

No. N/378/17

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. 231/2017

BETWEEN:

M/s. Mayfair Renewable Energy (I) Private Limited,
A Company registered under the
Companies Act, 1956/2013,
Having its registered office
At "Temple Steps" 3rd Floor,
Block No. A, Unit-B 184-187,
Anna Salai, Little Mount,
Chennai-600015.
(Represented by its Chief Executive Officer)
(Represented by Sri Gurudas Kannur, Senior Counsel for
Ms. Poonam Patil, Advocate)

....PETITIONER.**AND**

- 1) Hubli Electricity Supply Companies Limited (HESCOM)
Having its Registered Office
At Navanagar, P.B. Road,
Hubli-580 025, Karnataka.
(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)

... **RESPONDENTS.**

(Respondent No. 1 & 3 represented by
Sri P. Chinnappa, Advocate,
Sri Guruprasad Reddy, Advocate,
Ms. Sahana Devanathan, Advocate,
Ms. Drishya Shetty, Advocate &
Ms. Rithika Ravikumar, Advocate
For M/s Induslaw Advocates, and
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) Declare that the effective date with respect to Article 8.5 of the PPA
dated 31.05.2016, is 30.08.2017, i.e., the date of execution of the
Supplementary PPA.

In the alternative.

Pass an order granting extension of time to the Petitioner for fulfilling its
obligation under the PPA on the grounds of Force Majeure Events.

- b) 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.

- c) Grant such other and further reliefs as this Commission may deem 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 Ron Taluk, Gadag 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-B 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-C 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-D 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 31.05.2016. 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-E 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 01.06.2016. The Commission granted its approval to the PPA vide an order (Annexure-F to the Amended Petition) dated 05.10.2016 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 05.10.2016, the original PPA dated 31.05.2016 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-G 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 dated 31.05.2016, in itself, was an incomplete document and can only be considered to be complete and approved when read along with the Supplementary PPA dated 30.08.2017 as such, the effective date for Commissioning the Solar project is 30.08.2017.
- n) It is further submitted that, as is clear from the circumstance mentioned hereinabove, though the PPA was signed on 31.05.2016 and approved by the Commission on 05.10.2016, 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 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 21.12.2016 is produced herewith and marked as (Annexure H to the Amended Petition).
- Obtained financial approval/assistance to the tune of Rs. 95.62 crores. A copy of the said endorsement issued by the Bankers dated 07.02.2017 is produced herewith marked as (Annexure J to the Amended Petition).
- Obtained Evacuation approval (Annexure-K 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 L to the Amended Petition).

- p) 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. Copies of Evacuation Approval application (Annexure-M to the Amended Petition), demand letter for fees (Annexure-M1 to the Amended Petition), Receipt for payment (Annexure-M2 to the Amended Petition), acceptance of Tentative Evacuation approval (Annexure-M3 to the Amended Petition) and intimation to remit 10% Supervision charges along with GST (Annexure-M4 to the Amended Petition) dated 14.11.2017 are produced. Further the copies of Tentative Evacuation Scheme (Annexure-M5 to the Amended Petition) dated 02.02.2017, internal letter (Annexure-M6 to the Amended Petition) dated 17.03.2017, proceedings of 157th T.B Committee meeting held (Annexure-M7 to the Amended Petition) on 27.10.2017 are produced.
- q) 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.

- r) A copy of the statement issued by the Chartered Accountant (Annexure N 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.10,99,58,002/- (Ten crores, Ninety-Nine lakhs and Fifty-Eight thousand and Two 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-P to the Amended Petition). A copy of the communication issued by the Bankers refusing disbursement of loan is produced as (Annexure-Q to the Amended Petition).
- s) 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 (Annexure-S to the Amended Petition). It was only on 30.08.2017 that the Respondent No.1 came forward to sign the supplementary PPA, after a delay of 104 days (from 19.05.2017 to 30.8.2017) from the directions issued by the Commission directing the parties to execute a supplementary PPA. A copy of the PPA dated 31.05.2016 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 are addressed to the Respondent No. 1 are produced as Annexure S & S1 (to the Amended Petition). The Supplementary PPA dated 30.08.2017 signed by the Petitioner with the Respondent No. 1 is produced as Annexure T (to the Amended Petition).

t) The Petitioner made the following grounds in Amended Petition stating that as, 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.
- u) It is pertinent to note that the MNRE after examining the impact of GST law, issued Official Memorandum (Annexure-X to the Amended Petition) dated 20.06.2018 wherein it has extended SCOD for the solar projects for a period of 62 days, by way of the said official memorandum, MNRE has considered the disruption of business and consequent delay in commissioning of the projects on account of introduction of GST law.
- v) It is stated that all points of time since the issuance of the letter of award and allotment letter, the Petitioner has been earnest and sincere in its efforts in developing this project and has always been abiding by the law and the orders of the Commission even in the face of refusal to disburse funds by the Bankers on account of non-availability of the Supplementary PPA, the Petitioner has been utilizing its equity portion of funds and doing its best to complete the project at the earliest. Due to the execution of the Supplementary PPA on 30.08.2017, this date is to be reckoned as effective date, and the project is to be commissioned within 30.08.2018.

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

GROUND

1. For that as per the order dated 05.10.2016 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 05.10.2016. 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.
3. As such, it is submitted that only pursuant to the execution of the Supplementary PPA would be the requirement, as envisaged under order dated 05.10.2016 read with RfP, of execution of an effective PPA would be complete. It is stated that the PPA dated 31.05.2016, in itself was an incomplete document and can only be considered to be complete when read along with the Supplementary PPA dated 30.08.2017.
4. 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.

5. 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., 30.08.2017. Therefore, the obligation under Article 8.5 is to be implemented within 12 months from 30.08.2017.
6. 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.51/2011 in case of M/s. Rithwik Energy Generation Private Limited Vs. Karnataka Power Transmission Corporation Limited & Others, 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”.

7. 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

30.08.2017, the lenders were in a position to disburse funds only pursuant to the said PPA.

8. It is stated that, as per Article 4, if there is a change in KERC applicable Tariff, the changed applicable Tariff for the Project shall be the lower of the following:
 - i. Tariff at in Clause 12.1 above
Or
 - ii. KERC applicable Tariff as on the Commercial Operation Date.”

From the above provision, it is evident that as per Article 12.1 the Petitioner is entitled to a tariff Rs. 5.00/ kWh. Further, as per Article 12.2, in the event there is a “delay” in commissioning of the project beyond the SCOD in terms of Article 8.5, then the Petitioner would be entitled to either the tariff provided in Article 12.1 or the tariff as per the Tariff Order issued by the Hon'ble Commission, whichever is lower. In the present case, since the zero date qua Article 8.5 starts from 30.08.2017, there is no “delay” as contemplated under Article 12.2 hereinabove. The delay in terms of Article 12.2 would only start from the expiry of 12 months from the effective date. As such, in the event the Petitioner delays implementation of the solar project beyond 30.08.2018, only then Article 12.2 would be applicable.

9. On account of the above, the only tariff clause applicable to the Petitioner, as on today, is Article 12.1 unless the said Petitioner is not able to implement the solar project before 30.08.2018.

10. It is further stated that even if the Petitioner exceeds the above timeline of 30.08.2018, the said Petitioner would be entitled to claim of SCOD based upon any Force Majeure events which may occur between 30.08.2017 and 30.08.2018.
11. 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 evacuation 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.
12. 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.
13. 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.

14. 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 are 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 as Annexure-U (to the Amended Petition).
15. 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	From - To	No. of days delay
1	Introduction of GST	01.07.2017 to 31.08.2017	62
2	Delay in signing of SPPA	19.05.2017(The date of KERC order declaring effective date to 30.08.2017 (Date of signing of SPPA)	102
3	Delay in issuing Evacuation approval	18.01.2017 (Date of filing Second Evacuation approval application) to 17.03.2017 (Date of issue of Evacuation approval)	58
4	Delay in granting land for Bay allocation	21.02.2017 (Date of requisition for allotment of Bay) to 27.10.2017 (Decision taken to spare land for Bay allotment)	247
Total			469

Total delay suffered by Petitioner project owing to the aforesaid force majeure events, duly considering overlapping events is 383 days.

16. It is respectfully submitted that despite delay of 383 days on account of aforesaid force majeure events, the Petitioner with all its best and committed efforts, Commissioned the project on 28.03.2018. In the light of the afore-stated Force Majeure events, the project has been Commissioned well within time. The copy of Commissioning certificate is produced as Annexure-Y (to the Amended Petition).
17. The Tariff agreed by the parties under the PPA is Rs. 5.00/ 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.
18. 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 31.05.2016 and commissioned on 28.03.2018 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. 5.00 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 31.05.2016 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. 5.00/- 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 as follows: -
- a. The 1st and 3rd Respondents filed common statement of objections stating that, the Petition filed by the Petitioner is frivolous, vexatious and a luxurious litigation only to evade its liability to pay damages by cleverly shifting onus on the Respondents to cover up for their own short comings and failures in fulfilling their obligations arising out of the terms of the PPA, thereby, the Petitioner is not entitled for any relief.
 - b. The primary allegations of the Petitioner against the Respondents are that there was a delay in signing the Supplemental Power Purchase Agreement and that there was delay in procuring the evacuation approval from the KPTCL, which are vehemently denied by the Respondents. The allegations made by the Petitioner in the Petition cannot be termed as Force Majeure Events as defined under the PPA. If at all the Petitioner was aggrieved by an event of Force Majeure, the same had to be notified to the Respondents within a period of 7 days as stipulated under Article 14.5.1 of the PPA, but no such notice of an event of Force Majeure has been issued to the Respondents.
 - c. The approval to the PPA was given by the Commission on 05.10.2016 itself. At the time the Commission had only directed the parties to execute SPPA to incorporate certain changes. The Petitioner being aggrieved by the Official Memorandum issued by the 2nd Respondent making the effective date of the

PPA as 25.05.2016, had approached the Commission for a clarification, and sought to make the effective date as the date of the approval by the Hon'ble KERC. However, in the meantime, the Commission had approved the PPA and there was no restriction on the Petitioner in taking further necessary steps towards the execution of the SPPA or towards completion of the Conditions Precedent and commissioning of the project. The 1st Respondent was ready as on 26.10.2016 itself and called upon the Petitioner to execute the SPPA. It was the Petitioner who delayed the execution of SPPA stating that it required its Board's approval for the same.

- d. The PPA was approved by the Commission on 05.10.2016. It is not the case of the Petitioner that the parties had to take further approval from the Commission after the execution of the SPPA. Now there is an enormous delay on behalf of the Petitioner in commissioning of the project. The Petitioner is seeking to take the execution of the SPPA as the effective date, as the same is convenient to the Petitioner.
- e. The further contention of the Petitioner that, there was a delay in procuring evacuation approval. The allegations of the Petitioner that, the approval granted by the KPTCL on 17.03.2017 is only a tentative approval and the final approval was given only in the month of November 2017 is absolutely false. The Petitioner furnished the details of facilitation fees paid vide letter dated 22.10.2016, the proposal was further processed by KPTCL after obtaining the field report from the concerned transmission zone. Meanwhile, the Petitioner vide its letter dated 18.01.2017 requested for change in evacuation approval to 11 KV Hirehal s/s instead of 11 KV

Naregal s/s. System studies were conducted and finally tentative evacuation scheme dated 02.02.2017 was issued. The Petitioner thereafter, conveyed its acceptance for the scheme vide its letter dated 21.02.2017 and sought for the final evacuation approval (Annexure-M6 to the Amended Petition) which was issued on 17.03.2017. As per the terms of PPA, Article 4 for Conditions Precedent, the Petitioner is supposed to obtain evacuation approval within 8 months from the effective date. In the present case, the effective date is 05.10.2016, thereby, there is no delay in the procurement of the evacuation approval thus, it cannot be termed as Force Majeure Event.

- f. The Petitioner has relied upon the judgements of Gujarat Urja Vikas Nigam Limited V/s GERC in Appeal No. 123/2012, but the present case is not relevant to the facts and circumstances and principles laid down in the referred case. Thereby, the judgement referred by the Petitioner is not relevant to his case.
- g. Further the Respondents have stated that the contents in Paragraphs 1 to 12 are all matters of record thereby, there is nothing to reply on these paragraphs. The contents of para 13 is admitted to the extent that the Commission was pleased to grant its approval to the PPA dated 31.05.2016, on 05.10.2016, no further approval was necessary on the incorporation of the changes as suggested by the Commission by entering into SPPA.
- h. Further the contents of paragraphs 14 to 21 are denied as baseless. Since, the Respondent No. 1 was ready and willing to sign the SPPA on 26.10.2016

only but the Petitioner did not approach for signing the SPPA. Even the 1st Respondent issued reminders dated 12.01.2017, 25.01.2017, 27.01.2017, 24.04.2017, 03.07.2017 but no avail. On account of these reasons the Petitioner cannot hold Respondent No. 3 as responsible for the inevitable circumstances in issuing evacuation approvals. With this they pray that the Petition to be dismissed in the interest of justice and equity.

- 4) As per the orders of this Commission dated 21.01.2021, the Petitioner has filed amended Petition. Thereafter, the Respondent No. 1 & 3 have filed additional objections by stating the primary allegations of the Petitioner as against the Respondents is that there was a delay in signing SPPA and that there was a delay in procuring the evacuation approval from the 3rd Respondent. The amendment application filed by the Petitioner introduces additional grounds of Force majeure, in support of its prayer for extension of time in order to complete performance of its obligations under the PPA (a) introduction of the Central Goods & Services Tax Act, 2017 (GST) with effect from 01.07.2017, which allegedly caused uncertainty about tax slabs and the time line for implementation, on account of which the Petitioner was allegedly unable to arrive at a dependable cost basis for the project and (b) alleged delay in bay allotment by the Respondent No. 3.
- 5) Further stated that, in terms and consequences of the PPA, the Petitioner was required to fulfil its obligations thereunder, and commission the project on or before 25.05.2017, well before GST was enforced in India on 01.07.2017. The Petitioner cannot be permitted to take advantage of its own defaults and claim that the introduction of GST as Force Majeure event, on account of which

commissioning of the project was delayed, as the project was Scheduled to be commissioned well in advance of the introduction of GST. If the Petitioner wished to claim extension of time on the grounds of Force Majeure on account of introduction of GST, it ought to have made an application to the Respondent No. 1 along with documents evidencing its claims. However, the Petitioner has not produced till date any documentary evidence in proof of it.

- 6) The Respondents further stated that, the allegations made by the Petitioner that there was a delay caused by the Respondent No. 3 in allotment of land for bay erection is false and baseless. However, while granting the regular evacuation approval on 17.03.2017, the Petitioner was requested to purchase suitable land adjacent to 110 KV s/s Hirehal for construction of the 110 KV terminal bay. He never communicated any progress on this aspect but insisted the Respondent No. 3 to spare its station land for construction of terminal bay. The Petitioner vide letter dated 13.10.2017 made a specific request to spare readily available 110 KV terminal bay at 110 KV s/s Hirehal. 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. Therefore, the contention taken by the Petitioner in this regard cannot be accepted. With this he prays to dismiss the Petition in the interest of justice and equity.
- 7) 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.

- 8) 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.
- 9) 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.
- 10) 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, S and S1 (to the Amended Petition). The Petitioner has produced copy of communication dated 21.12.2017 in respect of delayed issuance of bay allotment letter and bay estimation as Annexure-J (to the rejoinder). A copy of the letter dated 03.10.2018 addressed to KREDL on the issue of GST is also produced as per Annexure-K (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 dated 11.11.2020 & OP 29/2018 dated 11.11.2020 (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.

- 11) Heard the arguments, perused the written submissions on both sides and the records.
- 12) 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 30.08.2017 as claimed by the Petitioner or as per Article 3.1 of the PPA dated 31.05.2016?
 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?
- 13) **Issue No. 1:** Whether the effective date is to be the date of execution of SPPA dated 30.08.2017 as claimed by the Petitioner or as per Article 3.1 of the PPA dated 31.05.2016?
14. As per Letter of Award and Allotment Letter (Annexure-B 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-C 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-D 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-E 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 31.05.2016. 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.'"

15) The Respondent No. 1 sent the PPA to the Commission for approval on 01.06.2016. The Commission granted its approval to the PPA vide an order (Annexure-F to the Amended Petition) dated 05.10.2016 with a direction to

execute Supplementary PPA for incorporating certain correction/modifications as stated in the said order.

- 16) The Petitioner being aggrieved by the Official Memorandum (Annexure-E 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. 51/2017 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-E 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) months from 25.05.2016” is invalid and not binding on the Petitioner.”

“(d) Consequently, it is affirmed that, in OP No. 51/2017 the definition of the 'Effective date' mentioned under Article 21.1 of the PPA executed between the parties in this case, shall stand as it is.”

- 17) During the proceedings of this case on hand, on 18.09.2018 this Commission has passed orders as “LD to be deducted after notice”. Aggrieved by this order the Petitioner has preferred an appeal in Appeal No. 11/2019 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 02.01.2020 as stated below: -

- I. *“The dispute in this appeal seems to be what would constitute as effective date for PPA vis-à-vis commissioning of Power Plant. So far as, commissioning of Power Plant in terms of PPA, this appeal came to be filed challenging Interim Order dated 18.09.2018. Stay was granted on 30.11.2018. On 01.02.2019 further observations were made so far as the supply of energy and the payments to be made which reads as under:*

“Heard Mr. Prabhulinga Navadegi, Learned Senior Counsel for Appellant. On 30.11.2018 we granted stay directing the Respondents not to deduct liquidated damages if they were to be assessed after notice. However, Learned Senior Counsel for Appellant submits that though damages were not deducted the energy charges for supply of energy from April 2018 till date are not paid.

We direct the Respondent Distribution Company-Hubli Electricity Supply Company Limited to make payment of charges within 4 weeks from today towards supply of energy as per the bills raised....”

- II. *'Subsequently, Hubli Electricity Supply Company Limited (HESCOM) files memo clarifying and making it clear how the payments were made. As on today Liquidated Damages (LDs) are not deducted. The fact remains main Petition is pending for consideration before KERC. Since KERC has to apply its mind to the terms and conditions including with regard to effective date of PPA of the power plant, accordingly, we dispose of the appeal as under.'*
- III. *'Appeal is disposed of with direction to the Respondent KERC to dispose of the main petition untrammelled by any of our observations including prima facie opinion pertaining to effective date of PPA.'*
- IV. *'However, in terms of interim directions dated 30.11.2018 the Respondent DISCOM shall make the payments as and when bills are raised by the Appellant without*

deducting Liquidated charges till disposal of the Petition pending before KERC. All contentions of both the parties kept open. The IA's which are still pending are disposed off.'"

In the above orders the Hon'ble Appellate Tribunal for Electricity, New Delhi has found that the KERC has to apply its mind to the terms and conditions including with regard to effective date of PPA of the power plant. Accordingly, disposed off the appeal with a direction to the KERC to dispose off the main Petition untrammelled by any of the observations made in the orders including prima facia opinion pertaining to effective date of PPA.

- 18) '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.'
- 19) In the present case vide letter (Annexure-F to the Amended Petition) dated 05.10.2016, the Petitioner and the 1st Respondent were informed the approval of the Commission to the PPA dated 31.05.2016. Therefore, the date 05.10.2016 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 on which SPPA is signed by the Petitioner and Respondent No.1 in case of the execution of such SPPA is needed, could be considered as the Effective Date. Therefore, the contention of the petitioner is not acceptable.
- 20) The Petitioner has contended that, as the letter (Annexure-F to the Amended Petition) dated 05.10.2016 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.

- 21) The letter dated 05.10.2016 (Annexure-F to the Amended Petition) communicates approval of the Commission to the PPA dated 31.05.2016 executed between the parties in respect of development of 20 MW (AC) Solar Power Project in Ron Taluk, Gadag 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 31.05.2016 communicated by letter dated 05.10.2016 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.
- 22) 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: -

"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."

In the case on hand, the 1st Respondent entered into PPA with Petitioner on 31.05.2016. 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 05.10.2016. Therefore, the Petitioner could act upon PPA as per its terms and conditions only from 05.10.2016. Therefore, the prayer of the Petitioner to treat the effective date as on 30.08.2017 cannot be accepted, thereby, the Issue No.1 is held in negative.

- 23) **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?
- 24) The present Petition is filed seeking for a declaration that the effective date with respect to Article 8.5 of the PPA dated 31.05.2016, is 30.08.2017 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.
- 25) 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 (102 days).
 - c) Delay in issuing Evacuation approval (58 days).
 - d) Delay in granting land for bay allocation (247 days).

Total delay suffered by the Petitioner's project owing to the afore stated Force Majeure events, duly considering over lapping events is 383 days.

- a) Introduction of GST:** - 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 07.02.2017 and commissioned the plant on 30.04.2018. 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 21.01.2021. 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. In this regard the Learned Counsel for the Respondents referred the judgements passed in M/s Mytrah Advait Power Private Limited Vs BESCO in OP 202/2017 dated 29.05.2020 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 such as Ugrappa Solar Private Limited Vs BESCO & Others in OP 148/2017 dated 9.05.2018 and Smt. Sharada Doddi Vs GESCOM in OP No. 122/2017 dated 21.02.2019, this Commission 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.

- iii) 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. In the 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."

iv) 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 30.04.2018. 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: - 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 communication (Annexure-G to the Amended Petition) dated 27.05.2017, 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-Q to the Amended Petition). The Petitioner faced several financial hurdles because of the sudden withdrawal by their Bankers to fund the project. It was only on confirmation of execution of SPPA from the Petitioner, their Bankers sanctioned the loan again on 23.08.2017 (Annexure-B to the Rejoinder). 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 Respondents herein have acted in the letter and spirit of the terms of PPA entered into between the Petitioner and the Respondent No. 1. On the other hand the Petitioner having with open eyes entered into the PPA was aware that time was of the essence in the PPA and that the PPA here

marked a specific date for the completion of the Conditions Precedent and achieving the Commercial Operation Date. Despite this the Petitioner has failed to take the necessary steps to achieve these milestones within the time lines set out by the PPA and cannot now claim that the Petitioner was unaware or incapable of achieving the same on account of inactions on the part of the Respondents. The Petitioner itself was not taken necessary steps in a timely manner which cascading into the delay in the completion of the Conditions Precedent and Commercial Operation Date.

- iii) Further the Learned Counsel for the Respondents submitted, the 1st Respondent entered into PPA with Petitioner on 31.05.2016. 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 05.10.2016. While granting the approval the Commission had directed the parties to execute SPPA and incorporate certain changes. However, the Petitioner was aggrieved by the Official Memorandum dated 27.05.2016, issued by the 2nd Respondent making the effective date of the PPA as 25.05.2016, had approached the Commission for a clarification and sought to make the effective date as the date of approval by the Commission. During the pendency of these proceedings initiated by the Petitioner there was no restriction on the Petitioner in taking further necessary steps towards execution of the PPA. But the Petitioner at any point of time while taking steps to implement the terms of the PPA failed to address its grievances to the Respondents regarding the effective

date as stipulated in PPA or a delay in execution of the SPPA. The Petitioner after an inordinate delay in commission of the project, for the very first time, at the time of filing of the present petition has put forth frivolous contentions stating that there was a delay in execution of SPPA which is attributable to the Respondent No. 1 and therefore the effective date is required to be altered. It is submitted that considering the enormous delay of the Petitioner in commissioning of the project, as a matter of convenience the Petitioner is seeking to take execution of the SPPA as the effective date. The Petitioner cannot be permitted to change its stance as and when convenient to it, therefore, on this contention the petition cannot be considered.

- c) Delay in issuing Evacuation approval:** - 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 to 110/11 KV Naregal Sub-Station. However, since the feasibility report in respect for Ron Taluk was split and given for 20 MW project with 10 MW at Hirehal Sub-Station and another 10 MW at Gajendragad Sub-Station each on account of the report of the KPTCL dated 30.12.2016 on non-feasibility of connection to Naregal Sub-Station on account of overloading of existing 110 KV Sc Gadag-Naregal-Ron line, the Petitioner has to apply for change in the Sub-Station from Naregal to Hirehal. The Petitioner requested for Hirehal Sub-Station under a communication dated 18.01.2017. On 21.02.2017 the Petitioner accepted the Tentative Evacuation Scheme issued by 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 though the application was filed on 15.06.2016, the Petitioner has claimed delay only from 18.01.2017 when they were forced to file another evacuation application due to change in sub-station as per the report of the KPTCL. This delay has also been a contributing factor to delay in commissioning the project on time. In support of his arguments, he relied upon the orders passed by KERC, 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 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 it is a trite practice that the developer of the solar power project / the Petitioner, is required to identify a suitable land for evacuation and furnish the details to the Respondent No. 3/KPTCL. In this case the Petitioner submitted the details of the facilitation fees paid vide letter dated 22.10.2016 for a particular parcel of land. The Respondent No. 3 processed the proposal of the Petitioner after obtaining a field report from the concerned transmission zone. In the meanwhile, the Petitioner vide letter dated 18.01.2017 requested for a change in the evacuation approval from 110 KV Naregal Sub-Station to 110 KV Hirehal Sub-Station, in this regard, the

Respondent No. 3 conducted system studies and issued a tentative evacuation scheme dated 02.02.2017. Thereafter, the Petitioner has conveyed its acceptance for the scheme vide letter dated 21.02.2017 and sought for the final evacuation approval. The regular/final evacuation scheme was issued on 17.03.2017 by the 3rd Respondent.

- iii) Further he submitted that, after request of the Petitioner for a change in evacuation approval from Naregal to Hirehal, a tentative evacuation scheme was issued by the 3rd Respondent within a period of 15 days. Therefore, there is no delay in issuing tentative evacuation scheme. But the Petitioner took over 20 days to accept the scheme vide letter dated 21.02.2017. The Respondent No. 3 after receiving the letter dated 21.02.2017 has in a fast-tracked manner processed the request of the Petitioner and granted regular evacuation scheme on 17.03.2017, which is also within the period of 30 days. Therefore, from the timeline pertaining to communication, correspondences and approval it can be ascertained that no delay is attributable to the 3rd Respondent and the Petitioner cannot urge this ground under the head of Force Majeure. Further he stated as per Article 4 of PPA the Petitioner is required to obtain evacuation approval within 8 months from the effective date. In the present case on hand the effective date is 05.10.2016 and final approval of the evacuation scheme was granted on 17.03.2017 i.e., within a period of 8 months. Thereby, if there is any delay in procurement of the evacuation approval, it cannot be termed as an event of Force Majeure.

iv) In support of his arguments the Learned Counsel for the Respondents has placed reliance in the orders passed by the Commission in: -

- 1) Op 148/2017 between Sri Ugrappa Solar Private Limited Vs BESCO
& 2 Others dated 29.05.2018.
- 2) OP 2/2018 (KERC) 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. 122/2017 between Smt. Sharada Doddi Vs GESCO dated
21.02.2019

In the above orders the Hon'ble 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.

- v) 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, and submitted in these orders, the Commission has placed reliance upon the findings given by the Hon'ble Appellate Tribunal for Electricity, New Delhi 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.
- vi) As the Petitioner failed to establish delay by the Respondent No. 3/KPTCL in approving evacuation approval as claimed in the Petition, the prayer for extension of time on this account is rejected.
- d) Delay in granting land for bay allocation:** - 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 execution 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. On 17.03.2017 itself the Chief Engineer (Ele), Planning and Coordination addressed a communication to the Chief Engineer (Ele), Transmission

Zone, requesting for comments to place it before the Land Sparing Committee. The Land Sparing Committee met only on 27.10.2017 after a delay of over 7 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. But the Respondent is attempting to mislead the Commission by stating that the Petitioner sought for sparing of land for erection of bay only on 13.10.2017. As per the documents furnished by the Petitioner would go to show that it was the Respondent No. 3 alone who was responsible for delay in issuing the bay reception/evacuation scheme that further led to enormous delay in execution of the project. Since the evacuation approval was granted within 8 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/KPTCL within time which led to delay in commissioning the plant. Further, submitted in this contest the findings given by the Hon'ble Appellate Tribunal for Electricity, New Delhi in the case of Chennammagathihalli Solar Power Project Vs BESCO in appeal No.

351/2018 are rightly applicable since, the facts of the present case are similar to the facts of the that case. With this he prays to consider his prayer.

- ii) 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 s/s Hirehal 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. The Petitioner vide letter dated 13.10.2017 made a specific request to spare readily available 110 KV terminal bay at 110 KV s/s Hirehal. 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.
- iii) We have perused the relevant documents furnished by the Petitioner. On 19.12.2016 the Petitioner has approached M/s Sagar Associates, Gadag for service order for providing land and related works like documents, exemption from Section 109, nonagricultural use conversion etc., in respect of land parcels of around 100 Acres Hirehal Village, Ron Taluk,

Gadag District. Thereafter, it appears the Petitioner has made a request to the KPTCL on 21.02.2017 (Annexure-M3 to the Amended Petition) to give final evacuation approval and also allocate the bay for proposed 20 MW solar project in 110/11 KV Hirehal Substation, Ron Taluk. In turn, the 3rd Respondent KPTCL has communicated the Petitioner (Annexure-M4 to the Amended Petition) dated 14.11.2017 with a request to remit 10% of supervision charges and other charges for conducting detailed survey for construction of 110 KV SC line on DC tower by using lynx conductor from the existing 110/11 KV s/s at Hirehal Village. Along with this document the Petitioner has produced a receipt for having paid amount dated 18.11.2017. The 3rd Respondent has communicated the Petitioner (Annexure-M5 to the Amended Petition) approval of tentative evacuation scheme through a letter dated 02.02.2017 in which it appears that the Petitioner had paid facilitation fees to the 2nd Respondent/KREDL on 30.05.2016. As per communication dated 17.03.2017 (Annexure-M6 to the Amended Petition) it appears that the 2nd Respondent has written a letter to Chief Engineer, Transmission Zone, stating sparing of KPTCL land for construction of one 110 KV TB for Petitioner. Thereby called for comments for opinion in the matter to place it before the Land Sparing Committee meeting. The document furnished by the Petitioner in Annexure-M7 (filed along with Amended Petition) shows that the proceedings of 157th TB Committee meeting held on 27.10.2017, in that meeting after discussion it is decided to spare available KPTCL land for construction of one number of 110 KV TB along with metering arrangement at proposed 110/11 KV

Hirehal Substation to Petitioner Company. All these documents detailed herein below: -

Table 1

Sl. No.	Date	Description of the documents	Annexures
1.	21.02.2017	A request made by the Petitioner to the KPTCL to give final evacuation approval and also allocate the bay	"M3" filed along with Amended Petition
2.	17.03.2017	Letter written by the Chief Engineer (Ele), Planning and Coordination, KPTCL to the Chief Engineer (Ele), Transmission Zone, KPTCL stating sparing of KPTCL land for construction of 110 KV TB for Petitioner Company	"M6" filed along with Amended Petition
3.	27.10.2017	Proceedings of 157 th TB Committee on sparing KPTCL land to IPPS installations	"M7" filed along with Amended Petition

Table 2

Sl. No.	The difference of Period shown in Annexure-M3 (filed with Amended Petition) and Annexure-M7 (filed with Amended Petition)	Days
1.	21.02.17 to 28.02.17	7 days
2.	March 2017	31 days
3.	April 2017	30 days
4.	May 2017	31 days
5.	June 2017	30 days
6.	July 2017	31 days
7.	August 2017	31 days
8.	September 2017	30 days
9.	01.10.2017 to 27.10.2017	26 days
Total		247 days

Considering the date on which the Petitioner applied for sparing of land belonging to KPTCL for bay allocation and the date of the proceedings of

Land Sparing Committee, the Petitioner has suffered delay in procuring land from the KPTCL for construction of bay.

- iv) In this regard the judgement of the Hon'ble Appellate Tribunal for Electricity, New Delhi 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."

- v) We have perused the Judgement passed by the Hon'ble Appellate Tribunal for Electricity, New Delhi, NewDelhi, 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"

- vi) We have perused the Judgement passed by the Hon'ble Appellate Tribunal for Electricity, New Delhi, NewDelhi, 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 require licensee 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."

26) We have gone through the judgements relied by both the parties. The Respondents have relied upon the judgements passed in OP No.148/2017 – Sri

Ugrappa Solar Private Limited Vs BESCO & 2 Others dated 29.05.2018, 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. 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 GESCO. 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. 2/2018, OP No. 148/2017, OP No. 38/2018 as referred supra are not relevant in these circumstances.

- 27) 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 affecting 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.

28) 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.*

29) 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 HESCOM dated 27.05.2017 (Annexure-G 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. 51/2017 (Annexure-A to the rejoinder). Another letter written by the

Petitioner to the HESCOM dated 16.08.2017 (Annexure-S to the Amended Petition) shows that, the Petitioner has communicated HESCOM 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 way. Another letter written by the Petitioner to the HESCOM dated 05.12.2017 (Annexure-S1 to the Amended Petition) reads as: -

- I. *“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.’*
- II. *‘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.’*
- III. *‘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.’”*

30) All these documents establish that the Petitioner had complied with 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 noting is placed in support of their contention. Thereby,

to this extent the arguments addressed by the Learned Counsel for the Respondents holds no water.

- 31) Further the Petitioner has also produced Commissioning certificate (Annexure-Y to the Amended Petition) dated 31.03.2018 which shows 110 KV Terminal Bay with metering arrangement at 110 KV s/s Hirehal and 110 KV SC line on DC towers for a distance of .0350 Kms commissioned on 28.03.2018 at 9.46 PM. Another document furnished by the Respondent No. 1 & 3 along with statement of objections shows that the Executive Engineer (Ele), O & M Division, HESCOM, Ron has issued final commissioning certificate on 27.09.2018 stating that 20 MW Solar Power Project has been commissioned and synchronized to KPTCL grid on 30.04.2018, this document reads as follows: -

"This is to clarify that 20 MW solar plant project through KREDL 1200MWs scheme allotted to M/s. MAYAFAIR RENEWABLE ENERGY PVT LTD, Chennai at Hirehal village, Ron Taluk, Gadag District, Karnataka has been commissioned in parts as 15 MW capacity has been commissioned on 28.03.2018 as per the MOM dated 28.03.2018 and balance 5MW capacity has been commissioned on 30.04.2018 as per the MOM Dated 18.05.2018. Hence the total of 20MW solar power project has been synchronized & interconnected to KPTCL grid having bulk tariff metering unit bearing RR No: HESCOM/RON/DN/RON/17-18/MREPL – HRL 002 at 110/33/11kV KPTCL Hirehal Sub-station in Ron Taluk. This certificate is issued as per the interconnection approval accorded by Chief Engineer (Ele), P&C, KPTCL, Bangalore vide letter No. CEE(P&C)/ SEE(Plg)/ EE(PSS)/ KCO-96/ 81271/ F-846/ 28651-68 Dated: 28.03.2018 & 1st time period extension: CEE(P&C)/ SEE(Plg)/ EE(PSSS-N)/ KCO-96/ 100271/ F-846/ 16354-70 Dated: 20.08.2018- & the commissioning approval accorded by Chief Electrical Inspectorate to Govt. of Karnataka, Bangalore vide letter No CEIG/TEC/DWD-124/49731-37/17-18 Dated. 27.03.2018 – for 110KV Terminal Bay, Transmission Line, Solar PV Modules and as per the MOM's cited under above reference first part 15 MW & second part 5 MW the total of 20 MW Solar

Power Project has been commissioned & synchronized to KPTCL grid on 30.04.2018."

As per the Commissioning Certificate produced by the Respondent, the subject plant was commissioned on 30.04.2018 as per final Commissioning Certificate 27.09.2018. It is further stated in the certificate that 15 MW was commissioned on 28.03.2018 and balance 5 MW was commissioned on 30.04.2018 (Annexure to statement of objections dated 19.01.2021).

- 32) In the present case, the Petitioner had to achieve the SCOD within 12 months from 06.10.2016 (Effective Date). After receiving the copy of Official Memorandum (Annexure-E 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. 51/2017 before the Commission. The said Petition after contest, disposed by the Commission by passing orders on 19.05.2017. After filing of the OP 51/2017 till its disposal i.e., during pendency of proceedings in OP 51/2017, the Petitioner could not proceed with the further project work. On perusal of the Petition in OP 51/2017 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 51/2017 could be treated as Force Majeure Event as per Clause 14.3.1 (d).
- 33) In view of the discussions made above and also in Page 47 (Para 23 (d) (iii) in Table-2), the table disclose the time taken for delay 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 granting land for Bay allocation despite he was able to commissioned the plant on 30.04.2018. 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 events as described in the PPA.

- 34) The Petitioner in his Petition has sought for declare that the effective date with respect to Article 8.5 of the PPA dated 31.05.2016, is 30.08.2017 i.e., is the date of execution of Supplementary PPA. This prayer cannot be granted as because we have already answered to Issue No. 1 in Negative. As the Petitioner has not produced for delay due to GST induced delay, the same is rejected.
- 35) In the alternative, the Petitioner has prayed for to pass an order granting extension of time for fulfilling its obligation under the PPA on the grounds Force Majeure Events. Further he has furnished Annexure-A to the written submission showing 172 days delay in achieving the SCOD, but as per final Commissioning Certificate issued by the Executive Engineer (Ele), O & M Division, HESCOM, Ron dated 27.09.2018, the Solar Power Project has been commissioned and synchronized to KPTCL grid on 30.04.2018. Under these circumstances the delay in commissioning and synchronizing the project to KPTCL grid comes 207 days, which is detailed as here under: -

Sl. No.	Period	Days
1.	06.10.2017 to 31.10.2017	26 days
2.	November 2017	30 days
3.	December 2017	31 days
4.	January 2018	31 days
5.	February 2018	28 days
6.	March 2018	31 days

7.	01.04.2018 to 30.04.2018	30 days
Total		207 days

36) 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.”

As per the above Clause in case of extension occurring due to reasons specified in Clause 5.7.1 the SCOD 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. 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.

- 37) However, 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 we rely upon the judgement of Hon'ble Appellate Tribunal for Electricity, New Delhi in Appeal No. 351/2018, Appeal No. 328/2018, Appeal No. 322/2018 and facts and circumstances of the instant case, this Commission found that the Petitioner is entitled for extension of 207 days from 06.10.2017 to 30.04.2018 as stipulated in PPA. Hence, we are of the considered opinion that the Petitioner is entitled for the relief of extension of 207 days as he had commissioned the project on 30.04.2018 (as per final Commission Certificate filed along with written objections of Respondents 1 & 3). With this we answer Issue No. 2 in affirmative.
- 38) **Issue No. 3:** For what relief the Petitioner is entitled to?
- 39) 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 207 days from 06.10.2017 to 30.04.2018, he is entitled for the tariff as agreed in PPA. Hence, the Petitioner is entitled for Rs. 5.00/kWh tariff. Accordingly, this Issue No. 3 is answered accordingly.

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

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

ORDER

- 1) The Petition is allowed.
- 2) The delay of 207 days is condoned in commissioning of Solar Power Project in Ron Taluk, Gadag District.
- 3) Consequently, the SCOD is extended till 30.04.2018 and Tariff of Rs. 5.00/kWh as agreed in PPA is allowed.
- 4) 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