistance in synchronizing the Unit and also for conducting Commissioning Tests."

57. For the commissioning of the project, the following provisions have been made in PPA:

"4.2 Commissioning Tests:

4.2.1 After a Unit has been successfully Synchronized with the Grid System, the Company shall further give at least seven (7) days notice by fax followed by registered mail to the HPSEBL of the exact date(s) on which Commissioning Test(s) will commence. The

HPSEBL shall designate its authorized representative to observe these test(s).

4.2.2 The Company shall conduct Commissioning Tests within fifteen (15) days from the Synchronization Date, in the presence of an Independent Engineer appointed by both the Parties and the authorized representative of HPSBEL. The Independent Engineer and the authorized representative of the HPSBEL shall submit a certificate of the Tested Capacity and necessary performance tests of the plant to the Chief Engineer (System Operation), HPSEBL Shimla, or to any other authority as may be designated by the HPSBEL. After successful completion of the Commissioning Tests, trial operation of the Unit(s) shall be carried out by the Company for a period of 15 days to establish the reliability and stability of the Generating Unit(s). The Company shall also furnish a copy of the Test results and the report regarding the trial operation to the HPSEBL."

58. The Superintending Engineer (Design), Power House, HPSEBL, Sundernagar, conducted commissioning tests on 10.04.2018 and recommended that the Commercial Operation Date (COD) be declared as 25.04.2018. This highlights a distinction between synchronization and commissioning, as commissioning can occur up to 15 days after synchronization, making it clear that the two events do not necessarily coincide.

59. The Appellant filed Petition No. 7 of 2020 before the Respondent No. 1 Commission, seeking adjudication of the dispute with Respondents No. 2 and 3. This petition was later modified by Petition No. 146 of 2020, and a hearing was conducted by the Commission. After deliberation, the Respondent No. 1

Commission issued an order on 15.12.2020, holding that since the Appellant's plant was not commissioned before 31.03.2018, the applicable tariff rate would be ₹4.37/kWh instead of the higher rate sought by the Appellant.

60. Further the Counsel submitted that Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Vs. Solar Semiconductor Power Company (India) Pvt. Ltd. & Anr. (2017) 16 SCC 498 has held as follows:

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

61. Therefore, it is contended that the Appellant has failed to demonstrate compliance with the requirements for synchronization and commissioning as prescribed under Clause 4 of the PPA. Since the Project was commissioned after the cut-off date of 31.03.2018, the Appellant is not entitled to the higher tariff rate of ₹5.31/kWh. Given these facts and circumstances, it is submitted that the present appeal is devoid of merit and is liable to be dismissed accordingly.

Submissions of the Respondent Nos. 2 and 3

62. Respondent Nos. 2 and 3 submitted that the State Commission rejected the Appellant's contention that the synchronization date of its 1 MW Solar PV Project should be treated as the commissioning date under the Power Purchase Agreement (PPA). The Appellant's sole argument is that the synchronization date and commissioning date under the PPA are synonymous. It is undisputed that the applicable tariff is determined based on the commissioning date i.e. Rs. 5.31/- per unit for commissioning before 31.03.2018, or the lower tariff applicable for subsequent financial years.

63. The prayers in the petition filed before the State Commission are as under:

PRAYERS IN ORIGINAL PETITION (PETITION NO. 07 OF 2020)

It is most respectfully prayed, that this Hon'ble Court shall most graciously be pleased-

(a) to appoint an independent Arbitrator/ Arbitrators to resolve the present dispute, in the interest of natural justice and fair play.

(b) Such other or further order as may be deemed just and proper may also be passed.

PRAYERS IN AMENDED PETITION (PETITION NO. 146 OF 2020)

It is most respectfully prayed, that this Hon'ble Court shall most graciously be pleased-

(a) To appoint an independent Arbitrator/ Arbitrators to resolve the present dispute, in the interest of natural justice and fair play.

(b) Such other or further order as may be deemed just and proper may also be passed.

64. The State Commission, in the impugned Order, noted that the Appellant failed to provide specific details regarding synchronization events or any delays attributable to the agencies. Further, argued that the Appellant cannot seek relief in appeal that was not sought in the original petition and, at most, can request for their petition to be allowed. It is contended that synchronization and commissioning are distinct processes. Synchronization is a technical step involving initial grid connection and testing of equipment, whereas commissioning occurs after comprehensive testing of the generating station and equipment to ensure readiness for electricity generation.

65. The difference between synchronization and commissioning is plainly and clearly provided in the PPA in Articles 4.1, 4.2, and 4.3 which read as under:

"4.1 SYNCHRONIZATION:

4.1.1 The Company shall give the HPSEBL at least sixty (60) days advance written notice of the date on which it intends to Synchronize a Unit to the Grid System. In case the Company intends to Synchronize a Unit earlier than the Scheduled Synchronization Date for the first Unit, such notice shall be given at least 180 days in advance. If power cannot be evacuated smoothly under the regular arrangement envisaged in the Agreement, the

Parties may mutually agree to an interim arrangement as per the provisions of Section 4.4.

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

(i) it has been installed in accordance with the required technical specifications and Prudent Utility Practices;

(ii) it meets all related conditions prescribed in applicable Indian Standard(s)/Code(s) then in effect and otherwise meets the provisions of the Electricity Act, 2003 and the Rules or Regulations framed there under, or any other requirements for Synchronization to the Grid System;

(iii) it is capable of being operated safely and the Company has obtained the approval of the Chief Electrical Inspector of the Government for energisation; and

(iv) the Company has entered into a separate agreement for execution, operation and maintenance of the Interconnection Facilities as per Section 3.3.

4.1.3 The Company shall notify the HPSEBL, as soon as the requirement of Section 4.1.2 have been met and the Unit is ready to be Synchronised to the Grid System in accordance with the Agreement.

4.1.4 The HPSEBL, and/or its authorised representative(s) shall inspect any Unit which the Company intends to Synchronize to the Grid System within five (5) days after being notified in writing by the Company, pursuant to Section 4.1.3, to determine whether the

requirements of Section 4.1.2 have been met. The Company shall provide the HPSEBL with such access to the Station as is reasonably required to make such determination.

4.1.5 If the HPSEBL is satisfied that the Unit is ready to be Synchronized in accordance with Section 4.1.2 and 4.1.4, it shall within three days of the completion of the inspection of the Unit(s) notify the Company to that effect and provide the Company with all reasonable assistance in Synchronizing the Unit and also for conducting Commissioning Test(s).

4.2 ***COMMISSIONING TESTS:***

4.2.1 After a Unit has been successfully Synchronized with the Grid System, the Company shall further give atleast seven (7) days notice by fax followed by registered mail to the HPSEBL of the exact date(s) on which Commissioning Test(s) will commence. The HPSEBL shall designate its authorized representative to observe these test(s).

4.2.2 The Company shall conduct Commissioning Tests within fifteen (15) days from the Synchronization Date, in the presence of an Independent Engineer appointed by both the Parties and the authorized representative of HPSEBL. The Independent Engineer and the authorized representative of the HPSEBL shall submit a certificate of the Tested Capacity and necessary performance tests of the plant to the Chief Engineer (System Operation), HPSEBL, Shimla or to any other authority as may be designated by the HPSEBL. After successful completion of the Commissioning Tests,

trial operation of the Unit(s) shall be carried out by the Company for a period of 15 days to establish the reliability and stability of the Generating Unit(s). The Company shall also furnish a copy of the Tests results and the report regarding trial operation to the HPSEBL.

4.3 ***COMMERCIAL OPERATION:***

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

4.3.2 In case the Company fails to achieve Commercial Operation of the Unit(s) within 180 days from the first Synchronization of the last Unit of the Project, the Company shall, to the satisfaction of the HPSEBL, take off such Unit from the Station bus bar till such time the defect is removed, failing which the HPSEBL shall be free to disconnect the Project Line(s) from its Grid System after giving an opportunity to the Company to explain its position."

66. Under the PPA, synchronization, commissioning, and commercial operation are distinct stages governed by Articles 4.1, 4.2, and 4.3, respectively. Article 4.1 addresses synchronization, requiring a 60-day advance notice before

connecting the generator to the grid. Post-synchronization, commissioning involves:

- A mandatory 7-day notice for commencement of commissioning tests (Article 4.2.1). Synchronization on 30.03.2018 legally precludes commissioning before 06.04.2018, placing the commissioning date in FY 2018-19.
- Conducting tests within 15 days of synchronization, supervised by an Independent Engineer, who issues a Certificate of tested capacity and performance (Article 4.2.2). Trial operations lasting 15 days to verify reliability and stability, following successful commissioning tests.
- Commercial operation, per Article 4.3, begins only after completing commissioning tests and trial operations.

67. Each stage serves a unique purpose, and equating synchronization with commissioning or commercial operation undermines the intent and structure of the PPA.

68. The Independent Engineer's Certificate under Article 4.2.2, dated 10.04.2018, confirms the completion of tests conducted from 30.03.2018 to 10.04.2018 for commissioning. Commercial operation, governed by Article 4.3.1, is declared only after completing trial operations, which follow the commissioning stage. The Appellant's claim that Articles 4.2 and 4.3 should be disregarded, equating synchronization with commercial operation, is incorrect and legally untenable. Such an interpretation seeks to alter the agreed terms of the PPA, which is impermissible. Reference in this regard may be made to the following decisions of the Hon'ble Supreme Court:

Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Private Limited and Anr. [(2017) 16 SCC 498]:

*"**64.** As pointed out earlier, the State Commission has determined tariff for solar power producers vide Order dated 29-1-2010 and tariff for next control period vide Order dated 27-1-2012 [Hiroco Renewable Energy (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., Petition No. 1126 of 2011, order dated 27-1-2012 (Comm)]. The Order dated 29-1-2010 is applicable for projects commissioned from 29-1-2010 to 28-1-2012 and the Order dated 27-1-2012 [Hiroco Renewable Energy (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., Petition No. 1126 of 2011, order dated 27-1-2012 (Comm)] is applicable for projects commissioned from 29-1-2012 to 31-3-2015. As pointed out earlier, the tariff is determined by the State Commission under Section 62. The choice of entering into contract/PPA based on such tariff is with the power producer and the distribution licensee. As rightly contended by the learned Senior Counsel for the appellant, the State Commission in exercise of its power under Section 62 of the Act, may conceivably redetermine the tariff, it cannot force either the generating company or the licensee to enter into a contract based on such tariff nor can it vary the terms of the contract invoking inherent jurisdiction.*

Sanctity of power purchase agreement

***65.** It is contended that Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees and the terms and conditions of the PPA cannot be set to*

be inviolable. Merely because in PPA, tariff rate as per Tariff Order, 2010 is incorporated that does not empower the Commission to vary the terms of the contract to the disadvantage of the consumers whose interest the Commission is bound to safeguard. Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the advantage of the generating company, Respondent 1 and disadvantage of the appellant. Terms of PPA are binding on both the parties equally.

***66**. In Gujarat Urja Vikas Nigam Ltd. v. EMCO Ltd. [Gujarat Urja Vikas Nigam Ltd. v. EMCO Ltd., (2016) 11 SCC 182 : (2016) 4 SCC (Civ) 624] , facts were similar and the question of law raised was whether by passing the terms and conditions of PPA, the respondent can assail the sanctity of PPA. This Court held that power producer cannot go against the terms of the PPA and that as per the terms of the PPA, in case, the first respondent is not able to commence the generation of electricity within the "control period" the first respondent will be entitled only for lower of the tariffs.*

***67.** The first respondent placed reliance upon Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd. [Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd., (2016) 8 SCC 743 : (2016) 4 SCC (Civ) 284] In the said case, this Court was faced with the substantial question of law viz. whether the tariff fixed under a PPA (power purchase agreement) is sacrosanct and inviolable and beyond review and correction by the State Electricity Regulatory Commission. In that case, Respondent 1 thereon, power producer had entered into a PPA with the appellant therein, distribution*

licensee for sale of electricity from the generating stations to the extent of the contracted quantity for a period of 35 years at Rs 3.29 per kWh subject to escalation of 3% per annum till date of commercial operation. However, later the power producer found that the place from where the power was to be evacuated was at a distance of 23 km as opposed to a distance of 4 km, envisaged in the concession agreement entered into between the respondent power producer and Narmada Water Resources Department (Respondent 2 therein). On this ground the respondent had sought revision of tariff by the State Electricity Commission. This Court held that Section 86(1)(b) of the Act empowers the State Commission to regulate price of sale and purchase of electricity between generating companies and distribution licensees through agreements for power, produced for distribution and supply and that the State Commission has power to redetermine the tariff rate when the tariff rate mentioned in the PPA between generating company and distribution licensee was fixed by the State Regulatory Commission in exercise of its statutory powers. Relevant portion of paras 17 and 18 of the judgment, read as under : (SCC pp. 756 & 758)

> *"17. As already noticed, Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply. As held by this Court in V.S. Rice & Oil Mills v. State of A.P. [V.S. Rice & Oil Mills v. State of A.P., AIR 1964 SC 1781] , K. Ramanathan v. State of T.N. [K. Ramanathan v. State of T.N., (1985) 2 SCC 116 : 1985 SCC*

(Cri) 162] and D.K. Trivedi & Sons v. State of Gujarat [D.K. Trivedi & Sons v. State of Gujarat, 1986 Supp SCC 20] the power of regulation is indeed of wide import.

***

18. All the above would suggest that in view of Section 86(1)(b) the Court must lean in favour of flexibility and not read inviolability in terms of PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review of the tariff. The facts of the present case, as elaborately noted at the threshold of the present opinion, would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1898. …"

In the facts and circumstances of that case and that the tariff rate of Rs 3.29 per kWh was subject to escalation and subject to periodic review. Evacuation was changed from a distance of 4 km to 23 km from its switchyard. On account of the same, Respondent 1 therein had incurred an additional cost of about Rs 10 crores which was not envisaged in the Concession Agreement. In such facts and changed circumstances, this Court thought it apposite to take a lenient view and allow the State Commission to redetermine the tariff rate.

68. *In exercise of its statutory power, under Section 62 of the Electricity Act, the Commission has fixed the tariff rate. The word "tariff" has not been defined in the Act. Tariff means a schedule of*

standard/prices or charges provided to the category or categories for procurement by the licensee from the generating company, wholesale or bulk or retail/various categories of consumers. After taking into consideration the factors in Sections 61(a) to (i), the State Commission determined the tariff rate for various categories including solar power PV project and the same is applied uniformly throughout the State. When the said tariff rate as determined by the Tariff Order, 2010 is incorporated in the PPA between the parties, it is a matter of contract between the parties. In my view, Respondent 1 is bound by the terms and conditions of PPA entered into between Respondent 1 and the appellant by mutual consent and that the State Commission was not right in exercising its inherent jurisdiction by extending the first control period beyond its due date and thereby substituting its view in the PPA, which is essentially a matter of contract between the parties."

Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Anr. [(2016) 11 SCC 182]

***"36.** Though the First Tariff Order employs the expression "benefit" in the context of the AD Scheme under Section 32 of the IT Act, the applicability of the provision to a power producer depends upon the choice of the power producer. Whether the availability of the AD Scheme is beneficial to the power producer or not in a given case depends on various factors the details of which we do not propose to examine. It is for the power producer to make an assessment whether the availing of the AD is beneficial or not will take a decision if the scheme under Section 32 of the IT Act should be availed or not.*

37. *But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the first respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.*

……

39*. Apart from that both Respondent 2 and the Appellate Tribunal failed to notice and the first respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of Para 5.2 of the PPA:*

> *"In case, commissioning of solar power project is delayed beyond 31-12-2011, Guvnl shall pay the tariff as determined by the Hon'ble GERC for solar projects effective on the date of commissioning of solar power project or abovementioned tariff, whichever is lower."*

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first respondent not being able to commence the generation of electricity within the "control period" stipulated in the First Tariff Order. It also visualised that for the subsequent control period, the tariffs payable to a Projects/power producers (similarly situated as the first respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that

in such a situation, the first respondent would be entitled only for lower of the two tariffs. Unfortunately, the said stipulation is totally overlooked by the second respondent and the Appellate Tribunal. There is no whisper about the said stipulation in either of the orders."

Gujarat Urja Vikas Nigam Limited and Ors. v. Renew Wind Energy (Rajkot) Private Limited and Ors. [(2023) SCC OnLine SC 411]

"50. *In Emco Ltd. (supra), the parties had entered into a PPA on 09.12.2010 for the sale and purchase of solar power. The PPA was modified on 07.05.2011 in view of certain difficulties in the location of the unit. When the PPA was entered into, the tariff order was applicable. The PPA was thus entered into during the control period of the first tariff order. The second tariff order came into force on 27.01.2012. It granted certain concessions to purchase and availing of the benefit of accelerated depreciation under the income tax and did not grant such benefits to purchasers and tariff payable to power purchasers which did not avail of the benefit of accelerated depreciation. The respondent Emco had not availed accelerated depreciation. Despite that, it approached the Gujarat State Commission, seeking a determination of the tariff afresh, contending that the position had changed. This court noticed that the power purchaser had contended that notwithstanding that it entered into a PPA during the control period, it was not obliged to sell power to the distributor for a price specified in the PPA and was legally entitled to seek fixation of separate tariff. The Court rejected the contention after noticing the arguments. The relevant extracts of the judgment (In Emco Ltd.) are as below:*

"11. The case of the first respondent is that notwithstanding the fact that it entered into a PPA during the "control period" specified in the First Tariff Order, it is not obliged to sell power to the appellant for the price specified in Article 5.2 of the PPA and is legally entitled to seek (from the second respondent) fixation of a separate tariff. It is the further case of the first respondent that under the PPA, the appellant is under an obligation to procure the power from the first respondent for a period of 25 years if the first respondent commences the generation of power within the "control period" and is also obliged to pay for the power procured by it at the rates specified in Article 5.2 of the PPA. But the obligation of the first respondent to sell power generated by it to the appellant at the rates specified in Article 5.2 of the PPA comes into existence only on the happening of the two contingencies i.e. the first respondent (i) commencing the generation of power within the "control period" stipulated under the First Tariff Order; and (ii) choosing to avail the "benefit of accelerated depreciation" under the Income Tax Act. According to the first respondent, the stipulation under the First Tariff Order that the tariff fixed there under is not applicable to those Projects which "do not get such benefit, the Commission would on a petition in that respect determine a separate tariff taking into account all the relevant facts from not" would only imply that tariff fixed under the First Tariff Order is not applicable to those Projects/power producers which do not avail the "benefit of accelerated depreciation" under the Income Tax Act.

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13. We have already noticed that the first respondent did not commence generation of power within the "control period" stipulated under the First Tariff Order and also did not avail the "benefit of the accelerated depreciation" under the Income Tax Act. It is admitted on all hands that the "benefit of accelerated depreciation" mentioned in the First Tariff Order and the PPA is the stipulation contained in Section 32(1)(i) of the Income Tax Act read with Rule 5(1-A) of the Income Tax Rules. They provide for the method and manner in which depreciation of the assets of an assessee is to be calculated.

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26. Apart from that, the conclusion of the Tribunal in the instant case is wrong. First of all the PPA does not give any option to the respondent to opt out of the terms of the PPA. It only visualises a possibility of the producer not commissioning its Project within the "control period" stipulated under the First Tariff Order and provides that in such an eventuality what should be the tariff applicable to the sale of power by the first respondent. Secondly, the PPA does not "entitle" the first respondent to the "tariff as determined by the" second respondent by the Second Tariff Order. On the other hand, the PPA clearly stipulates that in such an eventuality:

"Above tariff shall apply for solar projects commissioned on or before 31-12-2011. In case, commissioning of solar power project is delayed beyond 31-12-2011, GUVNL shall pay the

tariff as determined by the Hon'ble GERC for solar projects effective on the date of commissioning of solar power project or abovementioned tariff, whichever is lower."

***51**. In Transmission Corporation of Andhra Pradesh Ltd. (Supra), the state commission had, by an order dated 20.06.2001 directed generators of non-conventional energy to supply power exclusively to the A.P. Transmission Corporation. Energy developers were not permitted to sell power to third parties. The Commission also approved the rate prevailing earlier for supply @ Rs. 2.25/- per unit with a 5% escalation per annum from 1994-1995 being the base year. The parties entered into PPA after the passing of the Regulatory Commission's order. The PPA embodied or reflected the tariff @ Rs. 2.25/- per unit with escalation @ 5% per annum having 1994 as the base year to be revised annually upto 2003-2004. After that, the purchase price was to be decided by the state commission. The stipulation also provided that further review of the purchase price on the completion of 10 years from the commissioning of the project would be made.*

***52.** The A.P. Transmission Corporation's functions devolved upon discoms by operation of law. In this background, the state commission exercised suo motu powers to revise non-conventional energy purchase tariffs. The APTEL rejected the appeal of the A.P. Transmission Corporation. This court held that once agreements were signed and were enforceable in law, such enforceable obligations could not be frustrated. The court also negatived the arguments on behalf of the power generator that they had been*

subjected to coercion or duress. The observations of this court in this regard are pertinent in this regard and are extracted below:

> *"39. [..] In the present case the order dated 20-6-2001 was fully accepted by the parties without any reservation. After the lapse of more than reasonable time of their own accord they voluntarily signed the PPA which contained a specific stipulation prohibiting sale of generated power by them to third parties. The agreement also had a renewal clause empowering TRANSCO/APTRANSCO/Board to revise the tariff. Thus, the documents executed by these parties and their conduct of acting upon such agreements over a long period, in our view, bind them to the rights and obligations stated in the contract. The parties can hardly deny the facts as they existed at the relevant time, just because it may not be convenient now to adhere to those terms. Conditions of a contract cannot be altered/avoided on presumptions or assumptions or the parties having a second thought that a term of contract may not be beneficial to them at a subsequent stage. They would have to abide by the existing facts, correctness of which, they can hardly deny. Such conduct, would be hit by allegans contraria non est audiendus."*
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> ---
>
> *42. Now, we will proceed to examine the merits or otherwise of the findings recorded by the Tribunal that the PPAs executed by the parties were result of some duress and thus, it will not vest the authorities with the power to review the tariff*

and other granted incentives. PPAs were executed prior and subsequent to the issuance of the order dated 20-6-2001. Different persons executed the contracts at different times in full awareness of the terms and conditions of such PPAS. To frustrate a contract on the ground of duress or coercion, there have to be definite pleadings which have to be substantiated normally by leading cogent and proper evidence. However, in the case where summary procedure is adopted like the present one, at least some documentary evidence or affidavit ought to have been filed raising this plea of duress specifically.

43. [..] From the record before us, nothing was brought to our notice to state the plea of duress and to prove the alleged facts which constituted duress, so as to vitiate and/or even partially reduce the effect of the PPAs. On the one hand, the Tribunal appears to have doubted the binding nature of the contracts stating that they contained unilateral conditions introduced by virtue of order and approval of the Regulatory Commission, while on the other hand, in para 53 of the order, it proceeded on the presumption that PPAS are final and binding and still drew the conclusion that the Regulatory Commission could not revise the tariff. Even in the order, no facts have been pointed out which, in the opinion of the Tribunal, constituted duress within the meaning of the Contract Act so as to render the contract voidable."

53. *In Gujarat Urja v. Solar Power Company India Pvt. Ltd. (hereafter "Solar Power Company India Pvt. Ltd."), the issue involved was whether the State Commission could extend the*

control period. One of the arguments made was that having regard to the terms of the PPA, the exercise of such power to extend the control period was not available under the statute. The Court (per Kurian Joseph, J) referred to Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd. wherein it was held that:

> *"10. While Section 61 of the Act lays down the principles for determination of tariff, Section 62 of the Act deals with different kinds of tariffs/charges to be fixed. Section 64 enumerates the manner in which determination of tariff is required to be made by the Commission. On the other hand, Section 86 which deals with the functions of the Commission reiterates determination of tariff to be one of the primary functions of the Commission which determination includes, as noticed above, a regulatory power with regard to purchase and procurement of electricity from generating companies by entering into PPA(s). The power of tariff determination/fixation undoubtedly is statutory and that has been the view of this Court expressed in paras 36 and 64 of A.P. TRANSCO v. Sai Renewable Power (P) Ltd. This, of course, is subject to determination of price of power in open access (Section 42) or in the case of open bidding (Section 63). In the present case, admittedly, the tariff incorporated in PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers. In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. Rather,*

it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved.

***54**. This Court in Solar Power Company India Pvt. Ltd. (Supra) further observed that:*

"35. This Court should be specially careful in dealing with matters of exercise of inherent powers when the interest of consumers is at stake. The interest of consumers, as an objective, can be clearly ascertained from the Act. The Preamble of the Act mentions "protecting interest of consumers" andSection61 (d) requires that the interests of the consumers are to be safeguarded when the appropriate Commission specifies the terms and conditions for determination of tariff. Under Section 64 read with Section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public. Hence, the generic tariff once determined under the statute with notice to the public can be amended only by following the same procedure. Therefore, the approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers.

36. Regulation 85 provides for extension of time. It may be seen that the same is available only in two specified situations - (i) for extension of time prescribed by the Regulations, and (ii) extension of time prescribed by the Commission in its order for doing any act. 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. Respondent 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.

37. The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act."

55. *The concurring view expressed by Banumathi J, crucially held that:*

"Sanctity of power purchase agreement

22. It is contended that Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees and the terms and conditions of the PPA cannot be set to be inviolable. Merely because in PPA, tariff rate as per Tariff Order, 2010 is incorporated that does not

empower the Commission to vary the terms of the contract to the disadvantage of the consumers whose interest the Commission is bound to safeguard. Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the advantage of the generating company, Respondent 1 and disadvantage of the appellant. Terms of PPA are binding on both the parties equally.

66. In Gujarat Urja Vikas Nigam Ltd. v. EMCO Ltd., facts were similar and the question of law raised was whether by passing the terms and conditions of PPA, the respondent can assail the sanctity of PPA. This Court held that power producer cannot go against the terms of the PPA and that as per the terms of the PPA, in case, the first respondent is not able to commence the generation of electricity within the "control period" the first respondent will be entitled only for lower of the tariffs."

56. *Similarly, in Bangalore Electricity Supply Co. Ltd. v. Konark Power Projects Ltd. this court held as follows:*

"13. The contention that Under Regulations 5.2, 5.3, 5.4 of the 2004 Regulations as well as Sections 61 and 62 of the Electricity Act, power is vested with the Commission to vary the tariff is concerned, such power specifically provided for in the said Regulations will only operate prior to fixing of the tariff once the concerned Power Purchase Agreements are ultimately concluded and the terms are agreed between the

parties under the Power Purchase Agreements, thereafter, in our considered opinion, Regulation 5.1 of the 2004 Regulations alone would apply in the case of the parties before us. Consequently, there was no scope for the Commission to vary the tariff agreed between the parties under the approved Power Purchase Agreement."

57. *Section 61 of the Act enacts the basis for tariff determination. On the other hand, Section 62 is concerned with the fixation of various other charges and tariffs. Section 64 lists the manner and procedure for tariff determination by the Commission. Section 86 lists the functions of the Commission and reiterates the determination of tariffs to be a prominent task of the commission. Tariff determination no doubt, comprehends the exercise of regulatory function, including purchase, sourcing, procurement of electricity from generators, by distribution and other licensees, and their sales. This part involves generating companies entering into PPA(s) with procuring entities or licensees. Tariff fixation is a statutory function. Yet, by virtue of Section 42, it is subject to open access determination of the price of power, and subject to Section 63 wherever it involves open bidding. In the facts of this case, the PPA incorporated a tariff between the respondents and Gujarat Urja constituted the tariff fixed by the State Regulatory Commission in the exercise of its statutory powers. The issue and sale of RECs, constituted an important part of that bargain, between the two parties, based on the assessment of their commercial interest.*

……..

***61**. In the present case, the PPA was entered into by the parties on 29.03.2102, within the control period stipulated in the tariff order of 2010. The change in the REC Regulations 2010, whereby the Explanation to Regulation 5 was amended resulted in a change. The pre-existing clause that the power would be "at a price not exceeding pooled cost of the power purchase" was altered to "at the pooled cost of power purchase". This change, was through the Second Amendment (to the REC Regulations), carried out on 10.07.2013. It is a matter of record, that for the period between 29.03.2102 and 10.07.2013 - and indeed, after the Second Amendment, no difficulty was experienced in the pricing mechanism agreed by the parties, under the PPA. It was on 10.12.2013 that the respondent WPD approached the state commission for re-determination of tariff. Clearly, this was an opportunistic attempt to derive advantage from the change, brought about by the Second Amendment, and seek to have it applied to an existing contract, which cannot be countenanced. In view of these reasons, it is held that the reasoning of APTEL, and the State Commission cannot be upheld.*

Applicability of the Second Amendment to pre-existing contracts-the general law

***62.** Power Purchase Agreements are essentially not statutory contracts; however, certain terms contained in those contracts, are regulated by law, i.e. applicable regulations, under the Act. The PPA between a generating company or, as in this case, a wind generator, and a distribution licensee, such as Gujarat Urja, is the outcome of a carefully considered decision, whereby the parties,*

after due deliberations and negotiations, agree on terms, which are based on existing law and regulations. Aside from contending that the PPA had to be approved, (which this court has rejected in a previous part of this judgment) but was not, the respondents also urge, independently, that the Second Amendment had necessitated re-visiting of the terms of the PPA, relating to the payment of average pooled power purchase cost, given that the amendment mandated that the power would be at the pooled power purchase cost, as opposed to the previous provision, which stated that the cost would not exceed the pooled power purchase cost.

……..

***69.** In view of the above discussion, it is held that agreements, such as the PPAs in the present case, entered into, voluntarily by the parties, before the Second Amendment, were not affected, by its terms. The findings to the contrary in the impugned order, are set aside."*

69. The rulings in the Solar Semiconductor and EMCO cases reaffirm that under similar PPA provisions, the tariff is determined by the commissioning date of the generating station. If commissioning occurs in a subsequent financial year, the applicable tariff is the lower of the PPA-stipulated tariff or the tariff for the following year.

70. The Appellant has contended that synchronization should be treated as commissioning under the PPA, citing:

a) General industry practice,

b) The PPA's objective, and

c) Lack of clarity on performance tests in the PPA, arguing the clause is unenforceable.

71. These contentions are flawed. The PPA explicitly defines the parties' rights and obligations, rendering reliance on vague notions of industry practice irrelevant. No evidence substantiates a legal precedent for such a practice.

72. The Appellant's reference to a SECI bidding document, stating that energy flow to the grid marks commissioning, does not override the specific terms of the PPA.

73. The above does not in any manner substantiate the case made out by the Appellant. The document produced is only a tender document, wherein it is specifically provided that the said document is only for reference and that the commissioning procedure would be guided by the PPA, as under:

> ***"COMMISSIONING PROCEDURE***
> ***(This is for Reference Only; the Commissioning Procedure will be guided by as per PPA)"***

74. In fact, in a PPA entered into by SECI with another solar project, namely, M/s Fortum Solar Plus Pvt. Ltd. pursuant to a bidding process in Rajasthan, which is the subject matter in Appeal No. 26 of 2022 before this Tribunal, synchronization is treated completely differently from commissioning with the express condition in Article 5.1.4 that "***For avoidance of doubt, it is clarified that the Synchronization/Connectivity of the Project with the grid shall not be considered as Commissioning of the Project.***"

75. Further submitted that the Appellant's reliance on a supposed "general industry practice" followed by SECI, equating synchronization with commissioning, is unfounded and irrelevant to the present PPA, which has its own distinct terms and conditions. Similarly, the argument that synchronization should be interpreted as commissioning under the PPA is untenable and lacks coherence.

76. Accepting the Appellant's contention that synchronization equates to commissioning would render Articles 4.2 and 4.3 of the PPA redundant. Article 4.2 explicitly mandates a 7-day gap post-synchronization for commissioning, during which various tests must be conducted. The Appellant cannot modify the express terms of its PPA based on the provisions of another agreement. The claim that performance tests are undefined and should be disregarded is baseless. The commissioning tests, conducted in the presence of the Independent Engineer, were jointly signed by the parties.

77. The Appellant’s acknowledgment of these tests precludes any argument that such tests were non-existent. The minutes of the meeting dated 30.03.2018, cited by the Appellant, confirm synchronization but also authorize HPSEB to conduct commissioning tests and provide a capacity and performance report, underscoring the distinction between synchronization and commissioning, which is as follows:

> *“MINUTES OF MEETING IN RESPECT OF SYNCHRONIZATION OF 1 MWP SOLAR POWER PROJECT BHOGPUR, SIMBALWALA BY M/S GR ENTERPRISES SOLAR ENERGY PRODUCER ON DATED 30.03.2018.*

M/s GR Enterprises Solar Power Project producer has authorized to conduct commissioning test and further advised to furnish the tested capacity and performance report of the Solar Plant to the office of the Superintending Engineer (Design), Power House Electrical, HPSEBL, Sundernagar for further witnessing of the commissioning test of the 1 MWp Solar Power plant."

78. The above minutes of the meeting dated 30.03.2018 are also signed by the Appellant.

79. The reliance on the minutes of the meeting dated 12.03.2019 is misplaced, as these minutes do not equate synchronization with commissioning. Rather, they clearly state that because the project was not commissioned by 30.03.2018, a lower tariff applies.

80. Additionally, the minutes note that the meeting ended without any conclusion. The Appellant's argument that the tariff at the date of synchronization should apply because HPSEB paid for electricity from that date is unfounded. The terms of the Power Purchase Agreement (PPA) cannot be waived, regardless of the parties' intentions. This is also settled by the decision of the ***All India Power Engineer Federation & Ors. v. Sasan Power Ltd & Ors., [(2017) 1 SCC 487].*** The relevant extract of All India Power Engineer Federation & Ors. v. Sasan Power Ltd & Ors. is as under:

"31. All this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act. This is

for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with Guidelines issued. If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest.

32. But on the facts of these cases, it is argued by the learned counsel for Sasan that in point of fact the tariff laid down in Schedule 11 of the PPA has not been sought to be changed. All that has happened is that, as a result of COD being declared on 31-3-2013, the very tariff laid down in Schedule 11 becomes applicable, but for year one being treated as one day and year two commencing from 1-4-2013. The counsel for Sasan may be right in saying this, but the substance of the matter is that a consumer would have to pay substantially more by way of tariff under the PPA if year one is gobbled up in one day, as year two's tariff is one paisa more than year one and year three's tariff is substantially more than year two. In short, instead of getting two years or part thereof exceeding one year at a substantially lower tariff, the consumer now gets only one year and one day at the lower tariff rates. This may also by itself not lead to the parties having to go to the Commission as this is envisaged by the PPA. But it is clear that if a waiver is to be accepted on the facts of this case, it would clearly impact the public interest, in that consumers would have to pay substantially more for electricity consumed by them. This being the case, on facts it may not be necessary to go to the Commission as

had Sasan in fact met the parameters of Schedule 5 on 30th March, then as per Schedule 11, year one would in fact have been only for one day. However, any waiver of the requirement of Schedule 5 would definitely impact the generation of electricity at the mandated percentage of contracted capacity as also the amounts payable by consumers, and would therefore affect the public interest. This being the case, this is not a case covered by the judgments cited on behalf of Sasan, in particular the judgment of this Court in Commr. of Customs v. Virgo Steels [Commr. of Customs v. Virgo Steels, (2002) 4 SCC 316] , in which it has been held that even the mandatory requirement of a statute can be waived by the party concerned, provided it is intended only for his benefit. This case would fall within the parameters of the other judgments referred to above, and would therefore be governed by the judgments which state that any waiver of the requirements of Article 6.3 and Schedule 5 would ultimately impact consumer interest and therefore the public interest. Such waiver therefore cannot be allowed to pass muster on the facts of the present case."

81. The Counsel further submitted that Article 6.1 of the PPA specifies that while payment for energy starts from the date of synchronization, the applicable tariff is determined by the date of commissioning, as detailed in Articles 6.2(a) and 6.2(b)(ii). These provisions have been adhered to by both parties, and no waiver exists. The core dispute concerns the application of a lower tariff of Rs. 4.37/kWh. Therefore, the appeal to modify the PPA terms is unfounded and should be dismissed.

Analysis and Conclusion

82. After a detailed hearing of all parties and examining the various documents placed before us, the main issue in this appeal is as follows:

Whether the petitioner is entitled to a tariff of Rs. 5.31/kWh from the date of synchronization when Net Saleable Energy flowed into the grid on 30.03.2018?

83. The Appellant herein has prayed for the following:

a) Quash and set aside the Impugned Annexure A-1 order Dated: 15.12.2020 passed by State Commission (R-1) in petition Nos. 7 and 146 of 2020.

b) Hold and declare the Date of Synchronization is date of commissioning of project and rate of Rs. 5.31/KWH is applicable to the appellant Project as per the PPA.

c) Direct the respondent to pay the Bill @ Rs. 5.31/KWH from 31st March, 2018 with interest @ 18% till the final disposal of the appeal and direct them to pay the Bills @ RS. 5.31/KWH in future also.

d) If at all there is any delay in the commissioning of the project that may kindly be condoned.

e) Call for the records of the case from the respondents.

f) Allow the cost of appeal.

g) Such other or further order as may be deemed just and proper may also kindly be passed.

84. The answer to the above question lies in determining whether the date of synchronization and the commissioning of the project are the same or not.

85. The Appellant contends that all the tests for synchronization and commissioning were completed by 30.03.2018, which is also the date of synchronization. It is also asserted that no commissioning tests were conducted post-synchronization, as solar power generation technology necessitates all tests to be completed before synchronization, consistent with domestic and international standards, including those of SECI. The commissioning procedure outlined in the PPA, derived from the Model PPA for Small Hydro Projects, is argued to be impractical for solar projects and has been implemented with adjustments reflecting the technology's requirements. The Appellant's unit began supplying energy and raising invoices from 30.03.2018, with the project being fully commissioned on that date, leaving no further commissioning actions outstanding is the contention of the Appellant.

86. The Appellant has also asserted that all requisite commissioning tests for the solar project were completed by 30.03.2018, coinciding with the date of synchronization, as corroborated by official documents, including letters from HPSEBL dated 26.03.2018, 29.03.2018, and 30.03.2018. It was argued that the nature of solar power generation technology does not mandate commissioning tests post-synchronization, as acknowledged in standard practices adopted by the Solar Energy Corporation of India (SECI), which considers a solar project commissioned once energy flows into the grid. This approach aligns with industry norms and was applied in the present case despite procedural language in the PPA derived from hydro and thermal power models.

87. The Appellant highlighted that the synchronization minutes dated 30.03.2018 and related documents confirm that all necessary testing was completed before the energy supply commenced. The subsequent activities between 30.03.2018 and 10.04.2018, described as a "trial run," were solely to ensure grid stability and reliability, which pertains to determining the

Commercial Operation Date (COD) under Clause 4.3 of the PPA but is irrelevant to tariff entitlement under Clause 6.2. No substantive commissioning tests were conducted after 30.03.2018, and the readings tabulated on 10.04.2018 merely monitored project performance, as evidenced by the Independent Engineer's Certificate, which declared the project ready for commercial operation.

88. The Appellant further contended that the Respondents have not demonstrated the existence of any commissioning tests conducted after synchronization or how such tests differ from routine reliability monitoring.

89. The Appellant and Respondents Nos. 2 and 3 entered into a PPA, approved by Respondent No. 1. The project achieved synchronization with the grid on 30.03.2018. However, Respondents 2 and 3 claimed that the commissioning tests were conducted on 10.04.2018, and thereafter, the Commercial Operation Date (COD) was declared as 25.04.2018.

90. The Appellant filed Petition Nos. 7 and 146 of 2020 before HPERC, seeking adjudication of the tariff dispute. HPERC held that the project was commissioned after the stipulated deadline of 31.03.2018 and, therefore, the lower tariff of ₹4.37 per kWh applied, on the contrary, the Appellant has contended that synchronization with the grid on 30.03.2018 qualifies the project for the higher tariff of ₹5.31 per kWh.

91. It is a settled principle of law that the provisions contained in the PPA are sacrosanct and are binding to contracting parties, it is, therefore, important to note the relevant provision of the PPA for examining whether synchronization and commissioning are distinct stages under the PPA.

92. The relevant provisions are reproduced as under:

2.2.10 "Commercial Operation of the Unit Project"
means the state of a Unit/Project where it is capable of delivering Active Power and Reactive Power on a regular basis after having successfully met the requirements of the Commissioning Tests.
2.2.11 "Commercial Operation Date (CoD) of Unit/Projects"
means the date(s) on which unit(s) or the Project achieves the Commercial Operation.
2.2.66 "Synchronization/ Synchronize/ Synchronizing"
means an act to cause paralleling of two A.C. circuits/ systems when they are within the desired limits of frequency, phase angle and Voltage.
2.2.67 "Synchronization Date(s)/ Date of Synchronization"
means with respect to each Unit, the date on which such Unit is synchronized and connected for the first time, to the Grid System.

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

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

(i) it has been installed in accordance with the required technical specifications and Prudent Utility Practices;

(ii) it meets all related conditions prescribed in applicable Indian Standard(s)/Code(s) then in effect and otherwise meets the provisions of the Electricity Act, 2003 and the Rules or Regulations framed there under, or any other requirements for Synchronization to the Grid System;

(iii) it is capable of being operated safely and the Company has obtained the approval of the Chief Electrical Inspector of the Government for energisation; and

(iv) the Company has entered into a separate agreement for execution, operation and maintenance of the Interconnection Facilities as per Section 3.3.

4.1.3 The Company shall notify the HPSEBL, as soon as the requirement of Section 4.1.2 have been met and the Unit is ready to be Synchronised to the Grid System in accordance with the Agreement.

4.1.4 The HPSEBL, and/or its authorised representative(s) shall inspect any Unit which the Company intends to Synchronize to the Grid System within five (5) days after being notified in writing by the Company, pursuant to Section 4.1.3, to determine whether the requirements of Section 4.1.2 have been met. The Company shall provide the HPSEBL with such access to the Station as is reasonably required to make such determination.

4.1.5 If the HPSEBL is satisfied that the Unit is ready to be Synchronized in accordance with Section 4.1.2 and 4.1.4, it shall within three days of the completion of the inspection of

the Unit(s) notify the Company to that effect and provide the Company with all reasonable assistance in Synchronizing the Unit and also for conducting Commissioning Test(s).

4.2 COMMISSIONING TESTS:

4.2.1 After a Unit has been successfully Synchronized with the Grid System, the Company shall further give atleast seven (7) days notice by fax followed by registered mail to the HPSEBL of the exact date(s) on which Commissioning Test(s) will commence. The HPSEBL shall designate its authorized representative to observe these test(s).

4.2.2 The Company shall conduct Commissioning Tests within fifteen (15) days from the Synchronization Date, in the presence of an Independent Engineer appointed by both the Parties and the authorized representative of HPSEBL. *The Independent Engineer and the authorized representative of the HPSEBL shall submit a certificate of the Tested Capacity and necessary performance tests of the plant to the Chief Engineer (System Operation), HPSEBL, Shimla or to any other authority as may be designated by the HPSEBL.* ***After successful completion of the Commissioning Tests, trial operation of the Unit(s) shall be carried out by the Company for a period of 15 days to establish the reliability and stability of the Generating Unit(s). The Company shall also furnish a copy of the Tests results and the report regarding trial operation to the HPSEBL.***

4.3 COMMERCIAL OPERATION:

4.3.1 The Commercial Operation of a Unit shall have occurred as on the date such Unit successfully completes, after having passed

Commissioning Test(s) as per Section 4.2.2, the fifteen days' trial operation as certified by the Superintendent Engineer (Design) Power House (Electrical), HPSEBL, Sundernagar (or any officer as may be designated by HPSEBL) and accepted by the Chief Engineer (System Operation), HPSEBL, Shimla or any other Chief Engineer designated by HPSEBL for the purpose, under intimation to the Company.

4.3.2 In case the Company fails to achieve Commercial Operation of the Unit(s) within 180 days from the first Synchronization of the last Unit of the Project, the Company shall, to the satisfaction of the HPSEBL, take off such Unit from the Station bus bar till such time the defect is removed, failing which the HPSEBL shall be free to disconnect the Project Line(s) from its Grid System after giving an opportunity to the Company to explain its position."

6.1 SUPPLY OF POWER

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

During such periods, as may occur from time to time, as the project is partially or totally unable to operate, the Company may draw Energy required for the upkeep and maintenance of the Project from the HPSEBL's system, which shall be metered at the Interconnection Point and adjusted against the Net Saleable Energy in corresponding month's bill in case the quantum of such

drawls by the Company during a month, the excess drawls shall be paid for the Company at the same rate as applicable for Net saleable Energy as per Section 6.2.

6.2 Tariff for Net Saleable Energy

(a) The HPSEBL shall pay for the Net Salable Energy delivered and sold to it by the Company at the Interconnection Point at a fixed rate of Rs. 5.31 per kWh as determined in the Commission's tariff Order dated 6th July, 2016.

(b) The rate of Rs. 5.31 per kWh as per Clause (a) above is firm and fixed and shall not be subject to any indexation, escalations, adjustment or review due to any reason whatsoever except for adjustment on the following line and the specific provisions under Section 8.8.

(ii) ***The rate given above shall be applicable if the entire capacity of the project is commissioned on or before 31.03.2018 i.e. 31st March of the year immediately succeeding the financial year in which PPA is signed after approval of the Commission. However, if the commissioning of the project is delayed beyond 31.03.2018, the rate determined by the Commission for the category under which the total category of the project falls for the financial year(s) immediately preceding the respective financial year(s) in which the capacities are commissioned for the respective capacity(ies) or the rate of Rs. 5.31 per unit as above, whichever is lower, shall be applicable."***

93. Clause 4.1.5 of the PPA states that HPSEBL, if satisfied, shall, within three days of the completion of the inspection for synchronization, provide the Appellant with all reasonable assistance in synchronization and conducting the commissioning tests.

94. Undisputedly, the synchronization of the plant was completed on 30.03.2018.

95. However, once the synchronization has been achieved, Clause 4.2.1 mandates that the Company shall further give at least seven (7) days' notice by fax followed by registered mail to the HPSEBL of the exact date(s) on which Commissioning Test(s) will commence.

96. Further, Clause 4.2.2 provides that the Appellant shall conduct Commissioning Tests within fifteen (15) days from the Synchronization Date, in the presence of an Independent Engineer appointed by both the Parties and the authorized representative of HPSEBL.

97. Accordingly, the commissioning tests shall be performed after the synchronization of the units of the solar plant.

98. Further, Clause 4.2.2 mandates that the Independent Engineer and the authorized representative of the HPSEBL shall submit a certificate of the Tested Capacity and necessary performance tests of the plant to the Chief Engineer (System Operation), HPSEBL, Shimla, or to any other authority as may be designated by the HPSEBL.

99. It is only after the successful completion of the Commissioning Tests, trial operation of the Unit(s) shall be carried out by the Company for a period of 15

days to establish the reliability and stability of the Generating Unit(s). The Company shall also furnish a copy of the test results and the report regarding the trial operation to the HPSEBL.

100. Clause 4.3: Commercial Operation- This clause details the requirements for declaring a unit commercially operational. Further, Clause 4.3.1 provides that a unit achieves commercial operation only after completing commissioning tests and a 15-day trial operation, as certified by HPSEBL officials.

101. These clauses collectively distinguish between synchronization, commissioning tests, and commercial operation, which are successive and carried out in distinct stages.

102. In short, the Synchronization ensures grid connection, commissioning tests validate operational readiness, and commercial operation certifies the unit’s capability for sustained energy supply.

103. However, all the provisions are silent regarding the commissioning and the date of commissioning on which it is achieved.

104. The PPA unequivocally differentiates between synchronization and commissioning tests but is silent on the differentiation between synchronization and commissioning. Therefore, the Appellant's argument that synchronization should be treated as commissioning, must be examined in the context of relevant practices followed.

105. Further, Clause 6.1 establishes the operational framework for the delivery and purchase of energy between the Company and HPSEBL. The supply of electrical energy begins from the date of synchronization of the first unit of the

project. The energy is delivered at the designated Interconnection Point. HPSEBL is obligated to purchase the net saleable energy, defined as the energy received from the project at the Interconnection Point from the date of synchronization.

106. Clause 6.2: Tariff for Net Saleable Energy- This clause governs the pricing mechanism for the net saleable energy supplied to HPSEBL:

> Fixed Tariff Rate (6.2.a): The tariff is fixed at ₹5.31 per kWh as per the tariff order dated 06.07.2016.
>
> Tariff Conditions (6.2.b): The rate is firm and not subject to indexation, escalation, or adjustment, except under specified conditions in Section 8.8.
>
> Deadline for Higher Tariff (6.2.b.i): The ₹5.31 per kWh tariff applies only if the project is fully commissioned on or before 31.03.2018. If commissioning occurs after 31.03.2018, the applicable tariff will be the lower of: - the rate determined by the Commission for the relevant category for the preceding financial year(s); or ₹5.31 per kWh.

107. Clauses 6.1 and 6.2 collectively outline the operational and financial terms governing energy supply and tariff determination. Clause 6.1 establishes the terms for energy delivery and adjustments, while Clause 6.2 links the tariff entitlement to the project's commissioning date, setting clear conditions for eligibility for the higher rate.

108. We agree with the submissions of the Respondents that any industry practice followed in the country cannot override the explicit terms of a legally binding PPA, as also the same has been consistently held by the Hon’ble Supreme Court that PPAs represent negotiated agreements and cannot be

modified based on external practices or assumptions, however, as already noted the PPA is silent on the definition of commissioning date.

109. Clause 2.2.16 defines the Commissioning Tests as the applicable tests as detailed in relevant standards, the sub-clause is quoted as under:

> "2.2.16 **"Commissioning Tests"** means the applicable tests as detailed in relevant standards."

110. On being asked, neither of the Respondents nor the Appellant could place the details, even the letter of the Independent Engineer is silent on whether the tests performed by him are the commissioning tests as per relevant standards.

111. It is important to take note of the letter from the Independent Engineer as under:

> " CERTIFICATE OF THE INDEPENDENT ENGINEER
>
> DATED : 10th April, 2018
>
> It Is certified that the Capacity and Performance Tests of G R Enterprises PV SOLAR POWER PLANT (1MW), Distt Sirmaur HP were carried out on dated 10th April, 2018 in the presence of HPSEB Ltd Engineers and M/s G R enterprises Solar PV Project. Engineers. The plant is as per BIS / MNRE guidelines .The plant has been synchronised with HPSEBL's Grid and checked for its capacity and performance and found generally in order.
>
> The G R Enterprises PV SOLAR POWER PLANT (1MW is therefore hereby declared to be ready for Commercial Operation.
>
> (RAJENDRA BHASKAR)
>
> CHIEF ENGINEER(Retd).

INDEPENDENT ENGINEER
NARAYAN BHAWAN, OLD BUS STAND,
SHIMLA-171001"

112. The test carried out by the Independent Engineer confirms synchronization with HPSEBL's Grid, and the capacity and performance of the plant /Unit(s), which are found to be generally in order. Further, declaring the plant of the Appellant's PV SOLAR POWER PLANT to be ready for Commercial Operation and certainly, there is no mention of "Commissioning", thus confirming that the plant has been commissioned prior to such tests.

113. It is also seen from the PPA that the Commissioning Tests have to be completed before declaring the plant/ unit(s) having achieved Commercial Operation, the relevant clause is reproduced as under:

> *"2.2.10* ***"Commercial Operation of the Unit Project"*** *means the state of a Unit/Project where it is capable of delivering Active Power and Reactive Power on a regular basis* ***after having successfully met the requirements of the Commissioning Tests."***

114. None of the contesting parties could place before us the requirement of Commissioning Tests before declaring the plant/ unit(s) as ***"Commissioned"***.

115. We decline to accept the Respondents' contention that Clause 4.2 lays down the conditions for "Commissioning". Clause 4.2 pertains to Commissioning Tests which is a mandatory condition for the plant for achieving Commercial Operation.

116. Respondents 2 and 3's submission that the State Commission, in the Impugned Order, noted that the Appellant failed to provide specific details regarding synchronization events or any delays attributable to the agencies cannot be accepted as the date of synchronization has been confirmed, undisputedly, as 30.03.2018, as also noted in the Impugned Order.

117. The Respondents, further, equated the date of completion of Commissioning Tests to the date of Commissioning and thus differentiated Synchronization from Commissioning by interpreting Clause 4.1 and 4.2.

118. We find no merit in such an argument as Clause 4.2 relates to Commissioning Tests and not to Commissioning, as already dealt with in the previous paragraphs.

119. Further, reliance on 7 days' notice for commencement of commissioning tests (Article 4.2.1) after Synchronization on 30.03.2018 and conducting tests within 15 days of synchronization, supervised by an Independent Engineer legally precludes Commissioning before 06.04.2018 has to be rejected as such a condition is for carrying out the Commissioning Tests and not a condition for achieving Commissioning.

120. The success of tests performed prior to a milestone confirms the achievement of such a milestone. In the instant case, the pre-commissioning tests were performed and confirmed to be successful.

121. The Appellant’s project synchronized on 30.03.2018, and the pre-commissioning test was performed on 29.03.2018 (Letter NO. PDS/GR Enterprises/2017-18/ 998-1004) by the various teams of HPSEBL, it is also

seen that the pre-commissioning tests confirmed successful installation, the same is noted from various correspondences / documents placed before us.

122. The letter dated 29.03.2018 issued by Sr. Executive Engineer, Protection & Testing Division HPSEBL, Solan stated ***"It is intimated that the pre commissioning protection testing of 1 MW. Solar power plant and inter-connection point has been carried out by the testing team of this office on dated 29.03.2018 and all installed equipments checked."***

123. Further, MoM dated 30.03.2018 confirmed as under:

> *"The detailed documents and test reports of the various equipments installed at project site such as 0.380/33 KV transformer, DC/AC invertor,' Control panels etc. were reviewed, verified and found in order.* ***The Chief Electrical Inspector, HP Govt. has granted tentative approval vide his office letter no. HIMVINI/GRE/Kalaamb /2018/0099-11003 dated 26.03.2018. The Sr. Executive Engineer M&T, P&T also got conducted the required test and their reports were reviewed and found in order.***
>
> *------*
>
> *M/s G R Enterprises Solar Power Project producer has authorized* ***to conduct commissioning test*** *and further advised to furnish the tested capacity and performance report of the Solar Plant to the office of the Superintending Engineer (Design), Power House Electrical, HPSEBL, Sundernagar for further witnessing of the commissioning test of the 1 MWp Solar Power plant."*

124. It cannot be ignored that as per the industry practice worldwide, the commissioning of any solar PV scheme is the point at which it is tested electrically and connected to the generation network.

125. Even the Haryana Electricity Regulatory Commission has also adopted such norms, the HERC (Rooftop Solar Grid Interactive Systems Based on Net Metering/Gross Metering), Regulations, 2021, notified on 19.07.2021 defines ***"Commissioning" or "date of commissioning" means the date of synchronization of the rooftop solar system with the grid of the distribution licensee which shall also be certified by the designated officer of the distribution licensee."***

126. The Bidding Guidelines published by SECI and UPNEDA also follow a similar definition, they cannot be rejected merely because these are part of bidding documents, in fact, the bidding documents as published by SECI are based on standard bidding guidelines.

127. We are satisfied that after the successful installation of any PV system and completion of the inspection, the solar system will be ready to be plugged into the grid to transfer energy, and that process is referred to as Commissioning the system.

128. Accordingly, the Appellant's project was commissioned on 30.03.2018.

ORDER

For the reasons stated above, we are of the considered view that the captioned Appeal No. 135 of 2021 has merit and is therefore allowed for the reasons mentioned in the above-referred paragraphs.

The Impugned Order dated 15.12.2020 passed by the Himachal Pradesh Electricity Regulatory Commission in Petition Nos.7 and 146 of 2020 is set aside.

The Appellant is entitled to a tariff of Rs. 5.31/kWh from 30.03.2018, Respondent No. 2 shall make the payment @ of Rs. 5.31/kWh or the differential tariff within 3 months of this judgment along with carrying cost/ LPS as per the PPA

The Captioned Appeal and pending IAs, if any, are disposed of in the above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 7th DAY OF FEBRUARY, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

pr/mkj