

No.N/379/2017

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**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,**

**No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052.**

**Dated: 29.05.2020**

**Present:**

Shri Shambhu Dayal Meena	..	Chairman
Shri H.M. Manjunatha	..	Member
Shri M.D. Ravi	..	Member

**OP No.202/2017**

**BETWEEN:**

Messrs Mytrah Advait Power Private Limited,  
An SPV of Mytrah Energy (India) Private Limited,  
Registered under the Companies Act, 2013  
having its Registered office at  
8001, Sl.No.109 Q-City,  
Nanakramguda, Gachibowli,  
Hyderabad-500 032,  
Telangana.  
(Represented by its Authorised Signatory)

**... PETITIONER**

[Represented by Smt. Poonam Patil,  
Advocate, Bengaluru]

**AND:**

- 1) Bangalore Electricity Supply Company Limited,  
Having its Corporate Office at  
BESCOM Corporate Office, K.R. Circle,  
Bengaluru-560 001.  
(Represented by its Managing Director)

- 2) Karnataka Renewable Energy Development Limited,  
(KREDL), No.39, 'Shanthi Gruha',  
Bharat Scouts and Guides Building,  
Palace Road,  
Bengaluru-560 001.  
(Represented by its Managing Director)
- 3) Karnataka Power Transmission Corporation Limited,  
Incorporated under Companies Act, 1956  
having its Registered Office at  
Kaveri Bhavan,  
Bengaluru-560 009.  
(Represented by its Managing Director)

... **RESPONDENTS**

[Respondents 1 & 3 are represented by  
M/s Just Law Advocates and Respondent 2 is  
represented by Sri G.S. Kannur,  
Bengaluru.]

### **ORDERS**

The petitioner has filed the present petition under Section 86 (1) (f) of the Electricity Act, 2003, praying for the following reliefs:

- a) To pass an order granting extension of time to the petitioner for fulfilling its obligations under the PPA and consequently extend the Scheduled Commercial Operation Date (SCOD) by reasonable period but not less than 120 days from the effective date as stipulated in the PPA;
- b) To direct the Respondent No.1 to enter into a Supplementary Power Purchase Agreement (SPPA) with the petitioner immediately with the extended SCOD; and

- c) To pass any such further order(s) as this Commission may deem fit and proper in the facts and circumstances of the case as stated above.

2. The material facts stated in the petition are as follows:

- a) The 2<sup>nd</sup> Respondent Karnataka Renewable Energy Development Limited (KREDL) being the Nodal Agency of the State of Karnataka (GoK), for facilitating the development of the renewable energy, had called for the Request for Proposal (RfP) for the development of 1200 MW (AC) Solar Power Projects in the State of Karnataka for implementation in 60 taluks vide Notification dated 20.11.2015. Messrs Mytrah Energy (India) Private Limited being the selected bidder for Sindagi taluk in Vijayapura district for development of 15 MW capacity Solar Power Project, was issued Letter of Award (LoA) and Allotment Letter dated 23.03.2016 (Annexure-B) by KREDL. The tariff discovered was Rs.5.44/- per kWh for the energy to be delivered. The LoA contained other terms and conditions to be complied with. Pursuant to LoA (Annexure-B), the petitioner was incorporated as Special Purpose Vehicle (SPV) for the development of Solar Power Project and to execute the Power Purchase Agreement (PPA) with the 1<sup>st</sup> Respondent/Bangalore Electricity Supply Company Limited (BESCOM). Accordingly, the

petitioner and BESCO entered into PPA dated 31.05.2016 (Annexure-D) with all terms and conditions stated therein. The Power Purchase Agreement (PPA) dated 31.05.2016 (Annexure-D) was approved by this Commission and the same was communicated through letter dated 17.10.2016 (Annexure-E). The approval of PPA was subject to incorporation of certain corrections/modifications in the PPA as stated in the approval letter (Annexure-E), by entering into a suitable Supplemental Power Purchase Agreement (SPPA) between parties. The corrections/ modifications suggested to be incorporated in the PPA were only the formal corrections/modifications, but not material.

- b) As per the terms of the PPA the timeline fixed for achieving the Conditions Precedent is 8 months and for achieving the commissioning of the project is 12 months, from the 'Effective Date'. The Effective Date is defined as the date of approval of PPA by KERC. Therefore, the Conditions Precedent is to be achieved on or before 16.06.2017 and the SCOD is to be achieved on or before 16.10.2017. The petitioner could not achieve the timeline fixed for fulfilling the Conditions Precedent on or before 16.06.2017 and for achieving the commissioning of the project on or before 16.10.2017. The petitioner has filed the present petition on 25.10.2017 with the prayers noted above.

Subsequently, the Solar Power Project in question was commissioned on 08.02.2018. The Commissioning Certificate dated 19.02.2018 issued by the Executive Engineer (EI), OM & HESCOM, Indi is produced by the petitioner with Memo dated 24.04.2018.

- c) It is stated by the petitioner in para 9 of the petition that it could be able to achieve the following milestones towards the progress of the Solar Power Project.
- i) 06.12.2016 – Applied for power Evacuation approval but the same came to be granted only on 19.05.2017 i.e. after 164 days from the date of the application was made. A copy of the application for power evacuation dated 06.12.2016 (Annexure-F);
  - ii) 11.01.2017 – The demand for the processing fee for evacuation approval was raised on 28.12.2016 by KPTCL and the same was paid on 11.01.2017. A copy of the letter dated 28.12.2016 issued by KPTCL (Annexure-G);
  - iii) 24.01.2017 – Appointed Land Aggregator and entered into a land procurement and Development Agreement with a private company for procurement of land (Annexure H);
  - iv) April, 2017 – The petitioner entered into agreements to purchase lands for the 15 MW power plant. A copy of the data w.r.t. the land procured for the power plant is produced at Annexure-J;

- v) 19.05.2017 – The petitioner received the power evacuation approval (Annexure-M).
  - vi) 24.05.2017 – The petitioner filed an application under S.109 and is awaiting for approval. A copy of the application under Section 109 of the KLR Act, 1961 dated 24.05.2017 is as per Annexure-N.
  - vii) 30.05.2017 – Entered into Engineering and Services Agreement with the EPC contractor and agreement for BOP and Module Supply (Annexure-P, P1, P2 & P3).
  - viii) 12.06.2017 – Obtained Financial Assistance from bank (Annexure-Q).
  - ix) 24.06.2017 – Obtained NOC from Village Gram Panchyats. (Annexure-R).
  - x) 20.07.2017 – Placed purchase orders for various equipment. Copies of two such purchase orders are at Annexure-S.
- d) The petitioner applied for regular power evacuation approval on 06.12.2016, but the same was issued to the petitioner by 3<sup>rd</sup> Respondent/(KPTCL) only on 19.05.2017, after 164 days from the date of application.
- e) The petitioner could not apply for permission under Section 109 of the KLR Act, 1961 and could not obtain financial closure, until the regular evacuation approval was received. So also, activities like Bay erection, finalisation of plant design,

procurement of critical solar power plants components had to be kept in abeyance since these were dependent on power evacuation approval. These works were taken up and proceeded with only after obtaining the regular evacuation approval.

- f) Subsequent to obtaining, the power evacuation approval dated 19.05.2017, the petitioner was working with all earnest to complete the project and to achieve the SCOD (17.10.2017), however due to the unprecedented rains and flooding in the region and also due to certain local issues the petitioner was unable to achieve the SCOD. A copy of the data of rainfall issued by the Tahslidar, Sindagi, is produced as Annexure-X.
- g) That the approval to be granted under Section 109 of the KLR Act, 1961 has not yet been granted to the petitioner, which in-turn resulted in non-registration of lands in the name of petitioner till date.
- h) The petitioner wrote letter dated 16.06.2017 (Annexure-V) requesting with the 1<sup>st</sup> Respondent/BESCOM) for grant of 2 months' time to satisfy the condition precedent regarding production of title Deeds in respect of lands required for setting up of the solar power plant explaining the difficulties faced in producing the title deeds and that the petitioner has already

applied under Section 109 of KLR Act, 1961 praying for grant of appropriate approval and the concern authority has not yet granted such approval.

- i) That the 1<sup>st</sup> Respondent/BESCOM issued notice dated 28.06.2017 (Annexure-T), demanding to produce the land acquisition and land conversion details as required, in default, penalty would be levied as per the terms and conditions of the PPA. However, under letter dated 05.08.2017 (Annexure-U) the petitioner paid a sum of Rs.9,00,000 under demand draft of the same date towards penalty in terms of the demand made vide letter dated 28.06.2017 (Annexure-T).
- j) The petitioner wrote letter dated 06.10.2017 (Annexure-W) to 1<sup>st</sup> Respondent requesting to extend the SCOD by at least 120 days, explaining the difficulties faced and stating that these difficulties were 'Force Majeure' events.
- k) That in Appeal No.123/2012 between Gujrat Urja Vikas Nigam Limited Vs. GERC and others, the Hon'ble ATE has held that:

*"the events during the time period elapsed in obtaining statutory/government clearances from the governmental instrumentalities towards land and water sources are force majeure events."*



The Ministry of New and Renewable Energy (MNRE) has also issued a communication dated 28.07.2017 addressed to all the State Governments wherein it has directed the competent State Authorities to consider the case for extension of time, if there are delays of any kind on the part of the State Government authorities/Public Sector Undertakings like; land allotment, transmission/ evacuation facilities, connectivity permission as Force Majeure Events.

- I) Therefore, the petitioner has filed the present petition on 25.10.2017 praying for the reliefs noted above.
3. Upon notice, the respondents appeared through Counsel and 1<sup>st</sup> & 2<sup>nd</sup> Respondents filed separate statement of objections. We may note the objection statements of these respondents.
4. The 2<sup>nd</sup> Respondent/(KREDL), stated that this respondent being the Nodal Agency of the Government of Karnataka for facilitating the development of renewable energy in the State of Karnataka, invited proposals by its *"request for proposal in e-portal on 20.11.2015 to undertake development of 1200 MW solar power in the State"*. Pursuant to it, this respondent has issued letter of allotment dated 23.03.2016 in favour of 'M/s Mytrah Energy (India)Private Ltd', being the successful bidder for commissioning of solar power plant of 15 MW in Sindagi taluk, Vijayapura district. Further it stated that, in order to encourage the development of solar parks in the State, the

Government under Clause 18 of the Solar Policy, 2014-21 has established a dedicated cell with staff drawn from the revenue department and the KREDL to ensure creation of Government/private land banks for development of solar projects. Further it contended that, it is not a necessary party to the present petition as no relief is claimed against it. Therefore, it prayed to dismiss the petition as against it.

5. The statement of objections filed by the 1<sup>st</sup> Respondent/BESCOM) may be stated as follows:

a) The 1<sup>st</sup> Respondent has not disputed the preliminary facts like the petitioner being SPV of M/s Mytrah Energy (India) Private Limited which was the successful bidder for Sindagi taluk, the petitioner executing the PPA dated 31.05.2016 (Annexure-D), this Commission communicating the approval of PPA vide letter dated 17.10.2016 (Annexure E) etc. The further facts that the petitioner was required to achieve the condition precedents within 8 months and commission the solar power project within one year, from the date of approval of the PPA i.e., 17.10.2016 are also not disputed.

b) That the petitioner furnished certain documents to this respondent on 16.06.2017 to comply with the conditions precedents. However, the petitioner did not produce any documents evidencing that it was having clear title and

possession of the required extent of lands for construction of the solar power project. Therefore, this respondent issued letter dated 28.06.2017, calling upon the petitioner to furnish the documents required or to pay the damages. Thereafter the petitioner has paid the damages payable by it, for the non-fulfilment of the condition precedent regarding production of such documents.

- c) The petitioner vide letter dated 06.10.2017, requested this respondent to extend the schedule commissioning date as it could not achieve commissioning of the project within the stipulated time, due to Force Majeure Events. It is contended by this respondent that the reasons assigned by the petitioner for the delay in commissioning of the project, can in no manner be attributed to Force Majeure Events or other reasons stipulated in Article 5.7 of the PPA. The perusal of the Article 14 of the PPA dealing with Force Majeure Events, would make it evident that the delays sought to be termed as events of Force Majeure, are not in fact events that come under the purview of the said provision. Delay in obtaining evacuation approvals cannot be considered to be the events of Force Majeure. The petitioner could commission the solar power project only on 08.02.2018, long after the Scheduled Commissioning Date. Therefore, it is contended that the petitioner is liable for payment of liquidated

damages and also for the reduced tariff, as was prevailing on the date of commissioning of the solar power project.

d) With regard to the contention of the petitioner that it could not achieve scheduled commissioning date due to delay in granting of evacuation approval by 3<sup>rd</sup> Respondent/KPTCL, it is contended that there was no delay in granting evacuation approval by KPTCL as alleged by the petitioner. The different events with dates while obtaining regular evacuation scheme approval are stated as follows:-

- i. On 06.12.2016, the petitioner filed the application with 3<sup>rd</sup> Respondent to grant evacuation approval.
- ii. On 28.12.2016, the 3<sup>rd</sup> Respondent directed the petitioner to pay processing fee towards evacuation scheme approval.
- iii. On 11.01.2017, the petitioner paid the processing fee.
- iv. On 19.01.2017, the Chief Engineer (Ele.), Transmission Zone, KPTCL, Bagalkote, of 3<sup>rd</sup> Respondent was asked to furnish field report on feasibility of the solar power project of the petitioner.
- v. On 06.03.2017, Chief Engineer (Ele), Transmission Zone, KPTCL, Bagalkote, submitted the field report.
- vi. On 20.04.2017, the Tentative Evacuation Scheme approval was issued.

- vii. On 26.04.2017, the petitioner communicated its acceptance for the terms and conditions mentioned in the Tentative Evacuation Scheme approval and requested to issue to Regular Evacuation Scheme approval.
- viii. On 19.05.2017, Chief Engineer (Ele.) (Planning and Co-ordination), KPTCL, Bangalore, issued the Regular Evacuation Scheme approval (Annexure-M) for the proposed solar power project of 15 MW of the petitioner.
- e) It is contended that from the above narrated events, it is evident that there was no delay on the part of 3<sup>rd</sup> Respondent in granting evacuation approval as alleged by the petitioner. It is contended that the 3<sup>rd</sup> Respondent has acted diligently pursuant to the petitioner's application for evacuation approval and has given evacuation scheme approval within the reasonable time period and that there was delay of nearly 50 days from the date of approval of the PPA in filing the application for grant of evacuation scheme approval.
- f) That the petitioner had applied for conversion of land belatedly on 24.05.2017. It is contended that the averment in para 13 of the petition that the petitioner could not apply under Section 109 of the KLR Act, 1961 for conversion of land and could not achieve financial closure due to delay in granting of evacuation approval by KPTCL, is untenable and denied. Averment that the petitioner's various activities like bay erection, finalisation of plant design etc., was kept

in abeyance for want of evacuation of approval is untenable and denied. 3<sup>rd</sup> Respondent has acted diligently pursuant to the petitioner's application for evacuation approval and has given evacuation scheme approval within the reasonable time period. Further, that the petitioner herein has filed the application for evacuation approval with the 3<sup>rd</sup> Respondent after a lapse of nearly 50 days from the approval of the PPA by this Commission. Therefore, the 1<sup>st</sup> Respondent submitted that the contention of the petitioner that there was delay on the part of the 3<sup>rd</sup> Respondent in granting evacuation approval is untenable.

- g) With regard to the averment made in para 20 relating to the letter issued by the MNRE, it is contended that the said letter has no bearing on the petitioner's case. The allegation made by the petitioner, that the 1<sup>st</sup> Respondent has breached its obligations under Article 6.1.3 of the PPA is untenable and denied. The averments made in paras 25 and 26 of the petition regarding the project area receiving heavy rainfall and thereby the petitioner could not complete major works at the project area due to flooding etc., and the same was the force majeure events, are denied.
- h) For the above reasons, the 1<sup>st</sup> Respondent prayed for dismissal of the petition.

6. A separate statement of objection of 3<sup>rd</sup> Respondent is not found to be filed. The 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent are represented by the same Law firm. The statement of objections filed on behalf 1<sup>st</sup> Respondent, has also covered the statement of objections that could be raised on behalf of 3<sup>rd</sup> Respondent. The learned counsel for the 3<sup>rd</sup> Respondent during the arguments referred to the statement of objections of 1<sup>st</sup> Respondent, while narrating the contentions of 3<sup>rd</sup> Respondent. This has not been objected to by the learned counsel for the petitioner. Therefore, we consider the statement of objections filed on behalf of the 1<sup>st</sup> Respondent can be read as the common objection statements by the 1<sup>st</sup> & 3<sup>rd</sup> Respondents.

7. Subsequent to filing of the objections by the respondents to the petition, the petitioner has filed an application on 10.10.2018 for the amendment of the petition to the following effect: -

a) For inserting new paragraphs 10.1, 11.1 and 15.1 after the original paragraphs 10, 11 and 15 respectively.

- In the proposed paragraph 10.1, the petitioner has stated that the delay of 84 days was caused in acquiring the lands due to demonetisation introduced under Notification dated 08.11.2016 and in support of it produced Annexure S-1. Further, the petitioner has stated that on account of the cash crunch, the contractors, suppliers and vendors were

delaying their part of the performances. Further, that the land owners were not keen to sell their lands as payments would be made to them by cheque and proceeds from such sale of lands could not be withdrawn from the banks due to acute shortage of cash in semi-urban and rural banks.

- In the proposed paragraph 11.1, the petitioner has stated that the delay caused in achieving the progress of the solar project, was also due to introduction of the Central Goods and Service Tax Act, 2017 (GST Law) with effect from 01.07.2017. The petition relied upon the Office Memorandum dated 20.06.2018 of the MNRE marked as Annexure S-3 in support of its contention.
- In the proposed paragraph 15.1, the petitioner has stated that there was heavy rainfall from June, 2017 to October, 2017 in the State of Karnataka and the rains were unprecedented and as such same could not be predicted by the solar power project developers. Such incessant rains have resulted, inter alia, in flooding of project sites, idling of labour and equipment at project sites and severally hampering construction works. The petitioner took all possible steps to mitigate the impact of rainfall and in spite



of it, the heavy rainfall resulted in a delay of 49 days. The rain fall data for the relevant period is produce as Annexure W1.

b) Further in the amendment application, the petitioner has prayed for inserting new paragraphs 16, 23 & 27 in place of the original paragraphs 16, 23 & 27 respectively.

- In the proposed paragraph 16, it is stated as follows: -

“16. The delay in issuing evacuation approval, Demonetisation, introduction of GST law and heavy rainfall all constitute Force Majeure events beyond the control of the petitioner. On account of the same, the petitioner was unable to Commission the project by the scheduled commercial operation date of 17.10.2017. Therefore, the petitioner is approaching this Commission seeking extension of time to commission the project”.

- In the proposed paragraph 23, it is stated as follows:

“23. It could be seen that though the petitioner has been putting in its best efforts to complete the project on time, it was on account of the Force Majeure events such as Demonetisation, introduction of GST law, unprecedented heavy rainfall and delay in receiving evacuation approval that was hindering the progress of the project”. The delay caused by each of the Force Majeure events is set out herein below:

Sl. No.	Description of FM Event	From – To	Number of days delay
1	Demonetisation	08.11.2016 to 31.01.2017	84
2	Introduction of GST	01.07.2017 to 31.08.2017	62
3	Rain fall	June 2017 to October 2017 (June(14), July(3), Aug (11), Sep(11), Oct(10) days	49
4	Delay in granting Evacuation approvals	06.12.2016 to 19.05.2017	164
5	Total		359 days

Total delay suffered by the Petitioner's project owing to the afore-stated Force Majeure Events, duly considering over lapping events is 289 days (08.11.2016 to 19.05.2017 and June (14), 01.07.2017 to 31.08.2017, September (11), October (10 days)."

- In the proposed paragraph 27, it is stated as follows:

"27. It is respectfully submitted that despite the delay of 289 days on account of the aforesaid Force Majeure events, the Petitioner with all its best and committed efforts, commissioned the project on 08.02.2018 with a delay of 114 days from the date of SCOD as per PPA i.e. 17.10.2017. In light of the aforesaid Force Majeure events, the Project has been commissioned well within time".

8. The 1<sup>st</sup> Respondent had filed objection on 07.03.2019 to the application seeking amendment of the petition filed by the petitioner. Thereafter, on 04.06.2019 the application for the amendment of the petition was allowed after hearing both sides. On 25.06.2019, the petitioner filed amended

petition in the Registry of the Commission serving the copy of the same on the other side. While preparing the amended petition para 10.1 was added below the original para 10 as required. However, instead of adding the proposed para 11.1 & 15.1 below the original paras 11 & 15 respectively, the same were added as para 12 & para 17.1 respectively. Further, the petitioner was permitted to replace original paras 16, 23 & 27 by the proposed new paras as requested. However, these new paras intended to be inserted are numbered as paras 18, 25 & 29 respectively.

9. After filing the amended petition, the 1<sup>st</sup> Respondent filed additional statement of objections on 16.07.2019 in the registry of the Commission, for the amended portion of the petition. The material parts of the additional statement of objections may be stated as follows:-

- a) The grounds now alleged are completely an after-thought and are untenable.
- b) With regard to demonetisation and GST, it is contended that the petitioner has not produced any material to indicate that the same affected the construction of the petitioner's plant. It is further contended that demonetisation cannot be considered as a force majeure event under Article 14 of the PPA. It is further contended that Article 14.5 of the PPA provides that in case of force majeure event, notification to be issued to the other party within 7 days from the date of commencement of such an event. The petitioner herein

has not issued any such notice to the respondent herein. Therefore, the petitioner cannot seek for an extension of time under Article 14 of the PPA. It is further contended that the demonetisation only affected cash transactions and there was absolutely no embargo placed on cashless transactions by the Government. Therefore, the contention that demonetisation resulted in delayed Commissioning is untenable.

c) With regard to the rainfall data of 2017 submitted by the petitioner, it is contended that the rainfall data of 2016 also indicates the normal rainfall experienced by Sindagi Taluk is 470 mm in the monsoon months i.e., from June to September. The data published by Karnataka State Natural Disaster Monitoring Centre for the year 2016 is produced as Annexure R1. The data furnished by the petitioner also indicates that the total rainfall during June to September, 2017 was 470.5 mm. Therefore, Sindagi taluk did not receive any unprecedented rainfall in 2017. Hence, the averment seeking extension of time on the ground that the petitioner experienced unprecedented rainfall and hence the force majeure event deserve rejection.

d) The averments made in this paragraph 10.1, that encumbrances created over land by the way of loans taken by landowners could not be settled as banks could not process loan repayments is denied as untenable. The averment that the cash crunch created

unreasonable delay to the contractors/suppliers/vendors as they could not complete purchase orders is denied as untenable.

- e) It is contended that the averments made to the effect that contractors/suppliers were delaying performance of the contracts due to lack of clarity in the tax structure, is denied as untenable. The averment that lack of clarity on GST percentage, delayed setting up the project is denied. The averment that the contractors had to revamp the systems and re-issue purchase orders is denied as untenable.
- f) For the above reasons the Respondent No.1 prayed for dismissal of the petition.

10. We have heard the learned Counsel for the parties. The petitioner also filed written arguments.

11. From the rival contentions and the pleadings and the documents produced by the parties and also the submission made by them the following issues arise for our consideration.

Issue No.1: Whether the petitioner has proved the events or circumstances alleged by it amounted to 'Force Majeure' events, enabling extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date?

Issue No.2: If Issue No.1, is held either in affirmative or in negative, what should be the consequences?

Issue No.3: What Order?

12. After considering the submissions of the parties and the material on record, our findings on the above Issues are as follows:

13. Issue No.1: Whether the petitioner has proved the events or circumstances alleged by it amounted to 'Force Majeure' events, enabling extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date?

a) Before proceeding to consider this Issue, we may note the relevant part of 'Force Majeure' as stated in Article 14.3.1 of the PPA which reads thus:

*"14.3.1 A 'Force Majeure' means any event or circumstance or combination of events including those stated below which wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.*

a).....

b) ....

c) ....

d)....

e) ....

*Article 14.4 provides for the events regarding 'Force Majeure' exclusions.*

*Article 14.5 provides for issue of notice to the other side before claiming the benefit of 'Force Majeure' event by an Affected Party.*

*Article 14.6 further provides regarding the duty to mitigate the effect of 'Force Majeure' event to the extent reasonably possible by the Affected Party."*

b) The petitioner has relied upon the following events or circumstances for claiming the extension of time:

- a) Delay in granting evacuation approval;
- b) Unprecedented rainfall;
- c) Demonetization; and
- d) Introduction of GST.

14. Regarding: Delay in granting Evacuation approval:

- a) The petitioner has alleged on 06.12.2016, it filed application for granting Evacuation Scheme approval, however, the 3<sup>rd</sup> Respondent KPTCL issued the Regular Evacuation Scheme approval on 19.05.2017, thereby there was delay of 164 days in granting Evacuation approval. The 3<sup>rd</sup> Respondent denied the said allegations and contended that the period of time of 164 days for issue of Regular Evacuation Scheme was reasonable in the present case.

b) The Regular Evacuation Scheme approval dated 19.05.2017 (Annexure-M) contains the different events that had taken place in between the filing of application for grant of Evacuation Scheme approval and the actual issue of the said approval. The different events with dates while obtaining Regular Evacuation Scheme approval are stated in the statement of objections of 1<sup>st</sup> Respondent as follows:

- i) On 06.12.2016, the petitioner filed the application with 3<sup>rd</sup> Respondent to grant evacuation approval.
- ii) On 28.12.2016, the 3<sup>rd</sup> Respondent directed the petitioner to pay processing fee towards evacuation scheme approval.
- iii) On 11.01.2017, the petitioner paid the processing fee.
- iv) On 19.01.2017, the Chief Engineer (Ele.) Transmission Zone, Bagalkote of 3<sup>rd</sup> Respondent was asked to furnish field report on feasibility of the solar power project of the petitioner.
- v) On 06.03.2017, Chief Engineer (Ele.), Transmission Zone, Bagalkote submitted the field report.
- vi) On 20.04.2017, the Tentative Evacuation Scheme approval was issued.
- vii) On 26.04.2017, the petitioner communicated its acceptance for the terms and conditions mentioned in the tentative evacuation scheme approval and requested to issue the regular evacuation scheme approval.



- viii) On 19.05.2017, Chief Engineer (Ele.) (Planning and Co-ordination), KPTCL, Bangalore, issued the regular evacuation scheme approval (Annexure-M) for the proposed solar power project of 15 MW of the petitioner.
- c) It is contended by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents that the above narrated events would establish that there was no delay on the part of the officials of the 3<sup>rd</sup> Respondent in granting Evacuation approval and the said officials of 3<sup>rd</sup> Respondent have acted diligently.
- d) As against this, the petitioner has contended that the Chief Engineer (Ele.), (Planning & Coordination), KPTCL, Cauvery Bhavan, Bengaluru-560 009 by the letter dated 19.01.2017 (Annexure-K) directed the Chief Engineer (Ele.), Transmission Zone, KPTCL, Bagalakote, to furnish feasibility report for evacuation at 110/11 kV Sindagi Sub-station at 33 kV voltage class using Panther / Coyote conductor power from a Solar plant in Sindagi tauk, Vijayapura district, but the same was sent by CE (E), (TZ), KPTCL, Bagalakote, to CE (Ele.) (P&C), KPTCL, Bengaluru, on 06.03.2017, after a considerable delay. The report of CE (E), (TZ), KPTCL, Bagalakote, dated 06.03.2017 is produced as Annexure-L. The contents of this report is self-explanatory regarding the delay that might have caused in issuing this report. The relevant portion of this reports reads thus:-

*"I am herewith enclosing field/inspection report for subject evacuation scheme submitted by the Superintending Engineer Elec., Transmission (W&M) Circle, KPTCL, Bagalakote, based on the report of the Executive Engineer Elec., TL&SSM Division, KPTCL, Vijayapur, under reference (2) as desired by you under reference (1)."*

From the above contents of the letter dated 06.03.2017 (Annexure-L), it is clear that it is only the Executive Engineer, Elec., visited the spot and prepared the report and submitted the same to the Superintending Engineer and thereafter, it was sent to Chief Engineer (Ele.), TZ, KPTCL, Bagalakote. It is only the routine procedure that is to be blamed for the delay in preparing the feasibility report.

- e) The petitioner or the 3<sup>rd</sup> Respondent have not produced any guidelines or other statutory provisions disclosing the period within which the Evacuation Scheme approval is to be issued. The Conditions Precedent states that the petitioner has to obtain the Evacuation Scheme approval within 8 months from the date of approval of the PPA i.e., 31.05.2016. The issuance of Regular Evacuation Scheme approval takes certain time for study of Evacuation feasibility and to ascertain the terms and conditions to be imposed while issuing the Regular Evacuation Scheme. In the absence of any specific timeline prescribed, it is not possible to hold that there was delay in granting Regular Evacuation Scheme

approval subsequent to filing the application for the grant of the same.

- f) The Respondent 1 & 3 have contended that there was unexplained delay in applying for Regular Evacuation Scheme. They contended that soon after the communication of the approval of the PPA by the Commission, the petitioner could have applied for Evacuation Scheme approval. The LoA was issued on 23.03.2016 indicating the location of the project in Sindagi taluk of Vijayapura district. The petitioner executed the PPA on 31.05.2016. The communication of the approval of PPA was sent on 17.10.2016. The 3<sup>rd</sup> Respondent/ KPTCL had publicised in the official website, the availability of evacuation feasibility at or about the time of the RfP stage. The petitioner was the selected bidder for Sindagi taluk, Vijayapura district. Therefore, the petitioner could have finalized the sub-station at least by the time of communicating the approval of PPA on 17.10.2016. However, the petitioner has filed the application for evacuation scheme approval on 06.12.2016. Therefore, it can be said that the petitioner could have filed the application for evacuation scheme approval about 50 days earlier to 06.12.2016, the day on which the petitioner has applied for evacuation scheme approval.
- g) The petitioner claims that in the month of April, 2017, as detailed in Annexure-J, it had obtained registered agreements for sale in its

favour from three different persons with respect to 83 acres and 07 guntas of land required for construction of Solar Power Plant. Though the registered agreements for sale are not produced, the said fact can be accepted, as the petitioner has filed the application under Section 109 of the KLR Act, 1961 before the Deputy Commissioner, Vijayapura district, Vijayapura, on 24.05.2017 as per Annexure-N. The petitioner appears to have taken the possession of the lands while the agreements for sale were executed. The petitioner got the regular evacuation scheme approval on or about 19.05.2017. The petitioner is permitted to proceed with the construction of Solar Power Plant, soon after filing the application under Section 109 of the KLR Act, 1961, without waiting for the passing of actual conversion order of the lands by the Deputy Commissioner, Vijayapura, as provided in the Solar Policy 2014-21. The petitioner has entered into Engineering and Services Agreement, Construction Agreement and Module Supply Agreement on 30.05.2017 as per Annexures P, P1, P2 & P3. The petitioner has obtained loan Sanction Letter dated 12.06.2017 from the financier, asking the petitioner to express its acceptance within 16.06.2017.

- h) The petitioner has contended that without obtaining the regular evacuation scheme approval, it could not have proceeded to take the agreements for sale of the lands identified from different farmers

and to apply for permission under Section 109 of the KLR Act, 1961 and the financial closure could not have been completed. The Respondents have denied the said averments made by the petitioner.

- i) The Commission is of the view that obtaining evacuation scheme approval is not a pre-requisite for taking agreement for sale of lands, for filing application under Section 109 of the KLR Act, 1961 and for sanction of loan by the financier. The petitioner has entered into agreement for sale in April, 2017, as per Annexure-J and applied on 24.05.2017 for necessary permission under Section 109 of the KLR Act, 1961 (Annexure-N) and received communication dated 12.06.2017 of financial closure. The petitioner has not produced any provision of Rules or Regulations or other Guidelines prescribing the production of regular evacuation scheme approval for issue of loan sanction order or for applying permission under Section 109 of the KLR Act, 1961. It is also not shown by the petitioner that the Financer or the concerned Authority for conversion of land use, demanded the production of regular evacuation scheme approval before taking further action on the subjects. Therefore, it cannot be accepted, production of evacuation scheme approval is a pre-requisite for further progress of the above subjects.
- j) Therefore, we are of the considered view that there was no delay in granting evacuation scheme approval and that the time taken for

issuance of evacuation scheme approval has not caused any delay in the progress of the other events. Therefore, this cannot be treated as Force Majeure Event.

- k) The petitioner has further contended that without the evacuation scheme approval, the petitioner could not have proceed with the activities like; finalization of plant design, procurement of critical solar power plant components, etc., We think the progress in respect of these activities is not linked with evacuation scheme approval.

15. Regarding: Unprecedented rainfall;

- a) The petitioner has contended that during June, 2017 to October, 2017, there was unprecedented rainfall in the project site area and in the whole of northern Karnataka and that the project area was flooded and the progress of the construction work was adversely affected. In the letter dated 06.10.2017 (Annexure-W) addressed to the General Manager (Ele.), Power Purchase, BESCOM, Bengaluru, the petitioner has claimed that from 27.08.2017 up to the end of September, 2017 at different stretches, there were heavy rainfall and totally for 29 days the project activities were got affected. In the amended petition, the petitioner has also claimed further 10 days of disruption of activities due to heavy rainfall in the month of October, 2017. Therefore, it can be considered that the

affected period as per the petitioner was 39 days due to heavy rain. The petitioner has produced Annexure-X, the rainfall data issued by Tahsildar, Sindagi taluk, Vijayapura district, for the month from June, 2017 to October, 2017. The petitioner has also produced fifteen (15) photos of the project site area affected by rainfall. One photo was taken on 29.08.2017 and another photo was taken on 01.10.2017 and all other 13 photos relate to different dates in September, 2017. The petitioner has also produced the statistics of rainfall from June, 2017 to October, 2017 prepared by the Director, Karnataka State Natural Disaster Centre, as per Annexure-W1. The photos clearly indicate the hampering of the progress of work at project site. This fact was pleaded in the petition as well as in the letter addressed to the General Manager (Ele.), BESCO, Bengaluru, as per Annexure-W. The Commission can also take judicial notice that Vijayapura district had suffered a lot due to heavy rain in the rainy season of 2017. Therefore, we are of the opinion that the project activities were got affected for 39 days during rainy season from last week of August, 2017 to 1<sup>st</sup> week of October, 2017.

- b) Article 14.5 of the PPA provides for notification of 'Force Majeure Event' by the affected party to the other party before claiming any relief under Force Majeure Event. The petitioner has notified such event to the 1<sup>st</sup> Respondent/BESCO only after cessation of the

said Force Majeure Event as per letter dated 06.10.2017 (Annexure-W) but not at the beginning the event. Therefore, as per the terms stated in Article 14.5 of the PPA, the petitioner cannot be extended the relief under Force Majeure Event.

16. Regarding: Demonetization:

In Para 10.1 of the amended petition, the petitioner has stated that Demonetization had adverse effect from 08.11.2016 to the end of January, 2017, on land acquisition and other project activities which were delayed considerably. The petitioner has entered into land procurement and development agreement on 24.01.2017 (Annexure-H) and engineering and services contract on 30.05.2017 (Annexure-P, P1, P2 & P3). In the original petition, the petitioner has not stated anything regarding demonetization, affecting the progress of the project of the work. However, it can be noted that in the letter dated 16.06.2017 (Annexure-V) addressed to the General Manager (Ele.), Corporate Office, BESCO, Bengaluru, the petitioner had averred that Demonetization and GST affected the progress of its project work. As already noted in the petition, such contentions were not taken. Therefore, it is clear that as there was no supporting material, the petitioner had omitted these grounds in the petition. The petitioner entered into sale agreements relating to lands in the month of April, 2017. Therefore, we are of the opinion that the demonetization having adverse effect from 08.11.2016 to



the end of January, 2017 could not have affected the progress of the project of the petitioner.

17. Regarding: Introduction of GST:

- a) The petitioner in the amended petition at para 12, has stated that there was a slow-down from July, 2017 to September, 2017 in manufacturing as well as service industry across the country. The petitioner has relied upon the Official Memorandum (OM) dated 20.06.2018 issued by MNRE marked as Annexure-S3. This OM was issued on the request of the Solar Power Developers, to SECI/NTPC/other Implementing Agencies, for extension of time on case to case basis. It is made clear in this OM that the extension of time could be given for the Solar Power Project Developers provided they furnish all documentary evidence and establishing that they were actually affected due to GST induced disruptions in the period for which extension has been claimed.
- b) In the present case, the petitioner has not produced any documentary evidence in support of its claim and it has not established that it was actually affected due to GST induced disruptions between the period from 01.07.2017 to 31.08.2017.
- c) Therefore, we hold that the petitioner has failed to establish that introduction of GST has affected the progress of its project.

18. For the reasons stated above, we hold Issue No.1, in negative.

19.Issue No.2: If Issue No.1, is held either in affirmative or in negative, what should be the consequences?

It is found that issue No.1 is held in negative and thereby the petitioner is not entitled to extension of time. Whenever there is delay in achieving the Conditions Precedent and Scheduled Commissioning Date, the Solar Project Developer would be liable for payment of damages under Article 4.3 and for payment of liquidated damages for delay in commencement of supply of power under Article 5.8 of the PPA respectively. Further, as a consequence of delay in commissioning of the project beyond the Scheduled Commissioning Date, the project would be liable for lower tariff, if any, as provided in Article 12.2 of the PPA. In the present case, it was found that the petitioner has failed to establish any 'Force Majeure' events to claim extension of time for achieving the Conditions Precedent or Scheduled Commissioning Date. The Solar Power Project was commissioned on 08.02.2018 as against 16.10.2017, the Scheduled Commissioning Date. The Tariff agreed in the PPA is Rs.5.44 per kWh. The KERC determined tariff applicable as on the Commercial Operation Date i.e., 08.02.2018 is Rs.4.36 per kWh. Therefore, the petitioner is entitled to the reduced rate of Rs.4.36 per kWh. Therefore, Issue No.2, is held accordingly.

20. Issue No.3: What Order?

As already noted, the petitioner has paid damages of Rs.9,00,000 towards Conditions Precedent regarding non-production of title deeds of the lands in question. It is found that the demand for damages under Article 4.3 of the PPA is found to be not illegal. Therefore, for the foregoing reasons, we pass the following Order.

**ORDER**

- a) The petitioner is not entitled to any of the reliefs claimed in the petition;
- b) The petitioner is entitled to a reduced rate of Rs.4.36 per kWh for the energy supplied to the 1<sup>st</sup> Respondent from the Commercial Operation Date during the term of PPA;
- c) The petitioner is liable for payment of liquidated damages for delay in commencement of supply of power to the 1<sup>st</sup> Respondent as per Article 5.8 of the PPA; and
- d) The petitioner and the 1<sup>st</sup> Respondent shall settle the monetary claims as directed above, taking into consideration, the amount already paid/received between them.

sd/-  
(SHAMBHU DAYA MEENA)  
Chairman

sd/-  
(H.M. MANJUNATHA)  
Member

sd/-  
(M.R. RAVI)  
Member

