

No. N/420/17

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

Dated: 30.12.2021

<b>Shri Shambhu Dayal Meena</b>	<b>: Chairman</b>
<b>Shri H.M. Manjunatha</b>	<b>: Member</b>
<b>Shri M.D. Ravi</b>	<b>: Member</b>

**O.P. No. 234/2017**

**BETWEEN:**

M/s. Brics Renewable Energy Private Limited,  
A Company registered under the  
Companies Act, 1956/2013,  
Having its Registered Office  
At "Temple Steps" 3<sup>rd</sup> Floor, Block No. A,  
Unit-B 184-187, Anna Salai, Little Mount,  
Chennai-600 015.  
(Represented by Sri Gurudas Kannur, Senior Counsel for  
Ms. Poonam Patil, Advocate)

**....PETITIONER.****AND**

- 1) Bangalore Electricity Supply Company Ltd.  
A Company incorporated  
Under the Companies Act, 1956,  
Having its corporate office at,  
Corporate Offices, K.R. Circle,  
Bangalore -586 001.  
(Represented by its Managing Director)
- 2) Karnataka Renewal Energy Development Limited (KREDL),  
A Company Registered under the provisions  
of the Indian Companies Act,1956 having  
its Registered Office at  
No.39, Shanti Gruha,  
Bharath Scouts & Guides Building,  
Palace Road, Gandhinagar,  
Bengaluru-560 001.  
(Represented by its Managing Director)

- 3) Karnataka Power Transmission Corporation Limited,  
Incorporated under Companies Act, 1956  
Having its Registered Office at  
Kaveri Bhavan,  
Bangalore-560001.

... **RESPONDENTS.**

(Represented by its Managing Director)  
(Represented by Ms Deepthi, S. Just LAW for Respondents 1 & 3)  
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 03.06.2016 is 24.08.2017, i.e., the date of execution of the supplementary PPA.
- In the Alternative,
- b) Pass an order granting extension of time to the Petitioner for fulfilling its obligation under the PPA on the grounds of 'Force Majeure' events.
- c) Pass suitable directions restraining the Respondents from imposing any penalty/damages under the terms of the PPA including but not limited to levying of Liquidated Damages and also that of invoking the Bank Guarantees furnished by the Petitioner.
- d) Grant such other and further reliefs as this Commission deems fit in the facts and circumstances of the case, in the interest of justice.
- 2) The brief facts set out in this petition are as under: -
- a) The Petitioner is a Company incorporated under the Company's Act. The 1<sup>st</sup> 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 Harappanahalli Taluk, Davangere District for development of a 2 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 2<sup>nd</sup> Respondent by letter (Annexure-C to the Amended Petition) dated 02.04.2016.

- 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 2<sup>nd</sup> Respondent. The Petitioner Company entered into Power Purchase agreement with the Respondent No. 1 on 03.06.2016, the effective date as per Clause 3.1 of the PPA reads as under: -

*"3.1: Effective Date*

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

- d) As such the aforementioned Clause places the requirement of the approval on the part of the Commission for the purposes of determining the effective date. The same is in line with the provisions of the Electricity Act 2003, Section 63 read with Section 86 (1)(b), which infer that without approval of the appropriate Regulatory Commission, there can be no

effective/legal PPA between a Distribution Licensee and a Generating Company.

- e) The Respondent No. 2 unilaterally issued an Official Memorandum (Annexure-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 09.06.2016. The Commission granted its approval to the PPA vide an order (Annexure-F to the Amended Petition) dated 07.10.2016 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 07.10.2016, the original PPA dated 03.06.2016 was not final/approved since the Commission directed that the said PPA would be considered approved only upon execution of a Supplementary PPA.
- i) It is stated that, in accordance with Section 63 of the Electricity Act 2003, a PPA cannot be said to be effective if any of the following conditions are not satisfied:
- 1) If the PPA has not been finalized by the parties.
  - 2) If the PPA has not been granted approval by the Commission.
- j) It is therefore stated that, a PPA which does not receive the approval from the appropriate Commission, cannot have any sanctity.
- k) It is submitted that being aggrieved by the aforementioned finding, the Petitioner was constrained to approach this Commission, with a prayer to hold and declare that the 'effective date' in respect of the PPA entered into between the Petitioner and the ESCOM is from the date of approval of the PPA by this Commission as is mentioned under the Clauses 3.1, Clause 8.5 and Clause 21.1 of the PPA. This Commission allowed the said Petition and therefore, the effective date came to be declared as 'the date of approval of the PPA by the KERC' and the parties were directed to carry out the necessary corrections in the PPA.

- l) It is pertinent to mention that the determination of effective date is extremely crucial since all the terms and conditions laid out in the PPA and the time lines for various obligations under the PPA are subject to be determined in accordance with the effective date. In particular, reference is made to Clause 8.5 of the PPA, which provides for COD of the project to be achieved within 12 months from the effective date. As such, if there is ambiguity with respect to the effective date then the same shall constrain the parties in determining the timelines for achieving the COD.
- m) Immediately after receipt of the order passed on 19.05.2017 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 (Annexure-R to the Amended Petition) dated 03.06.2016, in itself, was an incomplete document and can only be considered to be complete and approved when read along with the Supplementary PPA (Annexure-T to the Amended Petition) dated 24.08.2017 as such, the effective date for Commissioning the Solar project is 24.08.2017.
- n) It is further submitted that, as is clear from the circumstance mentioned hereinabove, though the PPA was signed on 03.06.2016 and approved by the Commission on 07.10.2016, the clarification regarding the effective date was made known to the parties only in the last week of May 2017 vide order passed by the Commission. On account of ambiguity regarding the very effective date, the Petitioner was constrained from completing key aspects of the project. Permissions, clearances and some other

Project related works that could not be pursued without the said clarification such as the evacuation approval, identification of lands, financial assistance, and appointment of EPC Contractors were all completed.

o) The Petitioner has completed the following works in so far as the present project is concerned: -

- The company has entered into agreement of sale with the entire extent of project land and is in possession of the same. A copy of the Service order contract for complete land procurement dated 19.12.2016 is produced herewith and marked as (Annexure-H to the Amended Petition).
- Obtained financial approval/assistance to the tune of Rs. 9.98 crores. A copy of the said endorsement issued by the Bankers dated 20.03.2017 is produced herewith marked as (Annexure-J to the Amended Petition).
- Obtained Tentative Evacuation approval (Annexure-K to the Amended Petition) on 24.07.2017.
- 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) dated 07.07.2016.



p) The Petitioner could not have proceeded with erection of bay and connected activities such as procurement of electrical components right of way issues without the approval of Evacuation Scheme. The Petitioner had applied for Evacuation approval on 15.06.2016. 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. The Copy of request for Evacuation approval (Annexure-M to the Amended Petition) dated 15.06.2016 Bennahalli substation, the letter written by KPTCL to the Petitioner dated 21.11.2016 (Annexure-M1 to Amended Petition) to remit Rs. 50,000/- as processing fee plus applicable service tax at 15% on the processing fee within a period of one month from the date of intimation. The copy of the receipt dated 29.11.2016 showing the remittance of Rs. 57,500/- in favour of KPTCL (page 71 in the Amended Petition), the letter written by the Petitioner to the Chief Engineer (Ele), Transmission Zone, KPTCL on 29.11.2016 shows that the processing fee has been paid along with documents (Annexure-M2 to the Amended Petition), the letter written by the Petitioner to the Executive Engineer (Ele), TL & SS Division, KPTCL, Davangere on 29.11.2016 shows that, as per letter in Reference number 2 showing Annexure-M3 (to the Amended Petition) the Demand Draft has been drawn in the name of the Executive Engineer (Ele), TL & SS Division, KPTCL, Davangere towards payment of processing charges for evacuation approval, letter written by Chief Engineer (Ele), Transmission Zone, KPTCL, Tumkur in favour of Chief Engineer (Ele), Planning and Coordination, KPTCL, Bengaluru dated 09.08.2017 (Annexure-M4 to the

Amended Petition) shows that field report has been submitted along with single line diagram and layout sketches of existing 66/11 KV Bennihalli Substation, the copy of the Regular Evacuation approval (Annexure-Z to the Amended Petition) dated 23.12.2017 are produced.

- q) The Petitioner further submitted 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 dated 28.07.2017 (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. 83,80,000/- (Eight Three Lakhs and Eighty thousand only) as on 28.07.2017. A copy of the equipments for which order has been placed as against which advance amount has also been paid is produced as (Annexure-P to the Amended Petition). A copy of the communication issued by the Bankers refusing disbursement of loan is produced as (Annexure-Q & Q1 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. It was only on 24.08.2017 that the Respondent No.1 came forward to sign the supplementary PPA, after a delay of 98 days (from 19.05.2017 to 24.8.2017) from the directions issued by the Commission directing the parties to execute a supplementary PPA. A copy of the PPA dated 03.06.2016 signed by the Petitioner with the Respondent No. 1 is produced as Annexure R (to the Amended Petition). Copies of the communication dated 16.08.2017 and 05.12.2017 addressed to the Respondent No. 1 are produced as Annexure S & S1 (to the Amended Petition). The Supplementary PPA dated 24.08.2017 signed by the Petitioner with the Respondent No. 1 is produced as Annexure-T (to the Amended Petition).
- t) It is submitted that at 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 SPPA, 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 Supplementary PPA on 24.08.2017, the effective date up to which the solar project to be implemented is 24.08.2018.
- u) Apart from the above, the Petitioner urged the grounds as follows: -

### **GROUND**

- 3) For that as per the order dated 07.10.2016 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 07.10.2016. 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.
- 4) For that prior to the order dated 19.05.2017, the approval of the Commission was not in place since it was subject to a future event of execution of a supplementary PPA. As such, it is submitted that only upon the execution of the Supplementary PPA, as envisaged under order Dated 07.10.2016 read with RFP, the effective PPA would be complete. It is stated that the PPA dated 03.06.2016, in itself was an incomplete document and can only be considered to be complete when read along with the Supplementary PPA dated 24.08.2017.
- 5) 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.
- 6) It is stated that, apart from the project specific Force Majeure events that affected the project, all solar power projects in the State of Karnataka, including the Petitioner's project were affected by another Force Majeure Event, the introduction of the GST. Difficulties caused to the Developers on account of introduction of the GST has been acknowledged by the

Ministry of New & Renewable Energy. The Petitioner has achieved the financial closure on 20.03.2017 and has commissioned the project on 29.01.2018, does entitling itself to avail extension of 62 days as provided in the Official Memorandum (Annexure-X to the Amended Petition) dated 20.06.2018 passed by the MNRE. The Petitioner is therefore, seeking extension of 62 days due to imposition of GST as provided in the Official Memorandum.

- 7) 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.
- 8) Upon the said approval becoming effective, the rights and obligations of the parties start, including the fact that the zero date with respect to the obligation of implementing the solar project within 12 months, in terms of Article 8.5, being the date of execution of supplementary PPA i.e., 24.08.2017. Therefore, the obligation under Article 8.5 is to be implemented within 12 months from 24.08.2017.
- 9) For that the PPA cannot be said to have been executed or enforceable till the time the same has been granted approval by the Commission. In this regard, reliance may be placed on Judgement of the Appellate Tribunal dated 21.10.2011 In Appeal No. 51 of 2011 in case of M/s. Rithwik Energy Generation Pvt. Ltd. vs. Karnataka Power Transmission Corpn. Ltd. & Ors. which held that: -

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

- 10) For that it is a regulatory fact that a power project is funded through equity and debt components, with debt from financial institutions normally in the range of 70% to 80% of the total project cost. It is stated that no lender can grant loan, and disburse the said loan amount, until it has an approved PPA at hand. In the present case, since the approval of the Commission was to be made effective only pursuant to the execution of the Supplementary PPA dated 24.08.2017, the lenders were in a position to disburse funds only pursuant to the said SPPA.
- 11) It is further stated that even if the Petitioner exceeds the above timeline of 24.08.2018, the said Petitioner would be entitled to claim of SCOD based upon any Force Majeure events which may occur between 24.08.2017 and 24.08.2018.
- 12) 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 equipment, obtained execution approval etc., But, severe delay in issuing evacuation scheme and non-disbursement of funds left the Petitioner company heading slow in respect of fulfilment of registration of lands, delivery of equipments, and various other financial commitments related to the project.

- 13) 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.
- 14) 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.

- 15) The Ministry of Renewable Energy has also issued a communication addressed to all the State Governments wherein it has directed the competent State authorities to consider the case of extension of the time If there are delays of any kind on the part of State Government Authorities/PSUs like land allotment, transmission/evacuation facilities, connectivity permission or force majeure. It is therefore, submitted that



this Commission ought to consider the case of the Petitioner for extension since the delay resulted in the present case is on account of delay caused by the Respondents. Copy of the said communication issued by MNRE dated 28.07.2017 is produced herewith and marked as Annexure-U (to the Amended Petition).

- 16) 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: -

<b>Sl. No.</b>	<b>Description of FM Event</b>	<b>Period</b>	<b>No. of days delay</b>
1	Introduction of GST	1.7.2017 to 31.8.2017	62
2	Delay in signing of PPA	19.05.2017 (The date of KERC order declaring effective date to 24.08.2017 (Date of signing of SPPA)	96
3	Delay in issuing Evacuation approval	15.06.2016 (Date of filing Evacuation approval application) to 23.12.2017 (Date of issue of Evacuation approval)	555
<b>Total</b>			<b>713</b>

Total delay suffered by Petitioner project owing to the aforesaid force majeure events, duly considering overlapping events 397 days.

- 17) The Petitioner stated that despite delay of 397 days on account of aforesaid force majeure events, the Petitioner with all its best and committed efforts, Commissioned the project on 29.01.2018. 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).

18) The Tariff agreed by the parties under the PPA is Rs. 5.07/ 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 1<sup>st</sup> 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.

19) It could be seen that Tariff Rs. 4.36 per unit fixed by the Commission is made applicable to PPA's entered into before 01.04.2017 but which are not commissioned within the specified commercial operation date and achieve COD during the period from 01.04.2017 to 31.03.2018. The PPA in the present case was entered into on 03.06.2016 and commissioned on 29.01.2018 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. 5.07 per unit fixed under the PPA. Since the Tariff fixed under the PPA is

through bidding process, the generic Tariff order cannot be made applicable to the Petitioner. Even otherwise, since the PPA dated 03.06.2016 and the generic tariff which is now sought to be implemented for projects subsequently on 12.04.2017, the generic tariff cannot be made applicable retrospectively. The same is arbitrary and unreasonable, therefore the Petitioner is entitled to be paid a Tariff of Rs. 5.07/- with all this the Petitioner prays to allow the Petition as prayed for in the interest of justice and equity.

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

- a) The 1<sup>st</sup> Respondent filed statement of objections on 18.09.2018 has stated that, on 07.10.2016 the Commission has approved the PPA dated 03.06.2016 subject to certain modifications and the Respondent was directed to execute a suitable SPPA incorporating the modifications as suggested by the Commission. But the Petitioner filed a Petition in OP No. 49/2017 before this Commission seeking modification of the effective date under the PPA. This Commission has passed orders on 19.05.2017 altering the Effective Date as the date of approval of PPA dated 03.06.2016 by this Commission on 07.10.2016 instead of 25.05.2016.
- b) On 24.08.2017 the Petitioner executed SPPA as per the orders of the Commission. On 29.01.2018 the Petitioner interconnected its plant to the grid. It is the case of the Petitioner that effective date under the PPA should be the date of execution of SPPA dated 24.08.2017. The Petitioner contended that it could not commission the plant within SCOD due to

delay in granting of evacuation approval and Force Majeure Event. Further, it is submitted by the Petitioner that it is entitled to extension of time to commission the plant as it is affected by Force Majeure events. But the contention of the Petitioner in seeking relief wholly contrary to the terms of PPA. As per Article 21.1 of the PPA 'Effective Date' is the date on which this Commission approves the PPA. The date of Supplementary PPA was on 24.08.2017, which was executed incorporating effective date to be the date of approval of PPA by the Commission as per orders dated 19.05.2017. Therefore, the contention of the Petitioner that effective date is to be date of execution of supplementary PPA is untenable.

- c) As per Article 4 of the PPA, the Petitioner herein is required to satisfy Conditions Precedent within 8 months from Effective Date. Therefore, the petitioner herein is required to achieve condition precedents on or before 06.06.2017. One of the conditions precedents is that the Petitioner was required to furnish in the documentary evidence of having the clear title and possession of the land required for the Project in the name of the Developer. However, the Petitioner has not produced any document showing that the Petitioner has the clear title and possession of land till date. It is submitted that the Petitioner herein has not taken steps within the reasonable timeframe to achieve conditions precedent. Therefore, the Petitioner has not acted in a diligent manner and the said delay can only be attributed to the Petitioner.
- d) It will be of relevance to note that the Petitioner herein can be excused for not achieving conditions precedent only when it is affected by an

event of Force Majeure Event or if any of the activities is specifically waived in writing by the Respondent. It is submitted the PPA clearly sets out the events which are force majeure events, in Article 14 of the PPA. Perusal of the said clause would make it evident that the delays sought to be termed as events of force majeure are not in fact events that come under the purview of the said provision. Delay in obtaining approvals cannot be considered to be events of force majeure. Further, Article 5.1 clearly sets out the Obligations of the Developer. It clearly states that it is the responsibility of the Developer to obtain all clearances, consents etc. Hence, knowing fully well what its obligations under the contract are, the Petitioner is now attempting to take advantage of its own wrong. The reasons assigned for the delay in commissioning of the project cannot be attributed to the Respondents. The onus of obtaining all necessary approvals was on the Petitioner herein as per Article 5.1.1 of the PPA. However, the Petitioner failed to do so.

- e) It is pertinent to note that the Petitioner herein has to pay damages to the Respondent in the event the Petitioner fails to achieve conditions precedent and scheduled commissioning date within the stipulated time frame in accordance with the Article 4.3 and 5.8 of the PPA. The same is in keeping with what has been agreed to by the parties. Admittedly, in the present case Petitioner has not achieved Condition Precedents and commissioning within the stipulated timeframe under the PPA. Therefore, the Petitioner herein is required to pay liquidated damages as per the PPA.

- f) That the PPA clearly states that in the event of delayed execution of the project, the Petitioner would only be entitled to tariff be the lower of the rate mentioned in the PPA, namely Rs. 5.07 per kwh and the varied tariff applicable as on the date of commercial operation. Therefore, the Petitioner is entitled for tariff as per the Generic Tariff Order dated 12.04.2017 that was in operation on the date when Petitioner commissions the plant.
- g) By way of the present petition, the Petitioner is attempting to bypass its obligations under the PPA. It ought to be noted that the Respondent herein is a public utility and non-receipt of electricity within the stipulated time frame comes at a price. The Petitioner ought not to be absolved of its obligations and duties under the PPA on the ground of delay, which is in fact caused wholly and solely by the Petitioner itself and at any rate not attributable to the Respondent.
- h) The averments in para 1 to 11 are all matters of record, thereby, they need not specifically traversed. The other averments made in remaining paragraphs of the Petition are also untenable and denied. Further, the statement of the Petitioner that the non-availability of evacuation approval and non-signing of Supplementary PPA has put the Petitioner in severe financial stress and hindered the Petitioner from implementing the project is untenable. The fact that the Petitioner has commissioned the project with considerable delay proves that the Petitioner is not diligent and serious in implementing the plant. Thereby, it is clear that the Petitioner has not made out his case to call for any kind of intervention or help from

this Commission, hence, the Petitioner is not entitled to extension of time as prayed for, with this he prays to dismiss the Petition in the interest of Justice and equity.

- i) The Respondent No. 1 has stated that, it is the contention of the Petitioner that the uncertainty which hovered over implementation of GST has adversely affected its project and caused delay in achieving the Scheduled Commissioning Date. Further, the Petitioner is seeking extension of time by placing reliance on Official Memorandum dated 20.06.2018 issued by MNRE, which is untenable because the said Official Memorandum is only advisory in nature. The Petitioner was required to make a request for extension with the implementing agencies by producing all documentary evidences in support of its claim. The onus are on the Petitioner to explain satisfactorily that how the implementation of GST was affected the Petitioner implementing its project, however, the Petitioner has not produced any documents.
- j) Further the contention of the Petitioner, that uncertainty over tax slabs and timeline for implementation of GST has adversely affected the Petitioner project is untenable. As per Article 14.5.1 of the PPA, the affected party has to give the other party a notice of force majeure no later than 7 days after the date on which such party knew or should reasonably have known about the commencement of the force majeure. In the case on hand, the Petitioner has failed to issue any notice of force majeure within the required time periods. It is submitted that the Petitioner has made vague statements without any evidence in respect to implementation of

GST causing hurdles in executing the project. Therefore, the reasons assigned for seeking for extensions are wholly untenable.

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



Averment that there was delay in signing of SPPA, issuing evacuation approval and bay estimate is denied. With this he prays to dismiss the Petition.

- m) 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.
- n) 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.
- o) 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.
- p) The Third Respondent has filed statement of objections on 18.08.2021 stating that, at the outset no reliefs have been claimed against Respondent No. 3. However, certain allegations with regard to delay in

granting evacuation scheme have been made against this Respondent are denied.

- q) It is the case of the Petitioner that the Respondent No. 3 herein, delayed in granting evacuation scheme which resulted in delay in finalization of location, plant design, bay erection, and procurement of solar power plant components, following which the Commissioning of the solar power plant was delayed. In response to the allegations made against the Respondent No.3 herein it is submitted that Respondent No. 3 has granted approvals within a reasonable time period. The Petitioner has alleged delay on the part of Respondent only to camouflage its lackadaisical attitude in implementing the project.
- r) As per Article 4.1 of the PPA, the Petitioner was required to fulfil the conditions precedent within 8 months from the effective date. The Petitioner on 15.06.2016 approached the Respondent No.3 herein requesting for approval for evacuation of power from Behnapalli substation. On 07.11.2016, the Petitioner requested for a change of substation to Uchangidurga substation. Pursuant to the change in substation, on 21.11.2016, the Respondent No.3 herein addressed a letter to the Petitioner for payment of the processing fee and requested it to furnish the copy of the PPA. In the meanwhile, the Petitioner made the requisite payment on 29.11.2016. It is submitted that due to the change in the sub-station, the Respondent No.3 herein had to initiate the load flow studies all over again. After a lapse of 7 months, on 13.07.2017 the Petitioner yet again requested the Respondent No.3 herein to conduct

load flow study for evacuation of power from Bennihalli sub-station. In furtherance to the same, the Respondent No. 3 herein has granted tentative evacuation approval to the Petitioner on 24.07.2017. The Petitioner was also informed that it has to purchase the adjacent land for construction of 11 KV DP structure for terminating the evacuation line with SCADA operational tariff metering arrangement at Bennihalli substation. The Petitioner only on 23.12.2017 has accepted the tentative evacuation approval. On the very same day i.e., on 23.12.2017, the Respondent No. 3 has granted the regular evacuation approval to the Petitioner.

- s) From the above-mentioned facts, it is clear that Respondent herein has granted evacuation approval well within a reasonable time period. It is submitted that any delay in executing the project can only be attributed to the Petitioner as it was the Petitioner who changed the location of the sub-station twice. The Petitioner ought to have surveyed the land thoroughly before applying for evacuation approval. Nonetheless, the Respondent herein has granted approvals within a reasonable time. The Petitioner is suppressing these facts to shift the burden of the delay onto the Respondents. It is submitted that any delay in commissioning the project is solely due to Petitioner's indecisive approach towards the project and hence, the contention that the Respondent herein is responsible for delay in commissioning the plant is untenable. Therefore, the present petition deserves rejection. The other averments made in the Petition in the remaining paragraphs are all denied by this Respondent.

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

- 21) 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 S & S1 (to the Amended Petition) and Annexure – E (to the rejoinder). There has been no response by the Respondents to these communications issued by the Petitioner requesting extension of time, which shows that the Respondent did not attached any significance to the requirement of notifying them on the Force Majeure event. Further stated the Petitioner is also entitled the benefit of the orders passed by the Commission in OP 15/2018 & OP 29/2018 (M/s Adani Green Energy UP Limited V/s HESCOM & Others, where in the Commission has up held that demonetization is a Force Majeure Event that has affected the developers in commissioning the plant as per the terms of PPA. In this back ground the Learned Counsel for the Petitioner prays to allow the Petition in the interest of justice and equity.
- 22) Heard the arguments, perused the written submissions on both sides and the records.
- 23) At this stage the below mentioned issues arise for our consideration.
1. **Issue No. 1:** Whether the effective date is to be the date of execution of SPPA dated 24.08.2017 as claimed by the Petitioner instead of PPA dated 03.06.2016 as per Article 3.1 of the PPA?
  2. **Issue No. 2:** Whether the Petitioner proves that he is entitled for extension

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

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

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

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

25) 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 02.04.2016 intimating that as "propose to sign PPA, sometime after 20<sup>th</sup> 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 03.06.2016. The effective date as per Clause 3.1 of the PPA reads as under: -

*“3.1: Effective Date*

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

- 26) The Respondent No. 1 sent the PPA to the Commission for approval. The Commission granted its approval to the PPA vide an order (Annexure-F to the Amended Petition) dated 07.10.2016 with a direction to execute Supplementary PPA for incorporating certain correction/modifications as stated in the said order.
- 27) The Petitioner being aggrieved by the Official Memorandum (Annexure-E to the Amended Petition) dated 27.05.2016, issued by the 2<sup>nd</sup> 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. 49/2017 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 2<sup>nd</sup> Respondent to the effect that as: -

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

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

28) During the proceedings of this case on hand, on 18.09.2018 this Commission has passed orders as “LD to be deducted after notice to the Petitioner”. Aggrieved by this order the Petitioner has preferred an appeal in Appeal No. 14/2019 before Hon’ble Appellate Tribunal for Electricity, New Delhi. After hearing both the sides Hon’ble Appellate Tribunal for Electricity, New Delhi has disposed off the appeal by passing orders dated 08.02.2021 as stated below: -

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

In the above orders the APTEL has found that the KERC has to decide the issue pending between the parties by following directions mentioned in the order.

29) ‘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.'

30) In the present case vide letter (Annexure-F to the Amended Petition) dated 07.10.2016, the Petitioner and the 1<sup>st</sup> Respondent were informed the approval of the Commission to the PPA dated 03.06.2016. Therefore, the date 07.10.2016 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.

31) The Petitioner has contended that, as the letter (Annexure-F to the Amended Petition) dated 07.10.2016 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.

32) The letter dated 07.10.2016 (Annexure-F to the Amended Petition) communicates approval of the Commission to the PPA dated 03.06.2016 executed between the parties in respect of development of 2 MW (AC) Solar Power Project in Harappanahalli Taluk, Davangere District, subject to certain corrections/ modifications being incorporated in the said PPA by entering into a suitable SPPA. Therefore, it can be said that the approval of PPA dated



03.06.2016 communicated by letter dated 07.10.2016 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.

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

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

- 34) In the case on hand, the 1<sup>st</sup> Respondent entered into PPA with Petitioner on 03.06.2016. As per Article 3.1 of the PPA the effective date would be the date of getting concurrence from the Commission. The Commission granted approval of the PPA on 07.10.2016. The Petitioner could act upon PPA as per its terms and conditions only from 07.10.2016. Therefore, the prayer of the Petitioner to treat the effective date as on 24.08.2017 the date on which SPPA signed cannot be accepted, thereby, the Issue No.1 is held in negative.
- 35) **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?

- 36) The present Petition is filed seeking for a declaration that the effective date with respect to Article 8.5 of the PPA dated 03.06.2016, is 24.08.2017 i.e., the date of execution of the Supplementary PPA and also in alternative sought for extension of time to the Petitioner for fulfilling its obligation under the PPA on the grounds of Force Majeure Events.
- 37) The Petitioner has taken three major grounds under the head of Force Majeure Events for extension of time in commissioning the power project, which are detailed as below: -
- a) Introduction of GST (62 days).
  - b) Delay in signing of SPPA (96 days).
  - c) Delay in issuing Evacuation approval (555 days).

The total delay suffered by the Petitioner's project owing to the afore stated Force Majeure events, duly considering over lapping events is 397 days.

38) Introduction of GST (62 days): -

- i) During the course of arguments, the Learned Counsel for the Petitioner has submitted that, all solar power projects in the State of Karnataka including the Petitioner's project were affected by introduction of the GST. Difficulties caused to developers on account of introduction of the GST has been acknowledged by the MNRE in the Office Memorandum (Annexure-X to the Amended Petition) dated 20.06.2018. The Petitioner having achieved financial closure on 20.03.2017 and commissioned the plant on 29.01.2018. 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 02.03.2021. The Petitioner has misled by stating that, the Office Memorandum dated 20.06.2018 issued by the Ministry of New and Renewable Energy (MNRE) would be applicable to the Petitioner. But the MNRE Official Memorandum, requires that the affected party shall provide documentation to show that there was a disruption in the process and therefore, the project could not be commissioned as per the terms of the PPA. But the Petitioner till date, failed to produce any documentary evidence of its claims before this Commission. In this regard the Learned Counsel for the Respondents referred the judgement passed in M/s Adani Green Energy (UP) Limited Vs BESCO in OP No. 02/2018 dated 15.09.2020. In this judgement the Commission has held that the affected party/Petitioner is required to produce substantial documentary evidence in support of its claim that the commissioning of the project has been affected by the GST induced disruptions between the period from 01.07.2017 to 31.08.2017. Without providing cogent documentation the relief sought by the Petitioner cannot be granted. Apart from that as per Article 14.3.1 of the PPA, 'introduction of GST cannot be treated as Force Majeure event'. Again Article 14.5.1 of the PPA states that

'the affected party, allegedly the Petitioner is required to issue a notice to the Respondent within a period of 7 days from the occurrence of the Force Majeure event', but the Petitioner failed to do so. The Commission in various judgements has stated that it is trite law that the Force Majeure Clause in PPA has to be strictly construed and if no notice had been issued as contemplated under the Force Majeure Clause describing the event, the Petitioner cannot seek extension of time under the said clause. With this the Learned Counsel for Respondents submitted, the Petitioner is not entitled for any relief under this ground.

- 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 examining the impact of GST Law, issued Official Memorandum dated

20.06.2018 wherein, it has extended the SCOD for the solar projects for a period of 62 days. By way of said Official Memorandum (Annexure-X to the Amended Petition) dated 20.06.2018.

- iv) 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.”*

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 07.10.2017. But he failed to furnish any documentary evidence in this regard. Thereby, the Petitioner is not entitled for extension of time under this head.

- 39) **Delay in signing of SPPA (96 days):** - During the course of arguments, the Learned Counsel for the Petitioner has submitted that, the series of events explained in that Petition along with supporting documents would clearly

show the impact on the progress of the project in the absence of clarity on the 'effective date' and also that of delay in furnishing the SPPA. A bare perusal of the communications (Annexure-G to the Amended Petition) dated 27.05.2017, (Annexure-S to the Amended Petition) 16.08.2017 and (Annexure-S1 to the Amended Petition) 05.12.2017 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 & Q1 to the Amended Petition). The Petitioner faced several financial hurdles because of the sudden withdrawal by their Bankers to fund the project. Loan amount was disbursed subsequent to signing of the SPPA and making a copy of the same available to the Bankers. Further stated immediately after the order was passed by the Commission on 19.05.2017 clarifying the effective date, the Petitioner requested the Respondent No. 1 to come forward to sign the SPPA. Even as late as 16.08.2017 the Petitioner requested the Respondent No. 1 to sign the SPPA, these communications falsify the claim of the Respondent that the Petitioner kept postponing the execution of the SPPA for want of Board approval, which the Petitioner company can obtain any time, the Respondent indicates their readiness to sign SPPA. Therefore, Learned Counsel for Petitioner submitted the delay in executing SPPA by the 1<sup>st</sup> 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.

- 40) 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.
- 41) Further the Learned Counsel for the Respondents submitted, the 1<sup>st</sup> Respondent entered into PPA with Petitioner on 03.06.2016. As per Article 3.1 of the PPA the effective date would be the date of getting concurrence from the Commission. The Commission granted approval of the PPA on 07.10.2016. 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 2<sup>nd</sup> 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 commissioning 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.

42) **Delay in issuing Evacuation approval (555 days):** - During the course of arguments the Learned Counsel for the Petitioner has submitted that, he had requested the Respondent No. 3 on 15.06.2016 for evacuation approval (Annexure-M to the Amended Petition), the letter written by KPTCL to the Petitioner dated 21.11.2016 (Annexure-M1 to the Amended Petition) shows intimating the Petitioner to remit Rs. 50,000/- as processing



fee plus applicable service tax at 15% on the processing fee within a period of one month from the date of intimation, as per copy of the receipt dated 29.11.2016 shows that the Petitioner has remitted Rs. 57,500/- in favour of KPTCL (page 71 in the Amended Petition), the letter written by the Petitioner to the Chief Engineer (Ele), Transmission Zone, KPTCL on 29.11.2016 shows that the processing fee has been paid along with documents (Annexure-M2 to the Amended Petition), the letter written by the Petitioner to the Executive Engineer (Ele), TL & SS Division, KPTCL, Davangere on 29.11.2016 shows that, as per letter in Reference number 2 showing Annexure-M3 (to the Amended Petition) the Demand Draft has been drawn in the name of the Executive Engineer (Ele), TL & SS Division, KPTCL, Davangere towards processing charges for evacuation approval, letter written by Chief Engineer (Ele), Transmission Zone, KPTCL, Tumkur in favour of Chief Engineer (Ele), Planning and Coordination, KPTCL, Bengaluru dated 09.08.2017 (Annexure-M4 to the Amended Petition) shows that field report has been submitted along with single line diagram and layout sketches of existing 66/11 KV Bennihalli Substation. On 24.07.2017 the Tentative evacuation Scheme was issued (Annexure-K to the Amended Petition) and was accepted by the Petitioner on 25.09.2017 (Reference number 10 in Annexure-Z to the Amended Petition) and on the same day the Petitioner made a request for allotment of bay. The regular evacuation approval was given on 23.12.2017 (Annexure-Z to the Amended Petition). It could be seen that there has been a delay of 274 days in granting bay approval and this delay has been major contributing

factor to commissioned the project on time. In this regard, the Learned Counsel for the Petitioner has placed reliance of the orders passed by the Commission in OP No. 15/2018 in M/s. Adani Green Energy (UP) Limited Vs HESCOM & Others dated 11.11.2020 and OP No. 29/2018 in M/s. Adani Green Energy (UP) Limited Vs HESCOM & Others dated 11.11.2020, OP No. 188/2017 Cambria Solar Private Limited Vs GESCOM dated 23.03.2021 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.

43) By way of reply the Learned Counsel for the Respondents has submitted that, the ground urged by the Petitioner is baseless because on 15.06.2016, the Petitioner approached the Respondent No. 3 herein for regular evacuation approval. Subsequently, the Respondent No. 3 herein on 21.11.2016 requested the Petitioner to remit the processing fee and to furnish the details of the facilitation fees paid to Respondent No. 2/KREDL. The Petitioner paid the requisite fee on 29.11.2016 (Reference No. 7 to Annexure-K to the Amended Petition) and on 24.07.2017 (Annexure-K to the Amended Petition) tentative evacuation approval is issued in favour of the Petitioner. It is submitted that the Respondent No. 3 has granted Regular evacuation approval on 23.12.2017. It is pertinent to note that as per Article 4 the Petitioner had to achieve conditions precedents within 8 months from the effective date i.e., 07.10.2016. In the present case, the Petitioner is granted regular evacuation approval on 23.12.2017, much

before the deadline achieve conditions precedent. Such being the case, there is no delay in granting evacuation approval by KPTCL.

44) Further it is stated that, Respondent has granted evacuation approval well within a reasonable time period. That any delay in executing the project can only be attributable to the Petitioner as it was the Petitioner who changed the location of the substation twice. The Petitioner ought to have surveyed the land thoroughly before applying for evacuation approval. Nonetheless, the Respondent herein has granted approvals within a reasonable time. The Petitioner is suppressing these facts to shift the burden of delay on to the Respondents. It is stated that, any delay in commissioning the project is solely due to Petitioner's indecisive approach towards the project and hence the contention that the Respondent herein is responsible for delay in commissioning the plant is untenable. Therefore, any delay in commissioning of the plant is wholly on part of the Petitioner and hence the present Petition deserves rejection.

45) Article 5.4 of the PPA clearly stipulates that the Petitioner shall be responsible for evacuation of power from the power project to the nearest delivery point. It is stated that even though the responsibility of finding suitable land for establishment of terminal bay is on the Petitioner, nonetheless, the Respondent herein has put in sincere effort to facilitate the implementation of the project. Thus, the Respondent herein has always acted diligently to facilitate the implementation of the Petitioner's project. Therefore, any delay in commissioning of the plant is wholly on part of the Petitioner and hence, the present petition deserves rejection.

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

47) We have gone through the documents furnished by the Petitioner in this regard. The Petitioner has applied for evacuation approval at Harappannahalli Taluk, Davangere District (Annexure-M to the Amended Petition) to KPTCL dated 15.06.2016. In turn he got regular evacuation scheme from the KPTCL with communication (Annexure-Z to the Amended Petition) dated 23.12.2017. In between he had entered into an agreement with M/s Gita Power & Infrastructure Private Limited for Engineering Procurement and Construction Agreement for development and setting up of 2 MW (AC) solar power project on turnkey basis (Annexure-L to the Amended Petition) dated 07.07.2016. On perusal of Annexure-H (to the Amended Petition) dated 19.12.2016, the letter written

by Petitioner to the S. Sathyanarayana Shivamogga for service order for providing land and other related works in respect of land parcels of around 12 Acres +/- 10% in Bennihalli Village, Harappanahalli Taluk, Davangere District, shows that the Petitioner has proceeded with further work for allotment of land to develop solar power project. And he had applied for financial assistance of Rs. 9.98 Crores with Sri Hari Vallabha Enterprises and Investments Private Limited, Chennai, in turn the request for financial assistance is approved by the Sri Hari Vallabha Enterprises and Investments Private Limited, Chennai, accordingly, a letter is issued to the Petitioner dated 20.03.2017 (Annexure-J to the Amended Petition). All these documents show that the Petitioner has suffered certain days of delay in getting evacuation approval. The detailed description is placed here with as follows: -

**Table 1**

<b>Sl. No.</b>	<b>Date</b>	<b>Description of the documents</b>	<b>Annexures</b>
1.	15.06.2016	Application given by the Petitioner to KPTCL for evacuation approval at Harappanahalli Taluk, Davangere District	"M" filed along with Amended Petition
2.	21.11.2016	Letter written by Petitioner to the KPTCL for having made the payment of Rs. 50,000/- plus applicable service tax towards processing charges for evacuation approval	"M1" filed along with Amended Petition
3.	29.11.2016	Letter written by Petitioner to KPTCL for having paid process fee and further requested to conduct load flow study/system studies	"M2" filed along with Amended Petition
4.	29.11.2019	Letter written by Petitioner to Executive Engineer, E1 TL & SS Division, KPTCL, Davangere stating	"M3" filed along with Amended Petition

		DD has been drawn in the name of Executive Engineer, E1 TL & SS Division, KPTCL, Davangere towards processing charges for evacuation approval	
5.	09.08.2017	Letter written by Chief Engineer, KPTCL, Transmission Zone, Tumkur to the Chief Engineer, Planning & Coordination, KPTCL, Bengaluru regarding submission of field report	"M4" filed along with Amended Petition filed on 19.04.2021
6.	23.12.2017	Letter written by KPTCL to the Petitioner regarding regular evacuation scheme for proposed 2 MW solar power plant of the Petitioner in 66/11 KV Bennihalli Substation in Harappanahalli Taluk, Davangere District	"Z" filed along with Amended Petition filed on 19.04.2021

**Table 2**

Sl. No.	The difference of Period shown in Annexure-M (filed with Amended Petition) and Annexure-Z (filed with Amended Petition)	Days
1.	15.06.2016 to 30.06.2016	15 days
2.	July 2016	31 days
3.	August 2016	31 days
4.	September 2016	30 days
5.	October 2016	31 days
6.	01.11.2016 to 07.11.2016	07 days
<b>Total</b>		<b>145 days</b>
7.	25.09.2017 to 30.09.2017	5 days
8.	October 2017	31 days
9.	November 2017	30 days
10.	01.12.2017 to 23.12.2017	22 days
<b>Total</b>		<b>88 days</b>
<b>Total</b>		<b>233 days</b>

Therefore, the Petitioner has suffered a delay of 233 days in getting evacuation approval.

48) During the course of arguments, the Learned Counsel for the Petitioner has submitted that, he has placed all the communications sent to the

Respondents intimating them on the Force Majeure Events effecting the timely commissioning of the project. But there was no response by the Respondents to the communications issued by the Petitioner requesting extension of time which shows that the Respondent did not attach any significance to the requirement of notifying them on Force Majeure Event. Thereby, the allegations of the Respondents that no Force Majeure notice was given by the Petitioner are baseless and false.

49) 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.*

50) 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 are should reasonably have known or the commencement of event of Force Majeure. In the case on hand on perusal of the letter written by the Petitioner to the BESCOM 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. 49/2017 (Annexure-A to the rejoinder). Another letter written by the Petitioner to the BESCO dated 16.08.2017 (Annexure-S to the Amended Petition) shows that, the Petitioner has communicated BESCO non-signing of the Supplementary PPA has had a huge adverse financial impact on the company and the banks have not disbursed the loan even though the Petitioner had obtained financial approval way. Another letter written by the Petitioner to the BESCO dated 05.12.2017 (Annexure-S1 to the Amended Petition) reads as: -

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

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

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

51) Annexure-F (filed along with rejoinder) is a letter written by the Petitioner on 03.10.2018 to the KREDL with request extension in Scheduled Commissioning

Date of solar power plants, on account of GST related issues drawing attention towards Official Memorandum dated 20.06.2018 issued by MNRE.

- 52) All these documents establish that the Petitioner had complied in the provisions under Clause 14.5.1 of PPA. Though the Respondents have taken contention that the Petitioner has not followed strictly the Clauses of Force Majeure as per PPA, but nothing is placed in support of their contention. Thereby, to this extent the arguments addressed by the Learned Counsel for the Respondents holds no water.
- 53) In view of the discussions made above and also in Para 47 at Page No. 46 in Table-2, the table disclose the time taken for each event of delays for consideration, the prayer of the Petitioner is falls within the parameters as discussed under Force Majeure events and in the present case on hand though the Petitioner has suffered delay in signing of SPPA, issuing evacuation approval and introduction of GST Law has commissioned the SCOD on 29.01.2018.
- 54) 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 HESCOM and in OP No. 188/2017 dated 23.03.2021 between Cambria Solar Private Limited Vs GESCOM. 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.

- 55) We have gone through the judgements passed by Hon'ble APTEL in the case of Chennammagathihalli Solar Power Project Vs BESCO in appeal No. 351/2018, come to the aid of the Petitioner in which it is held as: -

*"8.10) Regarding force majeure events, Clause 8.3 of PPA, it is noted that under sub-clause (vi), it is provided that "inability despite complying with all legal requirements to obtain, renew or maintain required licenses or legal approvals" will also attribute to force majeure. In view of these provisions under the PPA, we are of the opinion that the delay in receiving various approvals / clearances by the Govt. and its instrumentalities which were beyond the control of the Appellants should also be treated as an event of force majeure under sub-clause (vi) of clause 8.3 which has directly and severely affected the execution of the solar projects. To be more specific, if the approval for land conversion is received on last day of September, 2016, it becomes extremely difficult to achieve COD on 03.01.2017 as envisaged under the PPA. Moreover, the grant of extension of the Scheduled COD was accorded by Govt. of Karnataka and in turn, by first Respondent after*

*complying with due procedures and applying its diligence and prudence under the four corners of the PPA and not beyond."*

*"8.15) In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the 1<sup>st</sup> 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 1<sup>st</sup> 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."*

56) 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 no 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”

57) 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 license or legal approval will also amount to Force Majeure Event. Therefore, we are of the opinion that if at all there was delay in receiving various clearances/approvals by the State Government and its instrumentalities which are beyond the control of the Appellants, the same has to be treated as event of force majeure, since the same would directly and seriously affect the implementations of the solar project."*

As per observations made herein above judgements relied by the Counsel for the Petitioner and the grounds urged by the Petitioner in the Petition fall under the Clause of Force Majeure as described in the PPA.

- 58) The Petitioner in his Petition has sought for declare that the effective date with respect to Article 8.5 of the PPA dated 03.06.2016, is 24.08.2017 i.e., is the date of execution of Supplementary PPA. This prayer cannot be granted as because we have already answered to Issue No. 1 in Negative.
- 59) 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 114 days delay in achieving the SCOD which is detailed as here under:-

Sl. No.	Period	Days
1.	07.10.2017 to 31.10.2017	25 days
2.	November 2017	30 days
3.	December 2017	31 days
4.	01.01.2018 to 28.01.2018	28 days
<b>Total</b>		<b>114 days</b>

- 60) 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."*

61) As per the above Clause in case of extension occurring due to reasons specified in Clause 5.7.1 any of the dates specified therein, can be extended subject to the condition that the Scheduled Commissioning date would not be extended by more than 6 months. In the present case on hand, the Petitioner has taken 3 major contentions i.e., delay in signing of SPPA, issuing evacuation approval and introduction of GST Law. As per the observations made by the Hon'ble APTEL in Appeal No. 351/2018 in the matter of Chennamangathihalli Solar Power Project LL. P Vs BESCO & another case, dated 14.09.2020, the KERC as being a State Regulator it has jurisdiction to look into affairs of ESCOM in purchase and supply of powers in the larger interest of Consumers, therefore,

the KERC can Suo Motto interfere in the matter which is in dispute between the parties.

- 62) The petitioner stated that as per Article 4.1 of PPA, the petitioner was required to achieve the Conditions Precent within 8 months from the effective Date. In view of the same, the petitioner approached respondent-3 KPTCL for evacuation approval on 15.06.2016 for approval of evacuation of power from Bennehalli substation. Until 07.11.2016, there was no further correspondence from KPTCL for having acted upon the request of the petitioner. There was a gap of about 145 days in taking forward the proposal for evacuation approval.
- 63) On 07.11.2016, the Petitioner has requested the KPTCL for approval of evacuation of power from Bennehalli to Uchangidurga substation, which is ascertained from the KPTCL letter dated 21.11.2017 as in reference No 3 and under reference No 1 in another letter dated 29.11.2016 addressed to the Executive engineer, TL&SS, Davangere. In the meanwhile, the petitioner paid the processing fee of RS 57,500/- in response to KPYCL letter 21.11.2016, and it is not clear from this letter to which of the substations the processing free was claimed from the developer. However, the said processing fee was paid on 29.11.2016 for which a receipt is placed in the petition (page 71) and intimated to the CEE, Transmission one, Tumakuru and another letter of the same date 29.11.2016 was addressed to the Executive engineer, TL&SS, Davangere, claiming therein the evacuation approval to Uchangidurga substation, Annexure-M2.
- 64) Again, there was a gap in processing the evacuation approval to Uchangidurga substation for about 29.11.2016 to 24.07.2017 for about 235 days

without any explanation. The petitioner has requested the KPTCL for approving evacuation to Bennehalli substation on 13.17.2017, as can be ascertained from the tentative evacuation letter dated 24.07.2017 in which reference 5 is referred to the requisition dated 13.07.2017.

- 65) The tentative evacuation was accepted by the petitioner on 25.09.2017, as ascertained from the regular evacuation approval letter dated 23.12.2017 (Annexure-Z to the Amended Petition). Upon acceptance of tentative evacuation on 25.09.2017 (Reference No. 10 in Annexure-Z to the Amended Petition), KPTCL took about 88 days for issuing the regular evacuation. It could be seen from regular evacuation scheme letter dated 23.12.2017 (Reference No. 11) the 143<sup>rd</sup> Land Sparing Committee held on 26.08.2017. As there was no explanation as to the delay 88 days (from 25.09.2017 to 23.12.2017) on the part of KPTCL which can be considered as Force Majeure event. As narrated above, KPTCL has failed to explain the delay in processing evacuation proposals even inspite of change in location.
- 66) There was delay of 114 days from SCOD dated 07.10.2017 to actual date of commissioning on 29.01.2018 on the part of petitioner in ensuring commissioning of the petitioner's solar project. Considering the above stated delays in processing the evacuation approval by the KPTCL, Same is allowed as force majeure event and considered the plant was commissioned within the extended scheduled commissioning date. Accordingly, issue 2 is answered.
- 67) In the present case the Petitioner has invested substantial amount in commissioning of Solar Power Project. Taking into consideration, all these facts and circumstances of the case as well as guidelines/directions given by

Hon'ble Supreme Court as well as Hon'ble APTEL, this Commission found that the Petitioner is entitled for extension of 114 days from 07.10.2017 as stipulated in PPA. Hence, we are of the opinion that the Petitioner is entitled for the relief of extension of 114 days as he had commissioned the SCOD (Annexure-Y to the Amended Petition) on 29.01.2018. With this we answer Issue No. 2 in affirmative by holding that the Petitioner is entitled for extension of 114 days from 07.10.2017.

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

69) 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 114 days from 07.10.2017, he is entitled for the tariff as agreed in PPA. Hence, the Petitioner is entitled for Rs. 5.07/kWh tariff. Accordingly, this Issue No. 3 is answered accordingly.

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

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

### **ORDER**

- a) The Petition is allowed.
- b) The delay of 114 days is condoned in commissioning of Solar Power Project in Harappanahalli Taluk, Davangere District.
- c) Consequently, the SCOD is extended till 29.01.2018, and the Petitioner is entitled for a Tariff of Rs. 5.07/kWh as agreed in PPA (Annexure-R to the Amended Petition).
- d) The Petitioner is not liable to pay any damages or liquidated damages in view of extension time.

sd/-

(SHAMBHU DAYAL MEENA)  
Chairman

sd/-

(H.M. MANJUNATHA)  
Member

sd/-

(M.D. RAVI)  
Member