

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 9th July, 2019

Present:

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

OP No.160/2017

BETWEEN:

M/s. Chirasthaayee Saurya Ltd.,
Flat No. 78, Electronic City,
Hosur Road,
Bengaluru – 560 100.

.. **PETITIONER**

[Represented by Smt. Poonam Patil, Advocate]

AND:

1) Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar
Hubballi – 580 029.

[Represented by Indus Law, Advocates]

2) The Karnataka Renewable Energy Development Limited,
No.39, "Shanthigruha"
Bharath Scouts and Guides Building
Palace Road,
Bengaluru – 560 001.

.. **RESPONDENTS**

[Represented by Shri Rakshith Jois Y.P., Advocate]

ORDERS

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003, praying to:
- (a) Hold and declare that the Scheduled Commercial Operation Date (SCOD) stands extended to the period corresponding to the time taken for grant of Section 109 approval (225 days) and consequently declare that the Commercial Operation Date shall be achieved within 225 days from the Effective Date i.e., COD, to be on 19.05.2018.
 - (b) Direct the Respondent No.1 to enter into a Supplementary Power Purchase Agreement (SPPA) with the Petitioner, immediately, with the Scheduled Commercial Operation Date as 19.05.2018.
 - (c) Set aside the communication bearing No.HESCOM/GH(T)/PTC/2062/17-18, dated 31.08.2017 (ANNEXURE-AW), issued by the Respondent No.1.
 - (d) Hold and declare that the time to complete the Conditions Precedent by the Petitioner shall be concurrent to the Scheduled Commercial Operation Date i.e., 19.05.2018.
 - (e) Pass suitable directions, restraining the Respondents from imposing any penalty / damages under clause 4 of the PPA including, but not limited to, invoking the Bank Guarantees furnished by the Petitioner under Clause 4.4 of the PPA.
 - (f) Pass any such further Order(s), as deemed fit and proper in the facts and circumstances of the case.

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- 2) The facts of the case are as follows:
- (a) The Petitioner is a Company, a wholly owned subsidiary and Special Purpose Vehicle (SPV) of Tata Power Solar Systems Limited, incorporated under the Companies Act, 2013.
- (b) The Government of Karnataka had resolved to undertake development of 1200 MW of Solar Power in Karnataka to be implemented in 60 Taluks through private sector participation. In pursuance of the same, the Respondent No.2 invited proposals by "Request for Proposal (RFP)" dated 20.11.2015 containing terms and conditions for selection of Bidders. The parent company of the Petitioner, Tata Power Solar Systems Limited placed a bid for setting up of 3 projects in the State and the same was accepted by the Respondent No.2. The present Petition concerns with one of the Projects at Kanakagiri Town in Gangavathi Taluk, Koppala District, for development of 17 MW capacity Solar Power Plant. The Respondent No.2 issued a Letter of Award (LOA) and Allotment Letter (LOA) bearing letter no. KERDL/07/RPO/GC/1200MWs-269/2016/1349 dated 31.03.2016. The LOA was acknowledged by the Tata Power Solar Systems Limited on 07.04.2016. As per clause 3.4.7 of the RFP, the developers were required to execute the Power Purchase Agreements (PPAs) with the ESCOMs within 30 days from the date of receipt of the LOA. However, on account of technical difficulties faced by the Developers with regard to creation of SPVs and other related issues, the time for execution of the PPAs was extended by the Respondent No.2 by 30 more days i.e., 60 days from the date of receipt of the LOA. On the request of

the Developers, time for execution of the PPAs was further extended by 8 working days from 25.05.2016 to 03.06.2016 by the Respondent No.2. The Tata Power Solar Systems Limited entered into PPA with the Respondent No.1 on 03.06.2016.

- (c) The Respondent No.2 had issued an Official Memorandum 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 the model PPA attached to the RFP. The Respondent No.1 sent the PPA to the Commission and the Commission communicated its approval to the PPA on 07.10.2016, with a direction to carry out certain corrections / modifications and consequently to execute a SPPA, incorporating the said corrections / modifications. One of the modifications suggested with respect to the 'Effective Date' was to bring the same in conformity with the recitals in the PPA, which stipulated COD to be achieved within 12 months from 25.05.2016. Tata Power Solar Systems Limited filed RP Nos. 1, 2 and 3/2017 before the Commission, with a prayer to hold and declare that the 'Effective Date' should be from the date of the Approval of the PPA by the Commission, as per clauses 3.1, 8.5 and 21.1 of the PPA. The Commission allowed the said Petitions on 19.05.2017 and therefore, the Effective Date came to be 'the date of the approval of the PPA by the KERC' i.e., 07.10.2016. Pursuant to the grant of approval by the Commission to the PPA, Respondent-1 vide its letter dated 26.10.2016, requested Tata Power Solar Systems Limited to execute the SPPA, in accordance with the directions issued by the Commission, vide its

letter dated 07.10.2016. The Tata Power Solar Systems Limited signed the SPPA on 03.03.2017, subject to the result of the Petition filed before the Commission.

- (d) The Petitioner was incorporated as a SPV, to develop the Project, by a Memorandum of Understanding dated 08.07.2017 between Tata Power Solar Systems Limited and the Petitioner.
- (e) The Petitioner faced severe obstacles, in having completed the sale transactions and getting peaceful possession of the land acquired. Though Agreements of Sale and Power of Attorney had been signed and registered during November, 2016, the Petitioner was not able to proceed with the registration of the Sale Deeds. Out of the total extent of 91.39 acres, because of local problems posed by the SC/ST Community of the area, with regard to land to an extent of 47.06 acres, the whole Project was jeopardized. The Petitioner, after all due diligence and enquiries, had identified the lands bearing R.S.No.29/B, R.S.No.35/1-2, 35/2, 36/P1 of Kanakagiri Village, Gangavati Taluk, Koppal District, to an extent of 47.06 acres and after verifying the marketability of the title, decided to set up the Project on the said land. The owners of the land were requested to provide the complete details of the records pertaining to the land and the detailed history of the sequence of events pertaining to successions of the property. The owners, in turn, requested the Tahsildar, Koppal District to furnish the information, as to whether the lands mentioned in their applications would come under the provisions of Karnataka SC and ST (PTCL) Act, 1978. Though the Petitioner held a clear title, it was made to

run from pillar to post, approach multiple legal Forums and was not allowed to work on the land by virtue of legal complications. However, despite having Police Protection Orders in its favour, the Petitioner was prevented from entering the site, which resulted in delay in completing the Project.

- (f) The delay in obtaining the Section 109 approval is an event that falls under clause 14.3.1(e), pertaining to *Force Majeure* Events in the PPA, thus entitling the Petitioner for extension of time corresponding to the time lost in obtaining the approval. The Petitioner addressed a communication on 09.05.2017 to the Respondents, bringing to their notice the hurdles faced and intimated that the same falls within the purview of '*Force Majeure*' Events, under the PPA and sought extension of time to commission the Project.
- (g) The PPA was signed between the parties on 03.06.2016 and the SPPA was signed on 03.03.2017. After a period of 9 months from 03.06.2016, the Petitioner was provided with a copy of the PPA and the SPPA. On account of non-receipt of the PPA, the Petitioner could not have proceeded with conversion and registration of land, financial closure, approval for consent to establish and apply for Project registration to avail duty benefits from the Ministry of New and Renewable Energy. There was delay in obtaining the Evacuation Approval. The Petitioner-Company had applied for the same on 28.06.2016, but the Karnataka Power Transmission Corporation Limited (KPTCL) issued the Evacuation Approval on 10.03.2017, after a delay of 254 days. The KPTCL also insisted the Petitioner to furnish the PPA,

which the Petitioner could make available only after 03.03.2017. Till the Evacuation approval is issued by the Respondents, the Petitioner has no access to the Switchyard for grid connectivity, resulting in further delay on the ground level. It is because of this delay in handing over the PPA, coupled with the land related problems, the Petitioner was prevented from fulfilling the conditions precedent, within the time frame under the PPA. Except for the compliance related to land conversion approval, and achieving Financial Closure on account of non-receipt of the PPA from Respondent No.1, the Petitioner had achieved all the other Conditions Precedent. The Petitioner informed Respondent No.1 about the said status on the Conditions Precedent, by communication dated 21.07.2017. On 31.08.2017, Respondent No.1 refused the request of the Petitioner for extension of time to achieve the Conditions Precedent. Hence, this petition.

- 3) The grounds urged by the Petitioner are as follows :
- (a) The delay caused by the Revenue Officers in issuing the Section 109 Land Conversion Order to the Petitioner.
- (b) The Hon'ble Appellate Tribunal for Electricity (ATE) has in the case of *Gujarat Urja Vikas Nigam Limited V. GERC and Others*, in Appeal No.123/2012, has upheld the following finding 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, the Scheduled Commissioning Date was extended by 19 months. The event in the present case also being the delay in statutory approval under Section 109, the Petitioner is entitled for extension of the Commercial Operation Date (COD). The Ministry of New and Renewable Energy has also issued a communication, addressed to all the State Governments, directing 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*. The case of the Petitioner for extension of time has to be considered, since the delay is on account of delay caused by the Revenue Authorities and the Respondents.

- (c) The Respondent No.1 has breached its obligation under clause 6.1.3(a) and (d) of the PPA, wherein it is 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, co-operate with and facilitate the Developer in the implementation and operation of the Project. Respondent No.1 is also under an obligation by virtue of Clause 4.2.1, to provide the Developer all the reasonable co-operation, as may be required by the Developer, for satisfying the Conditions Precedent. Respondent No.1 has contravened this clause by delaying in the handing over the signed copy of the PPA and granting the Evacuation Approval, which prevented the Petitioner from achieving the Conditions Precedent, well within the time. As per

clause 4.3 of the PPA, damages are to be paid on failure to achieve the Conditions Precedent within the time stipulated, subject to two situations viz., when the delay has not occurred for any reasons attributable to the Electricity Supply Company (ESCOM) or due to *Force Majeure*. In the present case, the delay in completion of Conditions Precedent is on both the counts i.e., delay in granting Evacuation Approval and furnishing of signed copy of PPA and also delay in obtaining Section 109 approval falling under the *Force Majeure* clause. Therefore, the Petitioner is not liable to Damages as per the provisions of the PPA.

- 4) Upon issuance of Notice, the Respondents appeared through their counsel. The Respondent-1 filed the Statement of Objections, as follows:
 - (a) The first two prayers have become infructuous, as the Project has been commissioned on 06.10.2017, within the SCOD.
 - (b) There was significant delay(s) by the Petitioner in satisfying the Conditions Precedent, as specified in Clause 4.2 of the PPA, more particularly, the failure to procure lands with a clear title, and therefore the Petitioner is liable to pay damages, as per Clause 4.2.3 of the PPA.
 - (c) While approving the PPA, vide letter dated 07.10.2016, the Commission had directed to carry out certain corrections / modifications and to execute a Supplementary PPA, incorporating the said corrections / modifications. One of the main modification suggested was to change the COD to 25.05.2016, to be in conformity with the Official Memorandum issued by Respondent No.2. Subsequently, the first SPPA was entered into

between the Petitioner and the 1st Respondent. Thereafter, the Petitioner approached the Commission, vide R.P.Nos.1, 2 and 3 of 2017 and the Common Order dated 19.05.2017 was passed, and the previous direction issued insofar as altering the Effective Date was cancelled and the definition of the "Effective Date", as per the original PPA dated 03.06.2016, was retained. Therefore, the Effective Date remained to be the date on which the Commission approved the PPA i.e., 07.10.2016. The change suggested, vide communication dated 07.10.2016 and reversing / cancelling the change, vide order date 19.05.2017, was restricted only to the alterations to the definition of the "Effective Date", hence, the said PPA was, in effect, from the day it was entered into i.e., 03.06.2016, for the purposes of initiation of action / proceedings to fulfil the Conditions Precedent. It is clear that, the above series of events / proceedings pertain to the change in the Effective Date only and do not take away the effect of the PPA and / or the obligations of each party. Therefore, the contention taken by the Petitioner that, it was able to sign the first SPPA only on 03.03.2017, subject to the result of the Petition (R.P.Nos.1, 2 and 3 of 2017), filed by the Petitioner before the Commission, is not sustainable. In fact, the Petitioner has deliberately tried to evade taking steps to procure necessary approvals from the concerned authorities, as it had failed to procure lands free from encumbrances (as required under Schedule 1 of the PPA) within 8 months from 03.06.2016 (as per Clause 4.1 of the PPA) and was trying to evade from performing the obligations under the PPA, by not being diligent in following up with concerned authorities in a timely manner and instead, latching on to certain inconsequential

circumstances, to wriggle out of the obligations under the PPA. This shows the Petitioner's unscrupulous ways in its dealings, to cover up its own shortcomings. The fact that the Petitioner waited until 03.03.2017 to execute the first SPPA, despite the 1st Respondent's letter dated 26.10.2016 requesting the Petitioner to execute the same, is proof of the Petitioner's lackadaisical approach in getting the works done in a timely manner.

- (d) The contention of the Petitioner that, it held a clear title from the beginning and on account of unforeseeable events caused by some people, claiming certain portions of the lands to the SC/ST holdings, is not within the knowledge of the 1st Respondent and hence denied. It was the duty and/or liability of the Petitioner to identify lands of clear title required for the Project and the Petitioner had failed to conduct a thorough enquiry, with due diligence, before acquiring the subject lands. The Petitioner is trying to cover up its shortcomings by creating concocted versions of its contentions, to unjustly take shelter under the *Force Majeure* clause of the PPA, only to wriggle out of its obligations of fulfilling the Conditions Precedent within 8 months from the Effective Date. It was the duty of the Petitioner to find a suitable land for the purpose of setting up the Project, which the Petitioner has failed to do.
- (e) Even though the PPA was entered into on 03.06.2016, the Petitioner waited till 27.12.2016, to file an application under Section 109 of the Karnataka Land Reforms Act, 1961, before the Deputy Commissioner of Koppal, which is almost 6 months after entering into the PPA, and the Petitioner has failed to give an explanation for the delay. This delay is only attributable

to the Petitioner's disinterest in fulfilling the Conditions Precedent in a timely manner. On 19.12.2016, the Petitioner received summons to appear before the Karnataka S.C and S.T. Commission on 30.12.2016 and only after this date, the Petitioner filed an application under Section 109, seeking approval for the procurement of the lands. This proves that, the Petitioner applied for permission to purchase the said lands, being fully aware of the problems posed by the SC/ST community and also that it did not have a clear title of the lands and that it would face several hindrances in getting permission to procure the said lands. The Petitioner's contention that, though it had a clear title of the lands, it had to run from pillar to post due to the local problems posed by the SC/ST community, to the extent of 47.06 acres out of a total extent of 91.39 acres, causing delay in obtaining necessary approvals under S.109 of the KLRA, 1961, is not correct as the Petitioner was aware of the consequences involved in the procuring the lands for setting up the Project.

- (f) The Petitioner cannot be permitted to seek refuge under the 'Force Majeure' clause, as this is not an event(s) or circumstance(s), which was not within the reasonable control of the Petitioner, for the following reasons:
- (i) it had failed to conduct a thorough due diligence about the title of the lands before deciding to procure these lands and it was an obligation cast upon the Petitioner to find suitable lands as per the terms of the PPA;

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- (ii) it had waited for more than 6 months from 03.06.2016, to apply for grant of permission to procure lands under S.109 of the KLRA, 1961;
 - (iii) it had filed the said application only after receiving summons from the Karnataka SC/ST Commission dated 19.12.2016 and it was fully aware as on 27.12.2016 that it did not have a clear title of the lands while applying for the grant of permission to procure lands under KLRA, 1961; and,
 - (iv) the Petitioner did not even follow up with the Respondent or the authorities for the copy of the PPA and SPPA.
- (g) There is no specific clause in the PPA, making the circumstances of the present case fall under the Clause 14.3 of the PPA and make it an Event of *Force Majeure*. The case of the Petitioner falls under the clause 14.4, which provides for *Force Majeure* Exclusions.
- (h) The Petitioner has relied on the case of *Gujarat Urja Vikas Nigam Limited Vs. GERC and Ors*, before Hon'ble ATE. For a period of 9 months, the Petitioner did not even take efforts to procure the approved PPA. This is distinct from the delays in obtaining statutory approvals, as mentioned in the above case relied upon by the Petitioner. The delays in the present case is clearly attributable to the shortcomings of the Petitioner in finding suitable lands with a clear title, filing applications under Section 109 of KLRA, 1961 in a timely manner. As per Clause 14.5.1 of the PPA, the Petitioner was supposed to give Notice to the Respondents on any of the *Force Majeure* as soon as reasonably practicable, but not later than seven days after the date on which the Petitioner knew or should have known of

the commencement of the event of *Force Majeure*. Therefore, even assuming the case of the Petitioner to be true, the Petitioner became aware of the *Force Majeure* event on 19.12.2016 i.e., the date on which it received summons from the Karnataka SC/ST Commission, calling upon to appear before the Commission, pursuant to the representation filed by Mr.Danvendra Badigar, vide case No.664/2016, alleging dispossession from the premises by the previous owners. However, the Petitioner waited until May, 2017 to bring it to the notice of the Respondent regarding the hurdles faced by it, in procuring the lands and intimated the Respondents that the above hurdles fall within the purview of '*Force Majeure*' Events under the PPA. The Petitioner has failed to adhere to Clause 14.5.1 of the PPA. Therefore, the Petitioner's contention to consider the above mentioned event as a *Force Majeure* event, cannot be granted.

- (j) The 1st Respondent, vide letter dated 26.10.2016, requested the Petitioner to execute the SPPA, in accordance with the directions issued by the Commission, vide letter dated 07.10.2016, which is about 15 days after receiving the communication from the Commission, to enter into a SPPA. The Petitioner has failed to show any documentary evidence that it has either responded to the request letter dated 26.10.2016 or has made any efforts to procure the PPA and SPPA or executing them. This clearly evidences its intentions to unscrupulously blame the 1st Respondent and to wriggle out of its obligations to fulfil the Conditions Precedent within 8 months from the effective date.

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- (k) The contention that the further delay was caused due to the delay in obtaining the Evacuation Approval from the KPTCL, despite applying for the same on 28.06.2016 and that the KPTCL insisted that Petitioner should furnish the PPA, but the Petitioner could furnish only on 03.03.2017, subsequent to which the KPTCL issued the evacuation approval on 10.03.2017, is completely wrong. The delay was caused due to unavailability of lands in the possession of the Petitioner and it cannot be attributed to the delay in furnishing the SPPA and even the delay in executing SPPA was only due to the Petitioner. Therefore, the Petitioner is liable to pay damages as per Article 4.3 of the PPA.
- (l) The averments that, though Agreement of Sale and Power of Attorney had been signed during November 2016, the Petitioner was not able to proceed with the deed registration, are not within the knowledge of the Respondent and the same are denied as false and the Petitioner is put to strict proof of the same.
- (m) The allegation that, out of the 91.39 acres of land, it is only because of local problems posed by the SC/ST Community with respect to land of 47.06 acres, that the whole project has been jeopardized, is a concocted version, created by the Petitioner to wriggle out of the consequences due to non-performance of its obligations under the PPA dated 03.06.2016 and the same is denied as false and baseless and the Petitioner is put to strict proof of the same.

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- (n) The allegation that, the Respondent No.1 has breached its obligation under Clause 6.1.3(a) and (d), wherein it is 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, co-operate with and facilitate the Developer in the implementation and operate of the Project, in accordance with the provisions of this Agreement, is denied as false and baseless. It is reiterated that, even though the Project is located in the GESCOM jurisdiction, this Respondent has always co-operated with the Petitioner as per the terms of the PPA. The Petitioner has not enclosed supporting documents, evidencing that there has been any breach of the Clauses 6.1.3(a) and (d) by the Respondent. Respondent No.1 is also under obligation by virtue of Clause 4.2.1, to provide the Developer all the reasonable co-operation as may be required to the Developer, for satisfying the Conditions Precedent, is true. However, the further allegation that, Respondent No.1 has contravened this clause by delay in handling over the signed copy of the PPA and delay in Evacuation Approval, which in turn prevented the petitioner from achieving the Conditions Precedent well within the time, is denied as false and baseless. Respondent-1 has prayed for dismissal of the petition.
- 5) The Respondent-2 has filed Objections, stating that it is a formal party to the case and that the Respondent-1 has to counter the averments in the Petition.

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- 6) The Petitioner filed a Rejoinder to the Objections filed by Respondent No.1, as follows:
- (a) Immediately after receiving the intimation of approval of the PPA by the Commission and in response to the communication dated 26.10.2016 issued by Respondent No.1, the Petitioner replied vide communication dated 02.11.2016, followed by another communication dated 22.11.2016. In the letter dated 02.11.2016, the Petitioner had sought for confirmation of the Effective Date, pursuant to a meeting of all the stakeholders with the Managing Director, KREDL, on the said issue and had requested Respondent No.1 to share a copy of the draft SPPA, to enable the Petitioner to sign the SPPA at the earliest. On 22.11.2016, the Petitioner submitted all the documents for assigning the PPA to the SPV's name and requested Respondent No.1 to approve the same.
- (b) Despite the Petitioner having clear title to the property, it was prevented to operate the Plant smoothly, by a few local SC/ST people, falsely claiming rights over the property. These people lost in all the legal proceedings foisted by them against the real owners of the property and against the Company. In spite of this, they have been trying to create obstacles to the Petitioner to illegally claim financial benefits. They have been approaching the Petitioner-Company, offering peace in exchange of monetary claims. However, it is only after 13.03.2018, when the Hon'ble High Court intervened and provided police protection to the Plant, that the Petitioner-Company has been able to operate the Plant smoothly without any hindrance. It is because of these sporadic untoward incidents,

beyond the control of the Petitioner, that it has been prevented from operating the Plant continuously and generate power to its full capacity. Unlawful incidents and law and order problems created by people totally unconnected with the land are situations / circumstances beyond the control of the Petitioner and hence, *Force Majeure* event entitling the Petitioner to the tariff agreed under the PPA. Even the delay in granting Evacuation approvals and Section 109 Approval are events beyond the control of the Petitioner and hence, *Force Majeure* Events. Therefore, the Petitioner is not liable to pay damages towards Conditions Precedent. The Petitioner has produced copies of the Orders passed by various forums.

- (c) The Petitioner has prayed to direct Respondent No.1, to make payments for the energy received, as per the tariff fixed under the PPA i.e., at Rs.6.10 per unit, from the date of supply of power for the tenure of the PPA. The Petitioner has also prayed that the interim tariff of Rs.4.36 per unit, granted by this Commission, which was subject to the result of the Petition, may be modified to tariff of Rs.6.10 per unit and Respondent No.1 may be directed to pay the Petitioner accordingly at Rs.6.10 per unit, from the date of generation for the term of the PPA.
- 7) We have heard the Counsel for both parties and perused the records.
- 8) During the course of the proceedings, the learned counsel for both parties submitted that the Plant had achieved the Commercial Operation within the time prescribed in the PPA and hence, the prayer to approve the extension of time for Commercial Operation of the Plant, does not survive

for consideration. We note that, the Plant has been commissioned on 06.10.2017, as per the Commissioning Certificate produced as Annexure-P11 and there is no delay in achieving the Commercial Operation of the Plant. The Petition was filed on 21.09.2017, earlier to the COD i.e., 06.10.2017.

- 9) The other aspect which needs to be decided is, whether the delay in achieving Conditions Precedent, would be a *force majeure* Event, as per the clauses of the PPA and if not, what are the consequences?
- (a) We note that Clause 4.1 of the PPA provides for achievement of Conditions Precedent, within 8 months from the Effective Date, subject to *Force Majeure* events. This includes, obtaining all consents, clearances, permits and production of documentary evidence of having clear title and possession of land in the name of the Developer. The Effective Date is the date of approval of the PPA by the Commission, that is, 07.10.2016. The Conditions Precedent had to be achieved within 07.06.2017. It is alleged by the Petitioner that, the main reason for the delay was problems and litigations in title and possession of land, delay in grant of evacuation approval and delay in handing over a copy of the PPA by Respondent-1 to the Petitioner. It is contended by the Respondent-1 that, the petitioner caused delay in signing the PPA and that the Respondent was not responsible for the land related issues and the alleged delay in granting evacuation approval by the KPTCL was due to the fact that, the Petitioner had no perfect title over the land .

(b) We note that the PPA was signed on 03.06.2016 and sent to the Commission for approval. The Commission approved the PPA on 07.10.2016, with certain modifications and directed the parties to sign a SPPA, incorporating the modifications. The SPPA was signed on 03.03.2017. It is alleged by the Petitioner that, the delay in handing over a copy of the PPA by the Respondent caused the delay in obtaining the approvals. The Respondent has contended that, on 26.10.2016, the Petitioner was called upon to sign the SPPA, but the Petitioner came forward to sign the same on 03.03.2017, after a delay of 147 days. The Petitioner has stated in the rejoinder that, on receipt of the communication dated 26.10.2016 from the Respondent, it replied, vide communications dated 02.11.2016 and 22.11.2016 and sought for clarification on the Effective Date. We note that the Petitioner could have signed the SPPA, immediately and there is no explanation as to why it delayed the signing till 03.03.2017. The clarification on the Effective Date could not have been a reason for not signing the SPPA. Admittedly, the Petitioner had filed Petitions before the Commission, on this aspect and the SPPA was signed on 03.03.2017 subject to the result of the said Petitions. Hence, we feel that the Petitioner has not given any satisfactory explanation for the delay in signing the SPPA. Had the Petitioner signed the SPPA, soon after receipt of the communication dated 26.10.2016, the delay of 147 days could have been avoided. Further, as per the recitals of the PPA, a copy of the PPA dated 03.06.2016 was delivered to the Petitioner on the date of signing itself. The Petitioner has also taken steps to implement the Project, even before 03.03.2017, as mentioned in

Paragraph-18 of the Petition. Therefore, this has not hampered the Project and does not qualify as a Force Majeure Event, under the clauses of the PPA.

- (c) The other reason attributed by the Petitioner is that, land approvals/ conversion process were delayed, due to obstructions by the local people and litigations that followed. The application for conversion of land was made on 27.12.2016, after 6 months from the date of signing the PPA. The reason for the delay is stated to be, the interference by a person belonging to SC community, delay in granting endorsement under PTCL Act, 1978 and the litigations which followed. In the rejoinder, the Petitioner has given the chronology of events in Paragraph-5. It is stated that, on 20.06.2016, the land owners approached the Tahsildar, Koppal for an endorsement under the PTCL Act, 1978 and as there was no response, on 04.10.2016, they filed W.P.Nos.108268-78/2016 in the Hon'ble High Court of Karnataka, Dharwad, against the inaction of the Tahsildar. This case could have been filed much earlier. The reason for waiting for more than 3 months, is not explained. It is contended by the Respondent that the Petitioner was not diligent in identifying suitable land, with clear title and hence, this does not fall under the definition of *Force Majeure*, as per Clause 14.3 of the PPA, but falls under *Force Majeure* exclusions, as per Clause 14.4(f)(i) of the PPA. As per Clause 5 of the PPA, it is the responsibility of the Petitioner to take clear possession of the land and all approvals for executing the project. The allegation of the Petitioner that the Respondent did not co-operate or extend support to procure the

permits, as required under Clause 6 of the PPA, cannot be applied to land approvals, which is the sole obligation of the Developer. The land conversion, though applied for after 6 months from the date of PPA, was granted on 09.08.2017 by the Deputy Commissioner, Koppal, within a period of 8 months, the period prescribed for achieving Conditions Precedent. When a period of 8 months is specified under the PPA to achieve the Conditions Precedent, we feel that, the Petitioner should have been more diligent in applying for required approvals and follow up actions.

- (d) The other reason mentioned by the Petitioner is the delay in granting the Evacuation Approval. We note that, the Petitioner applied to the KPTCL for the Evacuation Approval on 28.6.2016 and the same was granted on 10.03.2017, well before 07.06.2017. Hence, the Evacuation Approval was granted within the time prescribed for achieving the Conditions Precedent.
- (e) We also note that, no Notice, as contemplated under Clause 14.5 of the PPA, notifying the *Force Majeure* Event, was given by the Developer to the Respondent-1, within 7 days or at least within a reasonable time.
- (f) We note that, even in the judgment in Appeal No.123/2012, relied upon by the Petitioner, the Hon'ble Appellate Tribunal for Electricity (ATE) has held that, delay in obtaining statutory approvals, despite the developer complying with all legal requirements to obtain them, would fall within the *Force Majeure* Events. In this case, we have noted that, based on facts,

the Petitioner had not taken timely action in signing the SPPA and in following up the land related issues.

- (g) As per Article 4.3 of the PPA, damages have to be paid for not achieving the Conditions Precedent, within the stipulated time of 8 months from the Effective Date. We have held that, for the reasons mentioned above, the events do not qualify as *Force Majeure* Events, as per the terms of the PPA. Hence, the Petitioner is liable to pay damages, quantified in Clause 4.3 of the PPA, for the delay in achieving Conditions Precedent.
- (h) At the time of filing of the Petition, the Project was not commissioned. During the course of proceedings, the Project was commissioned on 06.10.2017. As observed above, this is within the time prescribed in the PPA. On 11.09.2018, the Commission had passed an Interim Order, allowing an interim tariff of Rs.4.36 per unit. In the rejoinder, the Petitioner has prayed for payment of the agreed tariff of Rs.6.10 per unit for the energy supplied, from the date of commissioning, for the term of the PPA. As the Plant is commissioned within the time stipulated, as admitted by the Respondent-1, the tariff of Rs.6.10 per unit would have to be paid, as agreed to in the PPA.
- 10) For the foregoing reasons, we pass the following:

ORDER

- (1) The Petitioner is liable to pay damages, as per Clause 4.3 of the PPA, for the delay in achieving the Conditions Precedent, which works out to Rs.10,20,000/- (Rupees Ten Lakhs Twenty Thousand only) [i.e., 6% (six percent) of the Performance Security of Rs.1,70,00,000/- (Rupees One Crore Seventy Lakhs only)];

- (2) The Petitioner shall be paid tariff of Rs.6.10 (Rupees Six and Paise Ten only) per unit, for the energy delivered from the Plant, for the term of the PPA;
- (3) For the energy already supplied and paid at Rs.4.36 (Rupees Four and Paise Thirty Six only) per unit, as per the Interim Order, the Respondent-1 shall pay the balance amount within 3 (three) months from the date of this Order; and,
- (4) The Petition is disposed of, as above.

Sd/-

(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-

(H.M. MANJUNATHA)
MEMBER

Sd/-

(M.D. RAVI)
MEMBER