

No.N/345/2017

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,

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

Dated: 29.05.2020

Present:

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

OP No.176/2017

BETWEEN:

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

... PETITIONER

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

AND:

- 1) Gulbarga Electricity Supply Company Limited,
Having its Corporate Office at
Gulbarga Main Road,
Gulbarga, Karnataka.
(Represented by its Managing Director)

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

... **RESPONDENTS**

[Respondents 1 & 3 are represented by
M/s ALMT Legal, Advocates & Solicitors
and Respondent 2 is represented by
Sri Rakshith Jois Y.P. Bengaluru.]

ORDERS

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

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

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

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

- a) The 2nd Respondent Karnataka Renewable Energy Development Limited (KREDL) being the Nodal Agency of the State of Karnataka (GoK), for facilitating the development of the renewable energy, had called for the Request for Proposal (RfP) for the development of 1200 MW (AC) Solar Power Projects in the State of Karnataka for implementation in 60 taluks vide Notification dated 20.11.2015. Messrs Mytrah Energy (India) Private Limited being the selected bidder for Raibag taluk in Belagavi district for development of 15 MW Solar Power Project, was issued Letter of Award (LoA) and Allotment Letter dated 16.05.2016 (Annexure-B) by KREDL. After negotiation, the tariff agreed was Rs.5.50/- per kWh for the energy to be delivered. The LoA contained other terms and conditions to be complied with. Pursuant to LoA (Annexure-B), the petitioner was incorporated as Special Purpose Vehicle (SPV) for the development of Solar Power Project and to execute the PPA with the 1st Respondent Gulbarga Electricity Supply Company Limited (GESCOM). Accordingly, the petitioner and GESCOM entered into PPA dated 15.07.2016 (Annexure-D) with all terms

and conditions stated therein. The PPA dated 15.07.2016 (Annexure-D) was approved by this Commission and the same was communicated through letter dated 29.09.2016 (Annexure-E). The approval of PPA was subject to incorporation of certain corrections/modifications in the PPA as stated in the approval letter (Annexure-E), by entering into a suitable Supplemental Power Purchase Agreement (SPPA) between parties. The corrections/ modifications suggested to be incorporated in the PPA were only the formal corrections/modifications, but not material.

- b) As per the terms of the PPA the timeline fixed for achieving the Conditions Precedent is 8 months and for achieving the commissioning of the project is 12 months, from the 'Effective Date'. The Effective Date is defined as the date of approval of PPA by KERC. Therefore, the Conditions Precedent is to be achieved on or before 28.05.2017 and the SCOD is to be achieved on or before 28.09.2017. The petitioner could not achieve the timeline fixed for fulfilling the Conditions Precedent on or before 28.05.2017 and for achieving the commissioning of the project on or before 28.09.2017. The petitioner has filed the present petition on 28.09.2017 with the prayers noted above. Subsequently, the Solar Power Project in question was commissioned on 23.01.2018. The Commissioning Certificate

dated 23.01.2018 issued by the Executive Engineer (EI), TL & SS Division, KPTCL, Chikkodi is produced by the petitioner with Memo dated 26.04.2018.

c) It is stated by the petitioner that it could able to achieve the following milestones towards the progress of the Solar Power Project.

- i) 16.02.2017 – Applied for Power Evacuation approval but the same came to be granted only on 01.06.2017 (as per Annexure-M);
- ii) 15.04.2017 – Appointed Land Aggregator and entered into a Land Procurement and Development Agreement with a private company for procurement of lands (Annexure-F);
- iii) 30.05.2017 – Entered into Engineering and Services Agreement with the EPC Contractor and Agreement for Module Supply (Annexure G, G1);
- iv) 24.06.2017 & 14.07.2017 – Obtained NOC from both Khandal and Itnal Village Gram Panchayats (Annexure-H);
- v) 12.06.2017 – Obtained Financial Assistance from Bank (Annexure-J);
- vi) July 2017 – Completed Land Lease Agreements (Annexure-K);
- vii) 20.07.2017 – Placed Purchase orders for various equipment. Copies of two such purchase orders are at Annexure-K1; and

viii) 05.08.2017 – Section 109 Application filed, awaiting approval (Annexure-L).

d) After approval of the PPA by this Commission, the petitioner began the process of identifying the land required for the project, based on the availability of nearest Sub-station for evacuation of power. As per the information posted on the website of the 2nd Respondent, Sub-stations at Kudachi and Hidkal were found most suitable for the petitioner's project. The petitioner approached the land owners near Kudachi Sub-station and tried to persuade them for the sale of lands. However, the entire region as also the surrounding areas were fully agricultural lands mostly thriving with sugarcane crop. With the strong reluctance of farmers in Kudachi belt, the petitioner left with no option but to try with the Sub-station at Hidkal. Even when the petitioner approached the land owners having lands abutting Hidkal Sub-station, the petitioner faced a lot of reluctance from the farmers, since even this area was largely fertile with agricultural sector being very active. However, with the continuous dialogue with the land owners, the petitioner finalised the Sub-station at Hidkal. Thus this entire process of land identification in and around two Sub-stations, consumed a considerable amount of time from October, 2016 to January, 2017. Immediately, after finalising the identification of lands, the

petitioner applied for power evacuation approval on 16.02.2017, but the same was issued to the petitioner by the 3rd Respondent/KPTCL only on 01.06.2017 (Annexure-M), after 104 days from the date of application. The petitioner applied for approval of drawings for construction of bay on 18.08.2017 through its letter dated 18.07.2017 (Annexure-N). The 3rd Respondent approved the same on 22.09.2017 (Annexure P).

- e) Subsequent to the Regular Evacuation Approval, the petitioner proceeded with the work at the project site in respect of which he had entered into lease agreements. To the shock of the petitioner, some of the land owners along with support of a few locals prevented the contractors, the security guards and the officials of the petitioner company from carrying out the project related activities on the pretext of non-payment of compensation towards crop damage. They even physically manhandled the contractors and company representatives who under their threat and fear, quit the job and refused to return back. Communications in this regard from the land owners/farmers threatening to prevent the petitioner company from going on with the project work are produced as Annexure-Q series (Q, Q1 to Q5). E-mail communication dated 30.08.2017, reporting the above incidence from the contractors to the petitioner company are produced as Annexure-R. The

petitioner sought the intervention of Tahsildar and a copy of the communication dated 21.08.2017 is produced as Annexure-S. However, the Tahsildar, acting on a complaint given by the land owners, directed the petitioner company not to go ahead with, the fixing of the electric poles and carry on with non-agricultural activities. The copy of the letter dated 15.09.2017 issued by the Tahsildar is produced at Annexure-T. In spite of the best efforts by the petitioner, because of these local issues the petitioner could not achieve the SCOD on time.

- f) That the filing of application under Section 109 of the Karnataka Land Reforms Act, 1961 (KLR Act, 1961) and the activities like 'Bay' erection, finalization of plant design, procurement of critical, Solar power plants' components had to be kept in abeyance for want of evacuation approval. These activities were taken up and proceeded with only after obtaining the regular power evacuation approval. The petitioner addressed a communication dated 21.09.2017 (Annexure-U) to the 1st Respondent seeking extension of the SCOD explaining the circumstances, but there was no response to the same. The delay in issuing the power evacuation approval and also the Bay approval was beyond the control of the petitioner, therefore, the petitioner could not be held liable for the consequent delay in commissioning of the project.

g) That in Appeal No.123/2012 between Gujrat Urja Vikas Nigam Limited Vs. GERC and others, the Hon'ble ATE has held that:

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

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

h) Therefore, the petitioner has filed the present petition.

3. Upon notice, the respondents appeared through Counsel and they filed separate statement of objections. We may note the objection statements of each of the respondents.
4. The 2nd Respondent (KREDL), stated that this respondent being the nodal agency of the Government of Karnataka for facilitating the development of renewable energy in the State of Karnataka, invited proposals by its

“request for proposal in e-portal on 20.11.2015 to undertake development of 1200 MW solar power in the State”. However, KREDL issued 52 numbers of LOA's to 22 successful Bidders for implementation of 870 MW capacity solar power projects in 47 taluks of Karnataka. As such, this respondent has issued letter of allotment dated 16.05.2016 in favour of 'Mytrah Energy (India) Private Limited', for commissioning of solar power plant of 15 MW in Raibag Taluk, Belagavi District. Further, that the KREDL shall coordinate with all agencies both in State level and the National level to promote non-conventional energy in the State. Further it contended that, it is not a necessary party to the present petition as no relief is claimed against it. Therefore, it prayed to dismiss the petition as against it.

5. The statement of objections filed by the 1st Respondent (GESCOM) may be stated as follows:

- a) That the inordinate delay of over 5 months in applying for the power evacuation approval, is not satisfactorily explained in the petition. The reasons given for the said delay, that the petitioner were looking for suitable lands, and that there was strong reluctance from farmers while procuring the said lands, are grossly insufficient. The petitioner has failed to demonstrate the action taken towards this project for a period of 5 months. All other averments made in the petition, in support of the defence of Force Majeure events are denied and the petitioner is put to restrict proof of the same.

b) That the petitioner is liable to pay damages under Articles 4.3 of the PPA and also to pay liquidated damages under Articles 5.8 of the PPA.

c) Therefore, the 1st Respondent requested to dismiss the petition as a whole.

6. The statement of objections filed by the 3rd Respondent (KPTCL) may be stated as follows:

a) The petitioner entered into PPA dated 15.07.2016 with the 1st Respondent herein. Thereafter, this Commission approved the above PPA on 29.09.2016. The tariff arrived at, as specified in the PPA, is Rs.5.50 per unit for a period of 25 years. As per Article 3.1 of the PPA, the said agreement shall come into effect from the date on which this Commission grants approval for the PPA and such date shall be referred to as the 'effective date'. The scheduled date for commissioning the project, as per Articles 8.5, is 12 months from the 'effective date', i.e. 28.09.2017.

b) Nearly 140 days after this Commission approved the PPA, the petitioner applied for the power evacuation approval on 16.02.2017.

c) The respondent also submitted that the inordinate delay of over 5 months in applying for the power evacuation approval, is not

satisfactorily explained in the petition. The reasons given for the said delay, that the petitioner were looking for suitable lands, and that there was strong reluctance from farmers while procuring the said lands, are grossly insufficient. Additionally, not a shred of evidence has been furnished by the petitioner to substantiate its averments as regards the delay of more than 130 days in applying for the power evacuation approval, after having received the approval of the PPA on 29.09.2016 by the Commission.

- d) The allegation in para 9 of the petition to the effect that the power evacuation approval was issued by this respondent to the petitioner after 104 days, is denied as false. It is stated that the petitioner received the tentative evacuation approval in 71 working days, and the regular evacuation approval in 81 working days from the date of the petitioner's application.
- e) The allegation in para 10 of the petition to the effect that the respondent approved the drawings pertaining to the erection of Bay was belated, is denied as false. It is stated that approval of drawings was applied on 18.08.2017 but not on 18.07.2017 as stated in the said paragraph.
- f) All other allegations made by the petitioner are denied as false.

g) For the above reasons the 3rd respondent has prayed for dismissal of the petition.

7. Subsequent to filing of the objections by the respondents to the petition, the petitioner has filed application on 25.10.2018 for the amendment of the petition, to the following effect:

a) In the amendment application, the petitioner has prayed for inserting new paragraphs 8.1, 9.1 and 12.1 after the original paragraphs 8, 9 and 12 respectively.

- In the proposed paragraph 8.1, the petitioner has stated the delay of 84 days was caused in acquiring the land due to demonetisation introduced under Notification dated 08.11.2016 and in support of it produced Annexure L-1 an OM dated 02.12.2016 issued by Ministry of New & Renewable Energy (MNRE). Further, the petitioner has stated that on account of the cash crunch contractors, suppliers and vendors were delaying their part of the performances. In support of it, a letter dated 08.12.2016 written by a supplier is produced as Annexure L-2.
- In the proposed paragraph 9.1, the petitioner has stated the delay caused in achieving the progress of the solar project, was also due to introduction of the Central Goods and Service Tax Act, 2017 (GST Law) with effect from 01.07.2017. The petition

relied upon the Office Memorandum dated 20.06.2018 of MNRE marked as Annexure M-1 in support of its contention.

- In the proposed paragraph 12.1, the petitioner has stated that there was heavy rainfall from August, 2017 to October, 2017 in the State of Karnataka and the rains were unprecedented and as such same could not be predicted by the solar power project developers. Such incessant rains have resulted, inter alia, in flooding of project sites, idling of labour and equipment at project sites and severally hampering construction works. The petitioner took all possible steps to mitigate the impact of rainfall and in spite of it, the heavy rainfall resulted in a delay of 40 days. The rain fall data for the relevant period is produce as Annexure U1.

b) Further in the amendment application, the petitioner has prayed for inserting new paragraphs 13, 20 and 22 in place of the original paragraphs 13, 20 and 22 respectively.

- In the proposed paragraph 13, it is stated as follows:-

“13. The delay in issuing evacuation approval and bay approval, Demonetisation, introduction of GST law and heavy rainfall all constitute Force Majeure events beyond the control of the petitioner. On account of the same, the petitioner was unable to Commission the project by the Scheduled

Commercial Operation date of 28.09.2017. Therefore, the petitioner is approaching this Commission seeking extension of time to Commission the project”.

- In the proposed paragraph 20, it is stated as follows:

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

Sl. No.	Description of FM Event	From – To	Number of days delay
1	Demonetisation	08.11.2016 to 31.01.2017	84
2	Introduction of GST	01.07.2017 to 31.08.2017	62
3	Rain fall	June 2017 to October 2017 (June(3), July(7), Aug (3), Sep(16), Oct(10) days	39
4	Delay in granting Evacuation approvals	16.02.2017 to 01.06.2017	104
5	Delay in granting approval of bay drawings	18.08.2017 to 22.09.2017	35
6	Total		324 days

Total delay suffered by the Petitioner’s project owing to the afore-stated Force Majeure Events, duly considering over lapping

events is 285 days (08.11.2016 to 31.01.2017 and 16.02.2017 to 22.09.2017 and October 2017 (10 days).

- In the proposed paragraph 22, it is stated as follows:

“22. It is respectfully submitted that despite the delay of 285 days on account of the aforesaid Force Majeure events, the Petitioner with all its best and committed efforts, commissioned the project on 23.01.2018 with a delay of 116 days from the date of SCOD as per PPA i.e. 29.09.2017. In light of the aforesaid Force Majeure events, the Project has been commissioned well within time”.

8. The Respondents did not file objection to the application seeking amendment of the petition filed by the petitioner, within the time allowed by the Commission and finally further time to file objection was rejected. Thereafter, on 05.07.2019 the petitioner filed amended petition serving the copy of the same on the advocate for respondents. The Respondents were granted time to file additional statement objections to the amended petition.

9. On 16.08.2019, the 1st respondent filed additional statement of objections to the amended petition. The gist of the addition objection may be stated as follows:

- a) That the grounds stated in the amended portion of the petition are clearly an after-thought grounds and they are wholly baseless and untenable.
- b) The petitioner has failed to furnish any material to conclusively to establish that these events have stalled or curtailed the construction of the petitioner's plants. The demonetization cannot be considered as a 'Force Majeure' event under Article 14 of the PPA. The petitioner had not issued any notice of the occurrence of such force majeure events as required under Article 14.5 of the PPA.
- c) The demonetization had only curtailed cash transactions and there was no embargo applicable for cashless transactions.
- d) Raibag Taluk did not receive unprecedented rainfall in 2017, as claimed by the petitioner. The rainfall during the said period was normal.
- e) That each and every averment and allegation made in the amended portion of the petition are untenable and therefore denied *in toto*.
- f) Therefore, the 1st respondent, prayed for dismissal of the petition.

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

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

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

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

Issue No.3: What Order?

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

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

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

"14.3.1 A 'Force Majeure' means any event or circumstance or combination of events including those stated below which wholly or partly prevents or unavoidably delays an

Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.

a).....

b)

c)

d)....

e)

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

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

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

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

- a) Delay in granting evacuation approval;
- b) Delay in granting approval of Bay Drawings;
- c) Unprecedented rainfall;
- d) Demonetization; and

e) Introduction of GST.

14. Regarding: Delay in granting Evacuation approval:

- a) The petitioner has alleged on 16.02.2017, it filed application for granting Evacuation Scheme approval, however, the 3rd Respondent KPTCL issued the Regular Evacuation Scheme approval on 01.06.2017, thereby there was delay of 104 days in granting Evacuation approval. The 3rd Respondent denied the said allegations and contended that the period of time of 104 days for issue of Regular Evacuation Scheme was reasonable in the present case and in between these days there were only 81 working days.
- b) The Regular Evacuation Scheme approval dated 01.06.2017 (Annexure-M) contains the different events that had taken place in between the filing of application for grant of Evacuation Scheme approval and the actual issue of the said approval. Subsequent to filing of the application dated 16.02.2017, the Chief Engineer (Ele.), Transmission Zone, KPTCL, Bagalkote, submitted field report regarding Evacuation feasibility vide letter dated 12.04.2017. Thereafter, Tentative Evacuation Scheme approval was communicated to the petitioner vide letter dated 19.05.2017. The petitioner accepted the terms and conditions of the Tentative Evacuation Scheme on 20.05.2017. Thereafter, the Chief Engineer (Ele.) (Planning and Coordination), KPTCL, Cauvery Bhavan, K.G.

Road, Bengaluru-560 009, issued the Regular Evacuation Scheme approval on 01.06.2017.

c) The petitioner has not produced any guidelines or other statutory provision disclosing the period within which the Evacuation Scheme approval is to be issued. The Conditions Precedent states that the petitioner has to obtain the Evacuation Scheme approval within 8 months from the date of approval of the PPA i.e., 15.07.2016. The issuance of Regular Evacuation Scheme approval takes certain time for study of Evacuation feasibility and to ascertain the terms and conditions to be imposed while issuing the Regular Evacuation Scheme. In the absence of any specific timeline prescribed, it is not possible to hold that there was delay in granting Regular Evacuation Scheme approval subsequent to filing the application for the grant of the same.

d) The Respondent 1 & 3 have contended that there was unexplained delay in applying for Regular Evacuation Scheme. They contended that soon after the communication of the approval of the PPA by the Commission, the petitioner could have applied for Evacuation Scheme approval. The LoA was issued on 16.05.2016 indicating the location of the project in Raibag taluk of Belagavi district. The petitioner has stated that as per the information posted on the website of KREDL, Evacuation feasibility was available at Kudachi as well as Hidkal Sub-stations. Such information was posted on the

website at or about the time of issuing the LoA. The petitioner could have finalised the Sub-station at Kudachi or the Sub-station at Hidkal by the time the communication of approval of PPA was sent to it. There was a gap of nearly four & half months from the date of issuance of LoA to the date of issuing the communication of approval of the PPA. However, the petitioner took time, of more than four & half months for applying the Evacuation Scheme approval after communication of the approval of the PPA.

- e) The petitioner has contended that it began the process of identifying the lands required for the project, soon after approval of the PPA and it found that the lands in the vicinity of Kudachi Sub-station were not available as the said lands were fertile sugarcane growing lands. Further, it stated that thereafter, it approached the land owners having lands abutting Hidkal Sub-station and there also it faced a lot of reluctance from the farmers in this area for sale or lease of the lands. According to the petitioner the entire process of land identification in and around the Sub-stations consumed a considerable amount of time from October 2016 to January 2017. However, the Commission notes that had the petitioner applied the Prudent Utility Practice, it should have ascertained the availability of lands in the vicinity of Sub-stations within 3-4 months from the date of issuance of LoA as noted above. Therefore, we hold that there was inordinate delay in applying for Evacuation approval. This

delay of four or four & half months period could have been avoided by the petitioner, if it had taken proper steps for identifying the lands.

- f) On 15.04.2017, the petitioner appointed land aggregator and entered into a land procurement and development agreement (Annexure-F). This agreement (Annexure-F) provides for identification of lands by the Land Aggregator within a period as provided in Clause 1.1 definition of "Services Completion Date(s)" of this agreement and further provides for payment of liquidated damages for failure to achieve the timeline stated in Annexure-C. However, it is found that Annexure-C is not attached with the agreement (Annexure-F) produced before the Commission. In July, 2017, the land lease agreements were taken for an extent of nearly 98 acres and on 05.08.2017, the application under Section 109 of the KLR Act, 1961 was filed before the Deputy Commissioner, Belagavi district, Belagavi, as per Annexure-L.
- g) The petitioner was required to produce the documentary evidence having the clear title and possession of the lands required for the project in its name on or before 28.05.2017. Before completion of the lease agreements in respect of lands required for the project, the Regular Evacuation Scheme approval was granted on 01.06.2017. Before acquiring the lands required for the project, the petitioner cannot start any work on the project site. Even for starting the construction work of Evacuation line, the acquisition of land for the project is necessary. Therefore, even assuming that there was

some delay in grant of Regular Evacuation Scheme approval it had not affected in any way, further progress of the work on the project site or the construction of the Evacuation line.

- h) The event or circumstances or combination of events relied upon by the petitioner should wholly or partly prevent or unavoidably delay the performance of the progress of the project, then only such events or circumstances or combination of events can be termed as 'Force Majeure' events. The petitioner has failed to establish that there was delay in granting Regular Evacuation Scheme approval and has also failed to establish that the delay if any, in the grant of Regular Evacuation Scheme approval hindered the progress of its project.
- i) The petitioner has stated one more ground for the delay in the progress of the project work. According to the petitioner, subsequent to obtaining the lease deeds, the petitioner proceeded with the work at the project site, but some of the land owners along with support of a few locals prevented the employees of the petitioners on the spot from carrying out project related activities on the pretext of non-payment of compensation towards crop damage. In this regard, the petitioner has produced Annexure-Q dated 25.07.2017, Annexure-Q1 dated Nil and Annexure-Q2 dated 17.08.2017 stating to be the complaints given to the petitioner. These complaints disclosed that the compensation for crop loss was

not paid though the possession of the lands were taken. Annexure-Q3, Annexure-Q4 and Annexure-Q5 are said to be the reports of the employees of the petitioner working on the project site. These documents show that these workers were obstructed on 30.08.2017 from carrying out the work. Annexure-R is an e-mail dated 30.08.2017 communicated between the employees of the petitioner stating the threat posed by locals on the spot. The documents Q to Q5 are not properly proved. If really, there were threat to the petitioner would have filed a complaint before the police. If for proper consideration, the lease deeds were taken there was no reason for the land holders to raise any dispute. Annexure-Q dated 25.07.2017 said to be an application filed by one Kallappa Bhupal Babannavar, claiming compensation for crop loss. Annexure-K shows that Kallappa Bhupal Babannavar, along with his brothers executed lease deed dated 25.07.2017 in respect of land bearing Sy.No.251 measuring about 11 acres. As noted above, the same person is shown to have claimed by application dated 25.07.2017, compensation for the crop loss and forced threat not to proceed with work till compensation is paid. The person executing lease deed and at the same time making such application appears to be highly improbable. The petitioner has not stated the period for which it had to stop the work on the spot. The petitioner has also produced Annexure-T dated 15.09.2017, stating to be the translation of an endorsement given by the Tahsildar, Raibag, intimating not to

proceed with the Evacuation line work till proper permission was obtained. The original endorsement is not produced. The translation does not convey the proper meaning and it also appears that it might not be true and correct translation. The petitioner has to obtain the consent of the land holders on whose lands Evacuation lines are to be drawn, if required by paying the agreed compensation. In the absence of it, the petitioner has to follow the due procedure of law. The petitioner does not claim that it had paid the compensation or had obtained any proper order from the competent authority before laying the Evacuation line. Therefore, these facts stated by the petitioner cannot be considered as events which prevented the progress of the work on the project site, amounting to 'Force Majeure' events.

15. Regarding: Delay in granting approval of Bay Drawings:

- a) The Regular Evacuation Scheme approval required the petitioner to produce the site responsibility schedule as per the relevant Regulation and also the Single Line Diagram of the Evacuation line. The petitioner produced the Single Line Diagram and the layout drawings on 18.08.2017 through letter dated 18.07.2017, as per Annexure-N to the Superintending Engineer (Ele.), TR (W&M) Circle, KPTCL, Belagavi. Thereafter, the Chief Engineer (Ele.), (P &C)), KPTCL, Bengaluru, issued approval for Single line diagram and also approval for layout drawings of 110/33/11 kV Hidakal Sub-station

indicating proposed 1 No. 33 kV line terminal Bay with certain conditions as per letter dated 22.09.2017 (Annexure-P) and there is a gap of 35 days in issuing the approval for Single line diagram and line terminal Bay. Before issuing this approval, the Chief Engineer (Ele.), (Planning and Coordination), KPTCL, Bengaluru, obtained the report of the Chief Engineer (Ele.), Transmission Zone, KPTCL, Bagalakote, vide letter dated 15.09.2017, as shown in Reference (2) in Annexure-P. Here also, the petitioner has not established that there was delay in issuing the approval as per Annexure-P. Apart from it, the petitioner has not stated the date on which the construction of Evacuation line was about to be completed. It is usual that the work at terminal Bay in the KPTCL Sub-station would start when the Evacuation line was about to be completed. Therefore, it is not shown that issue of approval dated 22.09.2017 (Annexure-P) had caused the delay in the progress of the project work.

16. Regarding Unprecedented rainfall:

- a) The petitioner had not taken this ground in his petition or he had not referred this fact in any of the communications sent to the respondents. The letter dated 21.09.2017 (Annexure-U) addressed to the Chief Engineer, Corporate Office, GESCOM, Kalaburgi, narrates the different events of alleged difficulties with a request to extend time for achieving the commissioning of the project. In this

letter also the petitioner had not stated event of unprecedented rainfall.

b) The petitioner has filed the petition on 28.09.2017. Therefore, the unprecedented rainfall if any, in the month of October, 2017 can be considered. In the amended petition, the petitioner had stated that there was a heavy rainfall between June, 2017 to October, 2017. The petitioner has alleged that in October, 2017 for 10 days, there was a heavy rainfall, thereby the progress of the work on the project was obstructed. In support of that fact, the petitioner has produced Annexure-U1, the statistics of rainfall relating to Belagavi district, for the month of June, 2017 to October, 2017 prepared by the Director, Karnataka State Natural Disaster Monitoring Centre. For the month of October, 2017, 10 days were shown as rainy days for Raibag taluk, in Annexure-U1. The 1st Respondent has contended in its additional statement of objections that Raibag taluk experienced the same level of rainfall in the monsoon months as in the previous year 2016 and further, denied that there was unprecedented rainfall in 2017. As already noted, the petitioner claims 29 days of delay for the months of June to September, 2017 due to heavy rainfall. As already noted, the petitioner would not have omitted to mention this that if there was unprecedented rain on certain days during June to September 2017, in the petition originally filed by it. Therefore, the plea of the petitioner that in the

month of October, 2017, there was heavy rainfall for 10 rainy days cannot be accepted. As already noted there were only 10 rainy days in the month of October, 2017. All these rainy days cannot be termed as unprecedented rainy days which would hamper the progress of the project. Except the rainfall statistics marked at Annexure-U1, no other evidence is produced. Therefore, the unprecedented rainfall hampered work on the spot alleged by the petitioner is not established and cannot be accepted.

17. Regarding: Demonetization:

In Para 8.1 of the amended petition, the petitioner has stated that Demonetization had adverse effect from 08.11.2016 to the end of January, 2017, on land acquisition and other project activities which were delayed considerably. The petitioner has entered into land procurement and development agreement on 15.04.2017 (Annexure-F) and engineering and services contract on 30.05.2017. In the original petition, the petitioner has not stated anything regarding demonetization, affecting the progress of the project of the work. The petitioner entered lease agreements relating to lands in the month of July, 2017. Therefore, we are of the opinion that the demonetization having adverse effect from 08.11.2016 to the end of January, 2017 could not have affected the progress of the project of the petitioner.

18. Regarding: Introduction of GST:

- a) The petitioner in the amended Para 9.1 has stated that there was a slow-down from July, 2017 to September, 2017 in manufacturing as well as service industry across the country. The petitioner has relied upon the Official Memorandum (OM) dated 20.06.2018 issued by MNRE marked as Annexure M1. This OM was issued on the request of the Solar Power Developers, to SECI/NTPC/other Implementing Agencies, for extension of time on case to case basis. It is made clear in this OM that the extension of time could be given for the Solar Power Project Developers provided they furnish all documentary evidence and establishing that they were actually affected due to GST induced disruptions in the period for which extension has been claimed.
- b) In the present case, the petitioner has not produced any documentary evidence in support of its claim and it does not establish that it was actually affected due to GST induced disruptions between the period from 01.07.2017 to 31.08.2017.
- c) Therefore, we hold that the petitioner has failed to establish that introduction of GST has affected the progress of its project.

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

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

It is found that issue No.1 is held in negative and thereby the petitioner is not entitled to extension of time. Whenever there is delay in achieving the Conditions Precedent and Scheduled Commissioning Date, the Solar Project Developer would be liable for payment of damages under Article 4.3 and for payment of liquidated damages for delay in commencement of supply of power under Article 5.8 of the PPA respectively. Further, as a consequence of delay in commissioning of the project beyond the Scheduled Commissioning Date, the project would be liable for lower tariff, if any, as provided in Article 12.2 of the PPA. In the present case, it was found that the petitioner has failed to establish any 'Force Majeure' events to claim extension of time for achieving the Conditions Precedent or Scheduled Commissioning Date. The Solar Power Project was commissioned on 23.01.2018 as against the 28.09.2017, the Scheduled Commissioning Date. The Tariff agreed in the PPA is Rs.5.50 per kWh. The KERC determined tariff applicable as on the Commercial Operation Date i.e., 23.01.2018 is Rs.4.36 per kWh. Therefore, the petitioner is entitled to the reduced rate of Rs.4.36 per kWh. Therefore, Issue No.2, is held accordingly.

21. Issue No.3: What Order?

For the foregoing reasons, we pass the following Order.

ORDER

- a) The petitioner is not entitled to any of the reliefs claimed in the petition;
- b) The petitioner is entitled to a reduced rate of Rs.4.36 per kWh for the energy supplied to the 1st Respondent from the Commercial Operation Date during the term of PPA;
- c) The petitioner is liable for payment of damages as per Article 4.3 of the PPA and for payment of liquidated damages for delay in commencement of supply of power to the 1st Respondent as per Article 5.8 of the PPA; and
- d) The petitioner and the 1st Respondent shall settle the monetary claims as directed above, taking into consideration, the amount already paid/received between them.

sd/-
(SHAMBHU DAYA MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member

