

No.N/84/2020

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

Dated: 11.06.2021

Present

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

O.P. No.37/2020

BETWEEN:

M/s ACME Kudligi Solar Energy Private Limited,
Plot No.152, Sector-44,
Gurgaon,
Haryana-122 022.

....PETITIONER.

(Represented by M/s HAS Advocates)

AND

- 1) Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru-560 001.
- 2) Karnataka Power Transmission Corporation Limited,
2nd Floor, KPTCL,
Kaveri Bhavan,
Bengaluru-560 009.
- 3) Karnataka Renewable Energy Development Limited,
39, 'Shanti Gruha',
Bharath Scouts and Guides Building,
Opp. The Chief Post Master General Office,
Palace Road,
Bengaluru-560 001.

... RESPONDENTS.

(Respondent No.1 & 2 represented by Sri S. Sriranga,
Advocate for M/s JUSTLAW Advocates
Respondent No.3 represented by
Sri Murugesh V Charati, Advocate.)

ORDERS

1. This is a petition filed under Section 86 (1) (f) of the Electricity Act, 2003 praying for the following reliefs to:

- a) Allow the present petition;
- b) Declare that the commissioning of power project was affected by the Force Majeure Event affecting the Developer i.e., non-commissioning/non-availability of 220 kW Kudligi Sub-station including incoming lines and terminal bays;
- c) Declare and hold that the delay in commissioning of the Project is for the reasons not attributable to the Petitioner and that the Scheduled Commercial Operation Date as prescribed under the Power Purchase Agreement dated 22.03.2018 will be modified as 30.05.2020 for all intents and purposes;
- d) Declare 30.05.2020 i.e., the date of commissioning and synchronization of the Petitioner's 20 MW Power Project with the 220 kV Kudligi Sub-station of KPTCL as the Commercial Operation Date of the 20 MW Power Project under the PPA;
- e) Declare and hold that the Petitioner will not be liable to bear any liquidated damages, reduction in tariff and/or contractual penalty for not commissioning its Project as per the Scheduled Commercial Operation Date as prescribed under the Power Purchase Agreement dated 22.03.2018 since the delay is for reasons beyond the control of the Petitioner and due to the non-commissioning of 220 kV Kudligi Sub-station i.e., Force Majeure Event affecting the Developer;
- f) Issue appropriate directions to Respondent No.1 to the effect that that original SCOD in the PPA shall be substituted as 30.05.2020 for all intents and purposes; and

g) Grant such order, further relief(s) in the facts and circumstances of the case as this Hon'ble Commission may deem just and equitable in favour of the Petitioner.

2. The relevant materials facts pleaded by the Petitioner for the disposal of the present case may be stated as follows:

a) The Petitioner is a Company incorporated under the Companies Act having its Registered Office at the address shown in the cause title. The Petitioner is a Special Purpose Vehicle (SPV) incorporated by ACME Solar Holdings Limited (ACME SHL) for setting up the 20 MW Solar Power Project in Kudligi taluk of Ballari district, Karnataka State (Solar Power Project).

b) Pursuant to the Solar Power Policy 2014-21 of Government of Karnataka, the 3rd Respondent-Karnataka Renewable Energy Development Limited (KREDL), being a Nodal Agency invited Request for Proposal (RfP) dated 07.12.2017 (Annexure-P1) for selection of bidders for undertaking development of Solar PV Ground Mounted Power Project of 860 MW in 43 taluks of Karnataka. M/s ACME SHL was the selected bidder for commissioning the 20 MW (AC) Solar PV Ground Mounted Power Project in Kudligi taluk of Ballari district and for sale of energy at Rs.2.94 per unit. Accordingly, the 3rd Respondent (KREDL) issued Letter of Award (LoA) dated 08.02.2018. The LoA dated 08.02.2018 contained the terms and conditions to be fulfilled by the selected bidder. Pursuant to the terms of LoA, ACME SHL incorporated the Petitioner as a SPV for development of Solar Power Project (It may be noted that Annexure-P2 is described in the petition as the LoA issued in respect of the Solar Power Project concerned

in this petition. However, it is found that Annexure-P2 is a LoA dated 08.02.2018 relating to 15 MW (AC) Solar Power Project to be established at Guledagudda taluk issued in favour of ACME SHL).

c)The Petitioner executed Power Purchase Agreement (PPA) dated 22.03.2018 (Annexure-P3) with the 1st Respondent (BESCOM) for sale of energy from the Solar Power Project at a tariff of Rs.2.94 per kWh. The PPA also contains other terms and conditions to be fulfilled by the parties.

d) Article 4 of the PPA provides for fulfilment of the Conditions Precedent by the Developer within 12 months from the effective date, unless such fulfilment is affected by any Force Majeure event or if any of the Conditions Precedent is waived in writing by the 1st Respondent (BESCOM). Article 5 of the PPA provides for commissioning of the Solar Power Project, no later than the Scheduled Commissioning Date (SCD). The SCD is defined in Article 21 of the PPA to mean eighteen (18) months from the effective date. Effective Date is defined as the date of getting concurrence from the Commission to the PPA in question. The Commission has approved the PPA concerned in this case on 04.05.2018 and the same is communicated to the 1st Respondent (BESCOM) and copy marked to the Petitioner vide letter dated 04.05.2018 (Annexure-P5). Therefore, the Petitioner was required to achieve the Conditions Precedent on or before twelve months from 04.05.2018 i.e., by 03.05.2019 and has to achieve SCD within eighteen months from 04.05.2018 i.e., by 03.11.2019. Here itself, it may be noted that the actual commissioning of the Solar Power Project

had taken place on 30.05.2020 with delay of six months and 26 days. The Commissioning Certificate dated 02.06.2020 (Annexure-P23) issued by the Executive Engineer (Ele.), 220 kV KPTCL, Ittigi, states that the Solar Power Project was commissioned on 30.05.2020.

e) The Petitioner through its letter dated 02.05.2018 (Annexure-P4) applied for Evacuation Scheme approval for evacuating power from the proposed Solar Power Project site to 220/66 kV Kudligi Sub-station. After following the required procedures, the 2nd Respondent (KPTCL) issued Tentative Evacuation Scheme approval on 06.10.2018 and thereafter the Regular Evacuation Scheme approval dated 19.11.2018 (Annexure-P6). The said Regular Evacuation Scheme specified that the evacuation of the proposed 20 MW power will commence only after completion and commissioning of the proposed 220/66 kV Kudligi Sub-station, apart from specifying the other usual terms and conditions.

f) The Petitioner vide its letter dated 07.02.2019 and 11.03.2019 (Annexure-P7 collectively) addressed to the General Manager (Ele.) PP, BESCOM and the Director (Transmission), KPTCL respectively, requested to furnish the status up-date of upstream transmission lines from upcoming 220/66 kV Kudligi Sub-station. In these letters, the Petitioner has also noted the pending works to be attended for commissioning Kudligi Sub-station and also requested to intimate definitive timelines of completion and commissioning of 220/66 kV Kudligi Sub-station. In response to the letter dated 11.03.2019, the Chief Engineer (Ele.) (Planning & Coordination),

KPTCL, intimated vide letter dated 21.03.2019 (Annexure-P8), the status update of the Kudligi Sub-station as follows:

“The Chief Engineer (Ele.)(Transmission Zone), Kalaburagi, vide letter cited under reference (3) dated 15.03.2019 has submitted the status of the subject work as follows:

(a) Status of work of 220 kV Kudligi Sub-station:

All the electrical equipment erection work, cable termination work and control room work has been complete. Testing and scheme checking work is under progress.

(b) Status of work of 220 kV line:

The probable date of commissioning of 220 kV Kudligi Sub-station is by 30.04.2019 and incoming line & terminal bay is by 30.06.2019 respectively.

This is for your information.”

g)The Petitioner again vide letter dated 12.07.2019 (Annexure-P9) addressed to the Director (Transmission), KPTCL and letters dated 29.08.2019 & 31.08.2019 (Annexure-P10 collectively) addressed to the Director, (Transmission), KPTCL and the Managing Director, KPTCL, respectively requested to complete the pending works at Kudligi Sub-station, stating that in the absence of completion of Kudligi Sub-station, the Petitioner could not commission its Solar Power Project within the timeline. It appears the Petitioner has also written similar letters to the 1st Respondent (BESCOM) and in reply to it, the BESCOM vide letter dated 30.09.2019 (Annexure-P11) stated that it was the responsibility of the Petitioner to commission the project within the timeline fixed and asked the Petitioner to approach the KPTCL to obtain present status of commissioning of Kudligi Sub-station.

- h) Thereafter, the Petitioner issued notice of Force Majeure due to non-commissioning of Kudligi Sub-station vide its letter dated 23.10.2019 (Annexure-P12) to the 1st Respondent (BESCOM) & wrote another letter dated 23.10.2019 (Annexure-P13) to the 1st Respondent (BESCOM) requesting for support in implementation of the project in accordance with 6.1.3 and other relevant provisions of the PPA.
- i) In para 4.7 of the petition, the Petitioner has stated that it had achieved all the Conditions Precedent within the timelines as per PPA and submitted all the documents within 03.05.2019.
- j) In para 4.8 of the petition, it is stated that the Petitioner has been able to achieve the progress of construction work of Solar Power Project, as per the timelines provided under PPA and that the Petitioner would have been able to achieve the commissioning of Solar Power Project by SCD but for the non-availability of adequate infrastructure for evacuation of contracted capacity due to non-commissioning of 220 kV Kudligi Sub-station. In this regard, the Petitioner has produced the following documents:
- (i) The Petitioner has produced CEIG approval of electrical installation pertaining to the Solar Power Project dated 23.10.2019 (Annexure-P14). This document shows that the CEIG has inspected; (1) 20 MW Solar Plant and its components; (2) 66/11 kV Sub-station at the Solar Plant of the Petitioner and its components; (3) 66 kV SCOH power evacuation line from Sola Power Project of the Petitioner to the

existing 220/66 kV KPTCL Sub-station at Kudligi taluk; and (4) 1 No. of 66 kV metering and protection bay extension existing 220 kV Sub-station at Kudligi & its components and giving its approval as required under Regulations 32 & 43 of CEA (Measure relating to Safety and Electric Supply) Regulations, 2010. (It is found that in Annexure-P14, CEIG Report, page No.5 is missing and the proper CEIG report is secured)

(ii) The Petitioner has produced letter dated 28.10.2019 (1st document in Annexure-P15) addressed to the Chief Engineer (Ele.) Planning & Coordination, KPTCL, Corporate Office, Bengaluru, in which it is asserted that the Petitioner has completed the construction of 20 MW Solar Power Plant, transmission line and 66 kV terminal bay in Kudligi Sub-station and the Solar Power Project is ready for commissioning. This letter also shows that the Petitioner has requested for the Pre-Commissioning Test of equipment in TB and tariff meters, but the KPTCL officials intimated that since the Kudligi Sub-station was not ready with its upstream 220 kV transmission lines, thereby they could not do the termination of CRP and metering and other control cabling.

(iii) In reply to the above letter dated 28.10.2019 the KPTCL replied vide letter dated 06.01.2020 (2nd document in Annexure-P15) that the 66 kV terminal bay work at both 220/66 kV Kudligi Sub-station and at the Sub-station of the Solar Power plant and were yet to be

completed, as such the Petitioner was informed to complete the evacuation scheme works at both 220/66 kV Sub-station at Kudligi and at the Solar Power plant in order to consider the request for regular inter-connection approval.

(iv) The Petitioner has produced correspondences made on different dates with the Chief Engineer (Ele.) (Planning & Coordination), KPTCL, Corporate Office, Bengaluru, Managing Director, KPTCL, the Additional Chief Secretary to Government, Energy Department and two other concerned Government Authorities at Annexures-P16 dated 29.01.2020, Annexure-P17 (collectively) dated 13.02.2020 & dated 19.02.2020 & Annexure-P18 (collectively) dated 26.02.2020 & 10.03.2020. In these letters, the Petitioner has stated that it has completed all the works within its scope relating to the construction of Solar Power Project and only cabling termination at Kudligi Sub-station was pending due to non-completion of the said Sub-station and non-cooperation of the concerned persons of that Sub-station.

(v) The Petitioner has produced letter dated 12.03.2020 (1st document in Annexure-P19) received from the Chief Engineer (Ele.) (Planning & Coordination), KPTCL, Corporate Office, Bengaluru, reiterating that as per the report sent by the Chief Engineer (Ele.) Transmission Zone, Kalaburagi, 66 kV termination bay work at both Kudligi Sub-station end and at the project site end were yet to be completed

by the Petitioner. The said letter dated 12.03.2020 also instructed the Petitioner to furnish the documents stated in this letter before seeking inter-connection approval. The above letter dated 12.03.2020 was replied by the Petitioner vide letter dated 17.03.2020 (second document in Annexure-P19) stating the same reasons already stated earlier for non-completion of minor works.

- (vi) The Petitioner has produced Annexure-P20 (collectively), the e-mails dated 02.04.2020 sent to the Principal Secretary to Government, Energy Department and others and also e-mail dated 30.03.2020 addressed to the Additional Chief Secretary to Government, Energy Department. In these two e-mails, the Petitioner has requested for a direction to commission the 220 kV Kudligi Sub-station at an early date, to enable the Petitioner to commission the Solar Power Project.
- (vii) The Petitioner has produced the Chief Electrical Inspector to Government (CEIG) provisional approvals dated 20.04.2020 (Annexure-P21 collectively) of upstream Transmission Lines and Kudligi Sub-station. These approvals issued by CEIG are addressed to the Executive Engineer (Ele.), Major Works Division, KPTCL, Davangere and Ballari.
- (viii) The Petitioner has produced Minutes of the Meeting held on 30.05.2020 prepared by the concerned officials at the time of commissioning of the Solar Power Project of the Petitioner and the

Commissioning Certificate dated 03.06.2020 issued by the Executive Engineer (Ele.), O&M Rural Division, GESCOM, HB Halli (Annexures-P22 collectively). The Petitioner has also produced Annexure-P23, the Commissioning Certificate dated 02.06.2020 issued by the Executive Engineer (Ele.), KPTCL, Ittigi, evidencing the commissioning of the Solar Power Project of the Petitioner to the KPTCL Grid on 30.05.2020.

- (ix) The Petitioner has produced letter dated 18.06.2020 (Annexure-P24) addressed to the General Manager (Ele.), PP, BESCOM, Corporate Office, K.R. Circle, Bengaluru, intimating that the Solar Power Project has been successfully commissioned on 30.05.2020 and requesting to do the further process and do the rest of the needful immediately.
- k) The Petitioner has urged the following material grounds in support of its claim:
- (i) Because the commissioning of Power Project was dependent on the commissioning of 220 kV Kudligi Sub-station including incoming lines and terminal bays which, admittedly, got commissioned/charged on 30.05.2020 at 1731 hours on 30.05.2020 subsequent to which Petitioner achieved the commissioning of Power Project on 30.05.2020 at 1900 hours.

- (ii) Because the delay caused in commissioning of the Petitioner's Power Project was due to reasons beyond the control of the Petitioner and Force Majeure events affecting the Developer i.e., non-availability of adequate evacuation infrastructure beyond the Delivery Point/the 220 kV Kudligi Sub-station by KPTCL and thus, the delay in commissioning of Power Project deserves to be condoned.
- (iii) Because Section 39 (2) (c) and 40 (a) of the Act cast a statutory obligation on 2nd Respondent to build, operate and maintain an efficient, coordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centres. In this regard, the Petitioner relied upon Section 39 & 40 of the Electricity Act, 2003.
- (iv) Because the 2nd Respondent is obligated to coordinate the construction and commissioning of the evacuation system to match with the date of commissioning of the Project in fulfilment of the duties/functions assigned to it as STU/transmission licensee under the Act. However, even till the SCOD of the Petitioner's plant, KPTCL was unable to provide any certainty or clarity as to the date by which it would be able to commission its 220 kV Kudligi Sub-station. Since the commissioning of Petitioner's project was directly dependent on the commissioning of Kudligi Sub-station therefore, any delays in construction and commissioning of the

evacuation infrastructures/Transmission Lines and/or any such other infrastructure required for evacuation of complete contracted capacity of 20 MW from the Project will invariably lead to delay in the commissioning of the power project.

(v) Because it is a settled principle that if there is delay on part of the STU/DISCOM in providing transmission/evacuation infrastructure to the solar power producer, it is not the solar power producer which should be punished for not commissioning its project by the SCOD. It is to be classified as a Force Majeure event, whether it is defined under the definition of 'Force Majeure' in the PPA or not and consequently extension in SCOD should be given to the solar power producer. In this regard, the Petitioner relied upon Rajasthan Renewable Energy Corporation Limited Vs. Rajasthan Electricity Regulatory Commission and Others in Appeal No.124 of 2016 decided on 03.07.2017.

(vi) Because the PPA categorically provides that Petitioner shall be responsible for power evacuation from the project to the nearest Delivery Point thereby meaning that beyond the Delivery Point it will be KPTCL's responsibility. Therefore, Petitioner cannot be punished for delay in commissioning due to delays on the part of KPTCL or for non-availability of the required infrastructure for evacuation of power from power plant.

(vii) Because a perusal of the PPA shows that any event or circumstance or combination of events including the ones stated in the PPA which are beyond the control of the Affected party and unavoidably delays the performance of obligations will qualify as a Force Majeure event thus, non-availability of evacuation infrastructure which was to be provided by KPTCL, on which Petitioner's commissioning was dependent upon, will qualify as a Force Majeure. Further, the scheme of the contract is such that a party affected by the Force Majeure Event will not be forced to face consequences which were beyond his control.

(viii) The Petitioner acted on the promises of the 2nd Respondent (KPTCL) and constructed the Project by investing huge sums of money. These promises/representations are thus, enforceable on the principles of 'promissory estoppel' and 'legitimate expectation'.

l) For the above reasons, the Petitioner has filed the present petition on 13.08.2020 for the reliefs prayed for, as already noted.

3. The Respondents appeared through their counsel and submitted their Statement of Objections.
4. The 1st & 2nd Respondents though filed separate Statement of Objections, have taken the similar grounds of defense. In this regard, the Statement of Objections filed by the 2nd Respondent (KPTCL) may be noted. Paras 8, 9 & 10 of the Statement of Objections of 2nd Respondent dated 02.02.2021,

substantially make out the grounds urged in defence by these Respondents which are as follows:

(a) (i) Para 8 – “In addition to the same, attention of the Commission is also drawn to the provisions of the RfP Clause 1.1.3 of the RfP reads as under:

The Developer shall be responsible for power evacuation from the power plant to the nearest sub-station/delivery point as mentioned in the PPA. Bidders shall be solely responsible for identification of suitable grid sub-station and carrying out any evacuation assessment study with respect to the connectivity of the Project to the grid sub-station. Also, the physical location of the Project shall be within the Taluka/Legislative Constituency for which the Bidder is submitting its Bid. However, the evacuation of the Project may be made to any nearby grid sub-station of KPTCL or concerned ESCOMs, as the case may be, irrespective of the allotted Taluka/Legislative Constituency for the Project. The selected bidder shall obtain power evacuation approval from KPTCL/ concerned ESCOM, as the case may be after signing of PPA. In this regard, the successful Bidder shall be solely responsible for obtaining the power evacuation approval from KPTCL/concerned ESCOM, as the case may be. In no case, KREDL/KPTCL/concerned ESCOMs shall be held responsible for the non-performance of the successful Bidder in obtaining the above mentioned approval from KPTCL/concerned ESCOM, as the case may be.”

Thus, onus was on the Petitioner to ensure that it carried out all necessary studies etc., to ensure that evacuation of power was possible.

(ii) Para 9 –It is submitted that the RfP also clearly states that the Petitioner is responsible for identifying suitable sub-station and carrying out any evacuation assessment study with respect to the connectivity of the Project to the grid sub-station. Therefore, it was the obligation of the Petitioner to identify the sub-station and verify the availability of evacuation facility so as to meet the timelines for commissioning the project within time. However, it has failed to do so and is now attempting to hold the Respondent herein liable for the same. It is settled law that a party cannot take advantage of its own wrong. The Petitioner who failed in its obligations cannot now seek for a prayer which prevents covenants of the contract. The contention of the Petitioner that it could not commence supply of energy from its plant due to the delay in commissioning of Kudligi Sub-station is untenable. It is submitted that the Petitioner applied for evacuation scheme on 02.05.2018. On 06.10.2018, the Petitioner was accorded tentative evacuation approval. Copy of the tentative evacuation scheme dated 06.10.2018 is produced herewith as Annexure-R1. It is submitted that the Respondent herein has clearly mentioned that the proposed 20 MW solar plant of the Petitioner will commence supply of energy only after completion and commissioning of the proposed 220/66 kV Kudligi Sub-station. The Petitioner being fully aware of the

same has accepted the said terms and conditions in the tentative evacuation scheme vide its letter dated 09.10.2018. Copy of the acceptance letter dated 09.10.2018 is produced herewith as Annexure-R2. Thereafter, on 19.11.2018 the Respondent herein has granted Regular evacuation approval. It is submitted that the Respondent herein has never guaranteed the Petitioner that the Kudligi Sub-station will be commissioned within the SCOD of the Petitioner and Respondent herein was under no obligation to do so. Further, the Petitioner in the circumstance of delayed commissioning of 220/66 kV Kudligi Sub-station had the obligation to go for alternative methods of evacuation. However, no such request was made before the Respondent. Therefore, the Petitioner cannot pass the burden of delay in commissioning its plant onto the Respondent herein. Further knowing fully well what its obligations under the contract are, the Petitioner is now attempting to take advantage of their own wrong. It is humbly submitted that the same is impermissible in law and ought not to be permitted.

- (iii) Para-10 – It is submitted that scheduled commissioning date of Petitioner was 03.11.2019. It is submitted Article 5.1.1 (c) of the PPA casts an obligation on the Petitioner to supply power to the Respondent not later than the SCOD. The Petitioner in its letter dated 28.10.2019 addressed to the Chief Engineer (Electy), Planning & Coordination, KPTCL has claimed that its 20 MW solar plant was ready for commissioning (produced at Annexure P-15 collectively at page 274 of petition copy). It is submitted that the said claim of the

Petitioner is false. It is submitted that the Respondent herein had addressed a letter to Petitioner on 06.01.2020 (produced at Annexure-P15 collectively at page 276 of the petition copy) informing the Petitioner that there was certain works pending at Petitioner's solar plant. It is submitted that Petitioner had not completed all the works at its end on the scheduled commissioning date which is also evident from the letter dated 30.11.2019 of the Executive Engineer (Ele.) Major Works Division, KPTCL, Bellary. The Petitioner is using the delay in commissioning of Kudligi Sub-station as a grouse to camouflage the delay at its end in completing the project within the stipulated timeframe. Therefore, the Petitioner's claim of having completed all the works at its end deserves rejection. Copy of letter dated 30.11.2019 are produced herewith as Annexure-R3."

- (b) In response to para 4.7 of the petition claiming that the Petitioner has achieved all the Conditions Precedent within the timeline and submitted all documents within 03.05.2019, these Respondents denied the said averments as wholly untenable. The 1st Respondent (BESCOM) produced letter dated 31.03.2020 (Annexure-R1) addressed to the Petitioner requiring to furnish the documents stated therein and a Certificate to the effect that Conditions Precedent have been complied with by the Petitioner.
- (c) The 2nd Respondent (KPTCL) had contended that it has only given the probable date of the commissioning of Kudligi Sub-station and has

never confirmed or guaranteed the commissioning of the said Sub-station within the SCD of the Petitioner's Solar Power Project.

(d) That no reliance can be placed on the judgment of the Hon'ble ATE in Appeal No.124 of 2016 decided on 03.07.2017 to support the contention of the Petitioner. It is stated that in the present case there has been no inaction on the part of the 2nd Respondent.

(e) It is contended that the Petitioner's power plant was not fully ready for evacuation of power as was evident from the letter dated 30.11.2019 [Annexure-R3 produced by the 2nd Respondent (KPTCL)].

(f) The 1st Respondent (BESCOM) has also produced Annexure-R2 collectively, the two letters dated 07.09.2019 & 30.09.2019 addressed to the Petitioner in reply to the query of the Petitioner to update the present status of Kudligi Sub-station, stating that for this purpose the Petitioner had to approach the 2nd Respondent (KPTCL).

(g) These Respondents have denied all other averments made in the petition which were not specifically traversed in and contrary to, the Statement of Objections.

(h) Therefore, the 1st & 2nd Respondents have prayed for dismissal of the petition.

5. The 3rd Respondent (KREDL) has filed its Statement of Objections requesting to dismiss the petition against it, stating that it is for 1st & 2nd Respondents to

counter the contentions urged by the Petitioner and this Respondent is not a necessary party to this petition.

6. The Petitioner has filed separate rejoinders to the Statement of Objections of Respondent No.1, 2 & 3. The rejoinder filed to the Statement of Objections filed by the 3rd Respondent (KREDL) is not material.
7. Regarding the contentions taken in the Statement of Objections of 1st Respondent (BESCOM) & 2nd Respondent (KPTCL), pointing out the responsibility of identifying suitable Sub-station and consideration of alternative methods of evacuation, the Petitioner replied in para 4 & 5 of the rejoinders as follows:

(a) Para – 4 – “In its Statement of Objections, BESCOM has alleged that it was the Petitioner’s duty to identify suitable Sub-station land and verify evacuation availability and that the Petitioner failed to do so. BESCOM has further alleged that in the event of delay being caused on account of non-availability of evacuation infrastructure, the Petitioner ought to have considered alternative methods of evacuation of power. Such allegations made by BESCOM are unmeritorious and deserve to be rejected.

(b) Para – 5 - It is submitted that the Petitioner had carried out the land identification work and proceeded to implement its Project considering the evacuation at 220 kV Kudligi Sub-station. The 220 kV Kudligi Sub-station and the associated transmission lines were to be implemented by the 2nd Respondent (KPTCL), which is a GoK entity.

It is submitted that in terms of the Regular Evacuation scheme issued by KPTCL vide its letter dated 19.11.2018, the power flow from the Petitioner's Project was subject to the commissioning of the 220 kV Kudligi Sub-station. The relevant portion of the same is reproduced herein below for ease of reference:

The Evacuation of the proposed 20 MW power will commence only after completion of the following by KPTCL: Commissioning of the proposed 220/60 kV Kudligi Sub-station."

8. Subsequent to filing the petition, the case was being called on for hearings through Video-Conferencing due to prevailing Pandemic COVID-19. It appears in the meanwhile, the 1st Respondent (BESCOM) issued Demand Notice claiming Liquidated Damages from the Petitioner. Then the Petitioner filed IA on 05.02.2021 before this Commission with a Memo requesting for urgent hearing of the petition. This Commission ordered the case to be listed on 02.03.2021. Then the Petitioner approached the Hon'ble ATE in OP No.6 of 2021. After hearing the parties on 15.02.2021, the Hon'ble ATE directed the parties to appear before this Commission on 16.02.2021 for further proceedings and also directed this Commission to dispose of all the applications filed by the Petitioner questioning the payment of Liquidated Damages forthwith. Thereafter, the matter was taken up for hearing. Both counsel orally submitted that the matter may be taken up for final disposal itself as the counsel for the 1st Respondent undertook that no action would be taken on the Demand Notice in

question. The parties concluded the arguments on 25.03.2021 on the main matter and the case was reserved for orders.

9. We have heard the learned counsel for the parties. They have reiterated the contentions taken in their respective pleadings. The learned counsel for the Petitioner also submitted that the Liquidated Damages as provided in Article 5.8 of the PPA cannot be demanded unless the 1st Respondent (BESCOM) establishes the actual damages suffered by it due to non-supply of energy during that period. The learned counsel for the 1st Respondent countered the said argument and stated that in the present case, the Liquidate Damages can be demanded. The learned counsel for the parties relied upon several decisions in support of their respective contentions.

10. From the pleadings and submissions of the parties, the following Issues would arise for our consideration:

Issue No.1: Whether on or before the Scheduled Commissioning Date (SCD), construction works of the Solar Power Project of the Petitioner was completed and the said Project was ready for commissioning?

Issue No.2: If Issue No.1 is held in negative, on which date the Solar Power Project was ready for commissioning?

Issue No.3: Whether in the facts and circumstances of the present case, the acceptance of conditional evacuation scheme approval by the Petitioner precludes it from claiming any relief under Force Majeure event for the period during which the evacuation system of 2nd Respondent (KPTCL) was not made available for evacuation of power from the Solar Power Project?

Issue No.4: Whether in the facts and circumstances of present case, the Petitioner had the obligation to go for alternative methods of evacuation of power?

Issue No.5: Whether delay in commissioning of Kudligi Sub-station would fall under the definition of Force Majeure as per Article 14 of the PPA?

Issue No.6: Whether the 1st Respondent (BESCOM) is entitled to claim Liquidated Damages at the rates specified in Article 5.8 of the PPA?

Issue No.7: To which reliefs the parties are entitled to?

Issue No.8: What Order?

11. After considering the submissions of the counsel for both the parties, the pleadings and the documents on record, our findings on the above Issues are as follows:

12. Issue No.1: Whether on or before the Scheduled Commissioning Date (SCD), construction works of the Solar Power Project of the Petitioner was completed and the said Project was ready for commissioning?

and

Issue No.2: If Issue No.1 is held in negative, on which date the Solar Power Project was ready for commissioning?

a) Both Issue No.1 & Issue No.2 can be conveniently disposed of at one place. Therefore, they are taken up at one place.

b) The Petitioner has obtained CEIG Report dated 23.10.2019 (Annexure-P14) which discloses the approval of electrical installations of

the (i) 20 MW Solar Power Plant; (ii) 66/11 kV Sub-station at the project site; (iii) 66 kV SCOH Power Evacuation Line from Solar Power plant to Kudligi Sub-station and (iv) installation of 1 No. of 66 kV Metering and protection bay extension at Kudligi Sub-station including all the components of the above. This fact is not denied by the 1st & 2nd Respondents. They contended that certain works at the 66 kV terminal bay at 220/66 kV Kudligi Sub-station end and at Solar Power Project end were yet to be completed as shown in the letter dated 06.01.2020 of the Chief Engineer (Ele.) Planning & Coordination, KPTCL (2nd document in Annexure-P15). The descriptions of these pending works are stated in detail by the Chief Engineer (Ele.), Transmission Zone, GESCOM, Kalaburagi in his letter dated 30.11.2019 (Annexure-R3 produced by KPTCL) which are as follows:

“ At 220/66 kV Kudligi S/s:

1. Cable tray needs to be fixed in the cable ducts along with the control cable laying and termination works of the equipment and 66 kV control panel.
2. Rigid pipe connecting both the Bus-1 & Bus-2 Isolator need to be fixed.
3. Levelling and jelly spreading work need to be completed.
4. Equipment and structure earthing need to be completed.
5. Equipment drawing and TAQC report of all the equipment along with DI need to be furnished.

At M/s ACME Plant end:

1. All the equipment need to be connected with Drake.
2. Levelling and Jelly spreading work need to be completed.

3. 110V DC battery set termination work in the control room need to be completed."

- c) The Petitioner in its letter dated 28.10.2019 (1st document in Annexure-P15) stated that for the request made by it for conducting the Pre-commissioning test of equipment in Terminal Bay & Tariff Meters installed at Kudligi Sub-station, the concerned officials intimated that they would not do the termination of CRP and metering and other control cabling Pre-commissioning tests, as the 220/66 kV Kudligi Sub-station and its upstream transmission lines were not yet commissioned. In any of the letters, the 1st & 2nd Respondents have not denied this fact. The Petitioner made the same grievances in number of other letters written to different Authorities including Respondents.
- d) As noted above, CEIG report was obtained on 23.10.2019. The SCD as per the PPA was 03.11.2019. There was nearly 12 days' time for completing the pending works if any, at Kudligi Sub-station Bay or at the Project Site. The Petitioner's contention that the pending work at Kudligi Sub-station Bay could not be completed due to non-cooperation of the officials, remains unchallenged. We are of the opinion that the pending works shown in the letter dated 30.11.2019 (Annexure-R3) noted above, are only the finishing works and at best it could have been completed within 3-4 days. The parties have not specifically stated the time period required for completion these pending works. Considering the above facts and circumstances, we hold that the Petitioner has completed the construction works of the Solar Power Project well before the SCD i.e.,

03.11.2019 and the contention of the 1st & 2nd Respondents that the Solar Power Project work was incomplete as on 03.11.2019 is to be rejected.

e) Accordingly, Issue No.1 is held in affirmative and Issue No.2 does not arise for consideration.

13. Issue No.3: Whether in the facts and circumstances of the present case, the acceptance of conditional evacuation scheme approval by the Petitioner precludes it from claiming any relief under Force Majeure event for the period during which the evacuation system of 2nd Respondent (KPTCL) was not made available for evacuation of power from the Solar Power Project?

a) Before considering the above Issue, we may note the law relating to Force Majeure which is considered in detail by the Hon'ble Supreme Court of India from para 30 onwards in the judgment between Energy Watchdog Vs. Central Electricity Regulatory Commission and Others reported in (2017) 14 SCC 80. Out of it, the para No.34, 36 to 38 explain in detail, the law relating to Force Majeure which are as follows:

Para 34 – *“Force Majeure” is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter-III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act. Sections 32 and 56 are set out herein:*

“32. Enforcement of contracts contingent on an event happening –

Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

56. Agreement to do impossible act –

An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful – A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful – *Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promise sustains through the non-performance of the promisee.”*

Para 36 – *The law in India has been laid down in the seminal decision of Satyabrata Ghose V. Mugneeram Bangur & Co. The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word “impossible” has not been used in the section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain*

circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place de hors the contract, it will be governed by Section 56.

Para 37 – *In Alopi Parshad & Sons Ltd. V. Union of India, this Court, after setting out Section 56 of the Contract Act held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.*

Para 38 – *Similarly, in Naihari Jute Mills Ltd. V. Khyaliram Jagannath, this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of Satyabrata Ghose V. Mugneeram Bangur & Co. Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.”*

b) For the disposal of this Issue, we assume that ‘Force Majeure’ definition in Article 14 of the PPA is inclusive but not exhaustive. Therefore, any event or circumstance or combination of events or circumstances including the ones stated in the PPA which are beyond the control of

the Affected Party and unavoidable delays the performance of the obligation will qualify as a 'Force Majeure' event.

- c) The relevant evidence for consideration of this Issue may be noted. The Tentative Evacuation Scheme approval dated 06.10.2018 (Annexure-R1 produced by the 2nd Respondent-KPTCL) contained the term that evacuation of power from the proposed Solar Power Project would commence only after the commissioning of the proposed 220/66 kV Kudligi Sub-station. Further, it was also made clear in this Tentative evacuation scheme approval that only after hearing acceptance for the terms & conditions stated in it, the Regular Evacuation Scheme approval would be issued. The Petitioner within three days on 09.10.2018 gave its confirmation for the terms & conditions stated in the Tentative Evacuation Scheme. In this regard, the 2nd Respondent (KPTCL) has produced Annexure-R2 dated 09.10.2018. The Regular Evacuation Scheme approval dated 19.11.2018 (Annexure-P6) also incorporates the same condition. Therefore, in the absence of any other evidence in favour of the Petitioner, one has to say that the acceptance of such conditional evacuation scheme precludes the Petitioner from claiming any 'Force Majeure' event for the period during which the evacuation system was not made available due to non-commissioning of the Kudligi Sub-station.
- d) However, the Petitioner claims that the 2nd Respondent (KPTCL) has assured to complete the upstream transmission line work and to

commission Kudligi Sub-station on or before 30.06.2019, enabling evacuation of power from Solar Power Project. Therefore, the Petitioner contended that the non-commissioning of Kudligi Sub-station on or before the SCD (03.11.2019) of the Solar Power Project, prevented it from performing its obligation of supply of energy to the grid, for no fault of it. Therefore, according to the Petitioner, the delay in commissioning Kudligi Sub-station should be treated as 'Force Majeure' event.

- e) The Respondents have contended that they had not given any confirmation or assurance that the Sub-station at Kudligi would be completed within 30.06.2019, but at the request of the Petitioner, the 2nd Respondent (KPTCL) had given the probable date of commissioning the said Sub-station. The Petitioner vide its letter dated 07.02.2019 and 11.03.2019 (Annexure-P7 collectively) addressed to the General Manager (Ele.) PP, BESCO and the Director (Transmission), KPTCL respectively, requested to furnish the status up-date of upstream transmission lines from upcoming 220/66 kV Kudligi Sub-station. In these letters, the Petitioner has also noted the pending works to be attended for commissioning Kudligi Sub-station and also requested to intimate definitive timelines of completion and commissioning of 220/66 kV Kudligi Sub-station. In response to the letter dated 11.03.2019, the Chief Engineer (Ele.) (Planning & Coordination), KPTCL, intimated vide letter dated 21.03.2019 (Annexure-P8), the status up-date of the Kudligi Sub-station. In the said letter, it is stated that the probable date of

commissioning of 220 kV Kudligi Sub-station is by 30.04.2019 and incoming line and terminal bay is by 30.06.2019 respectively. The Respondents have further pointed out that as per Clause 1.1.3 of the RfP, it is the sole responsibility of the developer to identify the suitable grid sub-station and carrying out any evacuation assessment study with respect to the connectivity to the grid sub-station. In this regard, in para 8 of the Statement of Objection of the 2nd Respondent, the Clause 1.1.3 of the RfP is extracted. The said provision in Clause 1.1.3 of the RfP casts the responsibility on the developer to search the suitable sub-stations for evacuation of power to the grid. Therefore, the 1st & 2nd Respondents have contended in view of the above facts, the Petitioner unconditionally accepting to evacuate power only after commissioning of Kudligi Sub-station precludes, the Petitioner to contend that the delay in commissioning Sub-station amounted to Force Majeure event.

f) After considering the above facts and the rival contentions, we are of the considered view that the claim of the Petitioner that the benefit of Force Majeure for the period during which the evacuation system was not made available due to non-commissioning of Kudligi Sub-station, is to be rejected for the following reasons:

- (i) The Petitioner must have been well aware of its obligation to search for the suitable Sub-station for evacuation of power from the proposed project site as contained in Clause 1.1.3 of the RfP.

The RfP was issued on 07.12.2017 (Annexure-P1). Subsequently, nearly after two months, LoA dated 08.02.2018 (Annexure-P2) was issued in favour of ACME SHL, the single business entity which incorporated the Petitioner as SPV for development of the Project. The Petitioner applied for evacuation scheme approval on 02.05.2018 itself as can be seen from the references made in Tentative Evacuation scheme approval (Annexure-R1 produced by the 2nd Respondent). From the records, it is clear that the progress of the work of Kudligi Sub-station and the upstream transmission lines connecting this Sub-station was at the mid-level. Hence, the Petitioner must have been aware of all the relevant facts before applying for evacuation scheme approval requesting evacuation of power to Kudligi Sub-station.

- (ii) Had the Petitioner obtained the probable or the definite timeline for completion of Kudligi Sub-station and the upstream transmission lines, before giving its consent to the terms & conditions stated in the Tentative Evacuation Scheme approval, there was some force in contending that the Petitioner had relied upon the assurance or the estimated period for commissioning Kudligi Sub-station, for giving its consent for conditional evacuation approval. The Petitioner obtaining a probable time period for completion of Kudligi Sub-station subsequent to agreeing for conditional evacuation of power does not help it in

any manner. It may be noted that by the time, the Petitioner received reply vide letter dated 21.03.2019 (Annexure-P8) regarding probable dates of completion of Kudligi Sub-station, the project work must have achieved sufficient progress. Therefore, one can say that the letter dated 21.03.2019 (Annexure-P8) was not the cause for continuing the project work by the Petitioner.

(iii) Assuming that the Petitioner had not at all applied its mind as to whether the conditional Tentative Evacuation Scheme approval is to be accepted or not, the Petitioner alone is to be blamed for its omission and commission. Had the Petitioner obtained the probable period of completion of Kudligi Sub-station earlier to giving consent for conditional Tentative Evacuation Scheme approval, there was some force in contending that the 2nd Respondent had a duty to complete Kudligi Sub-station within the time period stated by it.

(iv) Even in the letters dated 07.02.2019 & 11.03.2019, while requesting the status up-date of Kudligi Sub-station and the transmission lines, the Petitioner had not made it clear that in the event Kudligi Sub-station would not be ready within SCD of Solar Power Project, it would have thought of alternative course to be adopted.

(v) The petition does not contain any averment that the 2nd Respondent (KPTCL) was negligent in completing the works of

Kudligi Sub-station and the upstream transmission lines. In the absence of such pleading, the Petitioner cannot claim that it should not suffer for the delay in commissioning Kudligi Sub-station due to any negligence on the part of the 2nd Respondent (KPTCL). If there was actionable negligence on the part of the 2nd Respondent (KPTCL) in completing Kudligi Sub-station work, the Petitioner could have contended that it should not suffer for the negligence of KPTCL.

(vi) During the course of execution of the Project work, the Petitioner took the risk of accepting conditional evacuation scheme approval, therefore, it must be held responsible for the terms it agreed. That act of the Petitioner amounted to introducing a Force Majeure Exclusion Clause, so far such risk is concerned.

(vii) The unconditional acceptance of the Tentative Evacuation Scheme approval in the above facts and circumstances, is to be held an intentional act or at least an error or omission on the part of the Petitioner.

(viii) The representation and warranty of the developer stated in Article 7.1 (k) of the PPA reads as follows:

“Without prejudice to any express provision contained in this Agreement, the Developer acknowledges that prior to the execution of this Agreement, the Developer has after a complete and careful examination made on

independent evaluation of the Project, and the information provided by BESCO, and has determined to its satisfaction the nature and extent of risks and hazards as are likely to arise or may be faced by the Developer in the course of performance of its obligations hereunder.

The Developer also acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth above and hereby confirms that BESCO shall not be liable for the same in any manner whatsoever to the Developer.”

The above representation and warranty of the Petitioner makes it clear that it should take the entire risk and responsibility on itself for having accepted the conditional Evacuation Scheme.

g) From the above facts and circumstances and the conclusions which we have reached, we hold that the case of the Petitioner falls clearly under ‘Force Measure Exclusions’ stated in Article 14.4 of the PPA. The relevant part of it is as follows:

Article 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)
- b)
- c)

- d)
- e) Insufficiency of finances or funds or the agreement becoming onerous to perform; and
- f) Non-performance caused by, or connected with, the Affected Party's:
 - (i) Negligent or intentional acts, errors or omissions;
 - (ii)
 - (iii)
 - (iv)"

h) The Petitioner has further contended that it invested huge amount on the representation of the Respondents that they would extend all supports required, thereby the Respondents cannot be allowed to go back from their promise. In support of the said contention, the Petitioner relied upon the principles of promissory estoppel and legitimate expectation. At the outset, it can be said that the facts either pleaded or proved do not make out any case for promissory estoppel or legitimate expectation for extending any relief to the Petitioner. The Petitioner has further contended that the 2nd Respondent (KPTCL) was obliged to coordinate the construction and commissioning of the evacuation system (Kudligi Sub-station) to match with the date of commissioning of the Solar Power project in fulfilment of its duties and functions assigned as a STU/transmission licensee. In this regard, the Petitioner relied upon Sections 39 (2) (c) & 40 (a) of the Electricity Act, 2003. The Commission notes that the above provisions specifies the functions of STU/duties of transmission licensee to develop intrastate transmission lines for smooth flow of energy but does not cast any obligation to complete the

transmission system within any specified time so as to match with the date of commissioning of any Solar Power project. Therefore, these provisions do not improve the case of the Petitioner.

- i) The mere fact that due to delay in commissioning of the Solar Power Project, the Petitioner had to incur the liabilities towards payment of liquidated damages and reduction in tariff as per the terms of the PPA, is not a ground to relieve the Petitioner from its obligation.
- j) Before concluding this Issue, we may refer the decision relied upon by the learned counsel for the Petitioner in Gujarat Urja Vikas Nigam Limited Vs. ACME Solar Technologies (Gujarat) Private Limited & Others reported in (2017) 11 SCC 801. The learned counsel particularly relied upon para 8 of the said judgment which reads as follows:

Para – 8 *“Regard must also be had to the certificate of commissioning issued by GEDA which is another mandatory requirement in terms of the terms and conditions of PPA dated 31.05.2010. In the said certificate, though the date of commissioning is mentioned as 13.03.2012, it has also been certified that the plant was ready for generation on 31.12.2011 but for the 66 kV transmission line. Reading the aforesaid two certificates/ communications issued by the office of the Chief Electrical Inspector and GEDA it will be abundantly clear that the switchyard and the electrical installations required to be set up by Respondent 1 were ready for commissioning on 31.12.2011 though the actual commissioning thereof had to await the completion of the transmission lines which was made available by GETCO and accordingly were charged on 13.03.2012.”*

k) From the contents of the above para, the learned counsel for the Petitioner submitted that once the Solar Power Project work is found to be completed and CEIG Report is obtained, the Petitioner is not liable for payment of Liquidated Damages under Article 5.8 of the PPA for non-commissioning of the project due to delay in commissioning the Kudligi Sub-station. The said para No.8 does not lead to such conclusion as suggested by the learned counsel for the Petitioner. The close reading of the above said judgment of the Hon'ble Supreme Court of India shows that the PPA concerned in that case contained a term that the power producer shall approach GETCO (transmission licensee) for laying transmission line from its switchyard to nearest Sub-station of GETCO and that the delay in constructing the transmission facility/evacuation system for the reasons solely attributable to GETCO was a Force Majeure event exempting the developer from paying the Liquidated Damages for the delay in supply of energy from the date of Scheduled Commissioning Date. The other relevant fact of that case to be noted is that for the delay caused due to change of site of the project, a supplementary agreement was executed in which the developer had agreed to pay the Liquidated Damages even in case of non-availability of transmission system for evacuation of power by Scheduled Commercial Operation Date (SCOD). Admittedly, there was delay in commissioning the project due to incompleteness of work relating to evacuation of power. In such circumstances, the Hon'ble Supreme Court held that the term agreed in the SPPA undertaking to

pay Liquidated Damages even in the case of non-availability of transmission system for evacuation of power by SCOD is binding. However, the Hon'ble Supreme Court partially increased the Liquidated Damages but not for the entire period of delay, as requested by the Appellant-Procurer, taking into consideration the other relevant facts.

l) Therefore, the learned counsel for the Petitioner cannot take any benefit from the above judgment, but on the other hand the judgment makes it clear that the terms agreed to pay the Liquidated Damages even in the case of non-availability of transmission system for evacuation of power by SCOD, is binding. Hence, this decision may help the case of the 1st Respondent (BESCOM).

m) The learned counsel for the Petitioner also relied upon the judgment of Hon'ble ATE in Chennamangathihalli Solar Power Project LLP & Another Vs. BESCOM & Another; and the Orders passed in OP No.15 of 2018 between M/s Adani Green Energy (UP) Limited Vs. HESCOM & Others and in OP No.29 of 2018 between M/s Adani Green Energy (UP) Limited Vs. HESCOM & Others both dated 11.11.2020 and also Order passed in OP No.188 of 2017 between Combria Solar Private Limited Vs. GESCOM & Others dated 23.03.2021 on the file of this Commission. These decisions are based on the Clause contained in the concerned PPAs authorizing the procurer to grant extension of time on the ground of Force Majeure events for commissioning the project. In the present case, there is no such Clause in the PPA authorizing the 1st Respondent to extend time

on the ground of Force Majeure event. Therefore, these decisions are not relevant.

n) For the above reasons, we hold Issue No.3 in affirmative.

14. Issue No.4: Whether in the facts and circumstances of present case, the Petitioner had the obligation to go for alternative methods of evacuation of power?

a) The 1st & 2nd Respondents have contended that the Petitioner should have thought of alternative methods for evacuating the power from the Solar Power Project to the grid and should have made request to that effect before the 2nd Respondent (KPTCL). These Respondents have not made out that there was possibility of alternative methods for evacuating the power, in the event any such request being made.

b) The Petitioner could not have opted for some other Sub-station for evacuating the power, at the fag end of the completion of the project work, that too after constructing the dedicated evacuation transmission lines.

c) No other relevant fact is placed by the Respondents to make it probable that the Petitioner had the obligation to go for alternative methods of evacuation of power in the present case, at one or other stage before commissioning of Kudligi Sub-station.

d) Hence, Issue No.4 is held in negative.

15. Issue No.5: Whether delay in commissioning of Kudligi Sub-station would fall under the definition of 'Force Majeure' as per Article 14 of the PPA?

a) We may note the relevant portion of definition Clause of 'Force Majeure' event stated in Article 14.3.1 which reads as follows:

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

a) Act of God, epidemic, extremely adverse weather conditional lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or Ionising 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), invitation, 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 judgment 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 the 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.*

b) The opening phrase of the 'Force Majeure' definition of the PPA dated 22.03.2018 in the instance case to the effect that "A 'Force Majeure' means any event or circumstance or combination of events those stated below....." is restrictive and exhaustive of the events described in (a) to (e) in the said definition Clause to constitute 'Force Majeure' events. In the earlier PPAs, the Force Majeure was defined as "A 'Force Majeure' means any event or circumstance or combination of events including

those stated below.....”. Therefore, the definition of ‘Force Majeure’ in the earlier PPAs was not exhaustive of the events stated in (a) to (e) under the said definition, but it included all and every event or circumstances which wholly or partly prevented or unavoidably delayed an Affected Party in the performance of its obligations. However, in the present PPA, the word ‘inclusive’ is deleted. Therefore, necessarily the present definition of Force Majeure is to be understood in the light of the present restrictive definition. The events stated in (a) to (e) under the present ‘Force Majeure’ definition in the PPA dated 22.03.2018 do not cover the non-availability of Sub-station of STU for any reason to evacuate the power from the project site to State grid. This appears to be the proper interpretation of Force Majeure definition in the present PPA.

c) The Petitioner in its petition at para 5 (F) has averred as follows:

“Because it is a settled principle that if there is delay on part of the STU/DISCOM in providing transmission/evacuation infrastructure to the solar power producer, it is not the solar power producer which should be punished for not commissioning its project by the SCOD. It is to be classified as a Force Majeure event, whether it is defined under the definition of ‘Force Majeure’ in the PPA or not and consequently extension in SCOD should be given to the solar power producer.”

d) The above averment would show that the Petitioner was aware that in the present PPA, the definition of ‘Force Majeure’ would not cover the

event of non-availability of Sub-station, as a Force Majeure event. Therefore, it is stated that such event or circumstances whether falls under the Force Majeure definition or not, the extension in SCOD should be given to the developer. The Petitioner relied upon the decision of the Hon'ble ATE in Rajasthan Renewable Energy Corporation Limited Vs. Rajasthan Electricity Regulatory Commission and Others (Appeal No.124 of 2016 decided on 03.07.2017) in support of its contention that whether an event or circumstances falls under Force Majeure definition or not, the relief should be granted for non-availability of Kudligi Sub-station for evacuation of power.

e) The analysis of the facts and the relevant provisions in the PPA referred in the above judgment of the Hon'ble ATE, would show that nowhere the Hon'ble ATE made an interpretation that even if an event or circumstance though not falls under the definition of Force Majeure event, the benefit should be extended as contended by the Petitioner. In that case, the delay in shifting of Electric Poles by the local DISCOM from the project site was considered as DISCOM Event of Default. The shifting of electric poles from the project site was held to be the duty of that local DISCOM and without clearing the electric poles, the developer could not have started the project work. Article 4.5 of the concerned PPA providing for 'Extension of Time' stated that 'any STU/DISCOM(s)/Procurer Event of Default' was one of the events under which the Extension of Time for commissioning of the project could be

granted. However, the PPA in that case had not defined the STU/DISCOMs events of default. In such circumstances, the State Commission had concluded that the delay in shifting poles would amount to DISCOM events of default, though the PPA had not defined the DISCOM events of default. It is also noted that the DISCOM events of default though not falls under the definition of 'Force Majeure', the benefit of Extension of Time could be granted independently on the ground of 'DISCOM Events of Default'.

- f) The above proposition does not help the Petitioner in contending that though an event does not fall under the definition of 'Force Majeure', the benefit should be extended automatically. It is true that in the present case if the event amounted to ESCOM's event of default, the benefit of extension of time could have been granted, if the PPA so provided. In the present PPA also there is a provision in Article 5.7.1 (a) to the effect that Extension of Time can be granted in the event of any BESCOM Event of Default, though such BESCOM event of default does not fall under the definition of 'Force Majeure'. In the present case, the non-availability of KPTCL's Sub-station could not be termed as 'any BESCOM Event of Default' as specified in Article 5.7.1 (a) of the PPA. In the present PPA 'KPTCL's Event of Default' is not included in any of the provisions of the PPA as a ground for Extension of Time in favour of the developer. Therefore, the reliance on the above judgment of the Hon'ble ATE by the Petitioner is not acceptable.

g) The Commission is of the view that there is no bar for the parties to enter into a restrictive definition of 'Force Majeure' in a PPA, subject to the provisions of the Indian Contract Act, 1872.

i) For the above reasons, we hold Issue No.5 in negative.

16. Issue No.6: Whether the 1st Respondent (BESCOM) is entitled to claim Liquidated Damages at the rates specified in Article 5.8 of the PPA?

a) The learned counsel for the Petitioner submitted whether the claim is for the Liquidated Damages or for Unliquidated Damages, no pecuniary liability arises till the Court or Forum has determined the damages payable to the party complaining the breach of any term of the contract. Therefore, the learned counsel for the Petitioner submitted that the 1st Respondent (BESCOM) without getting the claim determined towards Liquidated Damages before a competent Commission, can recover the Liquidated Damages agreed to under Article 5.8 of the PPA. In support of his preposition, the learned counsel relied upon the decisions in Union of India Vs. Raman Iron Foundry Limited [AIR 1974 SC 1265: (1974) 2 SCC 231 and Division Bench judgment of the Hon'ble Karnataka High Court in the case of Greenhill's Exports (Private) Limited, Mangalore and Others Vs. Coffee Board [ILR 2001 Karnataka 2950: 2001(4) KLJ 158]. The copies of these judgments published in Manupatra (MANU/SC/0005/1974 and MANU/KA/0224/2001 respectively) are produced in this case.

b) The learned counsel for the 1st Respondent (BESCOM) has not denied the above proposition of law. However, he contented in a case where there is breach of term of the PPA regarding supply of energy, the distribution licensee has the right to claim the Liquidated Damages without leading any evidence in proof of the actual damages suffered due to the breach of such term. He submitted that in the case of supply of energy to the distribution licensee, it is very difficult to lead any evidence in proof of the actual damages sustained. Therefore, he submitted the PPA would contain a term regarding payment of Liquidated Damages pre-determined by the parties, for the breach of any particular term of contract. Therefore, he submitted without requiring any evidence, the Commission has to presume the loss caused to the 1st Respondent (BESCOM) as agreed in the Liquidated Damages clause. In support of his contention, he relied upon the following decisions:

- (i) Construction and Design Services Vs. DDA [reported in (2015) 14 SCC 263] – para No.14 to 17;
- (ii) Bharat Sanchar Nigam Limited Vs. Reliance Communication Limited [reported in (2011) 1 SCC 394]; para No.47, 48 & 53;
- (iii) Oil and Gas Corporation Vs. Saw Pipes Limited [reported in (2003) 5 SCC 705] – para No.64, 66 to 68;
- (iv) Lanco Kondapali Power Limited Vs. Andhra Pradesh Regulatory Commission and Others [reported in (2015) SCC Online APTEL 140] – para No.51, 53 & 54.

c) On perusal of the reasons and the findings given in the above decisions, we are of the considered opinion that the 1st Respondent (BESCOM) can claim the Liquidated Damages as per Article 5.8 of the PPA without leading any evidence in proof of loss sustained by it, due to non-supply of energy. In this regard, we may note para No.66 & 68 of the judgment in ONGC Limited referred above which reads as follows:

Para – 66 “ In Maula Bux case [(1969) 2 SCC 554, Maula Bux Vs. Union of India]the Court has specifically held that it is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in case of breach of some contracts it may be impossible for the court to assess compensation arising from breach.

Para – 68 From the aforesaid discussions, it can be held that:

- (1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.
- (2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by

way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

d) In the case of Lanco Kondapali Power Limited referred above, the Hon'ble ATE in para 51 of its judgment has stated that in view of the difficulties in calculating the actual damages suffered by a party due to non-supply of electricity by another party, a pre-calculated Liquidated Damages on pre-estimated basis as agreed between the parties in the PPA for breach of contract, is enforceable.

e) In this regard, the Commission notes that the summary of the principles stated in para No.43 of the judgment of the Hon'ble Supreme Court of India, reported in *(2015) 4 SCC 136 in the case of Kailash Nath*

Associates Vs. Delhi Development Authority and Another is useful. The summary of the principles stated in paragraph 43 of this judgement reads as follows:

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1 Where a sum is named in a contract as liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2 Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia Section 73 of the Indian Contract Act, 1872.

43.3 Since Section 74 of the Indian Contract Act, 1872 awards reasonable compensation for damage or loss caused by a breach of contract, the damage or loss caused is a sine qua non for the applicability of the section.

43.4 *The section applies whether a person is a plaintiff or a defendant in a suit.*

43.5 *The sum spoken of may already be paid or be payable in future.*

43.6 *The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensing with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.*

43.7 *Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”*

f) In the case of non-supply of energy by a generator to the distribution licensee, it is not possible to prove the actual damage or loss. Therefore, if the contract provides a genuine pre-estimate of damage or loss, the defaulting party is liable to pay the liquidated damages without proof of actuals loss or damage.

g) It may be noted that the interpretation clause in Article 1.2.1 (w) of the PPA provides as follows:

“1.2.1 In this Agreement, unless the context otherwise requires,

(a) to (v)

(w) the damages payable by either party to the other of them, as set forth in this Agreement, whether on per

diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (the "Damages"); and
x)"

The Petitioner has not produced any material to infer that the Liquidated Damages stated in Article 5.8 of the PPA is in the nature of penalty. On the other hand, the terms of the PPA would show that it is a genuine pre-estimate of the damages payable for non-supply of energy within the specified time.

h) For the above reasons, we hold Issue No.6 in affirmative.

17. Issue No.7: To which reliefs the parties are entitled to?

a) The learned counsel for the 1st Respondent (BSECOM) submitted that as a consequence of the delay in commissioning of the Solar Power Project, the Petitioner is liable to pay the Liquidated Damages as per Article 5.8 of the PPA and further, the Solar Power Project of the Petitioner is liable for reduced tariff as provided in Article 12.2 of the PPA, the said provision provides that as a consequence of delay in commissioning of the Solar Power Project beyond the Scheduled Commissioning Date, the tariff applicable shall be 80% of the tariff quoted by the bidder provided the project is commissioned within three months thereafter.

b) In the present case, there is delay of more than three months in commissioning the Solar Power Project. In that event also, the Commission is of the opinion that the said clause is attracted and the

Petitioner would be liable for reduce tariff of 80% of the quoted tariff. It is an admitted fact that the quoted tariff is Rs.2.94 per unit.

c) From the discussions made in the different Issues, it is found that the Petitioner is not entitled to any of the reliefs claimed in the petition. It is obvious that as a result delay in commissioning the Solar Power Project, the Petitioner is liable for the reduced tariff and for payment of Liquidated Damages for delay in supply of energy beyond the Scheduled Commissioning Date.

d) In view of the facts of the case and the undertaking given by the 1st Respondent (BESCOM) not to take coercive action for recovery of Liquidated Damages during the pendency of the interim applications for grant of temporary injunctions filed by the Petitioner in the course of the hearings, we think it is just and necessary to direct the 1st Respondent (BESCOM) to take any action for recovery of Liquidated Damages after a period of six weeks from the date of issue of this Order.

e) In para 4.7 of the petition, the petitioner has stated that it had achieved all the Conditions Precedent within the timelines as per PPA and submitted all the documents within 03.05.2019. The 1st Respondent (BESCOM) in reply to para 4.7 of the petition has denied the averments made by the petitioner in this regard and produced Annexure-R1 dated 31.03.2020 to contend that the petitioner had not complied with the Conditions Precedent within the time allowed. In line with the averments in para 4.7 of the petition, the petitioner need not have claimed any relief

to condone the delay in achieving the Conditions Precedent. Accordingly, no such relief is prayed by the petitioner. It may be seen that the 1st Respondent (BESCOM) has not made any counter claim asserting that the petitioner had not achieved the Conditions Precedent within the time allowed, thereby the petitioner was liable to pay any damages as per Article 4.3 of the PPA. In the absence of any counter-claim raised by the 1st Respondent (BESCOM), no relief can be granted to the 1st Respondent (BESCOM) in this proceedings for recovery of damages under Article 4.3 of the PPA. In view the above facts, we make it clear that the 1st Respondent (BESCOM) is not entitled to recover the damages provided under Article 4.3 of the PPA.

f) Hence, Issue No.7 is held accordingly.

18. Issue No.8: What Order?

For the above reasons, we proceed to pass the following:

ORDER

The petition is dismissed holding that the Petitioner is not entitled to any of the reliefs claimed in the petition, however, subject to the direction to the 1st Respondent (BESCOM) made in sub-para (d) of para No.17 of this Order.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member