

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**

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

**Dated : 26<sup>th</sup> September, 2019**

**Present:**

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

**OP No.212/2017**

**BETWEEN:**

- 1) SEI Aditi Power Private Limited,  
Menon Eternity,  
10<sup>th</sup> Floor, New # 165 (Old # 110),  
St. Mary's Road, Alwarpet,  
Chennai – 600 018.
- 2) SEI Bheem Private Limited,  
Menon Eternity,  
10<sup>th</sup> Floor, New # 165 (Old # 110),  
St. Mary's Road, Alwarpet,  
Chennai – 600 018.
- 3) SEI Suryashakthi Private Limited,  
Menon Eternity,  
10<sup>th</sup> Floor, New # 165 (Old # 110),  
St. Mary's Road, Alwarpet,  
Chennai – 600 018.

.. **PETITIONERS**

*[Petitioners represented Maths Law Associates, Advocates]*

**AND:**

- 1) Bangalore Electricity Supply Company Limited,  
K.R. Circle,  
Bengaluru – 560 001.

- 2) Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan,  
K.G. Road,  
Bengaluru – 560 009. .. **RSPONDENTS**

**[Note: Respondent-2 is impleaded vide Order dated 11.01.2018]**

*[Respondent-1 represented by Justlaw, Advocates,  
Respondent-2 represented by ALMT Legal, Advocates]*

**OP No.213/2017**

**BETWEEN:**

- 1) SEI Diamond Private Limited,  
Menon Eternity,  
10<sup>th</sup> Floor, New # 165 (Old # 110),  
St. Mary's Road, Alwarpet,  
Chennai – 600 018.
- 2) SEI Venus Private Limited,  
Menon Eternity,  
10<sup>th</sup> Floor, New # 165 (Old # 110),  
St. Mary's Road, Alwarpet,  
Chennai – 600 018. .. **PETITIONERS**

*[Petitioners represented by Maths Law Associates, Advocates]*

**AND:**

- 1) Bangalore Electricity Supply Company Limited,  
K.R. Circle,  
Bengaluru – 560 001.
- 2) Hubli Electricity Supply Company Limited,  
P.B. Road, Navanagar,  
Hubballi – 580 025.
- 3) Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan,  
K.G. Road,  
Bengaluru – 560 009. .. **RSPONDENTS**

**[Note: Respondent-3 is impleaded vide Order dated 11.01.2018]**

*[Respondent-1 represented by Justlaw, Advocates,  
Respondent-2 represented by Shri G.S. Kannur, Advocate,  
Respondent-3 represented by ALMT Legal, Advocates]*

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**COMMON ORDERS**

- 1) In the above two cases, the questions of law and facts involved, for our consideration, are almost similar, therefore, we proceed to pass this common Order.
  
- 2) In OP No.212/2017, the Petitioners have prayed, in effect, for the following reliefs:
  - (a) To approve the change of SCOD to 31.03.2017 in the respective Power Purchase Agreements between the respective Petitioners and Respondent No.1;
  - (b) To direct Respondent No.1 to enter into an Amendment Agreement to the respective Power Purchase Agreements, to modify the changes that may be approved by this Commission; and,
  - (c) To pass any other Order which this Commission may deem fit.
  
- 3) In OP No.213/2017, the Petitioners have prayed, in effect, for the following reliefs:
  - (a) To approve the change of SCOD to 28.03.2017 in the respective Power Purchase Agreements between the respective Petitioners and Respondent Nos.1 and 2;
  - (b) To direct Respondent Nos.1 and 2 to enter into an Amendment Agreement to the respective Power Purchase Agreements, to

modify the changes that may be approved by this Commission;  
and,

(c) To pass any other Order which this Commission may deem fit.

4) The common material facts, pleaded by the Petitioners in these Petitions, may be stated as follows:

(a) The Karnataka Renewable Energy Development Limited (KREDL) invited 'Request for Proposal' (RfP) dated 30.05.2014, prescribing the technical and commercial terms and conditions, for selection of bidders for undertaking the development of 500 MW of Solar PV Power Plants in Karnataka. The KREDL, after receiving the Proposals from certain bidders, including M/s. SunEdison Energy Holding (Singapore) Pte. Ltd., (Single Business Entity), accepted the five different bids of SunEdison Energy Holding (Singapore) Pte. Ltd., for development of five Solar PV Power Projects of 30 MW capacity each in Chellakere Taluk, Chitradurga District and issued separate Letters of Award (LoA) dated 19.11.2014 requiring, *inter alia*, to execute Power Purchase Agreements (PPAs) with the Distribution Licensees, stated therein. M/s.SunEdison Energy Holding (Singapore) Pte. Ltd., promoted and incorporated five Special Purpose Vehicles (SPVs), in terms of the RfP and requested the Distribution Licensees concerned to accept the SPVs as the Developers of the different Solar Power Projects and to execute the PPAs. Accordingly, the different SPVs have entered into the PPAs.

- (b) The details of the SPVs, the PPAs executed by them and other relevant facts may be stated as follows:

OP No.	Name of SPV	Name of ESCOM with whom PPA is executed	Capacity of Project	Date of PPA	Scheduled Commissioning Date	Actual Date of Commissioning of Project	Tariff Dis-covered Rs.Ps./ Unit
212/2017	SEI Aditi Power Private Limited	BESCOM	30 MW	18.12.2014	17.06.2016	30.03.2017	6.86
	SEI Bheem Private Limited	BESCOM	30 MW	18.12.2014	17.06.2016	30.03.2017	6.89
	SEI Surya-shakthi Private Limited	BESCOM	30 MW	18.12.2014	17.06.2016	30.03.2017	6.97
213/2017	SEI Diamond Private Limited	BESCOM	30 MW	18.12.2014	17.06.2016	28.03.2017	6.92
	SEI Venus Private Limited	HESCOM	30 MW	18.12.2014	17.06.2016	28.03.2017	6.83

- 5) The other relevant facts in OP No.212/2017 are as follows:

- (a) The locations of the three Projects involved are as follows:

- (i) SEI Aditi Power:

Near Pallavalli Village, Pavagada Taluk, Tumakuru District.

- (ii) SEI Bheem:

Uppatahalli and Agalmadke Villages, Pavagada Taluk, Y Tumakuru District.

- (iii) SEI Suryashakthi:

Kamballahalli Village, Pavagarda Taluk, Tumakuru District.

The Aditi Power Private Limited has undertaken to develop a common Pooling Station. The common Pooling Station is near Pallavalli Village, Pavagada Taluk, Tumakuru District. The distance between the common Pooling Station and the Kotagudda (Pavagada) Sub-Station, where power is to be evacuated, is about 13 KMs.

- (b) The Petitioners in OP No.212/2017 have obtained a common tentative Evacuation Scheme approval dated 28.05.2015, issued by the Chief Engineer, Electy. (Planning & Co-ordination), KPTCL, Bengaluru (Document No.1 produced by Respondent No.2). The said approval stipulates the works to be carried out by the Petitioners from the proposed common Pooling Station up to the 220 kV Bus of the proposed 220/66 kV Kotagudda (Pavagada) Sub-Station, with other terms and conditions. Further, it specifically states that the proposed evacuation of power would commence only after the commissioning of the proposed 220/66 kV Kotagudda (Pavagada) Sub-Station. Further, it states that, only after the acceptance of the said Evacuation Scheme, with the other conditions, from the Petitioners, the tentative Evacuation Scheme approval would be regularized and detailed approved regular Evacuation Scheme along with the terms and conditions and clearance for commencement of work of evacuation would be conveyed. The Petitioners accepted the terms and conditions stated in the tentative Evacuation Scheme and gave the consent letter dated 29.05.2015 (Document No.2 produced by the 2<sup>nd</sup> Respondent). Thereafter, the regular Evacuation Scheme approval dated 10.06.2015 with all the terms and conditions was issued, stipulating the work

to be undertaken by the Petitioners for construction of the 220 kV SC Line, for a distance of 13 KMs between the proposed common Pooling Station and the proposed 220/66 kV Kotagudda (Pavagada) Sub-Station. In this regular Evacuation Approval, again it was specifically stated that the proposed evacuation of power from the Power Projects would commence, only after the commissioning of the proposed 220/66 kV Kotagudda (Pavagada) Sub-Station. [The Regular Evacuation Scheme approval dated 10.06.2015 is produced by the 1<sup>st</sup> Respondent (BESCOM) as ANNEURE-R2].

- (c) The Petitioners in OP No.212/2017 have averred that, though the three Projects were almost ready and the work in respect of the common Pooling Station was also completed and they were sure to complete all the components of the Projects by end of August, 2016, as the 220/66 kV Kotagudda (Pavagada) Sub-Station and the Kotagudda-Madhugiri Transmission Line was being delayed due to various reasons, like the ROW issues at different locations and hence the Projects could not be commissioned. Therefore, the Petitioners requested the Chief Engineer, Electy.(Planning & Co-ordination) to explore the possibilities of evacuating the power from the Projects through the other Lines. (These facts are stated in the letter dated 19.08.2016, addressed to the Chief Engineer, Electy.(Planning & Co-ordination) (ANNEXURE-A). In reply, the Chief Engineer, Electy.(Planning & Co-ordination), Transmission Zone, BESCOM, Tumakuru, by letter dated 09.09.2016 (ANNEXURE-B), stated that, the work

of Kotagudda (Pavagada) Sub-Station and the Transmission Line was likely to be completed by 31.12.2016.

- (d) The Petitioners in OP No.212/2017, by letters dated 09.09.2016, 14.09.2016 and 17.10.2016 (ANNEXURE-C), have requested the Managing Director of the 1<sup>st</sup> Respondent (BESCOM) to extend the Scheduled Commissioning Date up to 31.12.2016 or the actual completion of the Kotagudda (Pavagada) Sub-station works along with the Transmission Line concerned. Earlier, the 1<sup>st</sup> Respondent (BESCOM), by letter dated 02.03.2016 (ANNEXURE-L) produced along with the Rejoinder of the Petitioner, had extended the Scheduled Commissioning Date up to 17.09.2016, subject to extension of the validity of the Bank Guarantees. The Petitioners, through letters dated 12.12.2016(ANNEXURE-D), expressed their apprehension that the works in respect of the Kotagudda (Pavagada) Sub-Station and the Transmission Line concerned were not being completed within 31.12.2016, The Petitioners wrote the letter dated 17.01.2017 (ANNEXURE-E) addressed to the Director (Technical) of the 1<sup>st</sup> Respondent (BESCOM) requesting them not to proceed with the encashment of the bank Guarantees. The KPTCL, vide letters dated 19.01.2017 (ANNEXURE-F), intimated the Petitioners that the works on Kotagudda (Pavagada) Sub-Station along with the Transmission Line concerned were likely to be completed by 31.03.2017. The Petitioners, vide letter dated 09.12.2017 (ANNEXURE-G) addressed to the 1<sup>st</sup> Respondent (BESCOM), requested it to extend the Scheduled Commissioning Date till 31.03.2017, without any penalty, as the delay in commissioning of the Projects was due to a *Force Majeure* Event.

- (e) As the works in respect of the Kotagudda (Pavagada) Sub-Station along with the Transmission Line concerned were not likely to be completed by 31.03.2017, the KPTCL issued an alternate temporary evacuation approval dated 24.03.2017, at a suitable place, by providing for evacuation of power by tapping the existing 66 kV Pavagada-Shylapur SC Line of the KPTCL, passing nearby the Kotagudda (Pavagada) Sub-Station, for evacuating the power from the Projects of the Petitioner (ANNEXURE-R1 produced by the 1<sup>st</sup> Respondent (BESCOM)). Subsequently, the KPTCL provided the interconnection approval, vide its letter dated 30.03.2017 and on the same day, the Solar Power Projects of the Petitioner were commissioned, vide Commissioning Certificates dated 06.04.2017 (ANNEXURE-H).
- (f) The Petitioners requested the 1<sup>st</sup> Respondent (BESCOM) to insert the Scheduled Commissioning Date as '30.03.2017' in the PPAs of the Petitioners, by extending the time, on the ground of *Force Majeure* Event. The 1<sup>st</sup> Respondent (BESCOM), in turn, requested this Commission to approve the extension of the Scheduled Commissioning Date, in respect of the three Solar Power Projects of the Petitioners, up to 30.03.2017, as per the letter dated 24.07.2017 (ANNEXURE-J). As advised by the Commission, the 1<sup>st</sup> Respondent (BESCOM), vide its letter dated 11.09.2017 (ANNEXURE-K), informed the Petitioners that, they should file a Petition before this Commission, with all the relevant grounds and documents, justifying the claim for extension of time under the *Force Majeure* Events of the PPAs. Thereafter, the Petitioners have filed the present common

Petition on 03.11.2017 against the 1<sup>st</sup> Respondent (BESCOM). Soon after filing of the common Petition, on the Application of the Petitioners, the 2<sup>nd</sup> Respondent (KPTCL) was impleaded.

- 6) Upon Notice, the Respondents appeared through their counsel and filed their Statements of Objections.
- 7) The material facts urged by the 1<sup>st</sup> Respondent (BESCOM) in its Statement of Objections dated 10.04.2018 and the additional Statement of Objections 09.07.2019, may be stated as follows:
  - (a) In the Statement of Objections dated 10.04.2018, the 1<sup>st</sup> Respondent (BESCOM) has admitted the several correspondences exchanged between the parties. It is contended that, the 1<sup>st</sup> Respondent (BESCOM) has no discretion to extend the time stipulated for commissioning of the Project, that there was a delay in commissioning the Projects within the stipulated time and that the delay caused in commissioning the Projects does not fall within the ambit of *Force Majeure* Events. The 1<sup>st</sup> Respondent (BESCOM), in the said Statement of Objections, has referred to the various letters written by the Petitioners to it, wherein the Petitioners had informed that they had completed all the Plant activities at the site. The 1<sup>st</sup> Respondent (BESCOM) has not denied the extension of time granted by it to the Petitioners under letter dated 02.03.2016 (ANNEXURE-L), for three months from 18.06.2016, up to 17.09.2016, for commissioning of the Projects. The 1<sup>st</sup> Respondent (BESCOM) has stated that, the subsequent requests made by the Petitioners for extension of the Scheduled Commissioning

Date up to 30.03.2017, was placed before the Board of Directors' meeting held on 26.11.2016 and it was decided, in that meeting, to proceed as per the legal opinion to be obtained and to take action, accordingly. However, in the meantime, this Commission, vide letters dated 16.03.2017 and 05.04.2017, directed the Electricity Supply Companies (ESCOMs) not to extend time beyond the Scheduled Commissioning Date and directed the ESCOMs to advise the SPDs/SPVs to file a Petition before this Commission, with all the relevant grounds / documents, for seeking approval of the extension of the commissioning date. The same was intimated to the Petitioners.

- (b) In the additional Statement of Objections filed on 09.07.2019, the 1<sup>st</sup> Respondent (BESCOM) has contended that, within the time frame for commissioning the Projects, i.e., on or before 17.06.2016, the Plants of the Petitioners were not ready for commissioning, and it was made clear in the letter dated 19.08.2016 (ANNEXURE-A) and also in the subsequent letter dated 16.03.2017 of the Petitioners (produced as ANNEXURE-R3). Therefore, it was contended that, the construction of the Solar Power Plant was not completed on or before 17.06.2016, i.e., the Scheduled Commissioning Date, and even subsequent to it. Further, it is contended that, the non-commissioning of the Kotagudda (Pavagada) Sub-Station cannot be treated as a *Force Majeure* event, and that the Petitioners had not issued a Notice of the *Force Majeure* events, therefore, the Petitioners cannot claim the benefit of the *Force Majeure* events. Further, it is contended that, there is delay in achieving the Conditions Precedent, as

well as the Scheduled Commissioning Date and that the Petitioners were liable to pay Liquidated Damages to the 1<sup>st</sup> Respondent (BESCOM), as per Articles 4.3 and 5.8 of the PPAs and they were also liable to the reduced tariff of Rs.6.51 per unit, the then existing generic tariff, prevalent as on the date of commissioning of the Projects. Therefore, the 1<sup>st</sup> Respondent (BESCOM) has prayed for the dismissal of the Petitions.

- 8) The material facts of the 2<sup>nd</sup> Respondent (KPTCL), stated in its Statement of Objections, are as follows:
- (a) That, the tentative Evacuation Scheme approval dated 28.05.2015 [Document No.1, produced by the 2<sup>nd</sup> Respondent (KPTCL)] specifically stated that the proposed evacuation of power from the Solar Power Projects would commence only after commissioning of the proposed 220/66 kV Kotagudda (Pavagada) Sub-Station and the Petitioners were asked to express their willingness for the above Evacuation Scheme, with the conditions stated therein, and on acceptance of the same, the regular Evacuation Scheme approval would be issued. Thereafter, the Petitioners conveyed their acceptance, vide letter dated 29.05.2015 (Document No.2), thereafter, the regular Evacuation Scheme approval dated 10.06.2015 [ANNEXURE-R2, produced by the 1<sup>st</sup> Respondent (BESCOM)] was issued.
- (b) That, the construction works in respect of the Solar Power Projects were completed only on 27.03.2017, as evidenced by the CEIG letters of approval dated 28.03.2017 (produced as Document Nos.3 to 5). That, the

Electrical Safety approvals are issued by the CEIG only, after completion of the construction of the Power Projects and ready for commissioning. That, the 2<sup>nd</sup> Respondent (KPTCL) had at no point of time, delayed in communicating the necessary approvals from its end, as and when the Petitioners requested for the same.

- 9) The Petitioners have filed a Rejoinder to the additional Statement of Objections filed by the 1<sup>st</sup> Respondent (BESCOM). The gist of the contentions raised in the Rejoinder may be stated as follows:
- (a) That, the 1<sup>st</sup> Respondent (BESCOM), by its communication dated 02.03.2016 (ANNEXURE-L), extended the Scheduled Commissioning Date from 17.06.2016 to 17.09.2016 (for three months). The tentative Evacuation Scheme approval and the regular Evacuation Scheme approval stipulated that, the evacuation of power would commence after the commissioning of the proposed 220/66 kV Kotagudda (Pavagada) Sub-Station. The validity of the Evacuation Schemes approval was limited to a period up to 17.06.2016, meaning thereby, that the 2<sup>nd</sup> Respondent (KPTCL) was conscious of the fact that 17.06.2016 was the Scheduled Commissioning Date and it had to complete the said Sub-Station works within that period. However, the 2<sup>nd</sup> Respondent (KPTCL) failed to commission the Sub-Station works within that time or within the extended time for the scheduled commissioning. That, when the Sub-Station and the Transmission Lines were still not ready, it had granted the temporary Evacuation Scheme approval (as per ANNEXURE-R1).

- (b) That, the assertion of the 1<sup>st</sup> Respondent (BESCOM) that the Solar Power Plants of the Petitioner were not ready as on 17.06.2016, is not correct and that taking advantage of the usage of the terminology "almost ready", the 1<sup>st</sup> Respondent (BESCOM) is asserting that the Plants were not ready. The said document (ANNEXURE-A) is read totally out of context and the question of the Power Plants being not ready, does not arise, because the Power Plants could be commissioned, only when they are connected to the Transmission Lines, that too, after the interconnection approval. The contention that, "it is only almost ready" and "not fully ready", is made, for the first time. The fact, that cannot be lost sight of, is that, in the communication dated 24.07.2017 addressed to this Commission, the 1<sup>st</sup> Respondent (BESCOM) has not stated that the Power Plants were not ready. In fact, the 1<sup>st</sup> Respondent (BESCOM) has not taken up such a stand, that the Projects were not ready, any time earlier to 09.07.2019, the date on which the additional Statement of Objections was filed. Therefore, it is estopped from making such a claim now, more so, when it has recommended to this Commission, to extend the Scheduled Commissioning Date due to *Force Majeure* conditions.
- (c) That, it is totally mischievous and misleading on the part of the 1<sup>st</sup> Respondent (BESCOM) to demand material evidence, for the first time, in these proceedings, that too, so belatedly, to prove that the Power Plants were ready for commissioning, on any particular day. That, the 1<sup>st</sup> Respondent (BESCOM) was completely satisfied that the Petitioner could not commission their Power Plants, due to delay on the part of the 2<sup>nd</sup>

Respondent (KPTCL), to complete the Kotagudda (Pavagada) Sub-Station.

- (d) That, it is not the case of the Petitioners that they could not commission their Power Plants, as the construction of the Plants was not completed, but their case is that their plants were ready, but they were not in a position to evacuate the power generation, because of the delay in commissioning of the Kotaguda (Pavagada) Sub-Station, which was a *Force Majeure* Event under the PPAs.
- (e) That keeping the Plant ready is not the same as commissioning the Plant. That, even if the Plant is ready, but the evacuation approval is not available, then the CEIG would not inspect the premises and grant permission for evacuation of the power.
- (f) The other contentions of the 1<sup>st</sup> Respondent (BESCOM), raised in the additional Statement of Objections, are denied.
- 10) The other material facts relating to OP No.213/2017 may be stated as follows:
- (a) The location of the two Projects involved in OP No.213/2017 are as follows:
- (i) Both the Projects are situated near Nelagettanahally Village, Nayakanahatty Hobli, Chellakere Taluk, Chitradurga District;
- (ii) The common Pooling Station for the both the Projects is near Varavukaval Village, Chellakere Taluk, Chitradurga District. The power from the common Pooling Station is required to be

evacuated to Thallakku Sub-Station of the KPTCL, which is at a distance of about 13 KMs from the common Pooling Station.

- (b) The Petitioners in OP No.213/2017 have obtained a common tentative Evacuation Scheme approval dated 08.03.2016, issued by the Chief Engineer, Electy.(Planning & Co-ordination), KPTCL, Bengaluru. This tentative Evacuation Scheme approval dated 08.03.2016 is at ANNEXURE-R3 [produced by the 1<sup>st</sup> Respondent (BESCOM), along with it additional Statement of Objections]. The Petitioners expressed their willingness to abide by the conditions stated in the tentative Evacuation Scheme approval, as per letter dated 16.03.2016 [a copy of the said letter is marked a Document No:8, produced by the 3<sup>rd</sup> Respondent (KPTCL) on 30.07.2016].
- (c) Thereafter, the regular Evacuation Scheme approval was issued on 10.01.2017. In the tentative, as well as the regular Evacuation Scheme approvals, it is stated that the evacuation of the Solar power from the Petitioners' Projects would be feasible, only after commissioning of the 220 kV DC line from the 400 kV PGCIL Hiriyr Sub-Station to the 220 kV Thallakku Sub-Station.
- (d) The Petitioners, through their letters dated 17.09.2016, 01.10.2016, 17.10.2016, 27.10.2016, 16.11.2016, 27.12.2016, 03.02.2017 and 09.02.2017, addressed to the Respondents 1 to 3, have claimed that the Solar Power Projects were almost nearing completion and requested the 3<sup>rd</sup> Respondent (KPTCL) to inform about the completion of the 220 kV DC Line

works from the 400 kV PGCIL Hiriya Sub-Station to the 220 kV Thallakku Sub-Station and requested the 1<sup>st</sup> Respondent (BESCOM) and the 2<sup>nd</sup> Respondent (HESCOM) to extend the Scheduled Commissioning Date. Earlier, the 1<sup>st</sup> Respondent (BESCOM), vide letter dated 02.03.2016 and the 2<sup>nd</sup> Respondent (HESCOM), vide letter dated 02.05.2016, had extended the Scheduled Commissioning Date up to 17.09.2016 and 16.09.2016, respectively.

- (e) The 3<sup>rd</sup> Respondent (KPTCL), vide letter dated 19.01.2017, informed that the Transmission Line works between the 400 kV PGCIL Hiriya Sub-Station and the 220 kV Thallakku Sub-Station was likely to be completed by 31.03.2017.
- (f) Thereafter, upon the rigorous follow-up by the Petitioners with the 3<sup>rd</sup> Respondent (KPTCL), for providing power evacuation connectivity to supply power to the Grid, the 3<sup>rd</sup> Respondent (KPTCL), based on the power flow analysis for the existing network scenario, communicated approval for interconnecting the Solar Power Projects of the Petitioners to the Thallakku Sub-Station, by ordering to delete the earlier condition that the Evacuation Scheme approval was subject to completion of the 220 kV DC Line from the 400 kV PGCIL Hiriya Sub-Station to the 220 kV Thallakku Sub-Station, vide letter dated 24.03.2017 [ANNEXURE-R4], produced by the 1<sup>st</sup> Respondent (BESCOM), along with its additional Statement of Objections.
- (g) Accordingly, both the Projects of the Petitioners were commissioned on 28.03.2017, vide Commissioning Certificates dated 30.03.2017 (ANNEXURE-D to the Petition).

- (h) The Petitioners requested the 1<sup>st</sup> Respondent (BESCOM) and the 2<sup>nd</sup> Respondent (HESCOM) to insert the Scheduled Commissioning Date as '28.03.2017' in the PPAs of the Petitioners, by extending the time, on the ground of the *Force Majeure* Event. The 1<sup>st</sup> Respondent, in turn, vide letter dated 24.07.2017 (ANENXURE-F) and the 2<sup>nd</sup> Respondent (HESCOM), vide letter dated 01.08.2017 (ANNEXURE-F), addressed to this Commission, requested this Commission for approval of the extension of the Scheduled Commissioning Date till 28.03.2017, on the ground of the *Force Majeure* Event, as there was delay in completing the 220 kV Transmission Line from the 400 kV PGCIL Hiriyur Sub-Station to the 220 kV Thallakku Sub-Station. This Commission intimated the 1<sup>st</sup> Respondent (BESCOM) and the 2<sup>nd</sup> Respondent (HESCOM), to advise the Petitioners to file Petitions before this Commission, with relevant grounds and documents, for justifying the claims for extension of time under the *Force Majeure* conditions of the PPAs. Thereafter, the Petitioners have filed the present common Petition on 03.11.2017 against the 1<sup>st</sup> Respondent (BESCOM) and the 2<sup>nd</sup> Respondent (HESCOM). Soon after filing of the common Petition on the Application of the Petitioners, the 3<sup>rd</sup> Respondent (KPTCL) was impleaded.
- 11) The material facts, urged in the Statements of Objections dated 10.04.2018 and 30.10.2018 of the 1<sup>st</sup> Respondent (BESCOM) and the 2<sup>nd</sup> Respondent (HESCOM), respectively, and in the additional Statement of Objections dated 09.07.2019 of the 1<sup>st</sup> Respondent (BESCOM), may be stated as follows:

- (a) In the Statement of Objections dated 10.04.2018 and 30.10.2018, the Respondents 1 & 2 have admitted the several correspondences exchanged between the parties. It is contended that, the Respondents 1 and 2 have no discretion to extend the time stipulated for commissioning the Projects and that there was delay in commissioning of the Projects and that the cause for the delay in commissioning the Projects does not fall within the ambit of the *Force Majeure* Events. The Respondents 1 and 2 have not denied the extension of time granted by them earlier, under their letters dated 02.03.2016 (ANNEXURE-L) and 02.05.2016, respectively, extending the Scheduled Commissioning Dates up to 17.09.2016 and 16.09.2016, respectively. They have stated that, the subsequent request made by the Petitioners, for extension of the Scheduled Commissioning Date up to 28.03.2017, was not considered, at their ends, in view of the communication sent by this Commission, vide letters dated 16.03.2017 and 05.04.2017.
- (b) In the additional Statement of Objections, filed on 09.07.2019, the 1<sup>st</sup> Respondent (BESCOM) has taken the same contentions as have been taken in OP No.212/2017, mainly contending that, no evidence was produced to prove that the Power Plants were ready for commissioning within the Scheduled Commissioning Date, *dehors* the availability of the evacuation facility and that the completion of the construction of the Solar Power Plants was essential before the Scheduled Commissioning Date, to avoid reduction in the tariff and payment of damages.

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- 12) The material facts urged by the 3<sup>rd</sup> Respondent (KPTCL), in its Statement of Objections, may be stated as follows:
- (a) That, the Petitioners changed the location of the Solar Power Plants, frequently, until issuance of the tentative Evacuation Scheme approval dated 08.03.2016.
  - (b) That, the Solar Power Projects of the Petitioners were commissioned on 28.03.2017, only after the construction was completed.
  - (c) That, the 3<sup>rd</sup> Respondent (KPTCL), vide letter dated 24.04.2017, has duly communicated the revised Evacuation Scheme approval, revoking the condition imposed earlier regarding the commissioning of the 220 kV DC Line from the 400 kV PGCIL Hiriyur Sub-Station to the 220 kV Thallakku Sub-Station, after duly conducting the system studies in the existing scenario. It is contended that, the 3<sup>rd</sup> Respondent (KPTCL) has, in no way, delayed in communicating the evacuation Scheme approval to the Petitioners.
- 13) The Petitioners have filed a Rejoinder to the additional Statement of Objections filed by the 1<sup>st</sup> Respondent (BESCOM). The gist of the contentions raised in the Rejoinder, filed in the present case, is similar to the contentions raised in the Rejoinder filed by the Petitioners in OP No.212/2017. It is mainly contended that the Power Plants of the Petitioners were ready, well before the Scheduled Commissioning Date, stipulated in the PPAs and further, well within the extended Scheduled Commissioning Dates communicated by the Respondents 1 and 2.

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- 14) We have heard the learned counsel for the parties. They have reiterated the contentions taken in their respective pleadings. Further, they have also filed their written submissions. The Petitioners, in their written submissions, have contended that, this Commission cannot go into the validity of the extension of the Scheduled Commissioning Date, granted by the Respondents 1 and 2, and that, it cannot call upon the Petitioners to prove the *Force Majeure* Events, by producing the relevant documents, and the grant of extension of time, on the grounds of *Force Majeure*, is at the discretion of the Distribution Licensee.
- 15) From the pleadings and the submissions of the parties in both the Petitions, the following issues would arise, for our consideration:
- (1) Whether this Commission has jurisdiction to call upon the Petitioners to prove the *Force Majeure* events, relied upon by them, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondents admitting or not denying the occurrence of the *Force Majeure* Events, alleged by the Petitioners?
  - (2) Whether the acceptance of the conditional Evacuation Scheme approvals by the Petitioners, precludes them from claiming that the non-availability of the evacuation system of the KPTCL, on or after the Scheduled Commissioning Date, would amount to a *Force Majeure* Event?
  - (3) In case, the construction of the Solar Power Projects itself is found to be incomplete and not ready for commissioning, can the non-availability of the evacuation system of the KPTCL be treated as a *Force Majeure* Event?

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- (4) Whether, on or before the Scheduled Commissioning Date, the construction works of the Solar Power Projects of the Petitioners were completed and ready for commissioning?
- (5) If answer to Issue No(4) above is held in the negative, on what dates these Solar Power Projects were ready for commissioning?
- (6) If there is a delay in achieving the Scheduled Commissioning Date, what shall be the tariff applicable for the energy supplied from these Solar Power Projects?
- (7) Whether there can be a direction in the present proceedings, for payment of the Liquidated Damages, as per Articles 4.3 and 5.8 of the PPAs?
- (8) What Order?
- 16) **ISSUE No.(1):** *Whether this Commission has jurisdiction to call upon the Petitioners to prove the Force Majeure events, relied upon by them, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondents admitting or not denying the occurrence of the Force Majeure Events, alleged by the Petitioners?*
- (a) The learned counsel for the Petitioners submitted that, Article 5.7 of the PPAs, providing for extension of time, authorizes the BESCO/HESCO for grant of extension of time, for achieving the Scheduled Commissioning Date, on the ground of *Force Majeure* Events affecting the Petitioners and this Commission has approved the PPAs, therefore, the BESCO/HESCO need not, again, approach this Commission. He further submitted that, the instructions issued by this Commission that the Developers should file Petitions before this Commission for proving the *force Majeure* Events, is not

in accordance with the law and the terms of the PPAs. He submitted that, only in the event of there being any differences between the Petitioners and the BESCO / HESCO in extending the time, the Developers may raise a dispute before this Commission.

(b) We have considered the submissions of the learned counsel for the Petitioners and in our considered view, his arguments are not tenable for the following reasons:

(i) It is not in dispute that, if the commissioning of the Solar Power Project does not take place within the specified time, the Developer would be entitled to a lower tariff, applicable as on the date of the commercial operation of the Project. Therefore, the indiscriminate extension of time, on the purported ground of a *Force Majeure* Event, affects the tariff, payable under the PPA, for the energy supplied. The BESCO / HESCO, accepting or consenting the *Force Majeure* Events, claimed by the Petitioners on insufficient grounds or otherwise, would affect the tariff payable under the PPAs, which in turn, would affect the interest of the consumers. In such an event, the Commission has a duty to intervene and satisfy itself, as to whether the claim of the Petitioners for the extension of time, on the ground of the *Force Majeure* Events, is properly made out or not, irrespective of the satisfaction of the BESCO / HESCO on the said fact.

- (ii) The above view that we have taken, is based on the principles stated in the judgment rendered by the Hon'ble Supreme Court, in the case of *All India Power Engineer Federation and Others –Vs- Sasan Power Limited and Others*, reported in (2017) 1 SCC 487. In the said decision, the Hon'ble Supreme Court has considered the effect of a waiver of a right by the Distribution Licensee under the provision of the PPA, which ultimately would adversely increase the tariff agreed to under the PPA. The principles are stated thus:

*“The general principle is that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. ...”* [Paragraph-22]

*“The test to determine the nature of interest, namely, private or public is whether the right which is renounced is the right of party alone or of the public also in the sense that the general welfare of the society is involved. ...”* [Paragraph-23]

Further, it is held that:

*“... If there is any element of public interest involved, the court steps in to thwart any waiver which may be contrary to such public interest.” ...”* [Paragraph-24]

In the said case, the question was, 'whether the waiver of a provision of the PPA by the Distribution Licensee, having an effect to increase the tariff, was valid or not'. It is held that, the increase in the tariff would adversely affect the consumers and thereby, any waiver by the Distribution Licensee, against the terms of the PPA, is invalid. We are of the considered opinion that, the principle stated above would squarely apply to a case, where the Distribution

Licensee gives its consent, against the terms of the PPA, in respect of a *Force Majeure* Event, which has the effect of an increase in the tariff, which in turn, would affect the consumers. Therefore, it becomes the duty of this Commission to scrutinize, as to whether there was a case for the extension of time, for commissioning the Solar Power Project, on the ground of *Force Majeure* Events.

- (iii) This Commission has the exclusive jurisdiction to determine the tariff for supply of electricity by a Generating Company to a Distribution Licensee, as per the provisions of Sections 61 to 64 of the Electricity Act, 2003 and the relevant Regulations framed, thereunder. The Generating Company is prohibited from recovering a price or charge exceeding the tariff determined by the Commission. Therefore, wherever the terms of the PPA provide for reduction in tariff, on occurrence of certain events, the Commission alone has the jurisdiction to pronounce a finding regarding the proof or otherwise of the occurrence of such events. The parties concerned being in agreement regarding the occurrence of such events, is irrelevant. Therefore, in the present cases, the clause in the PPA authorizing the Respondents (BESCOM / HESCOM) to extend the time for commissioning of the Project of the Petitioners, on the ground of *Force Majeure* Events, is contrary to the provisions of the Electricity Act, 2003, as it has the effect of taking away the jurisdiction of the Commission, to determine the applicable tariff. The parties cannot confer or take away the jurisdiction of a Court or

Adjudicating Authority. It is only this Commission that has the exclusive jurisdiction to adjudicate upon the existence or otherwise of such an event, which affects the tariff. The fact that earlier, the Commission had approved the PPA, does not take away the jurisdiction of this Commission, to adjudicate on the existence of the *Force Majeure* event, urged by the Petitioners.

- (iv) Therefore, the BESCO and the HESCO already extending the time of the Scheduled Commissioning Date for a period of three months or they having no objection to extend the time for a further period, till the Scheduled Commissioning Dates of the Projects, is of no relevance in the eye of law.
- (c) For the above reasons, we answer Issue No(1), in the affirmative.
- 17) **ISSUE No.(2):** *Whether the acceptance of the conditional Evacuation Scheme approvals by the Petitioners, precludes them from claiming that the non-availability of the evacuation system of the KPTCL, on or after the Scheduled Commissioning Date, would amount to a Force Majeure Event?*

- (a) The substantial part of the definition of “*force Majeure*”, stated in Article 14.3.1 of the PPAs. Reads thus:

*“A ‘**Force Majeure**’ means any event or circumstance or combination of events including those stated below which wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:*

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a)	XXX	XXX	XXX
b)	XXX	XXX	XXX
c)	XXX	XXX	XXX
d)	XXX	XXX	XXX
e)	XXX	XXX	XXX"

The last part of the above definition, viz., "*but only if and ... Prudent Utility Practices*", is in the nature of a Condition Precedent for claiming the existence of a *Force Majeure* Event. Therefore, it should be seen, whether the non-availability of the evacuation system of the KPTCL could have been avoided, if the Petitioners had taken reasonable care or complied with the Prudent Utility Practices.

- (b) The Petitioners were required to obtain the power Evacuation Scheme approval from the KPTCL, to fulfil one of the Conditions Precedent and they were required to commission the Projects on or before the Scheduled Commissioning Dates, to fulfil their obligation. Initially, all the five Projects were identified to be developed at Chellakere Taluk, Chitradurga District and the LoAs dated 19.11.2014 were issued, accordingly. Subsequently, the Petitioners in OP No.212/2017 requested for change of location of the Projects to Tumakuru District and ultimately got the tentative Evacuation Scheme approval on 28.05.2015. This tentative Evacuation Scheme approval contains a condition that the proposed evacuation of power from the Projects would commence, only after commissioning the proposed 220/66 kV Kotagudda (Pavagada) Sub-Station. It was specifically intimated that on hearing the acceptance of the said condition and the other conditions, the regular Evacuation Scheme

approval would be issued. The Petitioners in OP NO.212/2017 agreed for the terms stated in the tentative Evacuation Scheme approval and thereafter, the regular Evacuation Scheme approval dated 10.06.2015 was issued. In the same way, the Petitioners in OP No.213/2017 obtained the tentative Evacuation Scheme approval dated 08.03.2016, which states that, the evacuation of power from the Solar Power Projects was feasible, only after commissioning of the 220 kV DC Line from the 400 kV PGCIL Hiriyr Sub-Station to the 220 kV Thallakku Sub-Station. The Petitioners in OP No.213/2017 had accepted the said term and the other terms stated in the tentative Evacuation Scheme approval, and thereafter, the regular Evacuation Scheme approval dated 10.01.2017 was issued.

- (c) In OP No.212/2017 the Petitioners, before accepting the conditional Evacuation Scheme approval, should have obtained a clarification from the KPTCL about the date, within which the work on the proposed Sub-Station would be, or likely to be completed, to take a decision, as to whether they should proceed with the Projects at that location. The Petitioners have contended that, the KPTCL was aware of the Scheduled Commissioning Date, therefore, they should have completed the work on the proposed Sub-Station. That appears to be not the correct approach of the Petitioners in OP No.212/2017. One can naturally expect that, such a condition must have been introduced, as the KPTCL was not sure of completing the construction of the said Sub-Station within the scheduled Commissioning Date of the Projects. Therefore, the Petitioners without obtaining the clarification regarding the date of completion of the

Sub-Station works, accepting the condition stated in the tentative Evacuation Scheme approval, is not a prudent act on their part, and it would not amount to exercising the reasonable care in avoiding the delay in commissioning their Projects, in the event of non-availability of the evacuation system, within time. They could have avoided such a situation, if they could not have got the assurance from the KPTCL. A prudent Developer of the Power Project should have an assurance of evacuation of power from the Project, on or before the Scheduled Commissioning Date. The Petitioners in OP No.212/2017, proceeding with the works, without getting such an assurance from the KPTCL, have to blame themselves and it can be said that, they themselves have invited a *Force Majeure* Event of not getting the Evacuation Scheme system on or before the Scheduled Commissioning Date.

- (d) The Petitioners in OP No.212/2017 have, admittedly, not completed the construction works of the Projects, at least by the end of September, 2016, as can be seen from the findings recorded on the other issues. The Projects can be said to be ready for commissioning, only after the inspection of the CEIG and issuance of the Safety Certificates. The temporary evacuation approval was given, immediately after obtaining the CEIG Safety approvals. Therefore, the Petitioners cannot take advantage of their own faults and blame the KPTCL. The KPTCL had, at no point of time, made any representation of completion of the Kotagudda (Pavagada) Sub-Station works, on or before the Scheduled Commissioning Date, so as to persuade the Petitioners to take up the Project works on fast track.

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- (e) The Petitioners in OP No.213/2017 got the tentative Evacuation Scheme approval on 08.03.2016, about three months earlier to the Scheduled Commissioning Date. They have obtained the regular Evacuation Scheme approval on 10.01.2017, nearly after seven months from the Scheduled Commissioning Date. Therefore, in this case, one can say that the Petitioners themselves invited a *force Majeure* Event, as they had not taken any reasonable care or not complied with the Prudent Utility Practices.
- (f) For the above reasons, we hold that, the non-availability of the evacuation system of the KPTCL, on or after the Scheduled Commissioning Date, cannot be treated as a *Force Majeure* Event in the present cases. Therefore, we answer Issue No.(2), in the negative.
- 18) **ISSUE No.(3):** *In case, the construction of the Solar Power Projects itself is found to be incomplete and not ready for commissioning, can the non-availability of the evacuation system of the KPTCL be treated as a Force Majeure Event?*
- (a) The Petitioners have contended, in their Rejoinder, that the question of their Power Plants being not ready, does not arise, because the Power Plants could be commissioned, only when they are connected to the Transmission Lines. Such a contention implies that, even if the Solar Power Plants are found to be incomplete and not ready for commissioning, the non-availability of the evacuation system of the KPTCL should be treated as a *Force Majeure* Event. We are of the considered opinion that, such a contention of the Petitioners cannot be accepted. The Petitioners can claim the non-availability of the evacuation system as a *Force Majeure* Event, only when they establish that their Projects are ready for

commissioning, but evacuation facility is not ready. Such a conclusion is clearly derivable from the definition of "Force Majeure", stated in the PPAs. The benefit of a *Force Majeure*, due to non-availability of the evacuation system of the KPTCL, can be claimed by the Petitioners, only subsequent to the completion of their Solar Power Projects and they being ready for commissioning the Projects. The learned counsel for the Petitioners, either in his oral or written submissions, has not controverted the stand of the Respondents, that the Power Projects themselves not being ready for commissioning, the non-availability of the evacuation system cannot be treated as a *Force Majeure* Event.

(b) Therefore, we answer Issue No.(3), in the negative.

19) **ISSUE No.(4):** *Whether, on or before the Scheduled Commissioning Date, the construction works of the Solar Power Projects of the Petitioners were completed and ready for commissioning?*

(a) Admittedly, in both the cases, the construction works of the Solar Power Projects of the Petitioners were incomplete and they were not ready for commissioning, as on the Scheduled Commissioning Date, i.e., 17.06.2016. The Petitioners themselves have asserted that their Projects were completed by the end of September, 2016.

(b) Therefore, we answer Issue No.(4) in the negative.

- 20) **ISSUE No.(5)**: If answer to Issue No(4) above is held in the negative, on what dates these Solar Power Projects were ready for commissioning?
- (a) The Respondents have contended that, the Solar Power Projects of the Petitioners were not ready for commissioning, till the issuance of the Certificates by the CEIG, certifying the electrical safety approvals of the Solar Power Plants and other accessories. In OP No.212/2017, the electrical safety approvals were issued by the CEIG, as per his Certificates dated 28.03.2017. Such Certificates were issued in OP No.213/2017 on 25.03.2017, as can be seen from the letter dated 01.08.2017 of the HESCOM, addressed to this Commission (produced by the Petitioners as ANNEXURE-F). On the other hand, the Petitioners have contended that, the Solar Power Projects were ready for commissioning by the end of September, 2016.
- (b) In OP No.212/2017, in the letters dated 19.08.2016 (ANNEXURE-A), 09.09.2016 and 14.09.2016 (both produced at ANNEXURE-C), the Petitioners have claimed that, the Solar Power Projects were 'almost ready'. The references to the letters of the Petitioners, made in the CEIG Reports dated 28.03.2017, would show that, the Projects of Petitioners Nos.1 and 2 were reported to have been completed by 01.10.2016 and the Project of Petitioner No.3, viz., SEI Suryashakthi Private Limited, was reported to have been completed on 27.03.2017. Further, these approvals would show that, the CEIG intimated certain defects, as per his letter dated 26.12.2016, in respect of the Projects of Petitioner Nos.1 and 2. Further, they would show that, the final inspection was done on 28.03.2017,

for verification of the compliances of the defects, attended to. The electrical safety approval dated 28.03.2017 relating to Petitioner No.3 would show that, the Project works were reported to have been completed on 27.03.2017 and the inspection was conducted on 28.03.2017. From the above facts, it can be stated that, the Projects of the Petitioners in OP No.212/2017 may be taken as completed on 28.03.2017.

(c) As regards OP No.213/2017, in the letter dated 03.02.2017, addressed to the 2<sup>nd</sup> Respondent (HESCOM) and in the letter dated 09.02.2017 addressed to the 1<sup>st</sup> Respondent (BESCOM) (both marked as ANNEXURE-C), it is stated that, the Projects were 'almost ready' for interconnection. As already noted, the electrical safety approvals of the CEIG was obtained on 25.03.2017. Therefore, these Projects can be taken as completed on 25.03.2017.

(d) For the above reasons, we hold that, the Solar Power Projects of the Petitioners in OP No.212/2017 were ready for commissioning on 28.03.2017 and the Solar Power Projects of the Petitioners in OP No.213/2017 were ready for commissioning on 25.03.2017. Therefore, we answer Issue No.(5), accordingly.

21) **ISSUE No.(6):** *If there is a delay in achieving the Scheduled Commissioning Date, what shall be the tariff applicable for the energy supplied from these Solar Power Projects?*

(a) It is found that, there was a delay in achieving the Scheduled Commissioning Dates of the Solar Power Projects. Therefore, admittedly,

the tariff applicable for all the Projects is Rs.6.51 per unit, which was prevalent as on the date of commissioning of the Projects.

(b) Therefore, we answer Issue No.(6), accordingly.

22) **ISSUE No.(7)**: *Whether there can be a direction in the present proceedings, for payment of the Liquidated Damages, as per Articles 4.3 and 5.8 of the PPAs?*

(a) The Respondents claim that, there should be a direction for payment of the Liquidate Damages, as per Articles 4.3 and 5.8 of the PPAs. The Petitioners have contended that, in the present proceedings, there cannot be any direction for payment of the Liquidated Damages, unless the Respondents have made any counter-claim for the Liquidated Damages. The scope of the Petitions filed by the Petitioners does not cover the issue relating to the liability for payment of the Liquidated Damages, under the terms of the PPAs. The respective contentions of the parties, in this regard, are kept open.

(b) For the above reasons, we hold that, there can be no direction against the Petitioners, for payment of the Liquidated Damages, in these proceedings. Therefore, we answer Issue No.(7) in the negative.

23) **ISSUE No.(8)**: *What Order?*

For the foregoing reasons, we pass the following:

### **ORDER**

(a) The Petitioners in OP No.212/2017 and OP No.213/2017 are not entitled for any of the reliefs, as prayed for by them in the Petitions;

- (b) All the Solar Power Projects of the Petitioners, in both the Petitions, are liable to the reduced tariff of Rs.6.51 (Rupees Six and Paise Fifty One only) per unit, for the energy supplied under the PPAs, from the respective dates of commissioning of the Projects;
- (c) The claims of the Respondents, for award of the Liquidated Damages against the Petitioners, cannot be entertained in these proceedings; and,
- (d) The original Order shall be kept in OP No.212/2017 and a copy, thereof, in OP No.213/2017.

Sd/-  
(SHAMBHU DAYAL MEENA)  
CHAIRMAN

Sd/-  
(H.M. MANJUNATHA)  
MEMBER

Sd/-  
(M.D. RAVI)  
MEMBER