

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APPEAL NO. 287 OF 2021
&
APPEAL NO. 288 OF 2021**

Dated: **07.10.2022**

Present: **Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

APPEAL NO.287 of 2021

In the matter of:

M/s. Kamuthi Solar Power Ltd.

Through Authorised Representative
Adani House, Nr. Mithakhali Six Roads,
Ahmedabad- 380 009

....Appellant

Versus

1. Tamil Nadu Electricity Regulatory Commission.

Through its Authorised Representative
4th Floor , SIDCO Corporate Office Building
Thiru Vi Ka Industrial Estate , Guindy, Chennai-600 032 ...Respondent No. 1

2. Tamil Nadu Generation and Distribution Corporation Limited

Through its Chairman,
No. 144, Anna Salai, Chennai- 600 002 ...Respondent No. 2

3. Chief Engineer/Non-Conventional Energy Sources (NCES)

Through its authorized representative
2nd Floor, NPKRR Malaligai,
144, Anna Salai, Chennai- 600 002Respondent No. 3

4. Tamil Nadu Transmission Corporation Limited

Through its Chairman
144, Anna Salai, Chennai -600 002Respondent No. 4

Counsel for the Appellant(s) : Mr. Sajan Poovayya, Sr. Adv.

Mr. Amit Kapur
Ms. Gayatri Aryan
Ms. Aparajita Upadhyay
Ms. Poonam Verma

Counsel for the Respondent(s) : Mr. Basava Prabhu Patil, Sr. Adv.
Ms. Anusha Nagarajan
Mr. Rahul Ranjan
Mr. Geet Ahuja
Ms. Ramisha Jain for R-2 & 3

Ms. S. Vallinayagam for R-4

APPEAL NO.288 of 2021

In the matter of:

M/s. Ramnad Renewable Energy Ltd.

Through Authorised Representative
Adani House, Nr. Mithakhali Six Roads,
Ahmedabad- 380 009

....Appellant

Versus

1. Tamil Nadu Electricity Regulatory Commission.

Through its Authorised Representative
4th Floor, SIDCO Corporate Office Building
Thiru Vi Ka Industrial Estate , Guindy, Chennai-600 032

...Respondent No. 1

2. Tamil Nadu Generation and Distribution Corporation Limited

Through its Chairman,
No. 144, Anna Salai, Chennai- 600 002

...Respondent No. 2

3. Chief Engineer/Non-Conventional Energy Sources (NCES)

Through its Authorized Representative
2nd Floor, NPKRR Malaligai,
144, Anna Salai, Chennai- 600 002

....Respondent No. 3

4. Tamil Nadu Transmission Corporation Limited

Through its Chairman
144, Anna Salai, Chennai -600 002

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Mr. Rahul Ranjan
Mr. Geet Ahuja
Ms. Ramisha Jain for R-2 & 3

Ms. S. Vallinayagam for R-4

J U D G M E N T

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

1. The captioned appeals i.e. Appeal No. 287 of 2021 and Appeal 288 of 2021 have been filed by the Appellants namely M/s. Kamuthi Solar Power Ltd. (in short “ Appellant-1” or “KSPL”) and M/s. Ramnad Renewable Energy Ltd. (in short “Appellant-2” or “RREL”) assailing the common order dated 20.07.2021 (“Impugned Order”) passed by the Tamil Nadu Electricity Regulatory Commission (hereinafter “TNERC” or “State Commission”) in Petition M.P. No.26 of 2020 (*M/s. Kamuthi Solar Power Ltd. v. Tamil Nadu Generation and Distribution Corporation Ltd. & Ors.*) and in Petition M.P. No.25 of 2020 (*M/s. Ramnad Renewable Energy Ltd. v. Tamil Nadu Generation and Distribution Corporation Ltd. & Ors.*).

2. The two appeals have been filed assailing the Impugned Order on the same issue i.e. rejection of COD as claimed by the Appellants and consequentially the rejection of tariff for the projects as Rs. 7.01/unit, as notified by the State Commission for projects commissioned on or before 31.03.2016, and as such, are taken as batch of appeals.

Description of Parties

3. The Appellants in the two captioned appeals i.e. M/s. Kamuthi Solar Power Limited (KSPL), the Appellant in Appeal No. 287 of 2021 and M/s. Ramnad Renewable Energy Limited (RREL), the Appellant in Appeal No. 288 of 2021 are registered under the provisions of the Companies Act, 2013 and are primarily engaged in the business of setting up of power plants and generation of electricity thereof, they have entered into an separate Energy Purchase Agreements (EPAs), both EPAs dated 04.07.2015, with the TANGEDCO for the implementation of 216 MW and 72 MW solar power projects, respectively, in the State of Tamil Nadu.

4. The Respondent No. 1 i.e. Tamil Nadu Electricity Regulatory Commission (TNERC) is a statutory authority constituted under the Electricity Regulatory Commissions Act, 1998 with specific powers vested under Section 86 of the Act.

5. The Respondent No. 2 i.e. TANGEDCO is a Government Company under the control of the Government of Tamil Nadu, engaged in the business of Generation and Distribution in the State.

6. The Respondent No. 3 i.e. Chief Engineer, Non-Conventional Energy Sources (NCES), is the authorized representative of the Respondent No. 2.

7. The Respondent No. 4 i.e. TANTRANSCO is the State Transmission Utility (STU) of the State of Tamil Nadu engaged in setting up of transmission system with an aim to provide adequate and reliable transmission infrastructure.

Factual Matrix

8. The factual matrix of both the appeals is virtually common and the issues raised are similar, even majority of the dates to be considered except that the two projects are executed by different companies and the capacities of the two generating stations are also different, appreciating the same, the State Commission also dealt the two i.e. Petitions M.P. No 25 of 2020 and M.P. No. 26 of 2020 by a common order dated 20.07.2021, being the impugned order under consideration in the present Appeals. Accordingly, both the Appeals are being dealt hereunder by common judgment.

9. The Appellants proposed to set up solar power plants of varied capacity using solar photovoltaic (in short “PV”) technology in the State in consonance with the Solar Energy Policy (in short “SEP”) notified by the State Government in 2012 with a vision to lead the country by generating 3000 MW of Solar Power by 2015 through a policy conducive to promoting

solar energy in the State, one of the aspects of the State Government's Policy was to encourage setting up of solar plants and fixation of tariff at a nominal rate with respect to solar power, wherein solar PV technology is used.

10. Under the mandate of the SEP, TNERC vide Order No. 4 of 2014 dated 12.09.2014 (Corrected vide an Erratum as Order No. 7 of 2014) (hereinafter referred as the "Tariff Order") issued a comprehensive tariff order for solar power. As per the said order, the tariff for Solar PV plants was fixed at Rs. 7.01 per unit, separately in terms of the TNERC (Power Procurement from New and Renewable Sources of Energy) Regulations, 2008, (in brief "TNERC RE Regulations 2008") the control period of the tariff was fixed as one year from the date of the order, and the format for the energy purchase agreement was to be approved by TNERC after discussions with the generators and the distribution licensees.

11. On 07.10.2014, TANGEDCO, in compliance to the Tariff Order, issued "CMD TANGEDCO Proceedings No. 454" specifying instructions for the processing of applications for establishment of solar power plants under the "Preferential Tariff Scheme" mandating the list of initial documents required to be furnished along with applications

12. On 21.01.2015, Model Energy Purchase Agreement was approved for the Appellants by TNERC.

13. Separately, several review petitions were filed against the Tariff Order, assailing the issue of control period, however, dismissed by TNERC.

Nevertheless, in light of the emergent situation, TNERC, *suo motu* , initiated proceedings to consider extension of the control period for applicability of the preferential tariff and vide Order No. 4 of 2015 dated 01.04.2015, extended the control period of solar power tariff till 31.03.2016, thereby, the solar power projects commissioned on or before 31.03.2016 became entitled to a tariff of Rs. 7.01 per unit.

14. On 26.05.2015, KSPL proposed to set up 216 MW solar PV power plant at Sengapadai and Pudukottai Villages, Kamuthi Taluk, Ramnad District and RREL proposed for the establishment of a 72 MW solar PV power plant at O. Karisalkulam village, Kamuthi Taluk, Ramnad District. Furthermore, on 16.06.2015, the Appellants gave an undertaking to TANGEDCO to the effect that they would not claim any deemed generation or any other benefits whatsoever from TANGEDCO in case TANTRANSCO could not commission the proposed 400 kV substation at Kamuthi, Ramnad District and the grid connectivity is to be affected only after commissioning of sanctioned new Kamuthi SS at Kamuthi.

15. In response, TANGEDCO vide letters dated 17.06.2015, addressed separately to the two Appellants, proposed to interface the two Generating Stations power plant with TANTRANSCO grid at the sanctioned new Kamuthi SS at 110 KV level by erecting 110 KV line for a distance of 8 km, connecting the proposed Projects and the sanctioned Kamuthi SS. The above grid connectivity was to be affected only after commissioning of sanctioned new Kamuthi SS at Kamuthi. It was further noted that the Appellants, individually, had made a payment of 50% of the applicable

refundable security deposit. The Appellants were accordingly required to pay the remaining 50% for further consideration of its proposal.

16. In compliance thereof, the KSPL furnished the entire security deposit of Rs. 1001.50 Lakhs vide P.R. No. 209312 dated 29.04.2015 and P.R. No. 210593 dated 17.06.2015 for establishment of the 216 MW solar PV power plant and RREL furnished the entire security deposit of Rs. 425.50 Lakhs vide P.R. No. 209350 dated 02.05.2015 and P.R. No. 210594 dated 17.06.2015 for establishment of the 72 MW solar PV power plant.

17. Accordingly, the proposals of the Appellant were accepted by TANGEDCO through its "Noted for Record" dated 04.07.2015 and consequently, the separate EPA was executed by TANGEDCO with the two Appellants.

18. Subsequent to the execution of the EPA, the Appellants were required to commission their Projects on or before 31.03.2016, i.e., the expiry of the control period, in order to avail the preferential tariff of Rs. 7.01/unit as declared by TNERC under the Tariff Order.

19. Appellants submitted that they started commissioning of the projects immediately, taking all possible measures and efforts for completion of the projects in time, however, in November, 2015 i.e. during the commissioning of the projects, there was unprecedented rainfall recorded in Kamuthi Taluk, Ramnad District, adversely affecting the construction activities of the two projects, even resulting into stoppage of work at site, the said situation

continued for over a month and flooding of the construction site continued even after stoppage of rain, and despite their best efforts, the entire project was delayed due to the flooding, accordingly, the Appellants informed TANGEDCO that the stoppage of work is on account of force majeure and, hence, beyond their control, despite this, the Appellant submitted that all out efforts were made for completion of construction and commissioning of the Project within the control period as fixed by TNERC in the order dated 12.09.2014.

20. Further, on 19.02.2016, consent for operation of the Projects were issued by the Tamil Nadu Pollution Control Board in accordance with Sections 21 and 25 of the Air (Prevention and Control of Pollution) Act, 1981 and Water (Prevention and Control of Pollution) Act, 1974.

21. However, the evacuation system, as proposed by the Respondents, was not completed by the Respondents, matching with the commissioning of the Generating Projects, therefore, the Appellants vide separate letters dated 07.03.2016 addressed to TANGEDCO sought temporary evacuation from an alternate substation anticipating delay in commissioning of Kamuthi Sub-station.

22. Subsequently, the Chief Electrical Inspector of the Government (CEIG), under the mandate of Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010 (in short "2010 CEA Regulations") , inspected the projects of KSPL and RREL on 12.03.2016 and on 11.03.2016 respectively and issued the approval under Regulation 43 (4) of the said 2010 CEA Regulations to the two projects on

22.03.2016 with a direction to the Appellant to commission its Project within 3 months, which could not be completed as the evacuation facility to be provided by the Respondents was delayed, the Respondents failed to commission the Kamuthi Substation in time, putting the commissioning of the Appellant's Project before the cut-off date of 31.03.2016 at risk.

23. The Appellants i.e. KSPL and RREL vide letters dated 23.03.2016 and 24.03.2016 respectively requested the Chief Engineer, NCES to consider the alternate proposal by permitting the Appellants to evacuate power through one circuit of 110 KV D/C Old Kamuthi Substation to New Kamuthi Sub-station line at New Kamuthi substation end, as their Projects were ready for evacuation of power.

24. Thereafter, the Appellants vide various letters dated 28.03.2016, 30.03.2016 and 31.03.2016 (by KSPL) and dated 25.03.2016 and 31.03.2016 (by RREL) informed Chief Engineer and Superintending Engineer, Solar Energy/NCES, that the Projects have been ready to commence evacuation of power since 22.03.2016, however, on account of complete inaction on the part of Respondent TANGEDCO, are unable to evacuate the power, further, pointed out that all necessary approvals and consents for commencement of its operations had been obtained and that the project was ready for commissioning.

25. Contrary to it, TANGEDCO vide its letter dated 15.04.2016 alleged that the projects were not ready for commissioning, additionally in terms of letter dated 17.06.2015, the Appellants are not entitled to claim any

deemed generation or any other benefits from TANGEDCO, even if, TANTRANCO fails to commission the Kamuthi sub-station in time.

26. On 09.05.2016, the Appellants vide separate letters denied TANGEDCO's contention that the Projects were incomplete and reiterated that the Projects were ready for commissioning, thereafter, being aggrieved by the utter failure of TANGEDCO in providing interconnection to the projects with the grid and also not recognizing the projects as deemed commissioned before 31.03.2016, the Appellants i.e. KSPL and RREL filed separate Petitions bearing No. P.R.C. No. 3 of 2016 and P.R.C. No. 2 of 2016, respectively before TNERC, which were dismissed with the direction to Appellants to comply with directions issued by TNERC in Order dated 01.08.2016 in P. R. C. No. 1 of 2016 i.e., SEI Kathiravan Power Private Ltd. Vs. TANGEDCO.

27. On being approached again, on 16.11.2016, TNERC on 16.11.2016, passed an order directing the Appellants to file appropriate court fees, while observing that the matter involved a dispute in terms of Section 86(1)(f) of the Electricity Act, the Appellants assailed the order before this Tribunal through Appeal No. 32 of 2017 by KSPL and Appeal No. 3 of 2017 by RREL with the prayer to set aside the order and direct TNERC to examine the petition in exercise of 'regulatory powers' instead of treating it as a 'dispute'.

28. This Tribunal rendered its judgment on 24.09.2019 in the two appeals i.e. Appeal No. 32 of 2017 and Appeal No 31 of 2017, inter-alia, directed TNERC to treat the Petition of the Appellants as Miscellaneous

Petition and not as a Dispute Resolution Petition. The relevant extract of the judgment is quoted as under:

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

.....

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

.....

The fact that the solar plant was set up by the Appellant by making huge investment under the promotional Solar Policy notified by the State Government, wherein a tariff of Rs. 7.01 per unit was to be given to the Appellant on completion of the project by 31.03.2016

....

*8 (xxi) The State Commission, as defined under the Act, is a regulator and performance monitor, a statutory body to oversee the development of power sector in the State so as to evolve sustainable business model to supply electricity to the consumers in the State in the most efficient manner. **With this objective in mind, the endeavour of the State Commission while dealing with such matters should be lenient one, especially in matters relating to promotion of electricity generation from solar power plant under the promotional schemes notified by the State Government.** This instant case is one such case*

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

29. In compliance to the remand order, TNERC directed the two petitions to be numbered and listed as a “Miscellaneous Petition”, numbered as M.P. No. 26 of 2020 (KSPL) and M.P. No. 25 of 2020 (RREL), however, TNERC passed the Impugned Order dated 20.07.2021 rejecting the prayers of the Appellants, and hence, the two captioned appeals.

30. Since the questions of law raised and the facts of the two captioned appeals are identical, even the submissions made by the Appellants and the Respondents are also identical, the pleadings of Appeal No 287 of 2021 are being considered for the sake of brevity and the two appeals are disposed of by this common judgment.

Analysis & Observations

31. The main issues which emerge out of the two appeals in hand are the date of commissioning of the projects i.e. whether the projects are commissioned within the control period i.e. on or before 31.03.2016 and whether the projects are entitled for tariff at the rate of Rs. 7.01/unit as notified by the State Commission in the Tariff Order for the solar PV projects commissioned on or before 31.03.2016.

32. It is important to note here that the Impugned Order has been passed with division of votes, however, the decision of the Chairman, TNERC, enjoying the power of casting vote, has become the final order. The relevant extract of the Impugned Order is as under:

“13.0 Orders of the Commission:

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

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

Sd/-XXXX

(M. Chandrasekar) Chairman”

33. However, we find no infirmity in exercise of casting vote by the Chairman as this Tribunal has upheld the exercise of casting vote by the Chairman of the Commission in a scenario where there is a disagreement between the Chairperson and the Member comprising the bench adjudicating upon a matter. Reliance is placed on the judgment dated 05.02.2022 in Appeal No 239 of 2015 Indian Wind Power Association vs TANGEDCO and Ors.

34. The first issue which emerges out of the two appeals is whether the projects have achieved commissioning on or before 31.03.2016.

35. The Appellant, in Appeal no. 287 of 2021, has submitted that its project was ready for commissioning on 12.03.2016, and vide earlier letter dated 07.03.2016, had requested TANGEDCO for an alternate evacuation facility, confirming its readiness, CEIG inspected the solar plant on 22.03.2016 and conveyed its approval on 22.03.2016, as under:

“Approval is hereby accorded temporarily for a period of 3 months (up to 21.06.2016) under Regulation 43 (4) Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010 to commission the Electrical Installations inspected on 12.03.2016 at the

above premises as detailed in the Annexure subject to the rectification of defects item No. 1(xiv),1(xix) and 1(xx) communicated in the letter under 3ⁿ° cited and the rectification report should be reached to this office on or before 21 -06-2016 and subject to the terms & conditions of supplier .”

36. The Appellant submitted that the approval accorded clearly provides that the solar PV plant is ready for commissioning, as the relevant Regulation provided that the approval granted by CEIG is only after conducting an inspection, specific tests are carried out and declared that the plant is electrically safe for commissioning, further, submitted that the defects as pointed out by the CEIG are in the form of peripheral equipment or the connectivity to the evacuation system which cannot be considered as affecting the electrical safety for commissioning, the connectivity to the evacuation system to be commissioned by the Appellant was held up due to delay on the part of Government of Tamil Nadu in granting approval for the overhead electrical lines.

37. The Appellant submitted that Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. v. Acme Solar Technologies (Gujarat) (P) Ltd., (2017) 11 SCC 801 has acknowledged the CEIG certificate as conclusive proof of asset being ready to be commissioned, reliance was also placed on this Tribunal's judgments in *Solitaire BTN Solar Private Limited v. Tamil Nadu Electricity Regulatory Commission* 2021 SCC OnLine APTEL 24; *Taxus Infrastructure and Power Projects P Ltd. v. Gujarat Electricity Regulatory Commission and Ors.* 2018 SCC OnLine APTEL 86.

38. On the contrary, the Respondent no. 2 & 3 submitted that the approval of the CEIG was accorded as temporary/provisional for 3 months for commissioning of the Appellant's 72 MW project, in terms of Regulation 43 (4) of the 2010 CEA Regulations, with the direction that certain defects raised by the Authority during inspection to be rectified and asked to submit the rectification report by 21.06.2016 and stated that necessary permission should be obtained by the Appellant from the Government for erection of 33kV cable and for the 33kV cable crossing the public road/canal/pond from PV Segment 1 and 2 as per provisions of Electricity Act, 2003. It was also pleaded that the said certificate did not denote commissioning, but at best readiness subject to certain conditions, and it is pertinent that no fresh permission or evidence of commissioning has been furnished by the Appellant.

39. We are deeply anguished by the understanding and interpretation of Regulation 43 of the said CEA Regulations by the concerned officers of the Government Utility and the CEIG of the Government of Tamil Nadu, under which the impugned approval has been given, it is therefore, important to note here the relevant Regulations as applicable on the date of inspection i.e. 12.03.2016 i.e. the **Central Electricity Authority (Measures relating to Safety and Electric Supply) Amendment Regulations, 2015** (in short "CEA Amendment Regulations") notified by Central Electricity Authority (CEA) on 13.04.2015, which came into effect immediately, from the date of notification i.e. 13.04.2015, substituting the Regulation 43 as contained in the 2010 CEA Regulations, under which the approval has been accorded, quoted as under:

"43. Approval by Electrical Inspector and self-certification. -

(1) Every electrical installation of notified voltage and below shall be inspected, tested and shall be self-certified by the owner of the installation before commencement of supply or recommencement after shutdown for six months and above for ensuring observance of safety measures specified under these regulations and such owner shall submit the report of self-certification in the Form-I or Form-II or Form-III, as the case may be, of Schedule-IV to the Electrical Inspector.

(4) The Electrical Inspector may, on receipt of self-certification report referred to in sub-regulation (1), accept the report submitted by the supplier or owner and record variations as the circumstances of each case may require and may recommend that the defects may be rectified as recommended:

Provided further that every electrical installation covered under section 54 of the Act including every electrical installations of mines, oil fields and railways shall be inspected and tested by the Electrical Inspector of the Appropriate Government as specified in sub-regulation (3).

(Emphasis given)

40. From the above, it is clear that the "Approval" accorded by the CEIG is the 'Acceptance' of the report submitted by the supplier or owner regarding commissioning of the solar PV plant that it is ready for charging/

commissioning and has recommended certain variations which may require to be rectified, however, such recommendation is not a binding as per the provisions contained in the CEA Amendment Regulations and neither any compliance report is to be submitted by the Appellant nor any fresh approval is required.

41. The law cannot be and should not be violated, the provision under which the ‘*Approval*’ has been accorded is a binding for all and has to be understood in the way it meant to be, at this stage we refrain ourselves from placing on record for the failure of the officers of the Government Utilities and the CEIG in understanding the provision contained under Regulation 43(4) of the CEA Amendment Regulations, it cannot be interpreted in any other way and has to be construed as incorporated in the Regulations. The State Commission has also referred to the said Regulation as placed before them by the Respondents and without going through the provision as contained therein, has passed the Impugned Order based on the incorrect submissions made before it.

42. We accept the contention of the Appellant that the project was ready to commence supply within the said control period with end date as 31.03.2016, considering that CEIG issued the letter dated 12.03.2016 under Regulation 43(4) of the CEA Amendment Regulations, it is the acceptance conveyed by the CEIG, as also recorded by CEIG as under:

“Approval is hereby accorded temporarily for a period of 3 months (up to 21.06.2016) under Regulation 43 (4) Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010 to commission the Electrical Installations inspected on 12.03.2016 at the above

premises as detailed in the Annexure subject to the rectification of defects item No. 1(xiv), 1(xix) and 1(xx) communicated in the letter under 3rd cited---

43. As already clarified, the letter issued by the CEIG is nothing but the acceptance letter stating that the project is ready for commissioning, and recommended certain defects to be rectified.

44. TANGEDCO submitted that the offer to set up the 216 MW solar PV plant was accepted through the "Noted for Record Letter", with the following terms and conditions:

- (a) Grid connectivity shall be affected only after commissioning of the proposed Kamuthi Sub-Station.
- (b) If the solar power plant were to be commissioned beyond the control period of the tariff order, then the tariff rate fixed in the subsequent order shall be applicable.
- (c) Grid connectivity would be affected only after commissioning of the proposed Kamuthi Sub-Station and Appellant should not claim any deemed generation in the event of delay in commissioning of Kamuthi Sub-Station and Applicable Tariff will be as fixed by the TNERC at the time of commissioning of Kamuthi Sub-Station. Appellant was to submit an undertaking to such effect.

45. Further, submitted that the Appellant given an undertaking dated 16.06.2016 pursuant to the aforesaid acceptance specifically stating that: *"we will not claim any deemed generation or any other benefits whatsoever,*

from TANGEDCO, in case the TANTRANSCO could not commission the proposed 400 KV Sub-station at Kamuthi, Ramnad District even though we complete 216 MW PV Power Plant well in advance”, furthermore, TANGEDCO/ TANTRANSCO would not be responsible for any delay in commissioning of the solar plant in connection with connectivity and establishment of the Kamuthi Sub-station.

46. In response to the Appellant’s letter, informing NCES that the Power Plant was ready for commissioning and requested TANGEDCO to consider interface with 100kV old Kamuthi Sub-Station and Appellant’s unilaterally declaration of deemed commissioning of its Power Plant inter alia entitled to receive tariff at Rs. 7.01 per unit, TANGEDCO pointed out that the alternative interim arrangement to three other plants of Adani Green Energy was granted as group companies had sought connectivity much earlier, in point of time (in January and February 2016 itself), which were considered and effected based on feasibility for temporary connectivity.

47. Also informed that *“line of Kamuthi 110KV SS was restricted to only 25MW and other lines was already overloaded”, also “Based on CEIG approval and referring to a field inspection, TANGEDCO stated that the power plant was not even ready for commissioning” and “TANGEDCO had not, at any point of time stated and guaranteed that the Kamuthi 400 KV SS will be commissioned prior to 31.03.2016 for the purpose of achieving probable date of Commissioning of SPG prior to 31.03.2016.”*

48. From the above submissions made by TANGEDCO that connectivity to the solar PV plant with the Kamuthi substation can only be provided after

the commissioning of the said solar PV plant, and till the connectivity is not provided due to delay in completion of the said substation, the Appellant shall not claim any deemed generation benefit or any other benefit, also claimed that the plant has not been commissioned prior to 31.03.2016 referring to CEIG approval and field inspection carried out.

49. As already observed in the foregoing paragraphs, the approval of the CEIG is bad in law and cannot be relied upon, continuous insistence of the Respondents, on the contents of the approval letter, cannot be accepted and need call for explanation from such officers of claiming something without having the knowledge of the contents of the said legal provision.

50. In fact, TANGEDCO could have easily provided temporary connectivity for the purposes of establishing the claim of the Appellant regarding commissioning of the plant, however, because of the failure to complete the substation in time or refusal to provide alternative arrangement for evacuation of power, the claim for commissioning of the project could not be ascertained, therefore, at this stage the claim of the Appellant that the project was ready for commissioning cannot be denied, even the plant has to be considered as commissioned except that there is delay in commissioning the connectivity link which could not be completed due to delay on the part of the Government in according approval for laying of overhead transmission lines or cables as are required, further such system can be connected to the pooling point i.e. the Kamuthi substation only once the same is commissioned.

51. The second ground put forth by TANGEDCO, claiming that the project of the Appellant was not ready based on the field inspection carried out in addition to the first point raised as the approval of the CEIG, on being asked, no field inspection report was placed before us. As such, the contention of TANGEDCO cannot be accepted.

52. In our opinion, TANGEDCO is raising various issues without any conclusive proof that the plant is not ready for commissioning and evacuation of power before 31.03.2016 i.e. within the control period, making it eligible for a tariff of Rs. 7.01/ unit, in order to shield its failure to provide the evacuation facility in time (before 31.03.2016) which now seeks to take advantage of its own wrong.

53. The Respondents considered the date of the commissioning of the plant as 18.09.2016, immediately after the commissioning of the Kamuthi substation on 07.09.2016 by the Respondents, we find no conclusive facts that have changed during the period from the date of commissioning as claimed by the Appellant to the date as declared by the Respondents including any additional work carried out by the Appellant which was required for completing the commissioning process, as also find no provision in any of the documents suggesting that the plants shall be considered commissioned only when the Kamuthi substation is commissioned and made operational by the Respondents.

54. As per the contractual agreements, it is clear that the solar PV plant is required to be commissioned before the grid connectivity is extended to the project, as noted from the "Noted for Record Letter" issued by the

Respondents for the acceptance to the project and also from the letter dated 17.06.2015 sent by TANGEDCO intimating the Appellant about transmission scheme finalized for the project, specifically stipulating that the grid connectivity shall be effected only after commissioning of proposed Kamuthi Sub-station, therefore, it cannot be disputed that the solar PV plant is required to be commissioned well before the grid connectivity is to be provided.

55. It is important to note here that the commissioning process of a solar PV plant is different from the conventional power plants, in case of solar PV plant, after the installation of PV system is completed and the inspection is done, it is ready to be plugged to the grid for the evacuation of energy, and thus, such process is referred to commissioning of the system. Even, the Respondents have confirmed to it by citing that the grid connectivity shall be extended only after the solar PV plant is commissioned.

56. Therefore, the only conclusive evidence of the readiness or commissioning of the project is the self-certification by the Appellant and subsequent acceptance letter issued by the CEIG, as held in the foregoing paragraphs.

57. In our opinion it was TANDEGCO's failure to provide the evacuation facility in time (before 31.03.2016) which now seeks to take advantage of its own wrong, a fact which is not attributable to Appellant which has commissioned its project before 31.03.2016.

58. The contention of the Respondents and the observation of TNERC, as placed before us, that no adjudication of the rival contentions was undertaken by this Hon'ble Tribunal in Appeal Nos. 31 of 217 and 32 of 2017, we agree to the same, as such no findings are required on this issue.

59. Another submission was made before us by the Respondents before us that the Appellant has approached the State Commission for the extension of the control period, we, at this stage, are not obliged to take cognizance of the submission since no such a prayer has been made before us, also after, it is concluded that the solar PV plant is commissioned within the control period, it becomes irrelevant.

60. Further, the Respondents have submitted that the issue in the instant Appeal and in W.P. No. 8644 of 2017 before High Court of Madras are similar, whereby the High Court had dismissed the claim of the sister concern of the Appellant, on the identical issue, on merits, and therefore, is applicable here also.

61. On the contrary, the Appellant have argued that W.P. No. 8644 of 2019 was filed by Kamuthi Renewable Energy Ltd which is a different entity than the Appellants and the issues decided in the judgement dated 07.08.2019 only binds and decide the rights and liabilities of the contesting parties therein, no legal sequitur can be inferred from the same in respect of the Appellants herein.

62. The Chairman, TNERC has held the following in the impugned order with regards to consideration of order of Hight Court of Madras:

"It is clear from the above extracted portions of the order of the Hon'ble High Court of Madras that there is a conclusive finding in an identical issue. It is true that the order relates to the issue pertaining to the petitioner's sister companies and the petitioner was not a party in the said proceedings. But, can the said factor alone would be construed to mean that it would not bind the petitioner? I am unable to agree to the said contention. The petitioner might not have been party to the said proceedings. But the issues in both case, in my view, are identical and strikingly similar. I cannot therefore, ignore the said observations merely for the reason that the petitioner was not a party before the said proceedings. On the other hand, I am convinced that the order of the High Court is an order in rem. It may be seen that the crucial issue as to whether the undertaking given by the petitioner therein not to claim deemed generation or tariff of Rs.7.01 was dealt with extensively in the said order and I see no reason as to why I am not bound by the observations of the Hon'ble High Court. There is no doubt of whatsoever nature on my part to hold that the order passed by the Hon'ble High Court in W.P.No.8644 of 2017 is order in rem and binds the petitioner herein as well. But still I have to strictly go by the direction of the High Court to examine the issue without being influenced by any of the observations made therein as the High Court itself directed so in para-29 of the said order. In such context, I have to place on record that the primary requirement is the invocation of Clause-11 of the PPA and approaching the Commission for adjudication as seen in the order of the High Court. However, the petitioner has not chosen to do

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

63. After careful examination of the submissions of all the parties and the observations of the Chairman, TNERC in the Impugned order, we opine that the submission of Appellant Generators that the W.P. No. 8644 of 2019 was filed by a different entity than the Appellants, and the issues decided in the judgement dated 07.08.2019 only binds the parties therein.

64. Even the High Court itself in Para 29 of the judgment has held that if the Petitioner therein approached TNERC invoking Clause 11 (Settlement of Disputes) of the EPA, the same may be decided independently without being influenced by the observations of the High Court in the writ petition. The relevant extract of the judgment is as under:

“29. For the said reasons, the writ petition is dismissed. However, if the petitioner resort to Clause 11 of the Power Purchase Agreement and approach the TNERC, the same may

be decided independently without being influenced by any of the observation made in this writ petition. ...”

65. Therefore, the reliance of the Respondents on the judgment of High Court of Madras is misplaced.

66. Further, the Respondents have submitted that the Appellants have given an undertaking that no deemed generation and any other benefit shall be claimed against TANGEDCO in case of delay in commissioning of 400 KV Kamuthi substation, by an undertaking dated 16.06.2015, and claimed that the ‘any other benefit’ specified in the undertaking includes Rs 7.01 per unit of Tariff applicable before 31.03.2016.

67. The above contention of the Respondents was countered by the Appellants and submitted that only the deemed generation charges have been given up prior to the date of commissioning of Kamuthi substation in terms of its undertaking dated 16.06.2015, however, never consented to being deprived of the tariff of Rs 7.01 per unit when they have made all efforts to commission the projects within the control period of the Tariff Order, even knowing that the said substation will not be commissioned prior to 31.03.2016.

68. The decision of the Chairman, TNERC, in the Impugned Order in this regard is quoted as under:

“12.15 Issue No 6:

It may be seen that the petitioner has not only waived deemed generation but also any other benefit. It is to be seen here that the expression “any other benefit” is too broad and cannot be constricted. The undertaking has a direct nexus to the commissioning of 400 KV SS and it is explicitly clear that the petitioner waived all benefits arising out of inability of TANTRANSCO to Commission the 400 KV SS for any reason whatsoever. I find that the waiver was done with full consciousness mindful of all the likely consequences. The contention that the said undertaking is invalid in the light of the non-approval of the Commission has no legal legs to stand for the simple reason that the approval of the Commission is required only for the PPA and not for pre-commissioning agreements which is governed by the law of contract. But, I have to state at the same time, that there cannot be doubt whatsoever on the power of the Commission to adjudicate such pre-commissioning agreement as any dispute between a generator and licensee falls within the adjudicatory jurisdiction of the Commission as held by the Hon’ble Supreme Court in Gujarat Urja Vikas Nigam Vs Essar Power Limited. That is to say while for giving validity to PPA the prior approval of the Commission is mandatory, the prior approval of the Commission is not necessary for pre-PPA agreements but still such disputes can be brought before the Commission for adjudication. Now let me turn to the contention whether the tariff would fall within the scope of “any other benefit”.

In my view, surely, it does. Any benefit or claim arising out of the inability of TANTRANSCO to commission the project would include

tariff as well. If it is negated, it would render the undertaking given by the petitioner to absurdity. The very purpose of obtaining the undertaking would be set at naught if the plea of the petitioner is acceded to and it would permit the petitioner to wriggle out of the undertaking given voluntarily and consciously to which I cannot agree. Therefore, the absence of regulatory approval by the Commission for the undertaking which is essentially a pre-commission agreement cannot come to the rescue of the petitioner. The said undertaking given by the petitioner forms integral part of the EPA entered by the petitioner and the respondent. Therefore, the tariff applicable to the petitioner's project is from the date of commissioning of Kamuthi Sub-Station irrespective of the date of commissioning of the project. As per the contractual provisions, the tariff applicable on the date of commissioning of Kamuthi Sub-Station is to be paid to the petitioner as per the undertaking given by the petitioner which forms part of the contract. Therefore, the issue is decided against the petitioner."

69. We decline to accept such a contention, as the Tariff cannot be equated to "any other benefit", it is the contractual right of the Appellant to claim tariff as per its date of commissioning except that the same shall become effective only against the evacuation and supply of power to the beneficiary. The undertaking given by the Appellant is quoted as under:

"Whereas we, M/s. Kamuthi solar power Ltd, had requested TANGEDCO to enter into power purchase agreement for the

power to be generated and to be sold to TANGEDCO from the said proposed 216 MW solar PV power plant, we hear by agree to give the following undertaking:

1. That we will not claim any deemed generation or any other benefits whatsoever, from TANGEDCO, in case TANTRANSCO could not commission the proposed 400 KV substation at Kamuthi, Ramnad district even though we complete 216 MW PV power plant well in advance.”

70. After considering the impugned order and submissions made by the parties, we find merit in the contention of the Appellants that their decision to forgo the deemed generation on account of delay in commissioning of the transmission system cannot be construed to have included Tariff as well. The undertaking to forgo deemed generation would only relieve the procurer from the responsibility of making payment for energy that could not be generated on account of delay in commissioning of the transmission system. There is no reference to waiver of tariff in the aforesaid undertaking. Evidently, there has been no claim of the Appellants with regards to deemed generation till 18.09.2016 either in the Petition before the Commission or in the present Appeals. In fact, from the documents placed on record including the provisions of the EPA, it is evident that the Appellants never agreed to the proposal of applicability of tariff prevailing at the time of commissioning of Sub-station. The Respondent in the Noted for Record letter (Para 4) sought an undertaking from the Appellant Generators that the applicable tariff will be as fixed by the TNERC at the time of commissioning of SS in case delay in commissioning of the 400 KV Sub-station beyond 31.03.2016. The Appellants entered into Energy

Purchase agreement on 04.07.2015 without furnishing the undertaking sought by TANGEDCO. Thus, the contention of the Respondent to consider waiver of deemed generation to include waiver of Tariff is devoid of merit.

71. As regards waiver of '*any other benefit*', the Commission has considered the expression to have broad meaning which would include 'Tariff' as well. However, the Appellants have contended that the said phrase cannot be interpreted to construe a meaning including 'tariff'. The Appellants have relied on *Fitch v. Bates*, 11 Barb. (N.Y.) 473 and *Ferrigino v. Keasbey*, 93 Conn. 445, 106 A. 445,447, wherein the word 'benefit' is defined as "Advantage; profit; fruit; privilege". Hon'ble Supreme Court in *State of Gujarat v. Essar Oil Ltd.*, (2012) 3 SCC 522 has held that "*the word 'benefit' therefore denotes any form of advantage*".

72. As per Para 8.3 of the "Comprehensive Tariff Order on Solar Power" dated 12.09.2014, the Commission adopted Cost Plus Tariff Determination methodology considering the following tariff components:

- (1) **Capital investment**
- (2) Capacity Utilization Factor
- (3) Operation and maintenance expenses
- (4) Insurance cost
- (5) Debt-equity ratio
- (6) Rate of Interest and Term of Loan
- (7) Life of plant and machinery
- (8) Interest and components of Working Capital
- (9) Return on equity
- (10) Depreciation rate applicable
- (11) Auxiliary consumption

73. In view of the tariff structure being considered for cost plus methodology, tariff can be construed as benefit in case of solar generation only if, the actual capital investment made by the generator is much lower than the capital investment considered for tariff determination by the Commission for the said control period. Since the capital cost of solar projects have seen a declining trend in the last decade, a generator would unduly benefit if it received tariff determined for a control period that is prior to the control period in which it has made capital investment for the project. In the present case, TANGEDCO's plea to consider tariff for the next control period is premised only on the commissioning date of the projects completing ignoring the most critical part of Tariff i.e. capital investment. KSPL vide letter dated 30.03.2016 and RREL vide letter dated 25.03.2016 had informed TANGEDCO that they had incurred Rs 1524 crore and 508 crore respectively on the project. The Respondents have not contested the capital investment incurred by the Appellants. Thus, we have no reason to believe that tariff of Rs 7.01 per unit as determined by the commission for the control period ending 31.03.2016 could result in any undue benefit or unjust enrichment over and above the tariff determined by the Commission. Consequently, tariff would not fall within the scope of "any other benefit" in the present matter.

74. Further, the Hon'ble Supreme Court in All India Power Engineers Federation & Ors. v. Sasan Power Limited & Ors. (2017) 1 SCC 487 has held that waiver of any right must be explicit. The relevant extract of the order is as under:

“Waiver is, as has been pointed out above, an intentional relinquishment of a known right. Waiver must be spelled out with crystal clarity for there must be a clear intention to give up a known right. There is no such clear intention that can be spelled out on a reading of the two emails.”

75. In view of the above, in the absence of explicit relinquishment of ‘tariff’ in the undertaking provided by the generators, it cannot be alleged that the generators have waived off their right to receive tariff of Rs 7.01 per unit.

76. In addition to Respondent no. 2 and 3, the Respondent No 4, TANTRANSCO has submitted that it has no contractual arrangement with the Appellant and also no grievance has been raised against it, as such, we are not taking up the submissions made by it, which are otherwise similar to the submissions made by the other Respondents including TANGEDCO.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the present Appeals filed by the Generators i.e. Appeal no. 287 of 2021 filed by KSPL and Appeal no. 288 of 2021 filed by RREL, have merit and thus allowed.

The Impugned Order dated 20.07.2021 passed by the Tamil Nadu Electricity Regulatory Commission in Petition M.P. No.26 of 2020 (M/s. Kamuthi Solar Power Ltd. v. Tamil Nadu Generation and Distribution

Corporation Ltd. & Ors.) and in Petition M.P. No.25 of 2020 (M/s. Ramnad Renewable Energy Ltd. v. Tamil Nadu Generation and Distribution Corporation Ltd. & Ors.) is set aside.

We hold that the solar PV plants commissioned by the Generators i.e. M/s. Kamuthi Solar Power Ltd. and M/s. Ramnad Renewable Energy Ltd. have achieved commissioning within the control period ending on 31.03.2016 and are entitled for a tariff of Rs. 7.01/unit from 18.09.2016, the date at which the actual flow of firm power started, as per the notification issued by TNERC vide its Tariff Order dated 12.09.2014 for the solar PV projects commissioned on or before 31.03.2016.

The captioned Appeals are disposed of accordingly, including all pending IAs, if any.

PRONOUNCED IN THE OPEN COURT ON THIS 07TH DAY OF OCTOBER 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

REPORTABLE / NON-REPORTABLE
pr/mkj