

No. N/419/17

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

Dated: 30.12.2021

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

O.P. No. 233/2017

BETWEEN:

M/s. Aavanti Renewable Energy (I) Pvt.Ltd.
Regd.office at Temple Steps, 3rd floor, Block A,
Unit B, 184-187, Anna Salai, Little Mount,
Chennai-600015.
(Represented by Sri Gurudas Kannur, Senior Counsel for
Ms. Poonam Patil, Advocate)

....PETITIONER.**AND**

- 1) Bangalore Electricity Supply Company Ltd.
Corporate Offices, K.R.Circle,
Bangalore -586 001.
(Represented by its Managing Director)
- 2) Karnataka Renewal Energy Development Limited (KREDL),
A Company Registered under the provisions
of the Indian Companies Act,1956 having
its Registered Office at
No.39, Shanti Gruha,
Bharath Scouts & Guides Building,
Palace Road, Gandhinagar,
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, Bangalore-560001.
(Represented by its Managing Director)
(Represented by Sri Ranga S. Just LAW FOR Respondents 1 & 3)

... RESPONDENTS.

Respondent No. 2 represented by Sri Murugesh V Charati & Ms. Latha Advocates).

ORDERS

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003 by the Petitioner praying for the following reliefs to;
 - a) To declare that the effective date with respect to Article 8.5 of the PPA dated 03.06.2016 is 24.08.2017, i.e., the date of execution of the supplementary PPA.
In the Alternative,
 - b) Pass an order granting extension of time to the Petitioner for fulfilling its obligation under the PPA on the grounds of 'Force Majeure' events.
 - c) Pass suitable directions restraining the Respondents from imposing any penalty/damages under the terms of the PPA including but not limited to levying of Liquidated Damages and also that of invoking the Bank Guarantees furnished by the Petitioner.
 - d) Grant such other and further reliefs as this Commission deems fit in the facts and circumstances of the case, in the interest of justice.
- 2) The brief facts set out in this petition are as under: -
 - a) The Petitioner is a Company incorporated under the Company's Act. The 1st Respondent is the Distribution Licensee and the Respondent No. 2 is the nodal Agency of the Government of Karnataka for facilitating the development of Renewable energy in the State of Karnataka, the Respondent No. 3 is vested with the responsibility of transmitting power all over the state and construction and maintenance of sub-stations and

transmission lines of 66 KV and above. The Government of Karnataka had resolved to undertake development of 1200 MW of Solar Power in Karnataka to be implemented in 60 Taluks through a private sector participation. In pursuance of the same, the Respondent No. 2 had invited proposals by its request for proposal (RFP) dated 20.11.2015 containing terms and conditions for selection of bidders in respect of the proposed project.

- b) The Consortium comprising of M/s. OPG Power Generation Private Limited as a lead member and IBC Solar Ventures India B. V., had placed a bid for setting up of 4 projects in the State of Karnataka and the same came to be accepted by the Respondent No. 2. In compliance with the terms of RFP the Petitioner Company came to be promoted and incorporated as a SPV to undertake and perform the obligations and exercise the rights under the letter of allotment and to enter into Power Purchase Agreement in respect of the project allotted. The present Petition filed by the Petitioner concerns the project at Hosadurga Taluk, Chitradurga District for development of a 20 MW capacity solar power plant. Accordingly, KREDL/Respondent No. 2 issued a letter of award and allotment letter (Annexure-C to the Amended Petition) dated 23.03.2016. As per the letter of award and allotment letter, the Petitioner Company has communicated the receipt of the LOA to the 2nd Respondent by letter (Annexure-D to the Amended Petition) dated 31.03.2016.
- c) As per Clause 3.4.7 of the RFP the Developers were required to execute the Power Purchase Agreements with the ESCOMS within 30 days from

the date of receipt of the letter of award. However, on account of technical difficulties faced by the Developers with respect to creation of SPV's and other related issues, the time for execution of the PPA's came to be extended by the Respondent No. 2 by 30 more days i.e., 60 days from the date of receipt of the letter of award, accordingly an addendum (Annexure-E to the Amended Petition) dated 11.04.2016 is issued. The time for execution of PPA's further came to be extended by 8 working days from 25.05.2016 to 03.06.2016 by the 2nd Respondent. The Petitioner Company entered into Power Purchase agreement with the Respondent No. 1 on 03.06.2016, the effective date as per Clause 3.1 of the PPA reads as under:-

"3.1: Effective Date

'This Agreement shall come into effect from the date of its execution by getting concurrence from KERC on the PPA and such date shall be referred to as the effective date.'"

- d) As such the aforementioned Clause places the requirement of the approval on the part of the Commission for the purposes of determining the effective date. The same is in line with the provisions of the Electricity Act 2003, Section 63 read with Section 86 (1)(b), which infer that without approval of the appropriate Regulatory Commission, there can be no effective/legal PPA between a Distribution Licensee and a Generating Company.
- e) The Respondent No. 2 unilaterally issued an Official Memorandum (Annexure-F to the Amended Petition) dated 27.05.2016, under which commercial operation date for the project was stipulated to be

achieved within 12 months from 25.05.2016, contrary to the terms of the RFP and that of PPA itself.

- f) It is submitted that any PPA can be considered to be enforceable only when the terms and conditions for the same are final and both the parties are in consensus with respect to their liabilities and obligations. Further, it is pertinent to mention herein that Electricity Act, 2003, under Section 63 provides that if the tariff has been determined through a transparent bidding process, then the same is required to be accorded approval by the Commission.
- g) As per Section 63 of the Electricity Act 2003, places the mandatory requirement of obtaining approval of the appropriate Regulatory Commission with respect to the tariff that has been discovered pursuant to a bidding process. In other words, without the said approval, no PPA under Section 63 becomes effective. The Respondent No. 1 sent the PPA to the Commission for approval on 09.06.2016. The Commission granted its approval to the PPA vide an order (Annexure-G to the Amended Petition) dated 14.10.2016 with a specific direction that the said approval was to come into effect only upon execution of a Supplementary PPA for incorporating certain correction / modifications as stated in the said order. Hence, the PPA / draft PPA could only have been considered as approved once the Supplementary PPA incorporating the suggestions of the Commission is executed.
- h) It is pertinent, that after the order dated 14.10.2016, the original PPA dated 03.06.2016 was not final / approved since the Commission

directed that the said PPA would be considered approved only upon execution of a Supplementary PPA.

- i) It is stated that, in accordance with Section 63 of the Electricity Act 2003, a PPA cannot be said to be effective if any of the following conditions are not satisfied:
 - 1) If the PPA has not been finalized by the parties.
 - 2) If the PPA has not been granted approval by the Commission.
- j) It is therefore stated that, a PPA which does not receive the approval from the appropriate Commission, cannot have any sanctity.
- k) It is submitted that being aggrieved by the aforementioned finding, the Petitioner was constrained to approach this Commission, with a prayer to hold and declare that the 'effective date' in respect of the PPA entered into between the Petitioner and the ESCOM is from the date of approval of the PPA by this Commission as is mentioned under the Clauses 3.1, Clause 8.5 and Clause 21.1 of the PPA. This Commission allowed the said Petition and therefore, the effective date came to be declared as 'the date of approval of the PPA by the KERC' and the parties were directed to carry out the necessary corrections in the PPA.
- l) It is pertinent to mention that the determination of effective date is extremely crucial since all the terms and conditions laid out in the PPA and the time lines for various obligations under the PPA are subject to be determined in accordance with the effective date. In particular, reference is made to Clause 8.5 of the PPA, which provides for COD of the project to be achieved within 12 months from the effective date. As such,

if there is ambiguity with respect to the effective date then the same shall constrain the parties in determining the timelines for achieving the COD.

- m) Immediately after receipt of the order dated 19.05.2017 passed by the Commission, the Petitioner addressed a communication (Annexure-J to the Amended Petition) dated 27.05.2017 to the Respondent No. 1 requesting them to execute Supplementary PPA. It is stated that the PPA (Annexure-R to the Amended Petition) dated 03.06.2016, in itself, was an incomplete document and can only be considered to be complete and approved when read along with the Supplementary PPA (Annexure-T to the Amended Petition) dated 24.08.2017 as such, the effective date for Commissioning the Solar project is 24.08.2017.
- n) It is further submitted that, as is clear from the circumstance mentioned hereinabove, though the PPA was signed on 03.06.2016 and approved by the Commission on 14.10.2016, the clarification regarding the effective date was made known to the parties only in the last week of May 2017 vide order passed by the Commission. On account of ambiguity regarding the very effective date, the Petitioner was constrained from completing key aspects of the project. Permissions, clearances and some other Project related works that could not be pursued without the said clarification such as the evacuation approval, identification of lands, financial assistance, and appointment of EPC Contractors were all completed.
- o) The Petitioner has completed the following works in so far as the present project is concerned: -

- The company has entered into agreement of sale with the entire extent of project land and is in possession of the same. A copy of the Service order contract for complete land procurement dated 19.12.2016 is produced herewith and marked as (Annexure-K to the Amended Petition).
 - Obtained financial approval/assistance to the tune of Rs. 96.85 crores. A copy of the said endorsement issued by the Bankers dated 20.03.2017 is produced herewith marked as (Annexure-L to the Amended Petition).
 - Obtained Evacuation approval (Annexure-M to the Amended Petition) on 17.03.2017.
 - EPC Contractors for civil works contract, Erection Contract, Supply Contract (Domestic), Supply Contract (Overseas), and Engineering, Procurement and Construction Agreement have been appointment to oversee procurement of equipments. Copy of Engineering, Procurement and Construction Agreement is produced herewith and marked as (Annexure-N to the Amended Petition) dated 07.07.2017.
- p) It is stated that the Petitioner was incapable of proceeding with extension of Bay till the Evacuation scheme was obtained/finalized. The Petitioner had requested the Respondent No.3 as early as June, 15th, 2016 for Evacuation Approval.
- q) The Petitioner could not have proceeded with erection of bay and erect materials thereon based on the Evacuation Approval along in the

absence of approval of Evacuation Scheme which is subject to change till the same is issued finally after a detailed survey. It is highly arbitrary to expect the Petitioner to complete the project by mid-October when the Evacuation Scheme itself is issued on 07.10.2017. Copies of Evacuation Approval application, demand letter for fees, Receipt for payment and Evacuation Scheme dated 07.10.2017 are produced herewith as Annexure N1 Series (N1-N5 to the Amended Petition).

- r) In view of the above, it is stated that even though the financial approval was granted to the Petitioner by its Bankers on 20.03.2017, the Bank refused to disburse the loan amount for want of supplementary PPA, since the same records crucial terms like Effective Date and other factors concerning the commercial aspects of the project. The non-disbursement of funds has had a severe financial impact on the project. The land registration was delayed and even though the Petitioner had placed orders for equipments from the equity portion of funds, the delivery of the equipments was kept in abeyance for want of funds.
- s) A copy of the statement issued by the Chartered Accountant dated 28.07.2017 (Annexure-P to the Amended Petition) of the Petitioner company would clearly show that the Petitioner has, without waiting for the disbursement of funds from Bankers, gone ahead with the project work by expending about Rs. 8,20,40,000/- (Eight crores, Twenty lakhs and Forty thousand only) as on 28.07.2017. A copy of the equipments for which order has been placed as against which advance amount has also been paid is produced as (Annexure-Q to the Amended Petition). A copy of the

communication issued by the Bankers refusing disbursement of loan is produced as (Annexure-Q1 to the Amended Petition).

- t) The Petitioner addressed another communication to the Respondent No.1 on 16.08.2017, yet again requesting them to sign the Supplementary PPA and also seeking extension of the Date of Commissioning in the circumstances explained above. It was only on 24.08.2017 that the Respondent No.1 came forward to sign the supplementary PPA, after a delay of 98 days (from 19.05.2017 to 24.8.2017) from the directions issued by the Commission directing the parties to execute a supplementary PPA. A copy of the PPA dated 03.06.2016 signed by the Petitioner with the Respondent No. 1 is produced as Annexure R (to the Amended Petition). Copies of the communication dated 16.08.2017 and 05.12.2017 addressed to the Respondent No. 1 are produced as Annexure S & S1 (to the Amended Petition). The Supplementary PPA dated 24.08.2017 signed by the Petitioner with the Respondent No. 1 is produced as Annexure-T (to the Amended Petition).
- u) The Petitioner made the following grounds in Amended Petition which was allowed on 02.03.2021 by this Commission.
- v) On 01.07.2017 the Government of India introduced the Central Goods and Services Tax Act, 2017 (GST Law) which brought about fundamental structural changes in the prevailing tax regime in the Country. The goods and services tax rendered the Solar projects tread sluggishly due to uncertainty that hovered around it till the same was brought into effect in July 2017. There was uncertainty both about the tax slabs under which a

particular industry would fall and also about the timeline for implementation of GST, which posed difficulties in implementation of various projects, including the solar projects in the country. Due to the said uncertainty, the Petitioner Company was unable to arrive at a dependable cost basis for the project which is the primary criterion for any financial institution to lend funds, as result financial closure also took considerable time longer than expected, thus resulting in further slowing down of the project than the timeline originally considered by the Petitioner Company. The GST law had the following implications and developers of solar projects.

- Contractors/suppliers were delaying contracts due to lack of clarity on tax structure.
 - Contractors/suppliers had to revamp their systems amend and reissue purchase orders to align them as per the GST regime/ to make them GST law complaint.
 - Lack of clarity on GST percentage applicable on inverters contributed to delay in supply of material required for setting up of projects and
 - Introduction of GST law resulted in confusion regarding MNRE 'Certificate for Concessional Customs Duty' which was kept on hold from June 2017, further resulting in delay in supply of key equipment.
- w) It is stated that, apart from the project specific Force Majeure events that affected the project, all solar power projects in the State of Karnataka, including the Petitioner's project were affected by another Force Majeure

Event, the introduction of the GST. Difficulties caused to the Developers on account of introduction of the GST has been acknowledged by the Ministry of New & Renewable Energy. The Petitioner has achieved the financial closure on 20.03.2017 and has commissioned the project on 12.02.2018, does entitling itself to avail extension of 62 days as provided in the Official Memorandum (Annexure-X to the Amended Petition) dated 20.06.2018 passed by the MNRE. The Petitioner is therefore, seeking extension of 62 days due to imposition of GST as provided in the Official Memorandum.

- x) Apart from the above, the Petitioner urged the grounds as follows: -

GROUND

- 1) For that as per the order dated 14.10.2016 of this Commission, the approval of the PPA was to come into effect only upon execution of a supplementary PPA for incorporating certain corrections/modifications as stated in the order dated 14.10.2016. As such, there was no effective approval of the Commission, in terms of Section 86(1)(b) of the Electricity Act,2003, and the same was incomplete till the execution of the supplementary PPA by the parties.
- 2) For that prior to the order dated 19.05.2017, the approval of the Commission was not in place since it was subject to a future event of execution of a supplementary PPA. As such, it is submitted that only pursuant to the execution of the Supplementary PPA would be the requirement, as envisaged under order Dated 14.10.2016 read with RFP, of execution of an effective PPA would be complete. It is stated that

the PPA dated 03.06.2016, in itself was an incomplete document and can only be considered to be complete when read along with the Supplementary PPA dated 24.08.2017.

- 3) The delay caused by the Respondent No. 1 in signing the Supplementary PPA with the Petitioner despite the explicit orders of the Commission has resulted in having a huge adverse financial impact on the Petitioner Company, affecting the very Commissioning of the project on time.
- 4) Upon the said approval becoming effective, the rights and obligations of the parties start, including the fact that the zero date with respect to the obligation of implementing the solar project within 12 months, in terms of Article 8.5, being the date of execution of supplementary PPA i.e., 24.08.2017. Therefore, the obligation under Article 8.5 is to be implemented within 12 months from 24.08.2017.
- 5) For that the PPA cannot be said to have been executed or enforceable till the time the same has been granted approval by the Commission. In this regard, reliance may be placed on Judgement of the Appellate Tribunal dated 21.10.2011 In Appeal No.51 of 2011 in case of M/s. Rithwik Energy Generation Pvt. Ltd. vs. Karnataka Power Transmission Corpn. Ltd. & Ors. which held that:

“10.5) In view of the above, the distribution licensee has to obtain the consent of the State Commission for procurement of power against the PPA. Unless the State Commission gives its consent to the PPA, the distribution licensee cannot procure power under the PPA. Thus, the PPA will come into effect only after obtaining the consent of the State Commission”.

- 6) For that it is a regulatory fact that a power project is funded through equity and debt components, with debt from financial institutions normally in the range of 70% to 80% of the total project cost. It is stated that no lender can grant loan, and disburse the said loan amount, until it has an approved PPA at hand. In the present case, since the approval of the Commission was to be made effective only pursuant to the execution of the Supplementary PPA dated 24.08.2017, the lenders were in a position to disburse funds only pursuant to the said PPA.
- 7) It is further stated that even if the Petitioner exceeds the above timeline of 24.08.2018, the said Petitioner would be entitled to claim of SCOD based upon any Force Majeure events which may occur between 24.08.2017 and 24.08.2018.
- 8) The Petitioner is being made to suffer even after pursuing the project diligently by discharging its duties as could be seen from the preceding paragraphs wherein it has procured financial assistance, procured lands, placed orders for equipments, obtained execution approval etc., But, severe delay in issuing evacuation scheme and non-disbursement of funds left the Petitioner company heading slow in respect of fulfilment of registration of lands, delivery of equipments, and various other financial commitments related to the project.
- 9) The Respondent No. 1 has breached its obligation under clause 6.1.3(a) and (d) wherein it's required to support and assist the Developer in procuring applicable permits required from any Governmental agencies for implementation and operation of the project and to

support, cooperate with and facilitate the developer in the implementation and operation of the project in accordance with the provisions of this agreement.

- 10) The Hon'ble Appellate Tribunal has in the case of Gujarat Urja Vikas Nigam Ltd. Vs GERC and others in Appeal No.123/2012 held upheld the following findings of the GERC:

"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'."

In the above matter based on the said findings, the schedule Commissioning date was extended by 19 months. The events in the present case also being delay in getting Evacuation Scheme from the Respondent No.3 KPTCL, the Petitioner is also entitled for extension of COD.

- 11) The Ministry of Renewable Energy has also issued a communication addressed to all the State Governments wherein it has directed the competent State authorities to consider the case of extension of the time If there are delays of any kind on the part of State Government Authorities/PSUs like land allotment, transmission/evacuation facilities, connectivity permission or force majeure. It is therefore, submitted that this Commission ought to consider the case of the Petitioner for extension since the delay resulted in the present case is on account of delay caused by the Respondents. Copy of the said communication

issued by MNRE dated 28.07.2017 is produced herewith and marked as Annexure-U (to the Amended Petition).

- 12) It could be seen that though the Petitioner has put in its best efforts to complete the project on time, it was on account of the Force majeure events such as delay in signing of SPPA, delay in issuing Evacuation approval, bay estimate, and introduction of GST law 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	Period	No. of days delay
1	Introduction of GST	1.7.2017 to 31.8.2017	62
2	Delay in signing of PPA	19.5.2017 (The date of KERC order declaring effective date to 24.8.2017 (Date of signing of SPPA))	96
3	Delay in issuing Evacuation approval	15.6.2016 (Date of filing Evacuation approval application) to 17.3.2017 (Date of issue of Evacuation approval)	274
4	Delay in issuing Bay estimate	17.3.2017 (Date of issue of evacuation approval) to 7.10.2017 (Date of issuing demand for payment of charges)	203
Total			417

Total delay suffered by Petitioner project owing to the aforesaid force majeure events, duly considering overlapping events 319 days.

- 13) It is respectfully submitted that despite delay of 319 days on account of aforesaid force majeure events, the Petitioner with all its best and committed efforts, Commissioned the project on 12.02.2018. In the light of the afore-stated force majeure events, the project has been Commissioned well within time.

- 14) The Tariff agreed by the parties under the PPA is Rs. 4.97/ kwh. The Tariff order dated 12.04.2017 is determined by the Commission in exercise of its power under Section 62 of the Electricity Act, 2003, which makes the said order applicable in the following two circumstances: -
- i) On the basis of the approved parameters in modification of its earlier order dated 30.07.2015 the Commission hereby determines the Tariff of Rs. 4.36 per unit for all new grid connected MW scale Solar PV plants entering into PPA on or after 01.04.2017 but before 01.04.2018.
 - ii) This Tariff determined shall also be applicable to those grids connected megawatt scale Solar PV plants for which PPA's were entered into before 1st April 2017 but are not commissioned within the specified Commercial Operation Date and achieve COD during the period from 01.04.2017 to 31.03.2018.
- 15) It could be seen that Tariff Rs. 4.36 per unit fixed by the Commission is made applicable to PPA's entered into before 01.04.2017 but which are not commissioned within the specified commercial operation date and achieve COD during the period from 01.04.2017 to 31.03.2018. The PPA in the present case was entered into on 03.06.2016 and commissioned on 12.02.2018 and therefore as per the above Tariff order result in the Petitioner Company having to get a Tariff of Rs. 4.36 per unit as against Rs. 4.97 per unit fixed under the PPA. Since the Tariff fixed under the PPA is through bidding process, the generic Tariff order cannot be made applicable to the Petitioner. Even otherwise, since the PPA dated

03.06.2016 and the generic tariff which is now sought to be implemented for projects subsequently on 12.04.2017, the generic tariff cannot be made applicable retrospectively. The same is arbitrary and unreasonable, therefore the Petitioner is entitled to be paid a Tariff of Rs. 4.97/- with all this the Petitioner prays to allow the Petition as prayed for in the interest of justice and equity.

3) Upon notice, the Respondents appeared through their Learned counsel, and filed statement of objections separately as follows: -

a) The 1st Respondent has stated that, on 14.10.2016 this Commission has approved the PPA dated 03.06.2016 subject to certain modifications namely that the effective date would be 25.05.2016 instead of the date of approval of the PPA by this Commission and the Respondent was directed to execute a suitable SPPA incorporating the modifications as suggested by the Commission. Accordingly, the Respondent vide letter dated 28.10.2016 has requested the Petitioner to execute SPPA as per the Commission's letter dated 14.10.2016 but the Petitioner did not executed the SPPA. The Petitioner filed a Petition in OP No. 48/2017 before this Commission seeking modification of the effective date under the PPA. This Commission has passed orders on 19.05.2017 altering the Effective Date as 03.06.2016 instead of 25.05.2016.

b) On 27.05.2017 the Petitioner requested the Respondent to execute SPPA in terms of the order of the Commission upon request from Petitioner on 15.06.2016 for evacuation approval. The 2nd Respondent vide letter dated 14.10.2016 directed the Petitioner to pay processing fee for processing

evacuation proposal which the Petitioner paid on 22.10.2016. Thereafter, on 03.02.2017 the Petitioner was granted with the tentative evacuation approval. On 21.02.2017 the Petitioner has accepted the Tentative Evacuation Scheme. On 17.03.2017 the Petitioner was granted regular evacuation approval. On 24.08.2017 the Petitioner executed SPPA as per the orders of the Commission. On 21.09.2017 the Commission has approved the SPPA subject to recovery of liquidated damages for delay in achievement of Conditions Precedent. On 12.02.2018 the Petitioner interconnected its plant to the grid.

- c) The Petitioner is seeking a relief i.e., wholly contrary to the terms of PPA. As per Article 21.1 of the PPA 'Effective Date' is the date on which this Commission approves the PPA. The date of Supplementary PPA was on 24.08.2017, which was executed incorporating effective date to be the date of approval of PPA by the Commission as per orders dated 19.05.2017. Therefore, the contention of the Petitioner that effective date is to be the date of execution of supplementary PPA is untenable.
- d) As per Article 4 of the PPA, the Petitioner herein is required to satisfy Conditions Precedent within 8 months from Effective Date. Therefore, the petitioner herein is required to achieve condition precedents on or before 13.06.2017. One of the conditions precedents is that the Petitioner was required 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 Petitioner has the clear title and possession of land till

date. It is submitted that the Petitioner herein has not taken steps within the reasonable timeframe to achieve conditions precedent. Therefore, the Petitioner has not acted in a diligent manner and the said delay can only be attributed to the Petitioner.

- e) It will be of relevance to note that the Petitioner herein can be excused for not achieving conditions precedent only when it is affected by an event of Force Majeure Event or if any of the activities is specifically waived in writing by the Respondent. It is stated that, the PPA clearly sets out the events which are force majeure events, in Article 14 of the PPA. Perusal of the said clause 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 approvals cannot be considered to be events of force majeure. Further, Article 5.1 clearly sets out the Obligations of the Developer. It clearly states that it is the responsibility of the Developer to obtain all clearances, consents etc. Hence, knowing fully well what its obligations under the contract are, the Petitioner is now attempting to take advantage of its own wrong. The reasons assigned for the delay in commissioning of the project cannot be attributed to the Respondents. The onus of obtaining all necessary approvals was on the Petitioner herein as per Article 5.1.1 of the PPA. However, the Petitioner failed to do so.
- f) It is pertinent to note that the Petitioner herein has to pay damages to the Respondent in the event the Petitioner fails to achieve conditions precedent and scheduled commissioning date within the stipulated time

frame in accordance with the Article 4.3 and 5.8 of the PPA. The same is in keeping with what has been agreed to by the parties. Admittedly, in the present case Petitioner has not achieved Condition Precedents and commissioning within the stipulated timeframe under the PPA. Therefore, the Petitioner herein is required to pay liquidated damages as per the PPA.

- g) That the PPA clearly states that in the event of delayed execution of the project, the Petitioner would only be entitled to tariff be the lower of the rate mentioned in the PPA, namely Rs. 4.97 per kwh and the varied tariff applicable as on the date of commercial operation. Therefore, the Petitioner is entitled for tariff as per the Generic Tariff Order dated 12.04.2017 that was in operation on the date when Petitioner commissioned the plant.
- h) By way of the present petition, the Petitioner is attempting to bypass its obligations under the PPA. It ought to be noted that the Respondent herein 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 itself and at any rate not attributable to the Respondent.
- i) The averments in para 1 to 11, 18 and 27 are all matters of record, thereby, they need not specifically traversed. The other averments made in para 12 to 14, 16, 17, 19 to 26 and 28 to 41 are all untenable and denied. All other averments which are not specifically traversed by this Respondent are denied as untenable. Further, the statement of the Petitioner that the

non-availability of evacuation approval and non-signing of Supplementary PPA has put the Petitioner in severe financial stress and hindered the Petitioner from implementing the project is untenable. The fact that the Petitioner has commissioned the project after delay of 4 months proves that the Petitioner is not diligent and serious in implementing the plant. Thereby, it is clear that the Petitioner has not made out his case to call for any kind of intervention or help from this Commission, hence, the Petitioner is not entitled to extension of time as prayed for, with this he prays to dismiss the Petition in the interest of Justice and equity.

- j) By way of additional objections, the Respondent No. 1 has stated that, it is the contention of the Petitioner that the uncertainty which hovered over implementation of GST has adversely affected its project and caused delay in achieving Commissioning within SCOD. Further, the Petitioner is seeking extension of time by placing reliance on Official Memorandum dated 23.06.2018 issued by MNRE, which is untenable because the said Official Memorandum is only advisory in nature. The Petitioner was required to make a request for extension with the implementing agencies by producing all documentary evidences in support of its claim. The onus is on the Petitioner to explain satisfactorily as to how the implementation of GST was affected the Petitioner in implementing its project, however, the Petitioner has not produced any documents.
- k) Further the contention of the Petitioner, that uncertainty over tax slabs and timeline for implementation of GST has adversely affected the Petitioner

project is untenable. As per Article 14.5.1 of the PPA, the affected party has to give the other party a notice of force majeure no later than 7 days after the date on which such party knew or should reasonably have known about the commencement of the force majeure. In the case on hand, the Petitioner has failed to issue any notice of force majeure within the required time periods. It is submitted that the Petitioner has made vague statements without any evidence in respect to implementation of GST causing hurdles in executing the project. Therefore, the reasons assigned for seeking for extensions are wholly untenable.

- l) With regard to the averment that tariff of Rs 4.36 per unit as per Generic tariff Order date 12.04.2017 determined under Section 62 of the Electricity Act, 2003 cannot be applied to the Petitioner's project, it is submitted that Article 12 of the PPA clearly states that the Petitioner will be entitled to the lower tariff prevailing on the date of commissioning plant, in the event Petitioner has failed to commission the Plant within the stipulated time frame. The said PPA was signed voluntarily and has been approved by this Commission as well. Therefore, the contention of the petitioner that its tariff cannot be altered as same was discovered through bidding process is untenable. The Petitioner was well aware of the effect of delayed commission of the plant. It ought to be noted that if the contention advanced by the Petitioner is to be accepted, then it would lead to a situation wherein, there would be absolutely no adverse consequences for delayed execution of a project and the same would adversely affect the consumers of the State. Even otherwise, the tariff payable for power

ought to be commensurate with the rates payable at the time of commissioning.

- m) The averments of the Petitioner that, Force Majeure events such as delay in signing of SPPA, issuance of evacuation approval, bay estimate and introduction of GST law has hindered the progress of the project is untenable and denied. Averment that in the light of force majeure events, the Petitioner has commissioned the plant well within time is untenable and denied. Averment that there was delay in signing of SPPA, issuing evacuation approval and bay estimate is denied. With this he prays to dismiss the Petition.
- n) The Second Respondent has filed statement of objections stating that the Petitioner is not entitled for any relief as claimed by him, as the Petitioner was aware of the stipulated time and since he has agreed, there cannot be any further extension of time, thereby, the petition is liable to be dismissed.
- o) Further 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 had called for the request for proposal for the development of 1200 MW Solar power projects to be implemented in the 660 Taluks vide RFB dated 20.11.2015. However, this Respondent has issued letter of allotment to the successful bidders and also in favour of the Petitioner.
- p) Further stated the Petitioner has entered into a Power Purchase Agreement with the First Respondent therefore, it is for the Respondent No.

1 & 3 herein to counter the Petitioner allegations made against them. This Respondent is not a necessary party to this petition. Thereby, prays to dismiss this petition against Respondent No. 2 in the interest of justice and equity.

- a) The Third Respondent has filed statement of objections stating that, at the outset no reliefs have been claimed against Respondent No. 3. However, certain allegations with regard to delay in granting evacuation scheme have been made against this Respondent are denied.
- r) It is the case of the Petitioner that the Respondent No. 3 herein, delayed in granting evacuation scheme which resulted in delay in finalization of location, plant design, bay erection, and procurement of solar power plant components, following which the Commissioning of the solar power plant was delayed. In response to the allegations made against the Respondent No.3 herein it is submitted that Respondent No. 3 has granted approvals within a reasonable time period. The Petitioner has alleged delay on the part of Respondent only to camouflage its lackadaisical attitude in implementing the project.
- s) The Petitioner approached the Respondent No. 3 herein for regular evacuation approval on 15.06.2016. Subsequently, the Respondent herein on 14.10.2016 requested Petitioner to remit the processing fee and to furnish details of the facilitation fees paid to Respondent No. 2/KREDL. The Petitioner paid the requisite processing fee on 22.10.2016. On 03.02.2017, the Petitioner was granted tentative evacuation approval (Annexure - R1). On 21.02.2017, the Petitioner accepted the tentative

evacuation approval and requested for sparing of land at Method Substation for construction of 66 KV Terminal Bay.

- t) Thereafter, during the 105th Terminal Bay Meeting held on 04.03.2017, it was decided that due to unavailability of suitable land, the Petitioner would have to purchase adjacent suitable land for construction of 66 KV Terminal Bay. Copy of the Minutes (Annexure-R2) of the 105th Terminal Bay committee meeting held on 04.03.2017. This was conveyed to the Petitioner herein vide Regular Evacuation approval granted on 17.03.2017. In addition to the same, the Respondent No. 3 on 13.04.2017 requested the Chief Engineer, Electricity, Transmission Zone, Tumkuru to re-examine the availability of land for the Petitioner to construct 66 KV Terminal Bay. On 11.05.2017, the SEE (W&M), Davangere, addressed a letter to Respondent No. 3 herein stating that the land could be spared by making certain modifications like extension of security fencing, extension of earth mat, site surfacing, yard levelling, etc. In furtherance to the same in the 121st Terminal Bay meeting (Annexure – R3) held on 24.5.2017, the committee decided to spare land for construction of 66 KV Terminal Bay for evacuation of 20 MW from Petitioner's plant on 66 KV SC line on DC power from Method village to 66/11 KV Method sub-station by making necessary modifications/ alterations to the land. Subsequently, the Respondent No.3 informed through a letter (Annexure - R4) dated 07.10.2017 regarding necessary payment of charges. It is submitted that though the responsibility of finding suitable land for establishment of terminal bay is on the Petitioner, nonetheless, the Respondent herein has

put in sincere effort to facilitate the implementation of the project. Thus, it is amply clear that the Respondent herein has always acted diligently to facilitate the implementation of the Petitioner's project. Therefore, and any delay in Commissioning of the plant contended by the Petitioner to be on the part of the Respondent herein is untenable and denied.

- u) In addition to the above, it is submitted that Article 5.4 of the PPA clearly stipulates that the Petitioner shall be responsible for evacuation of power from the power project to the nearest delivery point. In the light of the same, the Petitioner cannot escape from its obligations and blame the Respondent herein for the delay in Commissioning the plant. It is submitted that there being no delay in approval of the regular evacuation scheme and it cannot be termed as the major cause of delay for the delayed Commissioning. It is submitted that the major cause of delay was the passive approach of the Petitioner towards the execution of the project. Therefore, in the light of the above, it is amply clear that the Respondent No. 3 herein has not delayed the Commissioning the plant and in fact assisted the Petitioner by making a decision to provide land.
- v) It is stated, it is the Petitioner's obligation under Article 5.4 of the PPA, that the Petitioner shall be responsible for evacuation of power from the power project to delivery point. Therefore, the Petitioner cannot take shelter by shifting its burden on to the Respondent No. 3. Therefore, the averment, that there was a delay of 274 days in granting evacuation approval and 203 days in granting evacuation scheme is wholly misplaced and denied.

Therefore, he prays to dismiss the Petition against him in the interest of justice and equity.

- 4) The Petitioner has filed rejoinder to the objections of the Respondents, reiterating the contents of the Petition. Further stated that the allegations of the Respondent that no Force Majeure notice was given as per terms of the PPA, is false and baseless. The Petitioner has already placed all the communications on record as per Annexure – G & H (to the rejoinder). There has been no response by the Respondents to these communications issued by the Petitioner requesting extension of time, which shows that the Respondent did not attached any significance to the requirement of notifying them on the Force Majeure event. Further stated the Petitioner is also entitled the benefit of the orders passed by the Commission in OP 15/2018 & OP 29/2018 (M/s Adani Green Energy UP Limited V/s HESCOM & Others, where in the Commission has up held that demonetization is a Force Majeure Event that has affected the developers in commissioning the plant as per the terms of PPA. In this back ground the Learned Counsel for the Petitioner prays to allow the Petition in the interest of justice and equity.
- 5) Heard the arguments, perused the written submissions on both sides and the records.
- 6) At this stage the below mentioned issues arise for our consideration.
 1. **Issue No. 1:** Whether the effective date is to be the date of execution of SPPA dated 24.08.2017 as claimed by the Petitioner instead of PPA dated 03.06.2016 as per Article 3.1 of the PPA?
 2. **Issue No. 2:** Whether the Petitioner proves that he is entitled for extension

of time on the grounds of Force Majeure events as claimed in the Petition?

3. Issue No. 3: For what relief the Petitioner is entitled to?

4. Issue No. 4: What Order?

7) **Issue No. 1:** Whether the effective date is to be the date of execution of SPPA dated 24.08.2017 as claimed by the Petitioner instead of PPA dated 03.06.2016 as per Article 3.1 of the PPA?

8) As per Letter of Award and Allotment Letter (Annexure-C to the Amended Petition) dated 23.03.2016 for development of 1200 MW (AC) Solar power projects in the State of Karnataka to be implemented in 60 Taluks, the Petitioner was requested to indicate a suitable date for execution of the Power Purchase Agreement. The Petitioner has written a letter to the Managing Director, KREDL (Annexure-D to the Amended Petition) dated 31.03.2016 intimating that as "propose to sign PPA, sometime after 20th April, 2016, but within the time Schedule". Thereafter, Respondent No. 2 has issued Addendum (Annexure-E to the Amended Petition) dated 11.04.2016, accordingly the Developer were required to execute the Power Purchase Agreements with the ESCOMS within 30 days from the date of receipt of the letter of award. However, on account of technical difficulties faced by the Developers with respect to creation of SPV's and other related issues, the time for execution of the PPA's came to be extended by the Respondent No. 2 by 30 more days i.e., 60 days from the date of receipt of the letter of award. As per Official Memorandum (Annexure-F to the Amended Petition) dated 27.05.2016 issued by KREDL, the time for execution of PPA further came to be extended by 8 working days from

25.05.2016 to 03.06.2016. Accordingly, the Petitioner Company entered into Power Purchase agreement with the Respondent No. 1 on 03.06.2016. The effective date as per Clause 3.1 of the PPA reads as under: -

“3.1: Effective Date

‘This Agreement shall come into effect from the date of its execution by getting concurrence from KERC on the PPA and such date shall be referred to as the effective date.’”

- 9) The Respondent No. 1 sent the PPA to the Commission for approval. The Commission granted its approval to the PPA vide an order (Annexure-G to the Amended Petition) dated 14.10.2016 with a direction to execute Supplementary PPA for incorporating certain correction/modifications as stated in the said order.
- 10) The Petitioner being aggrieved by the Official Memorandum (Annexure-F to the Amended Petition) dated 27.05.2016, issued by the 2nd Respondent in which it is stated that as “the Developers who are signing the PPA availing this time extension, the Commercial Operation Date for the project shall be achieved by the Developer within 12 months (Twelve) from 25.05.2016”, had approached the Commission through OP No. 48/2017 for a clarification and sought to consider the effective date mentioned in the Power Purchase Agreement executed by them to be the date of approval of the PPA by the Commission but not 25.05.2016 as mentioned in the Official Memorandum (Annexure-F to the Amended Petition) dated 27.05.2016. After hearing both parties the Commission has passed orders dated 19.05.2017 declaring that the later part of Official Memorandum dated 27.05.2016 issued by the 2nd Respondent to the effect that as: -

“12)(a)(ii) For the Developers who are signing the PPA availing this time extension, the Commercial Operation Date ('Commercial Operation Date'/'COD') for the project shall be achieved by the Developer within 12 (twelve) moths from 25.05.2016” is invalid and not binding on the Petitioner.”

“(b) Consequently, the directions given by this Commission in its communication dated 14.10.2016 in OP 48/2017 and the communication dated 07.10.2016 in OP No. 49/2017, in so far as it relates to altering the effective date as 25.05.2016 in Articles 3.1, 8.5 and 25.1 of the PPAs, stand withdrawn and the parties are permitted to carry out the necessary corrections in PPAs or the Supplemental PPAs concerned.”

- 11) During the proceedings of this case on hand, on 18.09.2018 this Commission has passed orders as “LD to be deducted after notice to the Petitioner”. Aggrieved by this order the Petitioner has preferred an appeal in Appeal No. 15/2019 before Hon’ble Appellate Tribunal for Electricity, New Delhi. After hearing both the sides Hon’ble Appellate Tribunal for Electricity, New Delhi has disposed off the appeal by passing orders dated 08.02.2020 as stated below: -

“Since the entire issue revolves around on the question/controversy of effective date as defined in the difference clauses of PPA, we are of the opinion that there is no purpose in deciding the above appeals on merits at the stage. Once the original petitions are disposed of by the Commission declaring what is the effective date and what reliefs these Appellants are entitled to in the OP, depending upon the outcome of the OP, either of the parties would be at liberty to approach this tribunal.”

In the above orders the Hon’ble Appellate Tribunal for Electricity, New Delhi has found that the KERC has to decide the issue pending between the parties by following directions mentioned in the order.

- 12) '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.'
- 13) In the present case vide letter (Annexure-G to the Amended Petition) 14.10.2016, the Petitioner and the 1st Respondent were informed the approval of the Commission to the PPA dated 03.06.2016. Therefore, the date 14.10.2016 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 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.
- 14) The petitioner has contended that, as the letter (Annexure-G to the Amended Petition) dated 14.10.2016 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.
- 15) The letter dated 14.10.2016 (Annexure-G to the Amended Petition) communicates approval of the Commission to the PPA dated 03.06.2016 executed between the parties in respect of development of 20 MW (AC) Solar

Power Project in Hosadurga Taluk, Chitradurga District, 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 03.06.2016 communicated by letter dated 14.10.2016 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.

- 16) In this regard, we rely upon the judgement passed in Appeal No. 322/2018 in the matter of Madamageri Solar Power Project LL. P & Smt. Girija B. Hattiholi Vs HESCOM & KERC dated 12.08.2021 in which it is held as: -

"117) It is now well settled that it is not the date of signing the PPA which has to be considered as effective date, but the date on which the PPA becomes implementable that is the approval of the PPA by the State Commission has to be the effective date."

- 17) In the case on hand, the 1st Respondent entered into PPA with Petitioner on 03.06.2016. As per Article 3.1 of the PPA the effective date would be the date of getting concurrence from the Commission. The Commission granted approval of the PPA on 14.10.2016. Therefore, the Petitioner could act upon PPA as per its terms and conditions only from 14.10.2016. Therefore, the prayer

of the Petitioner to treat the effective date as on 24.08.2017 cannot be accepted, thereby, the Issue No.1 is held in negative.

- 18) **Issue No. 2:** Whether the Petitioner proves that he is entitled for extension of time on the grounds of Force Majeure events as claimed in the Petition?
- 19) The present Petition is filed seeking for a declaration that the effective date with respect to Article 8.5 of the PPA dated 03.06.2016, is 24.08.2017 i.e., the date of execution of the Supplementary PPA and also in alternative sought for extension of time to the Petitioner for fulfilling its obligation under the PPA on the grounds of Force Majeure Events.
- 20) The Petitioner has taken four major grounds under the head of Force Majeure Events for extension of time in commissioning the power project, which are detailed as below: -
- a) Introduction of GST (62 days).
 - b) Delay in signing of SPPA (96 days).
 - c) Delay in issuing Evacuation approval (274 days).
 - d) Delay in granting land for bay allocation (203 days).

Total delay suffered by the Petitioner's project owing to the afore stated Force Majeure events, duly considering over lapping events is 319 days.

- a) Introduction of GST (62 days):** - i) During the course of arguments, the Learned Counsel for the Petitioner has submitted that, all solar power projects in the State of Karnataka including the Petitioner's project were affected by introduction of the GST. Difficulties caused to developers on account of introduction of the GST has been acknowledged by the MNRE in the Office Memorandum (Annexure-X to the Amended Petition) dated

20.06.2018. The Petitioner having achieved financial closure on 20.03.2017 and commissioned the plant on 12.02.2018 (Annexure-Y to the Amended Petition). This Commission has upheld GST as Force Majeure Event in OP 15/2018 and OP 29/2018 held between M/s Adani Green Energy (UP) Limited Vs HESCOM & Others. Thereby prayed to treat the delay caused in this regard as Force Majeure Event.

- ii) The Learned Counsel for the Respondents by way of reply has submitted that the Petitioner at the time of filing of the Petition i.e., on 13.12.2017, did not take the contention that the commissioning of the project was delayed due to the introduction of GST. Only after thought, the Petitioner has taken this contention and got amended the Petition on 02.03.2021. The Petitioner has misled by stating that, the Office Memorandum dated 20.06.2018 issued by the Ministry of New and Renewable Energy (MNRE) would be applicable to the Petitioner. But the MNRE Official Memorandum, requires that the affected party shall provide documentation to show that there was a disruption in the process and therefore, the project could not be commissioned as per the terms of the PPA. But the Petitioner till date, failed to produce any documentary evidence of its claims before this Commission.
- iii) In this regard the Learned Counsel for the Respondents referred the judgements passed in Himachal Sorang Power Limited Vs CERC and Other, 2015 SCC Online APTEL 148 dated 30.04.2015 and M/s Adani Green Energy (UP) Limited Vs BESCO in OP No. 02/2018 dated 15.09.2020, in these judgements the Commission has held that the affected

party/Petitioner is required to produce substantial documentary evidence in support of its claim that the commissioning of the project has been affected by the GST induced disruptions between the period from 01.07.2017 to 31.08.2017. Without providing cogent documentation the relief sought by the Petitioner cannot be granted. Apart from that as per Article 14.3.1 of the PPA, 'introduction of GST cannot be treated as Force Majeure event'. Again Article 14.5.1 of the PPA states that 'the affected party, allegedly the Petitioner is required to issue a notice to the Respondent within a period of 7 days from the occurrence of the Force Majeure event', but the Petitioner failed to do so. The Commission in various judgements has stated that it is trite law that the Force Majeure Clause in PPA has to be strictly construed and if no notice had been issued as contemplated under the Force Majeure Clause describing the event, the Petitioner cannot seek extension of time under the said clause. With this the Learned Counsel for Respondents submitted, the Petitioner is not entitled for any relief under this ground.

- iv) On 01.07.2017 the Government of India introduced the Central Goods and Services Tax Act 2017 (GST Law) which brought about fundamental structural changes in the prevailing tax regime in the country. There was a slowdown from July 2017 to September 2017 in the manufacturing as well as service industry across the country. Consequently, there were certain implications due to the GST Law on the developers of solar projects i.e., (1) Contractors/suppliers were delaying contracts due to lack of clarity on tax structure. (2) Contractors/suppliers had to revamp

their systems amend and reissue "purchase orders" to align them as per the GST regime/to make them GST law Complaint (3) Lack of clarity on GST percentage applicable on invertors contributed to delay in supply of material required for setting up of projects (4) and introduction of GST Law resulted in confusion regarding MNRE Certificate for Concession Customs Duty which was kept on hold from June 2017 further resulting in delay in supply of key equipment. The MNRE after examined the impact of GST Law, issued Official Memorandum dated 20.06.2018 wherein, it has extended the SCOD for the solar projects for a period of 62 days. By way of said Official Memorandum (Annexure-X to the Amended Petition) dated 20.06.2018 in which reads as follows: -

"All the Project developers who claim to have been affected by GST induced disruptions shall make a formal application to SECI/NTPC/ other implementing agencies for Extension of Time (EoT) due to GST disruptions giving all documentary evidence in support of their claim. SECI/NTPC/ Implementing agencies shall examine the claim objectively and grant EoT based on facts, following above principles. While applying the above principles, SECI/NTPC/any other implementing agency may satisfy itself that the claimants were actually affected due to GST induced disruptions in the period for which extension has been claimed. The implementing agencies shall also ensure that no double relief is granted due to overlapping reasons cited for grant of EoT."

- v) In the present case on hand the Petitioner though taken contention that due to introduction of the GST, his project was affected thereby, he could not achieve COD on 14.10.2017. But he failed to furnish any

documentary evidence in this regard. Thereby, the Petitioner is not entitled for extension of time under this head.

- b) Delay in signing of SPPA (96 days):** - i) During the course of arguments, the Learned Counsel for the Petitioner has submitted that, the series of events explained in that Petition along with supporting documents would clearly show the impact on the progress of the project in the absence of clarity on the 'effective date' and also that of delay in furnishing the SPPA. A bare perusal of the communications dated 27.05.2017 (Annexure-J to the Amended Petition), 16.08.2017 (Annexure-S to the Amended Petition) and 05.12.2017 (Annexure-S1 to the Amended Petition) respectively, would clearly show that the Petitioner was constantly following up with the Respondents on the issue of signing the SPPA and that the same cannot at any stretch of imagination be termed as an 'after thought' as alleged by the Respondent. The financial institutions who had earlier sanctioned the loan refused to disburse the loan amount on account of non-signing of the SPPA (Annexure-Q1 to the Amended Petition). The Petitioner faced several financial hurdles because of the sudden withdrawal by their Bankers to fund the project. Loan amount was disbursed subsequent to signing of the SPPA and making a copy of the same available to the Bankers. Further stated immediately after the order was passed by the Commission on 19.05.2017 clarifying the effective date, the Petitioner requested the Respondent No. 1 to come forward to sign the SPPA. Even as late as 16.08.2017 the Petitioner requested the Respondent No. 1 to sign the SPPA, these communications falsify the claim of the Respondent that

the Petitioner kept postponing the execution of the SPPA for want of Board approval, which the Petitioner company can obtain any time, the Respondent indicates their readiness to sign SPPA. Therefore, Learned Counsel for Petitioner submitted the delay in executing SPPA by the 1st Respondent is also one of the major grounds to claim extension of time for commissioning of the power project which comes under Force Majeure Event.

- ii) By way of reply the Learned Counsel for the Respondents submitted that, the contention of the Petitioner that delay in signing of the Supplementary PPA caused delay in commissioning the plant, as even after repeated follow ups the Respondent executed a supplemental PPA only on 24.08.2017. It is pertinent to note that the Commission by its vide order dated 19.05.2017 held that the effective date will be construed as per Article 3.1 of the PPA. Therefore, the delay in execution of the Supplemental PPA did not hinder the implementation of the project. The signing of the Supplemental PPA did not bring any changes to existing obligations under the PPA. Therefore, the contention that the delay in execution of Supplemental PPA delayed the project implementation is untenable. Thereby, on this contention the Petition cannot be considered.
- c) Delay in issuing Evacuation approval (274 days):** - i) During the course of arguments the Learned Counsel for the Petitioner has submitted that, he had requested the Respondent No. 3 on 15.06.2016 for evacuation approval (Annexure-N1) fees was demanded on 14.10.2016 and the same was paid on 22.10.2016 (Annexure-N3) and on 03.02.2017 the Tentative

evacuation Scheme was issued and was accepted by the Petitioner on 21.02.2017 (Annexure-N4) and on the same day the Petitioner made a request for allotment of bay. The regular evacuation approval was given on 17.03.2017 (Annexure-M). It could be seen that there has been a delay of 274 days in granting evacuation and 203 days for bay approval and this delay has been major contributing factor is delayed to commissioning of the project with SCOD. In this regard, the Learned Counsel for the Petitioner has placed reliance on the orders passed by the Commission in OP No. 15/2018 in M/s. Adani Green Energy (UP) Limited Vs HESCOM & Others and OP No. 29/2018 in M/s. Adani Green Energy (UP) Limited Vs HESCOM & Others, OP No. 188/2017 Cambria Solar Private Limited Vs GESCOM and submitted that in these orders the Commission has already held that the delay caused in commissioning the project due to delay in issuing evacuation approval comes under Force Majeure Event.

- ii) By way of reply the Learned Counsel for the Respondents has submitted that, the ground urged by the Petitioner is baseless because on 15.06.2016, the Petitioner approached the Respondent No. 3 herein for regular evacuation approval. Subsequently, the Respondent No. 3 herein on 14.10.2016 requested the Petitioner to remit the processing fee and to furnish the details of the facilitation fees paid to Respondent No. 2/KREDL. The Petitioner paid the requisite fee on 22.10.2016, Tentative Evacuation approval granted on 03.02.2017 and accepted tentative evacuation on 21.02.2017 requested for and also for grant regular evacuation approval, also requested for sparing of land at Method substation for construction

of 66 KV Terminal Bay. It is submitted that the Respondent No.3 has granted Regular evacuation approval on 17.03.2017. It is pertinent to note that as per Article 4 the Petitioner had to achieve conditions precedents within 8 months from the effective date i.e., 13.06.2017. In the present case, the Petitioner is granted evacuation approval on 17.03.2017, much before the deadline achieve conditions precedent. Such being the case, there is no delay in granting evacuation approval by KPTCL.

- iii) Further stated that, during 105th Terminal Bay Allotment Committee Meeting held on 04.03.2017, it was decided that due to unavailability of suitable land, the Petitioner would have to purchase adjacent suitable land for Construction of 66 kV Terminal Bay. This was conveyed to the Petitioner herein vide the Regular Evacuation approval granted on 17.03.2017. In addition to the same, the Respondent No.3 on 13.04.2017 requested the Chief Engineer Electricity, Transmission Zone, Tumkur to re-examine the availability of land for the Petitioner to construct 66 kV Terminal Bay. On 11.05.2017, the SEE (W&M), Davangere addressed a letter to Respondent No.3 herein stating that the land could be spared by making certain modifications like extension of security fencing, extension of earth mat, site surfacing, yard levelling etc. In furtherance to the same, in the 121th Terminal Meeting held on 24.05.2017, the committee decided to spare land for construction of 66 KV Terminal bay for evacuation of 20MW from Petitioner's plant on 66 KV SC line on DC tower from Method village to 66/11KVMethod sub-station by making the necessary modifications/alterations to the land. Subsequently, the Respondent No.3

informed Petitioner regarding necessary payment of charges on 07.10.2017. It is submitted that if there was any time lag in evacuation approval as contended by the Petitioner, the same can only be attributed to the errors on the part of the Petitioner in its application for evacuation.

- iv) Article 5.4 of the PPA clearly stipulates that the Petitioner shall be responsible for evacuation of power from the power project to the nearest delivery point. It is stated that even though the responsibility of finding suitable land for establishment of terminal bay is on the Petitioner, nonetheless, the Respondent herein has put in sincere effort to facilitate the implementation of the project. Thus, the Respondent herein has always acted diligently to facilitate the implementation of the Petitioner's project. Therefore, any delay in commissioning of the plant is wholly on part of the Petitioner and hence, the present petition deserves rejection.
- v) In support of his arguments the Learned Counsel for the Respondents has placed reliance in the orders passed by the Commission in: -
- 1) Op 108/2018 between Growth Street Solar Private Limited Vs BESCO & Others dated 16.02.2021.
 - 2) OP 2/2018 (KER) between Messers Adani Green Energy (UP) Limited Vs BESCO dated 15.09.2020.
 - 3) OP 38/2018 between Messers Adani Green Energy (UP) Limited Vs BESCO dated 05.06.2020.
 - 4) OP No. 09/2018 between Koppal Green Power Limited Vs GESCO dated 28.08.2019.

In the above orders the Commission has observed that “the Petitioners therein, have not produced any guidelines or other statutory provisions disclosing the period within which the evacuation scheme approval is to be issued, further held that 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, 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 grant of the same”. With this the Learned Counsel for the Respondents prays to dismiss the Petition.

- vi) By way of reply the Learned Counsel for the Petitioner has also relied upon the orders passed by the KERC dated 11.11.2020 in OP No. 15/2018 between Messers Adani Green Energy (UP) Limited Vs BESCO and OP No. 29/2018 dated 11.11.2020 between Messers Adani Green Energy (UP) Limited Vs HESCO, OP No. 188/2017 dated 23.03.2021 between Cambria Solar Private Limited Vs GESCO and submitted in these orders, the Commission has placed reliance upon the findings given by the Hon'ble APTEL in Appeal No. 351/2018 in the matter of Chennamangathihalli Solar Power Project LL. P Vs BESCO & another, dated 14.09.2020 and allowed the Petitions by extending SCOD as prayed for. Hence, the order relied by the Learned Counsel for the Respondents are not applicable to the case

on hand, thereby the Learned Counsel for the Petitioner prays to allow the Petition in the interest of justice and equity.

- vii) We have gone through the documents furnished by the Petitioner in this regard. The Petitioner has applied for evacuation approval at Hosadurga Taluk, Chitradurga District (Annexure-N1 to the Amended Petition) to KPTCL dated 15.06.2016. In turn he got regular evacuation scheme at Hosadurga Taluk from the KPTCL with communication (Annexure-M to the Amended Petition) dated 17.03.2017. In between he had entered into an agreement with M/s Gita Power & Infrastructure Private Limited for Engineering Procurement and Construction Agreement for development and setting up of 20 MW (AC) solar power project on turnkey basis (Annexure-N to the Amended Petition) dated 07.07.2016. On perusal of Annexure-K (to the Amended Petition) dated 19.12.2016, the letter written by Petitioner to the S. Sathyanarayana Shivamogga for service order for providing land and other related works in respect of land parcels of around 100 Acres +/- 10% in Hosadurga Taluk, Chitradurga District, shows that the Petitioner has proceeded with further work for allotment of land to develop solar power project. All these documents show that the Petitioner has suffered certain days of delay in getting evacuation approval. The detailed description is placed here with as follows: -

Table 1

Sl. No.	Date	Description of the documents	Annexures
1.	15.06.2016	Application given by the Petitioner to KPTCL for evacuation approval	"N1" filed along with Amended Petition

		at Hosadurga Taluk, Chitradurga District	
2.	14.10.2016	Letter written by KPTCL to the Petitioner regarding remittance of processing fee and furnishing documents	"N2" filed along with Amended Petition
3.	22.10.2016	Letter written by Petitioner to the KPTCL for having made the payment of Rs. 50,000/- plus applicable service tax towards processing charges for evacuation approval	"N3" filed along with Amended Petition
4.	21.02.2017	Letter written by Petitioner to the KPTCL accepting Tentative Evacuation Scheme and further requesting to give final evacuation approval and also allocate the bay	"N4" filed along with Amended Petition
5.	17.03.2017	Letter written by KPTCL to the Petitioner regarding regular evacuation scheme for proposed 20 MW solar project in Hosadurga Taluk, Chitradurga District	"M" filed along with Amended Petition
6.	07.10.2017	Letter written by KPTCL to the Petitioner for payment of necessary charges	"N5" filed along with Amended Petition

Table 2

Sl. No.	The difference of Period shown in Annexure-N1 (filed with Amended Petition) and Annexure-M (filed with Amended Petition)	Days
1.	15.06.2016 to 30.06.2016	15 days
2.	July 2016	31 days
3.	August 2016	31 days
4.	September 2016	30 days
5.	October 2016	31 days
6.	November 2016	30 days
7.	December 2016	31 days
8.	January 2017	31 days
9.	February 2017	28 days
10.	01.03.2017 to 17.03.2017	16 days
Total		274 days

Therefore, the Petitioner has suffered a delay of 274 days in getting evacuation approval.

- viii) We have gone through the judgements relied by both the parties. The Respondents have relied upon the judgements passed in Op 108/2018 between Growth Street Solar Private Limited Vs BESCO & Others dated 16.02.2021, OP 2/2018 (KERC)– Messers Adani Green Energy (UP) Limited Vs BESCO dated 15.09.2020 and OP 38/2018 Messers Adani Green Energy (UP) Limited Vs BESCO dated 05.06.2020 and OP No. 09/2018 between Koppal Green Power Limited Vs GESCOM dated 28.08.2019. In our opinion the judgements produced by the Respondents are not relevant for the facts of the present case, because they are all earlier orders passed by the KERC in OP No. 15/2018 between Messers Adani Green Energy (UP) Limited Vs BESCO dated 11.11.2020, in OP No. 29/2018 dated 11.11.2020 between Messers Adani Green Energy (UP) Limited Vs HESCO and in OP No. 188/2017 dated 23.03.2021 between Cambria Solar Private Limited Vs GESCOM.
- ix) In these orders, the Commission placing reliance on the Hon'ble Appellate Tribunal for Electricity, New Delhi decision, in the case of Chennammangathihalli Solar Power Project vs BESCO, has allowed the extension of time on the ground of delays by the Governmental agencies which is also the case in the present Petition. Under these circumstances, basing on the observations of Hon'ble Appellate Tribunal for Electricity, New Delhi in the cases referred supra as well as the reasons assigned by the Petitioner, the grounds urged by the Petitioner under the head of

Force Majeure Events has to be accepted. Hence, the orders relied by the Learned Counsel for Respondents in OP No. 108/2018, OP No. 2/2018, OP No. 38/2018 and OP No. 09/2018 as referred supra are not relevant in these circumstances.

- d) Delay in granting land for bay allocation (203 days):** - i) During the course of the arguments the Learned Counsel of the Petitioner has submitted that, though the regular evacuation approval was granted on 17.03.2017, the Petitioner was incapable of proceeding with extension of bay till the land for bay erection was allotted. On 21.02.2017 the Petitioner accepted the tentative evacuation scheme issued by the Respondent No. 3 and on the same day also requested for allocation of land for bay allotment. The Regular Evacuation approval was given on 17.03.2017, the evacuation scheme was issued only on 07.10.2017 after a delay of 8 months. The Petitioner could not have proceeded with erection of bay and erect materials thereon based on the evacuation approval alone in the absence of approval of evacuation scheme which is subject to change till the same is issued finally after a detailed survey. It is highly arbitrary to expect the Petitioner to complete the project by early October when the bay allotment itself was done in October 2017. Further, all other connected activities such as bay erection, finalization of plant design, procurement of critical solar power plant components, right of way issues had to be kept in abeyance, since, these are dependent on bay erection.

- ii) The following events would go to show that, it was the 3rd Respondent alone who was responsible for delay in issuing the Bay evacuation scheme and that further led to enormous delay in execution of the project: -

Table 1

Sl. No.	Date	Description of the documents	Annexures
1.	03.06.2016	PPA signed between the Petitioner and the 1 st Respondent	"R" filed along with Amended Petition
2.	15.06.2016	Application given by the Petitioner to KPTCL for Regular evacuation approval at Hosadurga Taluk, Chitradurga District	"N1" filed along with Amended Petition
3.	14.10.2016	Letter written by KPTCL to the Petitioner regarding remittance of processing fee and furnishing documents	"N2" filed along with Amended Petition
4.	22.10.2016	Letter written by Petitioner to the KPTCL for having made the payment of Rs. 50,000/- plus applicable service tax towards processing charges for evacuation approval	"N3" filed along with Amended Petition
5.	03.02.2017	Tentative evacuation approval was granted	In Page 11 at Para 15 of written submissions dated 23.09.2021 of the Petitioner (Reference 3 in Annexure-N4)
6.	21.02.2017	Letter written by Petitioner to the KPTCL accepting Tentative Evacuation Scheme and further requesting to give final evacuation approval and also allocate the bay	"N4" filed along with Amended Petition
7.	17.03.2017	Letter written by KPTCL to the Petitioner regarding regular evacuation scheme for proposed 20 MW solar project in Hosadurga Taluk, Chitradurga District	"M" filed along with Amended Petition

8.	24.05.2017	121 st Land Sparing Committee decided to spare land for construction of terminal bays	At Reference No. 5 in Annexure-N5. Statement of objections filed on 18.08.2021 by Respondent No. 3
9.	07.10.2017	Letter written by KPTCL to the Petitioner for payment of necessary charges	"N5" filed along with Amended Petition
10.	10.10.2017	Petitioner has made payments	Page No. 166 to 169 along with Annexure-N
11.	18.09.2017	Bay estimate	"D" to the rejoinder dated 26.07.2021
12.	04.05.2017	Proceedings of 105 th TB Committee Meeting	"R2" to the objections statement of 3 rd Respondent dated 18.08.2021
13.	24.05.2017	Proceedings of 121 st TB Committee Meeting	"R3" to the objections statement of 3 rd Respondent dated 18.08.2021

Table 2

Sl. No.	The difference of Period shown in Annexure-N4 (filed with Amended Petition) and Annexure-R3 (filed with objections of Respondent No. 3)	Days
4.	21.02.2017 to 28.02.2017	8 days
5.	March 2017	30 days
6.	April 2017	31 days
7.	01.05.2017 to 24.05.2017	24 days
Total		93 days

The above events would show that though the evacuation approval was granted after 9 months of the effective date, the Petitioner could not go ahead with the execution of the project as planned because of delays in granting bay erection/Bay estimate by the 3rd Respondent within time

which led to delay in the commissioning the plant. There is also delay in intimating the Petitioner to remit one-time, non-refundable land cost for installation of Bay in KPTCL, substation as the KPTCL informed the same on 07.10.2017. In support of his arguments, he has relied upon Hon'ble APTEL in the case of Chennammagathihalli Solar Power Project Vs BESCO in appeal No. 351/2018, come to the aid of the Petitioner in which it is held as: -

"8.15) In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the 1st Respondent was justified in extending COD up-to 6 months as per the relevant provision (Clause 2.5) of the PPA. Besides, it is also crystal clear that the approvals/ clearances from various Government instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in Commissioning of the Solar Projects. As these approvals were beyond the control of the Appellants, the State Government and 1st Respondent have rightly considered them as an event of Force Majeure and accordingly granted approval for COD extension." With this he prays to consider his prayer.

- iii) By way of reply the Learned Counsel for the Respondent submitted that, all the allegations made by the Petitioner that there was delay caused by the Respondent No. 3 in allotment of land for bay erection are all false. However, while granting the regular evacuation approval on 17.03.2017 the Petitioner was requested to purchase suitable land adjacent to 110 KV Hosadurga Taluk, Chitradurga District for construction of the 110 KV terminal bay. The Petitioner never communicated any progress on this aspect but insisted the Respondent No. 3 to spare its station land for construction of terminal bay. Though it was not binding on the Respondent No. 3 to spare its land to the Petitioner however, on the request of the

Petitioner the Respondent No. 3 initiated needful action in sparing its land for construction of 110 KV terminal bay to enable the Petitioner to evacuate the power generated. Thereby, the allegations of the Petitioner that the delay in the commissioning of the project was due to the delay in granting land for bay allocation is untenable.

- iv) We have perused the relevant documents furnished by the Petitioner. On perusal of Annexure-K (to the Amended Petition) dated 19.12.2016, the letter written by Petitioner to the S. Sathyanarayana Shivamogga for service order for providing land and land related works like documents, exemption from Section 109, nonagricultural use conversion etc., in respect of land parcels of around 100 Acres +/- 10% in Hosadurga Taluk, Chitradurga District. On 07.07.2016 the Petitioner has entered with an agreement of Engineering, Procurement and Construction Agreement for Development and setting up of 20 MW AC Solar Power Project on Turnkey bases (Annexure-N to the Amended Petition) with M/s Gita Power and Infrastructure Private Limited, Tamilnadu. Annexure-P (in the Amended Petition) dated 28.07.2017 shows that the Petitioner has obtained project cost from S.K. Gulecha and Associates, Chartered Accountants, Chennai along with application of funds and sources of funds of Rs. 82,040,000/-. As per Annexure-D (to the rejoinder) the Executive Engineer (Ele), Major Works Division, KPTCL, Chitradurga has written a letter to Superintending Engineer (Ele), Tr. (W & M) Circle, KPTCL, Davanagere submitting of estimate to the regular evacuation scheme. Annexure-R2 (to the objections of 3rd Respondent) dated 04.03.2017 is the proceedings of 105th

TB Committee Meeting in which the Committee decided not to spare the land for construction of terminal bay to the Petitioner, since the available land in substation is required for KPTCL use and informed the firm to purchase suitable adjacent to 66/11 KV Method Substation for construction of one number of 66 KV TB as per the tentative evacuation scheme approval communicated on 03.02.2017. The document furnished by the Respondent No. 3 (Annexure-R3 to the objections of 3rd Respondent) dated 24.05.2017 shows the proceedings of 121st TB Committee meeting held in which the Committee after deliberations decided to spare available KPTCL land for construction of one number of 66 KV TB along with metering arrangement at 66/11 KV Method Substation to the Petitioner.

- v) Considering the date on which the Petitioner has applied for Tentative Evacuation approval and the date of the proceedings of Land Sparing Committee, the Petitioner has suffered 93 days delay in procuring land from the KPTCL for construction of bay.

In this regard the judgement of the Hon'ble APTEL in the case of Chennammagathihalli Solar Power Project Vs BESCO in appeal No. 351/2018, come to the aid of the Petitioner in which it is held as: -

“8.10) Regarding force majeure events, Clause 8.3 of PPA, it is noted that under sub-clause (vi), it is provided that “inability despite complying with all legal requirements to obtain, renew or maintain required licenses or legal approvals” will also attribute to force majeure. In view of these provisions under the PPA, we are of the opinion that the delay in receiving various approvals / clearances by the Govt. and its instrumentalities which were beyond the control of the Appellants should also be treated as an

event of force majeure under sub-clause (vi) of clause 8.3 which has directly and severely affected the execution of the solar projects. To be more specific, if the approval for land conversion is received on last day of September, 2016, it becomes extremely difficult to achieve COD on 03.01.2017 as envisaged under the PPA. Moreover, the grant of extension of the Scheduled COD was accorded by Govt. of Karnataka and in turn, by first Respondent after complying with due procedures and applying its diligence and prudence under the four corners of the PPA and not beyond."

"8.15) In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the 1st Respondent was justified in extending COD up-to 6 months as per the relevant provision (Clause 2.5) of the PPA. Besides, it is also crystal clear that the approvals/clearances from various Government instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in Commissioning of the Solar Projects. As these approvals were beyond the control of the Appellants, the State Government and 1st Respondent have rightly considered them as an event of Force Majeure and accordingly granted approval for COD extension."

"9.1) Having regard to the deliberations and our analysis, as stated supra, we are of the opinion that there was nothing wrong on the part of KERC to Suo motto interfere in the matter. As being a State Regulator, it has jurisdiction to look into affairs of ESCOMS in purchase and supply of powers in the larger interest of Consumers. However, as the COD extension was granted under the signed PPA between the parties and after applying, due diligence in the matter considering all prevailing facts and matrix of events, the State Commission ought to have considered the same and approved so as to meet the ends of justice. Needless to mention that the PPA' Terms & Conditions were duly approved by the State Commission which crystallized the rights of the parties."

- vi) In Appeal No. 328/2018 in the matter of Basaragi KM Solar Power Project LL. P & Sri Channaraj Hattiholi Vs HESCOM & KERC dated 12.08.2021, Hon'ble Appellate Tribunal for Electricity has held and observed as follows: -

"81) Having regard to the fact that securing these approvals from various instrumentalities of the Government/ Government officer, 18 months period was envisaged to complete the project. Having regard to the fact that there could be circumstances or events which could delay the happening of COD within the original time slot, six months' time for extension of commissioning the project at the level of concerned distribution licensee was envisaged. For events beyond that, they had to approach the Respondent Commission."

"82) The above procedure was envisaged keeping in mind that possibility of delay happening on account of laches on the part of the offices of Governmental Instrumentalities, though Solar Developer or SPV do not contribute to such delay. Unforeseen happening could possibly delay commissioning of the project, therefore force majeure event clauses were introduced in the terms of PPA as stated above. These force majeure clauses definitely take within its fold, the delay caused by offices of the Government or Governmental Instrumentalities."

"83) Arguments of the Respondent HESCOM that KPTCL is not a party to the PPA, therefore, the delay on their part cannot come to the aid of the Appellant cannot be accepted. KPTCL is also a public utility and instrumentality of the Government. Therefore, even if the project is delayed on account of KPTCL, in not issuing approval for evacuation of power and grid connectivity within a reasonable time, it amounts to event of Force majeure."

"85) The Respondent HESCOM contends that there was delay in submitting applications to various departments by the Appellant. One has to analyze the circumstances in a holistic approach is whether there was negligence on the part of the Developer to approach and obtain these approvals? It cannot be said that the considerable time lapsed in obtaining these approvals from various instrumentalities of the Government was at the instance of the Appellants."

"86)Having invested huge amounts taking loans from Banks/financial institutions, one cannot even imagine that the Developer will be negligent in pursuing his project."

"91)However, the same set of Force Majeure Events could not convince the Respondent Commission. The Respondent Commission being a neutral body is expected to discharge its functions in a judicious manner. If delay has

occurred on account of reasons beyond the control of the Appellant, the Appellant cannot be punished. The intention of the Government to assist to the farmers should not become otherwise a weapon to punish them"

vii) In Appeal No. 322/2018 in the matter of Madamageri Solar Power Project LL. P & Smt. Girija B. Hattiholi Vs HESCOM & KERC dated 12.08.2021, Hon'ble Appellate Tribunal for Electricity has held and observed as follows: -

"118) In terms of guidelines issued by State Government to set up solar plants several sanctions/approvals/clearances had to be obtained by the farmers like land conversion, grid connection and power evacuation approvals, plant safety approval from chief electrical inspector etc. Apparently, right from the date of signing of the PPA, the Appellant was running from office to office to secure these approvals/sanctions as stated above. If time was taken for getting these approvals as stated above, we note that considerable time was lapsed. Definitely it was not on account of the Appellants' negligence or lethargic approach."

"119) We are of the opinion that the time taken to obtain the above-mentioned approvals would definitely become impossible for the Appellants to achieve COD of the solar plant within SCOD of the PPA."

"120) In fact, as stated above, the HESCOM taking into consideration all these facts and in line with the terms of PPA extended time for COD within the extended SCOD. This action of the HESCOM has support from the fact that the State Government also, after due diligence and prudence, accorded extension of COD by six months. On account of such extension, the SCOD automatically get postponed by six months."

"121) Apart from that, in terms of Clause 10.5 of PPA, it says despite complying with the legal requirements to obtain, renew or maintain required license or legal approval will also amount to Force Majeure Event. Therefore, we are of the opinion that if at all there was delay in receiving various clearances/approvals by the State Government and its instrumentalities which are beyond the control of the Appellants, the same has to be treated as event of force majeure, since the same would directly and seriously affect the implementations of the solar project."

Basing on the finding of Hon'ble APTEL in the case referred supra as well as the reasons assigned by the Petitioner, the grounds urged by the Petitioner under the head of Force Majeure Events has to be accepted.

- 21) During the course of arguments, the Learned Counsel for the Petitioner has submitted that, he has placed all the communications sent to the Respondents intimating them on the Force Majeure Events effecting the timely commissioning of the project. But there was no response by the Respondents to the communications issued by the Petitioner requesting extension of time which shows that the Respondent did not attach any significance to the requirement of notifying them on Force Majeure Event. Thereby, the allegations of the Respondents that no Force Majeure notice was given by the Petitioner are baseless and false.
- 22) As per Clause 14 'Force Majeure' of the PPA (Annexure-R to the Amended Petition) is described as under: -

“ARTICLE 14: FORCE MAJEURE

14.3 Force Majeure

14.3.1 A 'Force Majeure' means any event or circumstances or combination of events including those stated below which wholly or partly prevents or unavoidably delays an Affected Party in the performance of the 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) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive*

contamination or ionizing radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);

- b) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;
- c) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Developer or of the Contractors;
- d) any judgement or order of any court of competent jurisdiction or statutory authority made against the Developer in any proceedings for reasons other than (i) failure of the Developer to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Government or
- e) unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, license, permit, authorization, no objection certificate, consent, approval or exemption required by the Developer or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from that Developer's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, license, authorization, no objection certificate, exemption, consent, approval or permit.

14.4 Force Majeure Exclusions

14.4.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force majeure:

- a) Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;

- b) *Delay in the performance of any Contractor, sub-Contractor or their agents;*
- c) *Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;*
- d) *Strikes at the facilities of the Affected Party;*
- e) *Insufficiency of finances or funds or the agreement becoming onerous to performs and*
- f) *Non-performance caused by, or connected with, the Affected Party's:*
 - I. Negligent or intentional acts, errors or omissions;*
 - II. Failure to comply with an Indian Law; or*
 - III. Breach of, or default under this Agreement.*

14.5 Notification of Force Majeure Event

14.5.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement.

Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and remedial measures proposed. The Affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

14.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.

23)As per the above provisions the affected party shall give notice to the other party of any event of Force Majeure as soon as reasonably practicable, but not later than 7 days after the date on such party knew or should reasonably have known of the commencement of event of Force Majeure. In the case on hand on perusal of the letter written by the Petitioner to the BESCO dated 27.05.2017 (Annexure-J to the Amended Petition) shows that the Petitioner has requested to execute SPPA as per the orders of KERC dated 19.05.2017 in OP No. 48/2017 (Annexure-A to the rejoinder). Another letter written by the Petitioner to the BESCO dated 16.08.2017 (Annexure-S to the Amended Petition) shows that, the Petitioner has communicated BESCO non-signing of the Supplementary PPA has had a huge adverse financial impact on the company and the banks have not disbursed the loan even though the Petitioner had obtained financial approval. Another letter written by the Petitioner to the BESCO dated 05.12.2017 (Annexure-S1 to the Amended Petition) reads as: -

“we had earlier also written to you and notified you about Force Majeure Event and its consequence on the progress of the project and in the said circumstances we had sought for extension of Scheduled Dated of Commissioning. Till date we have not received any reply from you to the some Subsequently we had sent you the report on the status of the project also.’

‘Further the delay in issue of Evacuation Scheme by KPTCL has also retarded the pace of the project. We request you to kindly grant us the extension of the year from the date of signing of the supplementary PPA to commission our project, since delay in executing the Supplementary Power Purchase Agreement and also delay in issue of Evacuation Scheme, both are beyond our control and hence Force Majeure events.’

'We would like to humbly state to yourself if we fail to receive any response from you within 8 days from the date of the receipt of the present communication by you, we shall be constrained to initiate appropriate legal remedies.'"

- 24) Annexure-F (filed along with rejoinder dated 26.07.2021) is a letter written by the Petitioner on 03.10.2018 to the KREDL with request for extension in Scheduled Commissioning Date of solar power plants, on account of GST related issues drawing attention towards Official Memorandum dated 20.06.2018 issued by MNRE.
- 25) All these documents establish that the Petitioner had complied in the provisions under Clause 14.5.1 of PPA. Though the Respondents have taken contention that the Petitioner has not followed strictly the Clauses of Force Majeure as per PPA, but nothing is placed on record in support of their contention. Thereby, to this extent the arguments addressed by the Learned Counsel for the Respondents holds no water.
- 26) In this regard we rely upon the judgement passed by the Hon'ble Appellate Tribunal for Electricity, New Delhi in Appeal No. 38/2019 dated 12.08.2021 between Hirehalli Solar Power Project LL.P & Another Vs BESCO & Another, in which the Hon'ble APTEL has held in para 50 as: -

"It is also submitted that, this Tribunal in "Chamundeshwari Electricity Supply Company Ltd. Vs Saisudhir Energy (chitradurga) Pvt. Ltd" reported in 2018 SCC On Line APTEL 65 had held that no formal issuance of Notice is required in cases of force majeure events."

Further the Petitioner has also produced Commissioning certificate (Annexure-Y to the Amended Petition) dated 31.03.2018 which shows he had commissioned the project on 12.02.2018 at 7.50 PM.

- 27) In the present case, the Petitioner had to achieve the SCOD within 12 months from 14.10.2016 (Effective Date). After receiving the copy of Official Memorandum (Annexure-F to the Amended Petition) dated 27.05.2016 from the Respondent No. 2, in which it is stated that the project shall be achieved by the Developer within 12 months from 25.05.2016, the Petitioner filed a Petition in OP No. 48/2017 before the Commission. The said Petition after contest, disposed by the Commission by passing orders on 19.05.2017. After filing of the OP 48/2017 till its disposal i.e., during pendency of proceedings in OP 48/2017, the Petitioner could not proceed with the further project work. On perusal of the Petition in OP 48/2017 it appears that, the Petition was filed on 14.03.2017 before the Commission. The Commission has passed orders on 19.05.2017 in this Petition along with other connected Petitions. The time taken by the Commission to dispose of OP 48/2017 could be treated as Force Majeure Event as per Clause 14.3.1 (d).
- 28) In view of the discussions made above and also in Para 20 (at Page No. 45 and 49 in Table-2) the tables disclose the time taken for each event of delays for consideration, the prayer of the Petitioner is falls within the parameters as discussed under Force Majeure events and in the present case on hand though the Petitioner has suffered delay in signing of SPPA, issuing evacuation approval, introduction of GST Law and delay in granting land for Bay allocation has commissioned the project on 12.02.2018. As per observations made herein above judgements relied by the Counsel for the Petitioner and the grounds urged by the Petitioner in the Petition fall under the Clause of Force Majeure as described in the PPA.

- 29) The Petitioner in his Petition has sought for declaration that the effective date with respect to Article 8.5 of the PPA dated 03.06.2016, is 24.08.2017 i.e., is the date of execution of Supplementary PPA. This prayer cannot be granted as because we have already answered in Issue No. 1 in Negative.
- 30) In the alternative, the Petitioner has prayed for passing an order granting extension of time for fulfilling its obligation under the PPA on the grounds of Force Majeure Events. Further he has furnished Annexure-A to the written submission showing 119 days delay in achieving the SCOD which is detailed as here under: -

Sl. No.	Period	Days
1.	14.10.2017 to 31.10.2017	16 days
2.	November 2017	30 days
3.	December 2017	31 days
4.	January 2018	31 days
5.	01.02.2018 to 12.02.2018	11 days
Total		119 days

- 31) The Extensions of Time as per Clause 5.7 of PPA (Annexure-R), reads as follows:-

“5.7 Extension of Time

- i. In the event that the Developer is prevented from performing its obligations under Clause 5.1 by the Scheduled Commissioning Date due to:*
- a) any HESCOM Event of Default; or*
 - b) Force Majeure Events affecting HESCOM; or*
 - c) Force Majeure Events affecting the Developer,*

the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed in Clause 5.7.2 and Clause 5.7.3 for a reasonable period but not less than 'day for day' basis, to permit the Developer or HESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Developer or HESCOM, or till such time such Event of Default is rectified by HESCOM.

- ii. *In case of extension occurring due to reasons specified in Clause 5.7.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (six) months.*
- iii. *In case of extension due to reasons specified in Article 5.7.1(b) and (c), and if such Force Majeure Event continues even after a maximum period of 3 (three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 16.*

If the Parties have not agreed, within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 18.

- iv. *As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement."*

32) As per the above Clause in case of extension occurring due to reasons specified in Clause 5.7.1 any of the dates specified therein, can be extended subject to the condition that the Scheduled Commissioning date would not be extended by more than 6 months. In the present case on hand, the Petitioner has taken 4 major contentions i.e., delay in signing of SPPA, issuing evacuation approval, introduction of GST Law and delay in granting land for Bay allocation. As per the observations made by the Hon'ble APTEL in Appeal No. 351/2018 in the matter of Chennamangathihalli Solar Power Project LL. P Vs BESCO & another case, dated 14.09.2020, the KERC as being a State Regulator it has jurisdiction to look into affairs of ESCOM in purchase and supply of powers in the larger interest of Consumers, therefore, the KERC can Suo Motto interfere in the matter

which is in dispute between the parties. In the present case the Petitioner has invested substantial amount in commissioning of Solar Power Project. Taking into consideration, all these facts and circumstances of the case as well also rely upon Hon'ble Appellate Tribunal for Electricity, New Delhi in Appeal, this Commission found that the Petitioner is entitled for extension of 119 days from 14.10.2017 as stipulated in PPA. Hence, we are of the opinion that the Petitioner is entitled for the relief of extension of 119 days as he had commissioned the project (Annexure-Y to the Amended Petition) on 12.02.2018. With this we answer Issue No. 2 in affirmative by holding that the Petitioner is entitled for extension of 119 days from 14.10.2017.

33) **Issue No. 3:** For what relief the Petitioner is entitled to?

34) As per discussions made herein above paragraphs, and also answering issue No. 2 in affirmative by holding that the Petitioner is entitled for extension of time of 119 days from 14.10.2017, he is entitled for the tariff as agreed in PPA. As per the findings given by the Hon'ble APTEL in its judgement dated 28.02.2020 in Appeal No. 340/2016 between Azure Sunrise Private Limited Vs Chamundeshwari Electricity Supply Corporation Limited, the tribunal has held that "once extension of Scheduled Commissioning Date is approved, the question of reduced tariff does not arise". Hence, the Petitioner is entitled for Rs. 4.97/kWh tariff. Accordingly, this Issue No. 3 is answered accordingly.

35) **Issue No. 4:** What Order?

36) In view of the foregoing reasons, we pass the following: -

ORDER

- a) The Petition is allowed.
- b) The delay of 119 days is condoned in commissioning of Solar Power Project in Hosaduraga Taluk, Chitradurga District.
- c) Consequently, on extension of SCOD dated 12.02.2018, the Petitioner is allowed tariff of Rs. 4.97/kWh as agreed in PPA (Annexure-R to the Amended Petition).
- d) The Petitioner is not liable to pay any damages or liquidated damages in view of extension time.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member