

No. N/88/2018

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052.**

Dated 05.06.2020

Present:

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

OP No.38/2018

BETWEEN:

Messrs Adani Green Energy (UP) Limited,
A Company Registered under the provisions
of Companies Act, 1956)
Adani House,
Near Mithakhali Six Roads,
Navarangpura,
Ahmedabad-380 009.

... PETITIONER

[Represented by Smt. Poonam Patil, Advocate]

AND:

1. Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru-560 001.
(Represented by its Managing Director)
2. Karnataka Renewable Energy Development Limited,
No.39, Shanthi Gruha,
Bharat Scouts & Guides Building,
Palace Road,
Bengaluru-560 001.
(Represented by its Managing Director)

3. Karnataka Power Transmission Corporation Limited
Cauvery Bhavan,
Kempegowda Road,
Bengaluru-560 009.
(Represented by its Managing Director)

4.State of Karnataka,
Energy Department,
Room No.236, 2nd Floor,
Vikasa soudha,
Dr. B.R. Ambedkar Veedhi,
Bengaluru-560 001.
(Represented by Addl. Chief Secretary)

..... **RESPONDENTS**

[Respondents 1 & 3 represented by Just Law, Advocates;
Respondents 2 & 4 represented by Sri G.S. Kannur, Advocate]

ORDER

1. This is a petition filed under section 86 of the Electricity Act, 2003, praying

for the following reliefs:

- a) Call for records;
- b) To declare that the Petitioner was prevented from performing its obligations under the Power Purchase Agreement (hereinafter called as PPA) due to Force Majeure events affecting it;
- c) To grant concurrence to the Supplemental PPA (hereinafter called as SPPA) dated 17.12.2016; and
- d) To declare that the Effective Date under Article 3.1 of the PPA is the date on which the SPPA receives its concurrence from this Commission;
Alternatively;

e) To declare that the Effective date under Article 3.1 of the PPA is the date on which the SPPA was signed by the Petitioner and Respondent No.1 on 17.12.2016;

Alternatively;

f) To declare that the Effective date under Article 3.1 of the PPA is the date on which the PPA approval letter of the Commission was received by the Petitioner on 26.10.2016;

g) If the Commission were to consider that there is a delay in fulfilment of the Conditions Precedent and Commissioning of the Project, to condone the inadvertent delay caused for the reasons beyond the control of the Petitioner due to force majeure events affecting it in fulfilment of the Conditions Precedent and in achieving the Commercial Operation Date (hereinafter called as COD) of the project;

h) To direct the Respondents not to levy any liquidated damages and not to take any other incidental coercive measures under the PPA or under any other law for the time being in force, against the Petitioner based on the previous understanding of the parties on the Effective Date and resultant COD.

2. The facts mentioned in the Petition are:

a) The Petitioner is a company incorporated under the Companies Act, 2013, a 100% subsidiary of Adani Green Energy Limited and is primarily

engaged in the business of setting up power plants and generation of electricity.

- b) The Respondent No.2 invited proposals by its "Request for Proposal" dated 12.02.2016 (hereinafter referred as RfP) prescribing the technical and commercial conditions for selection of bidders for undertaking development of solar PV ground mounted power plants in Karnataka to be implemented in 17 taluks for capacity of 290 MW (AC) through private sector participation.
- c) Respondent No.2 after evaluation of the proposals received from bidders, accepted the bid of Adani Green Energy Limited for development of 20 MW (AC) capacity of solar project in Ramanagara Taluk and issued a Letter of Award dated 30.05.2016 (hereinafter called the "LoA") and allotment letter dated 30.05.2016 to Adani Green Energy Ltd., requiring, execution of PPA.
- d) Adani Green Energy Limited accepted the LoA for development of 20 MW Solar PV project in Ramanagara Taluk, Ramangara District, vide its letter dated 08.06.2016 and as per clause No.2.1.1 of the RfP, proposed to execute the Project through Special Purpose vehicle (SPV), Adani Green Energy (UP) Limited, i.e., the Petitioner.
- e) Thereafter, the Petitioner executed a PPA with Respondent-1 on 29.06.2016 for setting up of the solar power plant at Ramanagara Taluk.

The PPA was forwarded by the Respondent-1 to the Commission for approval.

- f) The Commission vide its letter dated 17.10.2016 communicated approval to the PPA subject to incorporating certain corrections/modifications by entering into a suitable SPPA. The said letter of the Commission was received by the Petitioner on 26.10.2016. Accordingly, the Petitioner executed a SPPA dated 17.12.2016 with Respondent-1.
- g) Clause 3.1 of the PPA defines the term "Effective Date" as the date of concurrence of KERC on the PPA.
- h) As per Article 4.2 of the PPA, the Solar Project Developer (SPD), is required to achieve the Conditions Precedent, i.e., financial closure, obtain evacuation approval and documentary evidence of having clear title and possession of the land, required for the Project in the name of Developer within 8 months from the Effective Date of the PPA, unless such completion is affected by any force majeure event, or if any of the activities is specifically waived in writing by Respondent No.1.
- i) Article 21 of the PPA defines the term "Scheduled Commissioning Date" as 12 months from the effective date.
- j) The petitioner communicated with Additional Chief Secretary, Government of Karnataka (GoK), Energy Department vide its letter on 30.05.2017 relating to fulfilment of conditions precedent under the PPA and submitted that the process for land procurement and approval

under Section 95/109 of the Karnataka Land Reforms (Amendment) Act, 2015 [for short KLR (Amendment) Act, 2015] is a time consuming process and beyond the control of Developers. The Petitioner requested the Government of Karnataka (GoK) to intervene in the matter and direct the ESCOMs to take cognizance of the documents submitted to KREDL, as sufficient compliance of the 'Conditions Precedent'.

- k) The Petitioner further addressed a letter dated 10.06.2017 (Annexure P-9) to Respondent-1 requesting to accept documents submitted to Respondent-2/ KREDL for approval under Section 95/109 of the KLR (Amendment) Act, 2015 as sufficient compliance of Conditions Precedent. The Petitioner also requested for time extension of 3 months, if the submitted documents are not acceptable.
- l) The Respondent-1 vide its letter dated 28.06.2017 (Annexure P-10) informed the petitioner that the land acquisition details and land conversion details have not been furnished and therefore, in this regard penalty will be levied as per the PPA, for non-fulfilment of Conditions Precedent.
- m) The Petitioner had, immediately after issuance of LOA, even before the signing of PPA and approval of the PPA by the Commission, approached the KPTCL for connectivity approvals on 22.07.2016. However, KPTCL kept the connectivity approval process on hold for want of Commission's approval to the PPA in the light of Commission's

communication returning all the PPAs to ESCOMs. In the absence of Commission's approval and Transmission connectivity approvals, the Petitioner was unable to progress on the land acquisition activities. Hence, the Petitioner lost precious time in project execution for no fault of it but due to delay in process of getting approval of PPA from the Commission and withholding of the connectivity permissions by KPTCL.

n) KPTCL granted the evacuation of 10 MW each to 66/11 kV Hejjala Sub-station (for short S/s) and 66/11 kV Melehalli S/s. Subsequently, the Petitioner on 01.11.2016 approached KPTCL to allow connectivity of 20 MW solar power project at 66/11 kV Melehalli S/s. Accordingly, the evacuation approval was granted by KPTCL. The Petitioner requested for connectivity to 66/11 kV Chakkagangawadi S/s. Later, on 13.03.2017 the Petitioner again requested for changing the evacuation S/s from 66/11 kV Chikkagangawadi S/s to 66/11 kV Melehalli S/s due to non-acquiring of land at Virupasandra village and proposing to set up the project at Melehalli & Arehalli villages of Ramanagara Taluk. Accordingly, the request for the change in the Sub-station was considered and processed and tentative evacuation scheme was communicated vide Letter dated 13.06.2017. KPTCL gave connectivity approval on 21.06.2017 (Annexure P-11).

o) After getting the regular connectivity approval from KPTCL, the petitioner initiated land acquisition activity and approached KREDL on 12.06.2017, for issuance of order u/s 95 of KLR (Amendment) Act, 2015,

for acquisition of 88 acres 18 guntas of land on lease. The said Order from the Government authorities is awaited. This has resulted in delay in obtaining the clear title and possession of the land, required for the project within 8 (eight) months from effective date of the PPA i.e., 17.10.2016.

- p) Demonetization was declared in the country on 08.11.2016 and all business activities at the ground level were stalled for a period 2-3 months. Demonetisation impacted the land acquisition phase.
- q) The Goods and Services Act (GST) was introduced by Government of India (GoI) w.e.f. 01.07.2017 after which certain previous exemptions provided on goods required for the execution, construction and operation of solar projects ceased to exist. As a result of change in the tax regime, the supplies for the vendors, invoicing and the payments were impacted. This resulted in the delay in supply of materials slowed the progress of the project implementation. The impact of GST was felt for a period of 3 to 4 months.
- r) There was a delay in clearance of solar modules imported by the Petitioner for its projects in Karnataka through Chennai Port and Nahva Sheva Port, due to wrong classification of HSN code for solar PV modules by the customs authorities. In July and August 2016, the classification of solar PV modules was done under CTH 8541, which attracted zero % Basic Custom Duty (BCD). This was disputed at various ports by the

customs authorities. The customs authorities were of the view that classification of Solar Panels with diodes and other current regulating equipment/elements would be classifiable under CTH 8501, which attracts 7.5% BCD.

- s) On 22.09.2016, the Central Board of Excise and Customs (CBEC) issued a clarification regarding the appropriate classification of Solar PV modules equipped with elements like diodes, stating that such solar PV modules, will not get excluded from CTH 8541, if the same do not supply power to an external load viz., motor, electrolyser, etc., On 29.09.2016, the office of the Chief Commissioner of Customs, Mumbai, in Public Notice No.135/2016 reiterated the clarification issued by the CBEC.
- t) Even though the clarification was issued by the CBEC, the Petitioner received a show-cause notice dated 27.07.2017 from the office of the Commissioner of Customs, Chennai, disputing the classification of solar modules under CTH8541, on the same ground, which was settled in September 2016, calling upon to explain as to why "Poly Crystalline Silicon (C-Si) Solar PV modules" accompanied by a junction box, should not be classified under CTH 8501 and BCD @ 7.5% plus cess.
- u) On the same issue the Petitioner was summoned by the Appraiser, Special Intelligence & Investigation Branch, Custom House, Chennai, under Section 108 of the Customs Act, 1962, vide its telegram dated

27.09.2017 for giving evidence and producing relevant documents, on 04.10.2017, in respect of an inquiry being made in connection with the import of Solar PV modules made by the Petitioner.

- v) In response to the summons dated 27.09.2017, the Petitioner on 05.10.2017 approached the Deputy Commissioner, Customs, Chennai, and found that the solar panels imported for Karnataka projects would be liable for seizure and provisional release of said goods would be permitted by the customs office on payment of differential amount between the concessional duty leviable under CTH-8541 and the duty payable under CTH-8501.
- w) On 06.10.2017, the Petitioner represented to the Deputy Commissioner, Customs, Chennai and on 31.10.2017 to customs officials. The petitioner put efforts including through the National Solar Energy Federation of India (NSEFI), in resolving the issue which has resulted in extraordinary delay in commissioning.
- x) This event is covered under per article 14 of the PPA, governing Force Majeure, as the above event has caused unavoidable delay in the performance of obligations of SPD post execution of PPA and is beyond reasonable control of SPD.
- y) The definition of Force majeure cannot be restricted to a few examples set out in Article 14.3 of the PPA and the illustrations are not exhaustive

and the intention of the parties was to save the performing party from the consequences of anything over which the affected party has no control and as a result of which it was rendered incapable of performing the contract.

z) As per the Article 5.7 of the PPA, the scheduled commissioning date and expiry date of the PPA needs to be deferred for the period during which such force majeure event subsists and the SPD is prevented from performing its obligations under Article 5.1.

aa) For land acquisition, the following process needs to be followed:

For Purchase of land: Procedure under Section 109 of KLR Act, 1964 is followed. The approval has to be followed at the individual District Collector level, only after KREDL issues a formal letter for processing the application called the facilitation letter.

For Lease of land: KREDL scrutinises all land documents and forwards the same to the Department of Energy for issuance of Government Notification/Order under Section 95 of KLR (Amendment) Act, 2015. Post this Government Notification, the concerned Collector issues a demand note for payment of conversion fees. After paying of the conversion fees, the Lease between the farmer/land owner & KREDL will be registered. Thereafter, the Lease/sub-lease will have to be registered between the SPD and KREDL.

These activities involve collection, collation of huge amount of documentation from the taluk offices and involves numerous steps. For land extent beyond the ceiling limit of 20 units, Cabinet approval of Karnataka Government is required. The whole process takes 5 to 6 months or even more time for KREDL.

ab) The Petitioner considering the above facts, on 06.7.2017 and 31.07.2017 (Annexure P-17) issued notices to the Respondent-1 in accordance with the Articles 14.5 and 5.7 of the PPA on occurrence of the Force majeure events and requested to allow time extension for fulfilment of Conditions Precedent till issuance of approval from Government of Karnataka permitting usage of lands for non-agricultural purposes or till project achieves its Commercial Operation Date, whichever is earlier. The Petitioner also requested Respondent-1 to withdraw its letter dated 28.06.2017 imposing levy of penalty.

ac) The Ministry of New and Renewable Energy (MNRE), on 28.07.2017 (Annexure P-18), taking due cognizance of the fact that the delay in connectivity permissions, land approvals and force majeure events can delay project implementation, has informed the State Governments that competent authorities can allow extension of time as per contractual agreements.

ad) In the light of the MNRE's letter, the Petitioner on 02.08.2017 (Annexure P-19), once again requested Respondent-1 in terms of Article 5.7 of PPA to provide relief by granting extension of time in submission of

documents on fulfilling conditions precedent and achieving SCOD by at least 49 days (equivalent to delay by KPTCL for connectivity approval).

ae) The 1st Respondent vide its letter dated 12.09.2017 (Annexure P-20) referred the Petitioner's request for extension of time to the Commission for directions.

af) The 1st Respondent vide its letter dated 17.11.2017 (Annexure P-21) replied referring to the Commission's letter dated 04.10.2017, wherein the Commission had directed as under:

- i) To allow the developer of the projects to commission the solar project;
- ii) As per the terms of the PPA, depending upon the actual Commercial Operation Date (CoD), the BESCO should enforce tariff, recovery of liquidated damages due to delay in achieving the CoD and other related aspects; and

iii) To direct the developer of the projects, to file a petition before the Commission after successful commissioning of the project with all the relevant grounds/documents, for justifying the claims for extension of time under Force Majeure conditions of the PPA, if so advised. BESCO in the said letter communicated its approval to commission the project on or before 16.12.2017 subject to the following conditions:

- To file a petition before the Commission with all the relevant grounds/documents, justifying the claims for extension of time under Force Majeure conditions of the PPA.

- The tariff applicable would be as per Article 12 (clause 12.2) of PPA.
- At present, the prevailing varied tariff applicable is as per KERC tariff order dated 12.04.2017.
- The liquidated damages as per the PPA clauses 4.3 and 5.8 are applicable.
- The Contract Performance Guarantees (CPG) are valid up to 29.09.2018. The same are to be extended up to 28.11.2018 and extended CPG are to be furnished within 15 days from the date of the letter.

This petition is filed on 10.04.2018, as instructed in the above letter.

3. The grounds urged by the Petitioner are:

- a) There was considerable delay in approval of PPA by the Commission. No meaningful progress is expected till the PPA is approved by the Commission. The original PPA has been substantially modified by the SPPA and the original PPA is to be read together with the SPPA. The Effective Date, needs to be changed from 17.10.2016 to the date of signing of SPPA, i.e., 17.12.2016, as granted to developers who signed the PPA on or prior to 25.05.2016. Unless the SPPA is approved, the Effective date does not commence. As SPPA is yet to be approved, there is no question of levying penalty or liquidated damages.
- b) In view of the changes in the definition on Delivery Point in the SPPA, the Petitioner had to make substantial deliberations on whether to continue

with or shift the project site/s. The Petitioner waited for a long time for the approval of the SPPA to get certainty on the Delivery point/s. Since, approval was not accorded to the SPPA, the Petitioner was contemplating to commission the project as per the original PPA. This caused substantial delays. In order to confer certainty on the investment, the SPPA needs to be approved by the Commission. Hence, the Effective Date should be considered from the date of approval of the SPPA.

- c) The delay in grant of PPA approval and connectivity approval beyond reasonable time, is not within reasonable control of the Petitioner and therefore is a 'force majeure' event under Article 14 of PPA.
- d) As per Article 5.7 of the PPA, Scheduled Commissioning Date (SCOD) and expiry date of PPA needs to be deferred for the period for which such Force Majeure event subsists.
- e) The tariff under the PPA is discovered through competitive bidding. Hence, it is not vulnerable to the variations in the generic tariff effected vide different generic tariff orders. The generic tariff order dated 30.07.2015 specifically excludes its applicability to the projects under competitive bidding. Since the subsequent generic tariff order dated 12.04.2017 is only a modification of the earlier order, this too is not applicable to the petitioner's case. Hence, there is no resultant impact on the tariff for delay in the commissioning.

f) The letter dated 17.10.2016 of the Commission approving the PPA was received by the Petitioner in Ahmedabad on 26.10.2016. Further, there was a delay of 49 days in granting approval by KPTCL, delay in land acquisition, delay of 3 months due to demonetization, delay of 3 months due to GST implementation, and delay due to wrong classification of modules under CTH 8501 instead of 8541 at Chennai Port. Hence, the project was commissioned on 28.03.2018 with a delay of 163 days.

4. Upon issuance of Notice, the respondents appeared through their Counsel and filed Statement of Objections.

5. The gist of the Statement of objections filed by the Respondent No.1 is as follows:

a) On 10.06.2017, the Petitioner requested the Respondent No.1 to consider that it has complied with the conditions precedent by submitting land documents for conversion of land with the KREDL and also requested extension of time by 3 months to achieve conditions precedent. Thereafter, on 17.06.2017, the Petitioner furnished certain documents to show compliance with the conditions precedent. However, the Petitioner did not produce any document showing that the Petitioner was in clear possession of land on which it intends to execute the project. Hence, the Respondent vide letter dated 28.06.2017 called upon the Petitioner to fulfil the conditions precedent

by furnishing land acquisition details and land conversion in terms of the PPA, failing which the penalty will be levied in terms of the PPA.

b) On 17.11.2017, the Petitioner was informed that the Respondent was granting approval for extension of time subject to the orders of the Commission. Therefore, the Petitioner was requested to prefer a petition before the Commission and seek further approval. In furtherance to the same, the Petitioner has filed the present petition.

c) The relationship between the parties is governed strictly by the terms of the contract. The terms of the PPA spell out the time frame for commissioning, the effective of the PPA, the period within which conditions precedent have to be achieved and the penalty that follows due to non-adherence to the timelines of the PPA.

d) As per Article 4 of the PPA, the petitioner is required to satisfy conditions precedent within 8 months from the effective date. Therefore, the Petitioner was required to achieve conditions precedent on or before 16.06.2017. One of the conditions precedent was that the Petitioner had to furnish documentary evidence of having the clear title and possession of the land required for the project in the name of the developer. However, the Petitioner has not produced any document showing that the clear title and possession of land till date. It was only on 12.06.2017, that the Petitioner made a request to KREDL for issuance of notification under Section 95 of the KLR (Amendment) Act, 2015. The

petitioner has not taken steps within reasonable time to achieve conditions precedent. Therefore, the Petitioner has not acted in a diligent manner and the delay can only be attributed to the Petitioner.

- e) The PPA sets out the Force Majeure events, in Article 14. It is settled position of law that delays in obtaining approvals cannot be considered to be events of force majeure. Further, Article 5.1 clearly sets out the obligations of the Developer and states that it is the responsibility of the developer to obtain all clearances, consents etc. Hence, knowing fully well of its obligations under the contract, the Petitioner is attempting to take advantage of its own wrong, which is impermissible in law and ought not to be permitted.
- f) The petitioner was required to achieve SCOD by 16.10.2017 as per Article 8.5 of the PPA. The Petitioner has commissioned the Plant on 28.03.2018. The reason assigned for the delay in commissioning of the project cannot be attributed to the Respondent.
- g) Delay in obtaining evacuation approval, forest clearance approval and customs clearance approval at Mumbai and Chennai ports cannot be termed as events of force majeure under Article 14 of the PPA.
- h) Article 14.4 of the PPA, stipulates Force Majeure exclusions. Any non-performance caused due to negligence, omissions, errors, failure to comply with an Indian Law and breach or default under the Agreement cannot be termed as a force majeure event. The Petitioner has not

taken steps within reasonable time frame to obtain necessary approvals. Hence, the averment that the Petitioner could not complete the project within the stipulated time frame as it was affected by the force majeure event is untenable and denied.

- i) Article 14.5 of the PPA sets out the procedure to be followed for notification of an event of force majeure and requires issuance of a notice of Force Majeure within 7 days of occurrence of such event. The Petitioner admittedly has not issued such a notice as contemplated in the PPA. It is settled law that when the terms of a contract contemplate issuance of a notice of Force Majeure and the same is not followed, the Force Majeure clause cannot be deemed to be invoked.
- j) The Government of India announced demonetization of bank notes of denominations of Rs.500 and Rs.1000 on 08.11.2016. Further, GST was implemented in the country on 22.06.2017. The said dates clearly indicate that the events relied upon by the Petitioner as Force Majeure events are wholly untenable.
- k) With regard to delay in customs clearance of the solar modules at Chennai and Mumbai Ports, it is the obligation of the Petitioner under Article 5.1.1 (b) of the PPA to comply with all applicable laws and obtain applicable consents, clearance and Permits. Also, as per Article 5.1.1 (g) of the PPA, the Petitioner is responsible for all payments related to taxes, cess, duties or levies imposed by the Government

Instrumentalities or competent statutory authorities on land, equipment, material or works of the project. Any delay caused in obtaining necessary approval cannot be attributed to the Respondent.

- l) Article 5.7 stipulates the circumstances in which the Petitioner can be granted extension of time to commission the project. The Petitioner is entitled to extension of SCOD in cases of default by the Respondent, Force Majeure events affecting the Petitioner and the Respondent. In this case, the delay in commissioning the plant can in no manner be attributed to the reasons stipulated in Article 5.7 of the PPA. Therefore, the Petitioner is not entitled to any extension of SCOD under Article 5.7 of the PPA.
- m) The Petitioner has to pay damages to the Respondent in the event of failure to achieve conditions precedent and SCOD within the stipulated time frame in accordance with Articles 4.3 and 5.8 of the PPA.
- n) The Respondent is a public utility and non-receipt of electricity within the stipulated time frame comes at a price. The Petitioner ought not to be absolved of its obligations and duties under the PPA on the ground of delay, which is in fact caused wholly and solely by the Petitioner.
- o) The contention that the date on which SPPA was signed or the date on which the Petitioner received the letter from this Commission approving the PPA should be considered as effective date does not flow from the

PPA between the parties. The Petitioner cannot be permitted to alter the terms of the PPA to suit its needs. When the language of the contract is clear, the question of providing any other interpretation running contrary to the plain terms of the contract is impermissible. This is so as this Commission has clarified vide its letter dated 25.10.2016 (Annexure R-2) that no separate approval is required for the SPPA. The averment that the original PPA is substantially modified by the execution of the SPPA is untenable and denied.

- p) There was no delay on the part of KPTCL in giving connectivity approval, as tentative evacuation approval was given on 13.06.2017 and regular evacuation approval was given on 21.06.2017.
- q) It was only on 12.06.2017, the Petitioner made a request with KREDL for issuance of notification under Section 95 of the KLR (Amendment) Act, 2015. The Petitioner had not taken steps within reasonable time to have a clear title in the land and on its own delayed the whole process. The averment that delay in conversion of land has resulted in delay in execution of the project is untenable and denied.
- r) The letters of the petitioner dated 06.07.2017 and 31.07.2017 cannot be considered as force majeure notice under Article 14.5. There is no specific provision under the PPA that provides for extension of time to fulfil conditions precedent. The letter dated 28.07.2018 issued by the MNRE does not have bearing on the Petitioner, as it is the Petitioner who

has failed to act diligently to obtain necessary approvals. Hence, the petitioner is not entitled to any relief.

- s) The PPA clearly states that in the event of delayed execution of the project, the Petitioner would only be entitled to the varied tariff applicable as on the date of commissioning of the project. The varied tariff was Rs.4.36 per unit in terms of the Commission's Order dated 12.04.2017, which is applicable at the time of commissioning of the Plant.

6. The Statement of Objections on behalf of Respondent No.2 is as follows:

- a) The Petitioner had to commission the project within 12 months of the date of approval of PPA from the Hon'ble KERC as per Clause 3.1 of the PPA.
- b) The petitioner sent request letter to the KREDL on 12.06.2017 (Annexure-R1). The Respondent No.2 has addressed letter to the DC on 27.06.2017 (Annexure-R2) requesting him to consider the application for purchasing of land under Section 109 of the KLR Act, 1964 and conversion of land without any delay, as per the procedure.
- c) There is no relief claimed against Respondent No.2. It is for the other Respondents and especially Respondent No.1 to counter the contentions urged by the Petitioner and that the Respondent No.2 is

not a necessary party to the petition. Hence, the petition against Respondent No.2 may be dismissed.

7. The gist of the Statement of objections filed by Respondent-3 is as follows:

- a) The allotment of PPAs pursuant to finalisation of bids was done taluk-wise and not Sub-station wise. On 27.02.2016, the KPTCL issued Sub-station wise feasibility report. This created ambiguity in processing the applications for evacuation approvals to different sub stations. For want of clarification in this regard and certain other issues, the Commission returned all the PPAs to ESCOMs, vide letter dated 22.07.2016 (Annexure R-1). On 29.08.2016, the Commission gave in principle approval to the power projects of 1200 MW and clarified that KREDL should co-ordinate with KPTCL and ESCOMs for efficient power evacuation from the solar plants. The Commission also directed that the PPAs should be resubmitted for approval (Annexure R-2).
- b) On 29.06.2016, the petitioner executed the PPA and on 22.07.2016, filed an application seeking evacuation scheme approval to 66/11 kV sub-Station Chhikkagangawadi from the Respondent (Annexure R-3). The Respondent vide letter dated 06.09.2016 (Annexure R-4) intimated the Petitioner to remit processing fee. The Petitioner paid the fee after a delay of 6 months on 03.04.2017 and intimated the Respondent about the change in the project location and requested for evacuation approval from 66/11kV Melehalli S/s (Annexure R-6).

- c) On 25.10.2016, Government of Karnataka, had issued an Order (Annexure R-5) specifying that evacuation applications can be processed based on the allotment letters issued by KREDL and all the statutory documents required should be obtained from the Developers. In furtherance of the same, the Chief Engineer (Planning and Co-ordination), vide letter dated 11.04.2017 requested the Chief Engineer (Transmission Zone) Bengaluru, to furnish an inspection report with respect to the request of the Petitioner for evacuation to the changed location at 66/11 kV Melenhalli S/s (Annexure R-7).
- d) Pursuant to submission of the feasibility report dated 16.05.2017, the Tentative approval was granted on 13.06.2017. The Petitioner conveyed acceptance of the tentative evacuation scheme vide letter dated 15.06.2017. On 21.06.2017, the Regular evacuation approval was granted.
- e) On 06.03.2018, the Petitioner requested for Interconnection approval. The same was granted on 12.03.2018 (Annexure R-8).
- f) Thus, there is no delay on the part of Respondent-3 in granting evacuation approval as alleged by the Petitioner.
- g) The reason for the delay in commissioning of the project cannot be attributed to the Respondent. The onus of obtaining all necessary

approvals was on the Petitioner as per Article 5.1.1 of the PPA. However, the Petitioner failed to do so.

8. The gist of the Statement of Objections on behalf of Respondent No.4 is as follows:

- a) The Petitioner for the first time identified the lands and submitted a list to KREDL vide letter dated 12.06.2017 (Annexure R-1) in respect of lands to an extent of 88 acres 18 guntas, for which agreements to sale were entered into. It was mentioned in the letter that the process of the acquisition of the remaining land was under progress.
- b) Pursuant to the receipt of the above letter, KREDL addressed a letter dated 27.06.2017 to the DC, Ramanaara, for approval under Section 109 of KLR Act, 1964 (Annexure R-2). The petitioner has taken more time for the identification of the land, which shows that the action of the petitioner was not in terms of the PPA and the time prescribed thereunder.
- c) The Petitioner is seeking for a relief under the head of the Force Majeure and inadvertent delay but has failed to produce the documents to prove the said contentions. There is no provision under the PPA and the RfP for time extension and retention of the agreed tariff under the head of inadvertent delay.
- d) All the Respondents have prayed for dismissal of the petition.

9. During the course of proceedings, the petitioner has filed additional documents which are taken on record.

10. The petitioner has filed rejoinders to the objections filed by the respondents. The gist of the Rejoinder filed by the Petitioner to the Statement of Objections filed by the Respondent No.1 is as follows:

a) The process of land acquisition is dependent on Regular Evacuation Approval by Respondent No.3, KPTCL. If the Petitioner were to acquire the land by investing huge resources and if KPTCL does not grant the Evacuation Approval for the project at the acquired land, the entire investment by the Petitioner will be rendered meaningless. Therefore, to commence any land acquisition the first step is to get the Evacuation approval from KPTCL. The Petitioner had applied for the Regular Evacuation Approval on 22.07.2016. However, KPTCL granted the said approval on 21.06.2017.

b) Having some visibility of receipt of Evacuation Approval from the KPTCL, the petitioner initiated well in advance the land acquisition activity and approached KREDL on 12.06.2017 for issuance of Government Notification/Order under Section 95 of the KLR (Amendment) Act, 2015 , for acquisition of land on lease. Delay in getting said notification from the Government, resulted in overall delay in various activities of construction, erection and commissioning

of plant. The lease/sub-lease agreement for the project land could be registered only after issuance of the said Conversion Order and it is beyond the reasonable control of Petitioner. The reason for not submitting documentary evidence of having the clear title and possession of the land in the name of Developer was because the task of land acquisition viz., lease and sub-lease was entrusted to the KREDL. The activities involve collection and collation of huge amount of documentation from the respective Taluka Offices along with a humongous effort. The whole process takes 5 to 6 months or even more time even for the KREDL. Despite all these, the Petitioner has submitted all the documentation within a reasonable time from the grant of evacuation approval by KPTCL.

- c) It is admitted by KREDL that on 05.10.2016, the Government of Karnataka issued a Notification, whereby, the KREDL was directed to enter into a lease agreement with the land owners and sublease the land to the SPD for the establishment of solar project. KREDL has also accepted that the Petitioner, in accordance with the above Government Notification, submitted necessary documents on 12.06.2017 to KREDL for verification and to execute the lease agreement.
- d) The KREDL has accepted that it issued a letter dated 29.05.2017 to the Respondent No.4/Additional Chief Secretary, Energy Department, Government of Karnataka to issue a Government Notification. The

Government, on 13.07.2017, issued a notification, whereby, permission was accorded to the KREDL to obtain the land on lease and sublet the same to Petitioner.

- e) The KREDL further admitted that after getting the Government Notification a letter was issued to the Deputy Commissioner, requesting him to issue an official memorandum in the name of the land owners. KREDL also accepted that there was no response from the office of the Deputy Commissioner, hence it could not execute the lease deed with land owners in order to sublet the same to the Petitioner. Delay has occurred in the entire process of getting necessary approval by the KREDL from the GoK. This was the prime reason of delay in fulfilment of Conditions Precedent as well as delay in commissioning of the project.
- f) There was an inordinate delay in clearance of solar modules imported by the Petitioner for its projects in Karnataka through Chennai Port and Nahva Sheva Port, due to wrong classification of HSN Code for solar PV modules by the customs authorities.
- g) The Petitioner has signed the PPA for a tariff of Rs.5.17 per unit. There is no question of levying penalty or liquidated damages merely because the Petitioner did not submit some documents. Even presuming, without admitting the Petitioner has delayed the commissioning of the project, the Respondents could not have levied liquidated damages

because the Respondents have only delayed the procurement of “costlier power” which has benefited them.

- h) The respondent has not shown any proof that due to the delayed submission of land documents they have incurred any loss. The efforts of the Respondents in levying liquidated damages/penalty is only to reduce net tariff payable to the Petitioner indirectly.
- i) The respondent was never entitled for damages from the petitioner, since the liquidated damages stipulated by encashment of Performance Bank Guarantee under the PPA is not a genuine pre-estimated loss, but was penalty. The Respondent has penalised the Petitioner at its discretion even though the Project was commissioned within the extended Scheduled Commissioning Date. When there is a claim for damages or invocation of Bank Guarantee for damages by the respondents, it is necessary to interpret liquidated damages as per Sections 73 and 74 of the Indian Contract Act, 1872.
- j) As per the aforesaid provisions and various judgments of the Hon'ble High Courts and Supreme Court in passed in *Union of India Vs. Rampur Distillery (AIR 1973 SC 1098): (1973) 1 SCC 649*, a five judge SC Constitution bench decision in *Feteh Chand Vs. Bal Kishan Dass AIR 1973 SC 1098* and *Kailash Nath Associates Vs. DDA (2015) 4 SCC 136*,

it is held that it is necessary that the damages can be awarded only if the respondents plead and prove that breach of contract has resulted in loss or damages to the Respondents.

- k) The Court/Tribunal is duty bound to ascertain whether or not there is any actual loss or damage and based on it determine the reasonable compensation. It is not correct that the stipulation by way of liquidated damages in the PPA is in itself evidence of damage more so when in the instant case there was force majeure event. The Respondent No.1/BESCOM has never claimed that they have suffered any loss or damage on account of any purported breach by the Petitioner nor BESCOM has given any proof of actual loss. The liquidated damages amount stipulated is the upper limit beyond which the Court/Commission cannot grant reasonable compensation. Even the said genuine pre-estimated damages can be awarded without proof of actual damages only if the actual damages suffered by the respondents could not be estimated. The claim of damages from the petitioner is also opposed to the decision of the Hon'ble Supreme Court of India in *Union of India Vs Rampur Distillery* reported in AIR 1973 SC 1098: (1973) 1 SCC 649 and a five-judge Constitution bench decision in *FATEH CHAND Vs. BAL KISHAN DASS* reported in AIR 1973 SC 1098 and *KAILASH NATH ASSOCIATES Vs. DDA* reported in (2015) 4 SCC 136.

- l) The current methodology for procurement of power is through Merit Order based principle wherein the energy source which has the lowest variable cost would be off-taken first. As found by the Commission, in the order dated 18.08.2016 passed in OP Nos.33/2015, 41/2015, 34/2015, 35/2015 and 36/2015, short term power price had come down sharply in the months of February 2016, March 2016 and April 2016. The Commission also determined Rs.4.67 per unit for the power acquired under Section 11 of the Electricity Act, 2003 as against the provisional tariff of Rs.5.08 per unit fixed by the State Government.
- m) The alleged actual loss suffered by the respondents can be assessed, if the respondents have purchased electricity from some other sources to compensate the shortfall of electricity due to non-supply by the petitioner. However, the respondent purchased electricity at much cheaper price from that stipulated under the present PPA. The Respondents by illegally deducting the LD has violated the interim orders passed by this Commission. On this ground alone the illegally deducted LD may be ordered to be refunded to the Petitioner. In Athani Sugars Limited Vs. PCKL and Others (OP No. 92/2016 date of disposed 19th December, 2018), this Hon'ble Commission, citing *Construction and Design Services Vs DDA (2015) 14 SCC 263*, ("DDA Case") has held that even without any loss, the Respondents are entitled to claim liquidated damages. However, that is not the ratio

laid down by the Apex court. The facts of that case are totally different and hence, the same is clearly distinguishable.

11. The gist of the Rejoinder filed by the Petitioner to the Objections filed by Respondent No.3/KPTCL is as follows:

- a) The Commission had given approval to the PPA on 17.10.2016, whereas, Petitioner had much earlier approached KPTCL for connectivity on 22.07.2016 for grant of connectivity at 66 kV level of 220/66/11kV Chikgangavadi Sub-station of KPTCL. Subsequently, the Petitioner had to re-apply for connectivity on 03.04.2017, at 66 kV level of 66/11 kV Melehalli S/s of KPTCL, due to technical/land constraint at identified land for the project.
- b) The reapplication by the Petitioner is not at the volition or choice of the Petitioner but because of the KPTCL's inability to provide necessary evacuation infrastructure. As per the provisions of Section 40 of The Electricity Act, 2003 (the "Act"), the KPTCL is statutorily bound to build, maintain and operate an efficient, co-ordinated and economical inter-State transmission system or intra-State transmission system. However, due lack of such statutory compliance by KPTCL, the Petitioner had to suffer.

- c) The KPTCL kept the connectivity approval process on hold for want of Commission's approval to the PPA in the light of the Commission's communication returning all the PPAs to ESCOMs. In the absence of Commission's approval and Transmission Connectivity approvals, the Petitioner was unable to progress on the land acquisition activities.
- d) The Commission had given its approval of PPA on 17.10.2016. Thereafter, KPTCL started processing Petitioner's connectivity application. The Tentative Evacuation Scheme Approval was communicated to the Petitioner on 13.06.2017, as follows:

“Construction of 66 kV SC line on DC tower for a distance of about 2.0 Kms with COYOTE ACSR conductor from your project pooling/generation station to 66/11 kV Melehalli substation with necessary terminal bay along and control equipment installed at both ends of the line as per layout and technical specification to be approved by KPTCL”.

- e) The Petitioner, immediately, vide its letter dated 15.06.2017 furnished its acceptance for the above. Despite the best of the efforts of the Petitioner, KPTCL, finally gave regular connectivity approval to the Petitioner only on 21.07.2017. The chart showing the dates and events is as hereunder:

Evacuation Application Details	
Date of submission of Evacuation Request at 66 kV level of 220/66/11 kV Chikgangavadi Sub-station of KPTCL	22.07. 2016
Date of Demand Note from KPTCL for processing fees	06.09.2016
Date of submission of subsequent evacuation request at 66kV Melehalli Sub-station of KPTCL	03.04.2017
Date of Processing Fee submission	03.04.2017
Date of receipt of Tentative Evacuation	13.06.2017
Date of acceptance on Tentative Evacuation	15.06.2017
Date of receipt of Regular Evacuation	21.06.2017
Total time taken for Issuance of Regular Evacuation (Days)	79
Delay in issuance of Regular Evacuation (Days)	49

- f) There was delay of 49 days in the grant of connectivity approval by KPTCL which resulted in delay in acquisition of land. Without knowing whether the evacuation of solar power generation at the identified site is possible or not, one cannot move ahead in acquisition of such identified land.
- g) After getting the regular connectivity approval from the KPTCL, the petitioner initiated land acquisition activity and finally approached KREDL on 13.06.2017, for issuance of Government Notification under Section 95 of the KLR (Amendment) Act, 2015, for acquisition of 88

acres 18 guntas land on lease. Till date the said Notification from the Government is awaited.

- h) The Petitioner, on 31.01.2018 again issued notice to the Respondent No.1, in accordance with the Article 14.5 of PPA for occurrence of the Force Majeure events. The Petitioner in the said letter stated that the State Government is in the process of approval of Stage-1 Clearance of the Forest and subsequently it will be placed for approval to Ministry of Forest. The above mentioned circumstance/events were not within the reasonable control of Petitioner. Out of total area for laying transmission line, 0.8955 hectare (ha.) of land is passing through in the vicinity of Forest land Area and required NOC from Forest Department of Karnataka Government. Accordingly, Petitioner on 29.08.2018, applied to Forest Department for NoC for diversion of 0.8955 ha. of forest land in Ankasandra Reserved Forest near Kurubarahalli Village (Sy. No.19), for the purpose of laying 66 kV Underground Cable.
- i) The above referred application was routed through various departments. i.e., Range Forest Officer, Assistant Conservator of Forest, Chief Conservator of Forests, Principal Chief Conservator of Forests and at last reached at Ministry of Environment, Forests and Climate Change, Regional Office (Southern Zone), Koramangala, Bengaluru on 01.02.2018. Subsequently, the office of the Deputy Conservator of Forests, Tumkur, raised a Demand Notice dated 03.02.2018 to the

Petitioner to pay the cost of raising plantation for a period of 20 years with respect to 237 trees. Forest approval took significant time and delayed laying of transmission line work which resulted into 156 days' delay in commissioning of project.

j) Article 2.1 of the PPA specify the scope of the Project as under:

"2.1 Scope of the Project

The Scope of the Project (the "Scope of the Project") shall mean and includes, during the term of this agreement:

- a) Designing, constructing, erecting, testing commissioning and completing the [Solar PV ground mount Project] and supply of Contracted Capacity;*
- b) Operation and maintenance of the [Solar PV ground mount Project] in accordance with the provisions of this Agreement; and*
- c) Performance and fulfilment of all other obligations of the Developer in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all the obligations of the Developer under this Agreement."*

k) The terms "Interconnection Facilities" and "Grid System" are defined as under:

"Interconnection Facilities" shall mean the facilities on developer's side of the delivery Point for sending and metering the electrical output in accordance with this Agreement and which shall include,

without limitation, all other transmission lines and associated equipments, transformers relay and switching equipment and protective devices, safety equipment and, subject to Article 10, the Metering System required for supply of power as per the terms of this Agreement.

“Grid System” mean the Interconnection Facilities and any other transmission or distribution facilities through which the Developer supply electricity to BESCO or BESCO transmits electricity to their customer(s);

- l) Under Article 4.2 of the PPA, the Petitioner has to fulfil the following Conditions Precedent:

“4.2 Conditions Precedent for the Developer

.....

c) made adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at the Delivery Point;

d) obtained power evacuation approval from Karnataka Power Transmission Company Limited (KPTCL)/BESCO, as the case may be;”

- m) Considering the above provisions of the PPA, the scope of work for Petitioner under the PPA was only up to the Interconnection Facility.

- n) As per Section 40 of the Electricity Act, 2003, it is the duty of the KPTCL to build Transmission System required for evacuation of power generated from the project. Contrary to this, the KPTCL in the evacuation approval

has directed petitioner to construct a 66 kV Transmission line of 6 km, at the cost of Petitioner.

- o) The Appellate Tribunal for Electricity (APTEL) in its Order dated 4.2.2014, in Appeal No.123 of 2012 and IA No. 396 of 2012 in the matter of Gujarat Urja Vikas Nigam Limited (GUVNL) Vs. Gujarat Electricity Regulatory Commission (GERC) and Others, has observed that the delay in obtaining approvals from the Government instrumentalities by a solar power developer would fall in the category of Force Majeure Events under the PPA and the period of such delay is required to be suspended or excused and to that extent the period of COD, Date of Construction default and SCOD are to be extended in terms of the PPA.
- p) The MNRE by its letter dated 28.07.2017 taking due cognizance of the fact that the delay in connectivity permission, land approvals and Force Majeure events can delay project implementation, has informed that the State Government Authorities/PSUs in granting connectivity permission, allotment of land etc., competent authorities can allow extension of time duration as per contractual agreement. Under similar circumstances, the MNRE has supported in allowing time extension due to inordinate delay in Land use conversion u/s 95 and u/s 105 of the KLR Act, 1964 that resulted in non-fulfilment of Condition precedents for Solar Power Projects of 2000 MW under VGF scheme in the State of Karnataka having PPA with Solar Energy Corporation of India Limited, ('SECI').

- q) The Petitioner and most other SPDs selected under the 1200 MW Taluk wise bid, were not able to fulfil the Conditions Precedent within the prescribed time and almost all projects are commissioned with delay.
- r) The Respondent No.2 took lessons for future and carried out the changes in RfP documents for inviting subsequent bid for Development of 860 MW (AC) Solar Power Projects in Karnataka to be implemented in 43 taluks/ on 07.12.2017, wherein the period for the completion of the project/COD is changed from 12 months to 18 months from the effective date and the period for compliance of condition precedents has been enhanced from 8 months to 12 months.
- s) The Telengana Electricity Regulatory Commission has in its order dated 28.08.2018 in M/s Mytrah Abhinav Power Private Limited Vs. Southern Power Distribution Company of Telangana Limited & Others has considered the Demonetization and introduction of GST as Force majeure events. Similar dispensation should be provided to the Petitioner and extension in SCOD should be allowed.
- t) The MNRE vide its Office Memorandum No. 283/131/2017 - Grid Solar dated 20.06.2018 has examined the issue of disruption and consequent delays caused in timely commissioning of the project due to introduction of GST and it has been decided by MNRE to give extension of up to two months for CoD to projects which might have been affected due to this disruption. Similar dispensation should be provided

to the Petitioner and extension in scheduled commissioning date should be allowed.

12. The gist of the Rejoinder of the Petitioner to the Statement of Objections filed by Respondent No.4/Government of Karnataka, is as follows:

- a) As per Article 4.2 of the PPA, Solar Project Developer (SPD), is required to furnish documentary evidence of having the clear title and possession of the land, required for the Project in the name of SPD within 8 (eight) months from the effective date of the PPA unless such completion is affected by Force majeure event. The Petitioner in its letter to KREDL dated 12.06.2017 had stated that the process of acquisition of remaining land is under process. The Petitioner has taken more time for identification of land. KREDL immediately recommended for approval under Section 109 of the KLR Act, 1964. The KREDL on 27.06.2017 issued a letter to Deputy Commissioner recommending to issue official memorandum in the name of land owners. Under the provisions of KLR Act, 1964 no person or company or entity other than an Agriculturist can acquire the agricultural land. Further, the lease or sub lease is also prohibited under the said law. Therefore, the Petitioner is precluded from leasing or sub-leasing any agricultural land. Realizing these difficulties faced by all SPDs, the Government empowered KREDL to facilitate the sub-lease of land to the SPDs. However, the Government realized that mere policy initiative in the absence of a concrete legislative enactment is of no avail.

Hence, as committed in the Solar Power Policy dated 22.05.2014, the Government of Karnataka, vide its Government Order dated 13.07.2017 empowered KREDL to initiate the process for conversion of land for the project land and enter into lease agreements with the land owners and, thereafter, sign sub-lease agreement with developer. The Petitioner on 03.08.2016, approached Principal Secretary, Revenue Department, GoK and requested to simplify the Rules for Section 109 of the KLR Act, 1964 approval and allow a single window clearance within 45 days irrespective of the size of Solar Project. Petitioner also requested for clarification under Section 95 of the KLR Amendment Act, 2015, that once any such land owner enters into an MOU/agreement with a Solar power developer for transfer/leases of agricultural land for setting up solar project and then applies for conversion, such application once submitted should be accepted as "deemed conversion". Once such land is converted as "non-agricultural land", the occupant should be allowed to divert the land to the developer. Since it is no longer an agricultural land, the project shouldn't fall under the scope of KLR Act, 1964 and not require Section 109 waiver. However, no response was received.

- b) The Respondent No.4/GoK has published Solar policy vide GO No. EN 21 VSC 2014 dated 22.05.2014 for the period of 2014-2021. The Government did not fulfil its assurance under the Solar Policy i.e.,

- i) Deemed conversion of land for Solar projects by amending Section 95 of KLR Act, 1964.
- ii) Government of Karnataka did not vest the DCs with full power to approve the projects of agricultural land for solar projects under Section 109 of KLR Act, 1964.
- iii) Developers were not allowed to start the project execution pending final approval of land conversion.

13. The Petitioner has filed the following documents vide Memo dated 19.12.2019.

- i) Agreement to Lease dated 18.11.2017 and 15.01.2019.
- ii) Application to DC dated 18.12.2018.
- iii) Challan issued demand note dated 02.07.2019
- iv) Tax demand by Laxmipur Gram Panchyat dated 06.09.2018.
- v) NA Order by DC dated 20.07.2019.
- vi) Commissioning Certificate dated 02.04.2018.

14. The Petitioner has produced the following documents vide Memo dated 10.02.2020:

- a) L&T Financial Services Agreement dated 20.04.2017 for Rs.700 crores.
- b) L&T Financial Services Agreement dated 20.04.2017 fee of Rs.374 crores for 240MW CPG 213-256.

15. We have heard the learned Counsel for the parties. The petitioner and Respondents 2 & 4 have also filed written arguments.

16. From the pleadings produced by the parties and the submissions made by them, the following Issues arise for our consideration.

Issue No.1: Whether the petitioner proves that the 'Effective Date' under Article 3.1 of the PPA should be treated as:

- a) The date on which the SPPA dated 17.12.2016 would be approved by the Commission, as the approval of the said SPPA was essential? or
- b) 17.12.2016, the date on which the said SPPA was executed? or
- c) 26.10.2016, the date on which the PPA approval letter dated 17.10.2016 was received by the petitioner?

Issue No.2: Whether the petitioner has proved that the events or circumstances alleged by it amount to 'Force Majeure' events, entitling for extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date?

Issue No.3: If Issue No.2, is held either in affirmative or in negative, what should be the consequences?

Issue No.4 What Order?

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

18. Issue No.1: Whether the petitioner proves that the 'Effective Date' under Article 3.1 of the PPA should be treated as:

- a) The date on which the SPPA dated 17.12.2016 would be approved by the Commission, as the approval of the said SPPA was essential? or

- b) 17.12.2016, the date on which the said SPPA was executed?
or
- c) 26.10.2016, the date on which the PPA approval letter dated 17.10.2016 was received by the petitioner?
- a) 'Effective Date' is defined in Article 21.1 of the PPA as the date of the approval of PPA by the KERC. Further, Article 3.1 of the PPA mentions the Effective Date with reference to the PPA as *'this agreement shall come into effect from the date of getting concurrence from KERC on the PPA and such date shall be referred to as the Effective Date'*. In the present case vide letter dated 17.10.2016 (Annexure-P4), the petitioner and the 1st Respondent were informed the approval of the Commission to the PPA dated 29.06.2016. Therefore, the date 17.10.2016 has to be considered as the Effective Date for the purpose of interpreting the relevant clauses in the PPA. The PPA does not provide that the date of receipt of intimation regarding approval of the Commission to the PPA or the date on which the SPPA is signed by the petitioner and the Respondent No.1 in case the execution of such SPPA is needed, could be considered as the Effective Date. Therefore, the contention of the petitioner is not acceptable.
- b) The petitioner has contended that, as the letter dated 17.10.2016 (Annexure-P4) communicating approval of Commission for the PPA in question directed to incorporate certain corrections/modifications in the PPA by entering into a suitable SPPA, the execution of SPPA and also the approval of such SPPA is essential. Further, it is contended that when the execution of such SPPA and its approval by the

Commission is required, such dates should be considered as the Effective Date.

c) The letter dated 17.10.2016 (Annexure-P4) signed by the Secretary of this Commission communicates approval of the Commission to the PPA dated 29.06.2016 executed between the parties in respect of development of 20 MW (AC) Solar Power Project in Ramanagara taluk, subject to certain corrections/modifications being incorporated in the said PPA by entering into a suitable SPPA. Therefore, it can be said that the approval of PPA dated 29.06.2016 communicated by letter dated 17.10.2016 is absolute subject to incorporating the corrections/modifications. For the purpose of incorporating the corrections/modifications, the execution of a SPPA is required. There is no direction given to the parties that after entering into the SPPA, the same should be again got approved by the Commission. It cannot be said that the approval of the Commission to the PPA takes effect only after effecting the corrections/modifications suggested, as the corrections/modifications suggested to be carried did not materially alter the rights and liabilities of the parties. Hence, the contention of the petitioner that the SPPA requires approval cannot be accepted. This aspect was clarified by the Commission in a subsequent letter dated 25.10.2016 addressed to the Government (Annexure R-2 to the Objections filed by Respondent-1).

d) Therefore, Issue No.1 is held in negative.

19.Issue No.2: Whether the petitioner has proved that the events or circumstances alleged by it amount to 'Force Majeure' events, entitling for extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date?

The petitioner has relied upon the following events or circumstances, as Force Majeure Events for claiming the extension of time to achieve the conditions precedent and commissioning the solar plant:

- (i) Delay in granting evacuation approval;
- (ii) Delay in grant of land conversion order;
- (iii) Demonetization;
- (iv) Introduction of GST; and
- (v) Delay due to wrong classification of solar modules.

20. We deem it proper to consider the events one after the other and give our findings, as hereunder.

21. Regarding: Delay in granting Evacuation approval:

- a) The petitioner had undertaken to develop 20 MW Solar Power Project in Ramanagara taluk. The LoA was issued on 30.05.2016 and the petitioner acknowledged the acceptance of the terms and conditions of the LoA through letter dated 08.06.2016 (Anexure-P2). The petitioner was required to search for the lands required for establishment of the Solar Power Project after examining the availability of evacuation approval to transmit the power from the Solar Power Project to the KPTCL Sub-station. Therefore, for establishing

a Solar Power Project, the required extent of land should be available as well as the possibility of evacuating the power from the project to the nearest Sub-station. For this purpose, the Developer has to search a suitable location. The land can be either purchased or taken on lease for the required period.

- b) The petitioner has made application dated 22.07.2016 to 3rd Respondent/KPTCL for grant of Evacuation Scheme to 66/11 kV Chikkagangavadi Sub-station of KPTCL. It is stated in the said application that the petitioner had identified 100 acres of land in Virupasandra village, and signed an MoU with the land aggregator for procurement of the land. It is also stated in the application that the nearest Chikkagangavadi sub station was at a distance of 6 km from the project site and hence, it was requested to carry out load flow studies to grant power evacuation permission. These facts can be seen from Annexure-R3 produced by 3rd Respondent/KPTCL. In response to the said application, the KPTCL addressed a letter dated 06.09.2016 calling upon the petitioner to remit the processing fee and furnish the SPPA entered into between the parties. On 03.04.2017, after about 7 months, the petitioner paid the processing fee and communicated to the 3rd Respondent/KPTCL that the lands in the earlier location could not be finalised and hence, a change in location of the project was contemplated and requested for evacuation at 66/11 kV Melehalli S/s. A copy of the said letter dated

03.04.2017 is produced as Annexure-R6 by the 3rd Respondent/KPTCL. In this application, the petitioner has stated that it has identified about 100 acres of land in Melehalli and Arehalli villages and has signed MoU with the land aggregator for procurement of the land. Thereafter, the 3rd Respondent has approved Tentative Evacuation Scheme on 13.06.2017 and subsequently, on acceptance of the terms and conditions of the Tentative Evacuation Scheme by the petitioner on 15.06.2017, granted Regular Evacuation Scheme on 21.06.2017 (Annexure P-11).

- c) Now, we shall consider the ground urged regarding delay in processing the Evacuation Approval by KPTCL. KPTCL in its Statement of Objections has stated that on 27.02.2016 it had furnished Sub-station wise Feasibility Study Report to KREDL; that the allotments of PPA were done Taluk-wise and not sub-station wise and this created ambiguity in processing the applications for Evacuation of power to different Sub-stations; that for want of clarification, the Commission vide letter dated 22.07.2016, returned all the PPAs to ESCOMs (Annexure-R1 produced by KPTCL) and later on 29.08.2016, the Commission accorded in principle approval to all the PPAs and clarified that KREDL would co-ordinate with KPTCL and ESCOMs for efficient power evacuation scheme from the Solar Power Projects. The Commission also directed that all the PPAs must be re-submitted for obtaining approval. A copy of the letter dated 29.08.2016 is produced as

Annexure-R-2 by KPTCL. It can be seen that on 22.07.2016 the petitioner had made an application to KPTCL seeking Evacuation approval but upon receipt of the letter dated 06.09.2016, of KPTCL calling upon to remit the processing fees, the petitioner did not pay the processing fees to process the application filed by it seeking Evacuation approval, obviously as land procurement at the earlier location did not materialise and the petitioner had to look for lands in a new location. This delayed the processing of the application. The fee was paid on 03.04.2017, and on the same day, the petitioner stated that it was intending to change the location of the project and requested to process the request for Evacuation approval to 66/11 kV Melehalli S/s. Thus, it can be stated that the request in the earlier application dated 22.07.2016 stood cancelled. Hence, the date of application for evacuation approval can be considered as 03.04.2017 when the petitioner requested for evacuation from Melehalli S/s. The Tentative Evacuation Scheme was granted on 13.06.2017 and the Regular Evacuation Scheme was granted on 21.06.2017, after receiving acceptance of the petitioner to the temporary evacuation scheme on 15.06.2017.

- d) From the above facts, it can be said that KPTCL has granted the Tentative Evacuation Scheme as well as Regular Evacuation Scheme approvals in reasonable time, within a period of two and half months from 03.04.2017. Therefore, the allegation that KPTCL caused delay in

granting evacuation approval is untenable. The delay as stated above, was due to change in location, solely attributable to the petitioner.

- e) According to the petitioner, the entire process of land identification in and around the Sub-stations consumed a considerable amount of time. The Commission notes that the PPA was a part of the bidding document and the timelines for achieving conditions precedent and commissioning the project and the consequences for delay were known to the petitioner at the time of bidding. The petitioner should have been prudent and ascertained the availability of lands in the vicinity of the Sub-stations within 3-4 months from the date of issuance of LoA. From the sequence of events mentioned above, we hold that there was inordinate delay by the petitioner in identifying the proper location of the project, applying for Evacuation approval and paying the processing fee which could have been avoided, if the petitioner had taken proper timely steps in identifying the lands.
- f) It is the allegation of the petitioner that as per section 40 of the Electricity Act, 2003, and the terms of the PPA, KPTCL was required to provide interconnection facility for evacuation of power from the solar project and contrary to these, the petitioner was directed in the evacuation approval to construct 66 kV SC line on DC tower for 2 km from the pooling/generation station to Melehalli S/s with terminal bay and control equipment.

- g) We note that under section 10 of the Electricity Act, it is the duty of the generating company to establish, operate and maintain the *dedicated transmission line* from the generating station to the substation. Hence, there is no illegality in the direction issued by KPTCL to construct 66 kV SC line for 2 km from the pooling/generation station to Melehalli S/s. Hence, this contention of the petitioner is rejected.

22. Regarding: Delay in grant of land conversion order:

- a) The Respondent-4 has contended that the petitioner approached KREDL on 12.06.2017 requesting to obtain an order of land conversion. The petitioner has stated that on 17.06.2017 (Annexure-P7) it had submitted to 1st Respondent the land related documents namely; (i) acknowledgement of Section 95 application submitted to KREDL; and (ii) sworn affidavit for possession of lands, apart from producing the other documents to evidence the fulfilment of Conditions Precedent as per PPA.
- b) Now, the question is whether filing an application before KREDL on 12.06.2017 for taking further action by KREDL to obtain an order under Section 95 of the KLR (Amendment) Act, 2015 amounts to sufficient compliance of Conditions Precedent in relation to production of documentary evidence of clear title and the possession of lands required for the project in the name of the petitioner. Though, the LoA was issued on 30.05.2016, the petitioner could finally locate the lands

near Melehalli S/s on 03.04.2017. As already noted, Conditions Precedent were required to be complied with on or before 16.06.2017. The petitioner has not explained the delay in identifying the lands. Hence, we note that the petitioner cannot bring the event of delay in identifying the lands under any of the provisions of 'Force Majeure' events under Article 14 of PPA.

- c) The lands required for the project could be either purchased or taken on lease by the petitioner. For purchase of lands, the petitioner has to obtain permission under Section 109 of the KLR Act, 1964. The GoK had issued a Circular bearing No.RD 01 LRM 2016 dated 22.02.2016 facilitating grant of permission under Section 109 of the KLR Act, 1964 and to obtain conversion of such lands for non-agricultural purpose within a timeframe. The GoK had issued Notification dated 05.10.2016 permitting KREDL to enter into lease of lands with the land owners and to obtain conversion of such agricultural land for non-agricultural purpose and thereafter to sub-lease the same to the Developer in order to facilitate development of Solar Project. The petitioner opted to obtain the land on sub-lease instead of purchasing the lands from the owners. Sub-para (D) of the Circular No.RD 01 LRM 2016 dated 22.02.2016 issued by the Principal Secretary to Government, Revenue Department, reads as follows:

“D – The permission under Section 109 of the Karnataka Land Reforms Act, 1961 shall be brought under SAKALA with time prescribed for its delivery being within 60 days.”

d) Under the Notification dated 05.10.2016, KREDL has to follow the procedure stated in Circular No.RD 01 LRM 2016 dated 22.02.2016 for obtaining an order under Section 109 of the KLR Act, 1964 for purchase of agricultural land and its conversion and thereafter has to sub-lease the land to Developer for establishing the Solar Project. Therefore, one can say that a definite timeframe of 60 days is prescribed for obtaining an order under Section 109 of the KLR Act, 1964. Had the petitioner applied to KREDL, at least 60 days before the date on which conditions precedent had to be achieved and there was a delay by the concerned authorities in processing the same or granting the approval, the date of application to KREDL by the developer, could be considered as the date of fulfilment of the production of the documentary evidence of having clear title of possession of the lands required for the project. Hence, in the present case, had the petitioner applied to KREDL at least 60 days before 16.06.2017, the date on which the Conditions Precedent should have been fulfilled, we could have considered whether making such application and producing the application to Respondent No.1 would amount to fulfilment of the Conditions Precedent within the stipulated time. Therefore, in our considered opinion, it is not possible to hold that the petitioner approaching KREDL on 12.06.2017 for getting conversion of land etc.,

is sufficient fulfilment of the Conditions Precedent relating to production of documentary evidence of the title and possession of the lands required.

- e) The petitioner could not have expected that when it moved the KREDL on 12.06.2017, an order for conversion of land could have been passed and in turn, lease of land in its favour could have been granted on or before 16.06.2017, the last date for fulfilment of the Conditions Precedent.
- f) The petitioner has not produced the copies of the consent letters, said to have been obtained from the land owners to lease their lands for the Solar Project of the petitioner which were annexed to the application dated 12.06.2017 filed before the KREDL. The Respondent No.4 has produced a copy of the letter dated 12.06.2017 but the consent letters of land owners are not produced. The petitioner is required to establish that the very same lands in respect of which consent letters were issued, were finally converted and sub-let to it. The petitioner has produced agreements of lease dated 18.11.2017 and 15.01.2019 vide Memo dated 19.12.2019. However, it cannot be ascertained that these documents relate to the lands in respect of which consent letters were said to have been obtained from the land owners, while filing the application dated 12.06.2017 before the KREDL. The document No.2 produced by the petitioner on 19.12.2019, shows that the petitioner had made an application on 19.12.2018 before the

DC, Ramanagara, seeking deemed conversion order under Section 109 of the KLR Act, 1964 and Section 95 of the KLR (Amendment) Act, 2015, pursuant to which the deemed conversion order dated 20.07.2019 was issued by the DC, Ramanagara (Document No.5 produced by the petitioner on 19.12.2019).

- g) We are of the opinion that the petitioner has failed to establish that it could produce the acceptable documentary evidence establishing the title and possession of the lands required within the period prescribed for fulfilling the Conditions Precedent.
- h) We note that the project was commissioned on 28.03.2018 (Document No.6 dated 02.04.2018 produced by the petitioner on 19.12.2019), much before the receipt of the land conversion order dated 20.07.2019. Therefore, it can be stated that the commissioning of the project was not delayed on account of non-receipt of conversion order and hence, this cannot be construed as a force majeure event, affecting the implementation of the project.

23. Regarding: Demonetization:

The petitioner has stated that Demonetization adversely affected the project for 2-3 months from 08.11.2016, as land acquisition and project activities which were delayed considerably. Except for the vague averment, no definite instances are mentioned to demonstrate as to how the progress of the project was affected due to demonitisation.

Therefore, without adequate proof, we cannot accept that demonetization adversely effected the progress of the project of the petitioner from 08.11.2016 to the end of January, 2017.

24. Regarding: Introduction of GST:

- a) The petitioner has stated that there was a slow-down from July, 2017 to September, 2017 in manufacturing and service industry across the country due to introduction of GST. The petitioner has relied on the Official Memorandum (OM) dated 27.06.2018 issued by MNRE. This OM was issued on the request of the Solar Power Developers, to SECI/NTPC/other Implementing Agencies, for grant of 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 establishing that they were actually affected due to GST induced disruptions in the period for which extension of time has been claimed.
- b) In the present case, the petitioner has not produced any documentary evidence in support of its claim to establish that it was actually affected due to any GST induced disruptions during 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.

25. Regarding Delay due to wrong classification of solar modules:

- a) It is alleged by the petitioner that due to wrong classification of solar modules by the Customs authorities in the ports and improper levy of customs duty, the release of the modules was delayed from July 2017 to November 2017, and this should be treated as a force majeure event affecting the project. It is contended by the respondents that this event cannot be treated as a Force Majeure event as it was the responsibility of the developer under the terms of the PPA to obtain all statutory clearances and pay the taxes, duty, cess, etc., and no notice of Force Majeure as required under the terms of the PPA was issued by the petitioner within 7 (seven) days of the occurrence of the event. It is further contended by the Respondent that under Article 14.4.1 of the PPA, the late delivery of equipment cannot be treated as Force Majeure event.
- b) Looking at the terms of the PPA, we note that it was the obligation of the developer under Article 5.1 of the PPA to obtain all necessary permits and comply with all laws. If any authority has wrongfully classified the solar panels, and imposed wrong customs duty, the remedy would lie before the appropriate forum of law. The issue before the Customs authorities was related to charging of BCD of 7.5% + cess on the imported solar modules. The petitioner has produced a Public Notice dated 29.09.2016 issued by the Commissioner of

Customs, Mumbai (Annexure P-12), which is a clarification in the matter of classification of solar panels. It is stated by the petitioner that despite issuance of the above clarification, a show-cause notice dated 27.07.2017 was issued by the Customs authorities (Annexure P-13) on the same issue. This show-cause notice is issued to M/s Wardha Solar Maharashtra Private Limited, Village Nalwar, Taluk Chittapur, District Gulbarga, and reads as follows:

“OFFICE OF COMMISSIONER OF CUSTOMS (NS-V)
JAWAHARLAL NEHRU CUSTOM HOUSE, NHAVA SHEVA
TAL: URAN, DIST: RAIGAD, MAHARASHTRA – 400 707

F. No. S/6-Gen-134/2017/Indev(I)

Date:27.07.2017

To

M/s Wardha Solar Maharashtra Private Limited,
4 Village-Nalwar, Tal-Chitapur,
Gulbarga, Karnataka.

Sub: Classification of goods declared as “POLY CRYSTALLINE SILICON (C-SI) SOLAR PHOTOVOLTAIC MODULES (JAP6 (K)-72-320/4BB)” imported vide BE No. 2397470 dt: 11.0.2017 - reg.

Please refer to the above mentioned Bill of Entry filed by your firm for clearance of goods declared as “POLY CRYSTALLINE SILICON (C-SI) SOLAR PHOTOVOLTAIC MODULES (JAP6(K)-72-320/4BB)”.

During examination of the said goods, it has been noticed that, the Solar Photo Voltaic Modules under import are equipped with elements like diodes, Junction box and MC4 compatible connector. It has been also noticed that that the solar modules are fully equipped to run the appliance like Drill Machine, DC motor etc., without the help of any extra fittings.

Since the goods under import are equipped with elements and these elements supply power directly to an external load i.e. a motor, it appears that these goods are rightly classifiable under Heading 8501. Goods when classified under Heading 8501 attract BCD @ 7.5%. It appears that the goods have been wrongly classified under Heading 8541, with an intention to evade duty.

In view of the foregoing, you are hereby requested to explain as to why goods should not be classified under Heading 8501 and duty be levied accordingly.

(SANDEEP YADAV)
Deputy Commissioner of Customs
INDEV CFS, NS-v"

- c) It is not known as to whether the petitioner responded to the show cause notice and if so, what was the reply given and whether the clarification dated 22.09.2016 given earlier by the CBEC was brought to the notice of the concerned in the reply to the show cause notice. We note that the above events relate to Mumbai Customs authorities. The petitioner has not stated as to when the solar modules were released by the Mumbai authorities.
- d) It is stated by the petitioner that summons were issued on the very same issue for appearance of the petitioner on 27.09.2017 (Annexure P-14). A perusal of the summons reveals that it was issued by the Appraiser, Special Intelligence and Investigation Branch, Custom House, Chennai, to M/s Adani Green Energy (UP) Limited, Galipura Kaval village, Holenarasipura taluk, Hassan district. It is stated that the petitioner represented to the concerned on 06.10.2017 (Annexure P-15) mentioning

the urgency in the release of modules and agreeing to furnish bank guarantee for the amount in dispute. Further, it is stated that on 31.10.2017 (Annexure P-16), the petitioner agreed to execute the bond and sought release of the modules on furnishing security as BG, referring to the letter of Customs Department dated 19.10.2017.

- e) The petitioner has mentioned about the dispute with regard to both Mumbai and Chennai Customs authorities. It cannot be made out from the pleadings whether the modules which were sought to be released related to this project alone or to some other projects also, as the show-cause notice dated 27.07.2017 is issued by Mumbai authorities to some other person and not the petitioner. With respect to the dispute before the Chennai authorities, we note that the modules were released on furnishing the BG by the petitioner in about a month from the date of the summons. Hence, we cannot hold that this event affected the progress of the project from July 2017 to November 2017 as alleged by the petitioner. The letter dated 06.07.2017, addressed by the petitioner to Respondent-1 (Annexure P-17) which the petitioner claims in the petition to be a notice of force majeure events under Article 14.5 of the PPA does not mention anything about this aspect and it is not the case of the petitioner that any further notice mentioning this aspect was furnished to the Respondent-1. Hence, the petitioner has failed to prove that the requirement of Article 14.5 of the PPA was complied with.

f) We also note that the fixing of modules is the last stage of construction of a solar generating plant. The project was commissioned on 28.3.2018. Even assuming the above event as force majeure event and that the modules were released in November 2017, it cannot be accepted that the time lag between November 2017 and 28.03.2018 is due to the wrong classification and levy of BCD for solar modules.

g) Hence, this ground for seeking extension of time is rejected.

26. For the reasons stated above, we hold that the petitioner had not acted in time in obtaining the permits/approvals and has failed to justify the delay on its part in the events mentioned above. Hence, we answer Issue No.2 in negative.

27. Issue No.3: If Issue No.2, is held either in affirmative or in negative, what should be the consequences?

a) Issue No.2 is found to be held in negative that the petitioner is not entitled to extension of time to achieve the Conditions Precedent or commissioning the project, under the force majeure clause of the PPA. 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 liquidated damages for delay in commencement of supply of power under Article 5.8 of the PPA.

- b) The Petitioner has alleged that, the proof of loss or damage, arising out of breach of contract, is essential, even when the Liquidated Damages are provided for in a contract, relying on the case laws mentioned in the Written arguments and Section 74 of the Indian Contract Act, 1872.
- c) We note that in the decision of the Hon'ble Supreme Court, reported in (2015) 4 SCC 136, in the case of *Kailash Nath Associates Vs. Delhi Development Authority and others*, it is held that, where it is possible to prove actual damage or loss, such proof is not dispensed with and in cases where damage or loss is difficult or impossible to prove, the liquidated amount named in the contract, if it is a genuine pre-estimate, can be awarded. We are of the considered opinion that, in the present case, it is difficult or impossible to prove the actual damage or loss and that the liquidated damages named in the contract is a genuine pre-estimate of the damage or loss sustained.
- d) We also note that, in this case, there was an option for the Respondent-1 to terminate the PPA when the project was not commissioned within time, but this option was not exercised and the project was allowed to be commissioned by granting extension of time. In the decision reported in (2018) 6 SCC 157, in the case of *Madhya Pradesh Power Management Company Limited Vs. Renew Clean Energy Private Limited and another*, the Hon'ble Supreme Court has held that, where the contract provides for claiming damages and

also for termination of the contract for the delayed performance, the damages in terms of the Agreement could be claimed, instead of taking steps for the termination of the Agreement and that, under such circumstances, the Liquidated Damages as per the Agreement could be awarded. Therefore, we are of the considered view that, even without there being any proof of the actual damage or loss, the Liquidated Damages, as agreed to, could be awarded, where steps for termination of the contract is not taken. We also note that, the quantum of the Liquidated Damages mentioned in the PPA is reasonable.

- e) 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.
- f) We rely upon the *Civil Appeal No.1220 of 2105 (Gujarat Urja Vikas Nigam Limited Vs. EMCO Limited and an others)* decided on 2.2.2016, where in Hon'ble Supreme Court of India has held, as follows:

“31. Apart from both the Respondent No.2 and the Appellant tribunal failed to notice that the 1st Respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.20 of the PPA: -

“In case, commissioning of solar power project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by the Hon'ble GERC for

*solar power project effective on the date of commissioning of solar power project of above mentioned tariff, **whichever is lower.**'*

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first Respondent not being able to commence the generation of electricity within the "control period" stipulated in the first tariff order. It also visualised that for the subsequent control period, the tariff payable to the project/power producer (similarly situated as the first Respondent) could be different, in recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1st Respondent would be entitled only the lower of the two tariffs---

- g) In the present case, it is found that the petitioner has failed to establish any 'Force Majeure' event to claim extension of time for achieving the Conditions Precedent or SCOD. The Solar Power Project was commissioned on 28.03.2018 as against 16.10.2017, the SCOD. The Tariff agreed in the PPA is Rs.5.17 per kWh. The KERC determined tariff applicable as on the COD i.e., 28.03.2018 is Rs.4.36 per kWh. Therefore, as per Article 12.2 of the PPA, the petitioner is entitled to the reduced tariff of Rs.4.36 per kWh. Therefore, Issue No.3, is held accordingly, holding that the petitioner is not entitled to any reliefs.

28. Issue No.4: What Order?

For the foregoing reasons, we pass the following.

ORDER

- a) The petitioner is not entitled to any of the reliefs claimed in the petition;
- b) The petitioner is entitled to the applicable tariff of Rs.4.36 per kWh for the energy supplied to the 1st Respondent from the Commercial Operation Date during the term of PPA;
- c) The petitioner is liable for payment of damages as per Article 4.3 of the PPA and liquidated damages for delay in commencement of supply of power to the 1st Respondent as per Article 5.8 of the PPA.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member

