

No. N/317/17

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

Dated: 18.03.2022

Shri H.M. Manjunatha : Officiating Chairperson
Shri M.D. Ravi : Member

O.P. No.155/2017

BETWEEN:

M/s Nagagouda Energies Pvt Ltd.,
Having its registered Office at:
658/8, 2nd Floor, F, 1st 'C' Main Road,
40th Cross, 8th Block, Jayanagar,
Bangalore-560082.
(Represented by its Director Sri. Ishwar Hegde)

....PETITIONER

(Represented by Sri Ganpathi Bhat Vajralli, Advocate
For Kumar & Bhat Advocates)

AND

1. M/s. Hubli Electricity Supply
Company Limited (HESCOM)
Navangar,
Hubli-580025.
Represented by its Managing Director
2. Karnataka Power Transmission
Corporation Limited
Caveri Bhavan, Bangalore.
Represented by its Managing Director
3. The KREDL
Shanthi Gruha, No.39,
Bharath Scouts and Guides Building,
Opposite The Chief Post Master General Office,
Palace road, Bangalore.
4. The Deputy Commissioner
Bijapur District, Bijapur.

...RESPONDENTS

(R1 represented by Sri P. Chinnappa for Induslaw Advocates,
R2 represented by Sri Shahbaaz Husain, Advocate for Precint Legal,
R3 represented by Sri Samarth Kashyap, Advocate)

ORDERS

This case is taken up for second time disposal as per directions of Hon'ble High Court of Karnataka in Writ Petition WP No. 52028/2018 (GM-KEB) C/W WP No. 7782/2020 (GM-KEB) (filed against the orders in OP No. 155/2017) & Others (Annexure-W to the Amended Petition).

- 1) Originally, the Petitioner has filed the Petition in OP No. 155/2017 on 15.09.2017 under Section 86(1)(b) of the Electricity Act, 2003. After receiving notice, the Respondent No. 1 to 3 have appeared before the Commission through their respective Counsel and contested the Petition by filing written objections separately. After hearing both the parties the Commission had passed orders on 25.09.2018 dismissing the Petition by holding that the Petitioner is not entitled for any reliefs as claimed, further held that, the Petitioner is entitled to a tariff of Rs. 4.36 only per unit as per Article 5.1 of the PPA and he is also liable to pay damages including liquidated damages as provided under Articles 2.2 and 2.5.7 of the PPA.
- 2) Aggrieved by this common order dated 25.09.2018 the Petitioner had approached the Hon'ble High Court of Karnataka, Bengaluru in Writ Petition bearing WP No. 7782/2020 (GM-KEB) challenging the orders of the Commission. After hearing both the parties the Hon'ble High Court of Karnataka has passed orders dated 20.09.2021 along with other writ petitions and held that: -

(a) All the writ petitions are allowed, the impugned orders passed by the Commission in all these cases stand quashed.

- (b) These matters are remitted back to the hands of the Commission for appropriate resolution of the dispute bearing in mind the observations made in the course of the order with regard to the controversy brought before it.*
 - (c) The Commission shall also consider all subsequent events that have taken place after passage of the impugned orders, while passing orders afresh, in the case now remitted.*
 - (d) Parties to the lis are at liberty to place on record all such documents that would advance their cause.*
 - (e) The Commission shall consider the claims of the Petitioners and pass appropriate orders within six months from the date of receipt of a copy of this order.*
 - (f) Interim orders granted and subsisting, if any, in all these cases shall continue to operate till the Commission takes up the case for consideration of an interim prayer, if sought for by the Petitioners.*
 - (g) All the contentions, except the ones decided in this order, of both the parties are kept open.*
- 3) After receiving the certified copy of the orders, this Commission has issued notice to both parties. The Petitioner has appeared through his Counsel and filed Amended Petition dated 30.11.2021. The Respondent No. 1 has filed objections on 31.01.2022 to the Amended Petition and Respondent No. 2 has filed objections on 28.01.2022 to the Amended Petition. This Commission has passed an interim order on 18.11.2021 granting the Interim tariff of Rs. 4.36/unit till the disposal of the Petition. Now this Commission has taken up the case for fresh disposal as per the directions of the Hon'ble High Court of Karnataka, Bengaluru as referred supra.

- 4) This Petition is filed under Section 86(1)(b) of the Electricity Act, 2003 in effect praying to:
- a) Direct Respondent No.1/HESCOM to comply with the original terms of the PPA dated 24.06.2015 and further provide the confirmation for time extension with original tariff under Clause 2.5 & Article 8 i.e., force majeure event and direct the first Respondent to implement the extension time with original tariff in the interest of justice and equity.
 - b) Direct the 1st Respondent/HESCOM to accept the original tariff agreed in the PPA i.e., an amount of Rs. 8.40 per kWh and remit the same to the petitioner.
 - c) Restrain the 1st Respondent/HESCOM not to deduct any liquidated damages from the Petitioner as force majeure events have caused the delay.
 - d) Declare that the Petitioner is entitled to extension of time with original tariff as per Article 2 of the PPA dated 24.06.2015 without imposing or changing any conditions as enshrined in the PPA.
 - e) To direct the Respondent No. 1/HESCOM to pay the Petitioner original tariff of Rs. 8.40 per unit in the terms of the PPA from the date of commissioning i.e., 31.03.2017 till the term of PPA.
 - f) To direct the Respondent No. 1/HESCOM to pay the difference of the tariff paid per unit from the date of commissioning of the plant along with late payment surcharge in terms of PPA and Clause 6.4 within stipulated time frame.

- g) To direct the Respondent No. 1/HESCOM to refund the recovered liquidated damages and conditions precedent damages along with late payment surcharge in the terms of PPA and Clause 6.4 within stipulated time.
 - h) Grant such other reliefs to meet the ends of justice and equity.
- 5) The brief facts set out in this Petition are as under: -
- a) Pursuant to the Solar Policy of the Government of Karnataka, dated 22.05.2014 and the Government Order, dated 26.08.2014, the Karnataka Renewable Energy Development Limited (KREDL), the Nodal Agency of the Government of Karnataka for implementation of Solar Power Projects in the State had issued a letter dated 16.03.2015 (Annexure-B filed along with Original Petition) in favour of a land owning farmer, Sri Rajashekar S Nadagouda [the Solar Project Developer (SPD)] and allotted 3 MW capacity Solar Power Project to be commissioned at Jalageri Village, Bijapur Taluk, Bijapur District, under 1-3 MW Farmers' Scheme, subject to certain terms and conditions.
 - b) The Petitioner has executed Power Purchase Agreement (Annexure-C filed along with Original Petition) dated 24.06.2015 with HESCOM for sale of power from 3 MW solar power plant at Jalageri Village, Bijapur Taluk, Bijapur District and consent of HESCOM Board for purchase of solar power from this project meeting held on 17.01.2015. Thereafter, a Supplementary PPA dated 10.06.2016 (Annexure-D filed along with Original Petition) was entered into

between the HESCOM and Petitioner for having taken over the project as SPV in the said land.

- c) Immediately after entering into SPPA, the Petitioner has started project development work on the site, specifically allotted to the project, this includes crucial work like land levelling, fencing, obtaining necessary approvals and sanctions such as conversion of land, Evacuation line, funds etc., from the Authorities concerned and getting loan sanctioned from Banks for establishment of the solar power plant. For the purpose, the petitioner requires total investment of Rs. 18,00,00,000/- (Eighteen Crores Fifty lakhs only) for the project. As per the Article 2 of the PPA dated 24.06.2015 the said project has to be completed on or before 23.12.2017, the Scheduled Commissioning Date (SCD) within 18 months from the effective date, the date of signing the PPA.
- d) It is stated that for completion of the project the Petitioner has to obtain numerous approvals as per Clause 2.1.1 of Article 2 of PPA such as: -
- i. Land conversion from agricultural into non-agricultural for setting up of Solar Plant.
 - ii. Power evacuation approval from KPTCL/HESCOM as the case may be.
 - iii. 11 KV work order and TAQC approval from HESCOM.
 - iv. Substation work order from KPTCL.
 - v. CEIG approval.
 - vi. Interconnection approval by KPTCL.
- e) Even though the PPA was signed on 24.06.2015, the same has to be approved by the KERC. However, after approval, the PPA has been

handed over to the Petitioner only on 17.10.2015 i.e., with 3 months 24 days delay for which the Petitioner cannot be held responsible. However, time for scheduled date of commissioning counted from 24.06.2015. Therefore, the Petitioner had lost about 3 months 24 days in receiving the PPA which has to be treated as Force Majeure Event under Article 8.3. The 1st Respondent is responsible for the said delay. Therefore, the Petitioner sought extension of time with the original tariff agreed as per PPA i.e., Rs. 8.40/KW.

- f) The Petitioner has sought permission and approved format from 1st Respondent enabling the Petitioner to form a SPV and sign up Supplemental Agreement as per provisions 12.11 of the PPA. However, the 1st Respondent has no clarity on the formation of the SPV and Supplementary Agreement. The Commission also aware that HECOM has not initially understood the formalities of forming a SPV and supplementary tariff agreement. The Commission has clarified the same in the month of December 2015 and even after that 1st Respondent could not understand the clarification given by the Commission and thereafter, the Commission has issued new format for AOA, MOA and supplementary tariff agreement on 21.03.2016 (Annexure-D1 filed along with Original Petition). In between these two clarifications, 9 months have elapsed from the date of signing of the PPA. The very purpose of introduction of Clause 12.11 is to provide PPA holder to get investor and subsequent financial closure of the project. Since there was no clarity with regard

to assignment of the PPA, the Petitioner could not get any investors to enable required funds for the project. By virtue of the act of the 1st Respondent causing delay in getting clarification and clarify it to the Petitioner, there was 9 months lapsed which tentamounts to denying the 18 months window of opportunity available to the Petitioner to execute the project for which Petitioner is not responsible and Petitioner requested that the same to be treated as Force Majeure.

- g) Subsequent to the insertion of Sub-clause 10 of Section 95 of the Karnataka Land Revenue (Amended) Act 2015, the Government of Karnataka has issued circular RD69/01.12.2015 (Annexure-F to the Original Petition) fixing the time for grant of deemed conversion as 15 days. As per the Government circular the Petitioner has submitted all requisite documents like PPA, KREDL letter, RTC, PTCL, NOC and other relevant documents as on the filing of the application for conversion of land before the Deputy Commissioner (Annexure-G to the Original Petition) on 17.02.2016. The Deputy Commissioner has passed order of conversion of land (Annexure-G1 to the Original Petition) on 22.08.2016, therefore, there was delay of about 6 months 12 days. This delay to be construed as Force Majeure event and extension of time to be declared with original tariff.
- h) The Petitioner has also applied for power evacuation approval before the KPTCL (Annexure-H to the Original Petition) on 23.12.2015, the same has been approved by the KPTCL (Annexure-H2 to the Original Petition) on 15.06.2016. There was a delay of 6 months from

the KPTCL/2nd Respondent for power evacuation approval for which the Petitioner is not responsible. Therefore, the Petitioner requested to treat the delay as Force Majeure event under Article 8 of the PPA.

- i) Subsequent to the power evacuation approval, the 2nd Respondent has granted work order to carry out substation work (Annexure-J to the Original Petition) only on 28.11.2016 and there was 11 months delay by KPTCL as this can be obtained only after the approval of regular power evacuation scheme. Therefore, the delay caused by KPTCL to be treated as Force Majeure event. Subsequent to the regular power evacuation approval the Petitioner could obtain 11 KV work order (Annexure-K to the Original Petition) to construct 11 KV line only on 16.12.2016, there was a delay of 12 months. Hence, the delay caused on the fault of Respondent No. 1 & 2 and the Petitioner requested treat the same as Force Majeure Event.
- j) It is stated that extension of time request was made before the HESCOM on 08.12.2016 but same has been received (Annexure-L to the Original Petition) on 04.02.2017, there was delay of 2 months. Since, the above said approvals are valid 18 months from the date of signing of PPA, the Petitioner could not carry out substation work as extension was not granted immediately on application, hence, there was 2 months delay for granting extension of time, same is on the fault of 1st Respondent and requested to treat the same as Force Majeure event.

- k) In the meanwhile, the Government of India on 09.11.2016 has taken extra ordinary step towards demonetization by banning 500 and 1000 notes and restricted for withdrawal of cash for a very small amount. The formal bank system was not available at the peak time and the cash withdrawal also was not possible. As the Petitioner's work was in the rural area unless there was a cash for labour work, tractors and other local men and materials, Petitioner was not able to continue the work for 3 months. Hence there was a delay of 3 months which the Petitioner requested to treat as Force Majeure Event for which the Petitioner was not responsible.
- l) It is stated that the various sanctions and permissions would reveal that inspite of having applied for the requisite permissions and sanctions, Petitioner suffered on account of inordinate delay in procuring the same. The said delay are beyond the control and power of the Petitioner. It is to be considered that the various sanctions which are pre-requisite in securing the confidence of the financial institution suffered on account of the Government Authorities or Authorities in power who are required to facilitate the permissions and sanctions without any hitch and delays. On account of there being no sanctions and approvals the Petitioner was only left with the work of executing things on paper. Even the basic requirement of ground levelling could not be initiated without their being required NA sanctions. In terms of Article 8.3 of the PPA, delays in executing the project would fall under Force Majeure events when

neither of the parties to the PPA are responsible for events beyond their control. On account of inordinate delay in getting land conversions, delay in getting evacuation approvals, bay extension approvals, CEIG approval etc., delay due to demonetization of the Indian currency, delay in getting MEI switch gears etc., has resulted delay in execution of the project.

- m) That the Petitioner is entitled for original tariff with extension of time for COD. The delay caused on account of various factors in executing the project are not attributable to the Petitioner and therefore Petitioner proposes extension of time under the Force Majeure Events affecting the SPD. The delay caused was directly attributable to various Government Departments in providing the sanctions and permissions. The Petitioner has at no point of time delayed the execution or delayed in complying with the various conditions of the PPA. Considering all these grounds the 1st Respondent/HESCOM has extended the commissioning date upto 23.06.2017 as per the letter Annexure-L (to the Original Petition) and subsequently GOK has conveyed its consent to the extension under Article 8 of PPA. However, the HESCOM directed the Petitioner to file the Petition before the Commission for approval of extension with original tariff by producing all relevant documents under Force majeure event, hence the present Petition is filed.
- n) The Petitioner has approached the Commission under the following grounds: -

- i) The Respondents ought to have considered that the delay caused was not because of the fault on the part of the Petitioner but the delay caused only on account of Respondents fault. The Petitioner has made application in time before all the Authority for requisite permissions, the same has not been provided in time. Hence, requested the Commission to approve the extension granted by the HESCOM.
- ii) There was a delay of 3 months 24 days in handing over the PPA on 24.06.2015 and approved the Commission as the same was delivered on 17.10.2015. In between there was a delay of 3 months 24 days. Unless getting the PPA documents by the Petitioner, the Petitioner could not take steps for implementation of the project, therefore, the 18 months time stipulated in the PPA actually commenced from date of delivery of PPA i.e., on 17.10.2015. Therefore, requested for considering the extension of time under Force Majeure Event with original tariff of Rs. 8.40/KWH.
- iii) As per the Government letter (Annexure-L1 to the Original Petition) dated 24.11.2016 issued to the 1st Respondent for extension of 6 months time under Article 2.5 of the PPA and HESCOM constituted a committee for verifying the individual application of the various applications including the Petitioner application and thereafter the 1st Respondent has issued letter to the Petitioner extending the time for a period of 6 months and

thereafter, extension has been accepted by the Government by writing a letter dated 23.06.2017 to the Commission on the Commission also accepted the extension of time under Force Majeure Event and the stand taken by the HESCOM. However, the Commission has not approved extension of the tariff as agreed in the PPA. Therefore, requested for considering extension of time along with original tariff agreed in the PPA.

- iv) The extension of time has been sought by the Petitioner on 08.12.2016, however, extension of time was granted on 04.02.2017 after lapse of about 2 months. Therefore, the extension of time has been delayed for 2 months, during this period the Petitioner could not carry out project works including substation works.
- v) The Respondents ought to have noticed that the State Government promoting solar power generation and has issued solar policy 2014-21 with the object of encouraging Green Power Generation. In furtherance of the solar policy the Karnataka Land Revenue Act was also amended incorporation Section 95(10) providing for deemed conversion of land for the purpose of Solar Power Generation. The Petitioner has been awarded the contract and has entered into PPA with HESCOM which stipulates that the project has to be commissioned within a period of 18 months. Due to the inordinate delay in issuance of various permissions and sanctions including conversion order

the time fixed under the PPA has expired and the Petitioner has sought for extension of time.

- vi) The Petitioner has invested 18 Crores and committed revenue sharing with farmer assuming the original tariff. If there is any change to the original tariff granted in the PPA, the same is in violation of original PPA conditions and also causes heavy losses to the Petitioner and livelihood of the farmers since farmers surrendered their entire land for the project.
- vii) The varied tariff stipulated under 5.1 clause is subject to the clause 2.5 of the PPA that provides for extension upto 6 months in the case of various events of default affecting the Solar Power Developers. In this case the extension was granted considering the delays caused in PPA approval, NA approval, PE approval, substation work order, 11KV line work order and extension delay by various Government agencies and all these events are beyond the control of the Petitioner and hence requested to treat the same as Force Majeure.
- viii) The delays were due to reasons beyond the control of the Petitioner and the Commissioning was achieved within the extended SCOD and hence the Petitioner is eligible to get the original tariff of Rs. 8.40/unit from the date of commissioning to the entire PPA term. Since, the payment is due as per original tariff from the commissioning date, the Petitioner is also eligible to receive late payment surcharge as per the clause 6.4 of the

agreed PPA. Similarly, the Petitioner is not liable to pay liquidated damages. The amount deducted in the bill amount by the HESCOM towards liquidated damages have to be refunded along with the late payment surcharges. In view of the same, Petitioner prays to allow the Petition as prayed for in the interest of justice and equity.

- 6) Upon notice, the Respondent No. 1 to 3 appeared through their Learned counsel. Respondent No. 1 & 2 did not file any objections to the Original Petition but now filed statement of objections separately to the Amended Petition and Respondent No. 3 filed statement of objections to the Original Petition and Respondent No. 4 who is formal party, remained absent.
 - a) The 1st Respondent has filed objections to the Amended Petition on 31.01.2022 stating that, the Petition is entirely frivolous, vexatious, malafide, malicious, lacking in material particulars and baseless. Hence, the Petition is liable to be dismissed in limine with exemplary costs. Further the 1st Respondent has denied the contents of the Paragraphs i.e., from Para No. 32/1 to 32/13 and 46/1 to 46/11 as false, misleading thereby not tenable under law.
 - b) Further stated, the allegation that while the Power Purchase Agreement ("PPA") was signed on 24.06.2015, and that due to delay in the approval by the Commission and Respondent No. 1 Board, the PPA was confirmed and handed over to the Petitioner only on 17.10.2015 with delay of 115 days and therefore the Scheduled Commissioning ("SCOD") had to be 15.04.2017 is denied as false. As

per Clause 1.1 (xiv) of the PPA, the Effective Date is defined as the date on which the PPA is signed by the Parties (viz. 24.06.2015) and not the date on which the Petitioner receives the PPA from the Commission or any other entity. The Petitioner is merely making a feeble attempt to shift the blame of its own lapses and delays on to the Commission. Additionally, it is trite law that the Petitioner need not wait to receive a copy of the PPA to commence performing its obligation thereunder. The Petitioner could have executed the works and performed its obligations under the PPA and this does not require the signed hard copy of the PPA. The decision relied on by the Petitioner in Panchakshari Power Projects LLP v. BESCO, Appeal No. 279/2018 is distinguishable from this case. In the present case, the Parties, exercising their autonomy and freedom to contract, mutually decided and agreed that as per Clause 1.1 (xiv) of the PPA, the Effective Date shall mean the date on which the PPA is signed by the parties (viz. 24.06.2015) and not the date on which the Petitioner receives the PPA from this Hon'ble Commission or any other entity. Thus, the decision in Panchakshari Power Projects LLP v. BESCO, Appeal No. 279/2018 does not come to the aid of the Petitioner as in that case, it appears that the Effective Date was considered by the APTEL to mean the date when the PPA was approved by Regulatory Commission concerned.

- c) The Respondent No.1 had originally approved the extension of time by six months without altering the terms and conditions of PPA vide its

letter dated 04.02.2017. Since the extension of time by Respondent No. 1 was without altering the terms and conditions of the original PPA, such an extension would surely have an impact on the tariff payable by the ESCOMs. Therefore, the Commission has the jurisdiction of legal scrutiny of the validity of the extension of time granted, and in this regard, the Respondent No. 1 issued letter (Annexure-R1 filed by the 1st Respondent along with statement of objections) dated 13.04.2017 directing the Petitioner to file a petition before the Commission with all relevant grounds/ documents for seeking approval for the extension of the SCOD. Therefore, the extension granted by the Respondent No. 1 was always subject to the decision on the same by the Commission. The Petition has also sought to misrepresent the purport of the letter dated 23.06.2017 produced by the Petitioner at Annexure – P by stating that the same condoned the Petitioner's delay in the project concerned under the PPA. On the contrary, the said letter dated 23.06.2017 only stated that the Commission consider approval of extension of the SCODs and did not direct this Hon'ble Commission to approve the same. Therefore, each case had to be examined individually to ascertain whether approval ought to be granted or not. Similarly, the Petitioner's allegation that the letter dated 09.04.2018 issued by the Ministry of New and Renewable Energy produced at Annexure – Q, requested to extend time with original tariff under the PPA is denied as misleading. The said letter at Annexure – Q only requested the

Government of Karnataka to consider the issue with the Commission, and did not direct for any approval of extension of time.

- d) It is respectfully submitted that even in the case of W.P. No. 7782/2020, the Hon'ble High Court of Karnataka noted that the Commission has the power to regulate the purchase and sale of electricity under Section 86(1)(b) of the Electricity Act, 2003. The decisions relied on by the Petitioner in paragraphs 36/7 to 36/10 also do not automatically inure to the benefit of all the IPPs to whom extension has been granted, including the Petitioner. They are based on the facts and circumstances of those cases and the facts and circumstances of each case subsequent to them will have to be examined individually.
- e) The various events mentioned by the Petitioner cannot be force majeure under Article 8 of the PPA. Additionally, the Petitioner has not explained the cause of the delay on its part in making the application for conversion of land made on 07.12.2015, nearly 6 months after the Effective Date, application for power evacuation approval made on 22.12.2015, nearly 6 months after the Effective Date, and has not provided any documents to show how it was affected by demonetization. The decisions relied on by the Petitioner do not automatically inure to the benefit of all the IPPs to whom extension has been granted, including the Petitioner. They are based on the facts and circumstances of those cases and the facts and

circumstances of each case subsequent to them will have to be examined individually.

- f) The Petitioner has also sought to misrepresent the purport of the letter dated 23.06.2017 produced by the Petitioner at Annexure – P by stating that the same condoned the Petitioner's delay in the project concerned under the PPA. On the contrary, the said letter dated 23.06.2017 only stated that the Commission consider approval of extension of the SCODs and did not direct the Commission to approve the same. Therefore, each case had to be examined individually to ascertain whether approval ought to be granted or not. Similarly, the Petitioner's allegation that the letter dated 09.04.2018 issued by the Ministry of New and Renewable Energy produced at Annexure – Q, requested to extend time with original tariff under the PPA is denied as misleading. The said letter at Annexure – Q only requested the Government of Karnataka to consider the issue with the commission, and did not direct for any approval of extension of time.
- g) Further Respondent No. 1 stated that the reasons mentioned by the Petitioner for delay in commissioning of the project cannot be treated as force majeure as per Article 8 of the PPA. Notwithstanding the same, and without prejudice to any of the rights and contentions of the Respondent No. 1, the said Respondent cannot be compelled to pay late payment surcharge as it has been paying the tariff as ordered by the Commission when it disposed of O.P. No. 155/2017.

Hence, the question of late payment surcharge, or even refunding the amount recovered for liquidated damages for that matter, doesn't arise. The other contentions taken by the Petitioner in the Petition are denied as false, hence, the Petition is liable to be dismissed.

- h) The 2nd Respondent has filed objections to the Amended Petition on 28.01.2022 stating that, pursuant to the grant of letter of award the 1st Respondent entered into PPA with the Petitioner on 24.06.2015 and as per Article 2.1 of the PPA the Conditions Precedent ought to be fulfilled within 365 days from the effective date of the agreement. As per Article 1.1 (xii) the effective date of the agreement is the date of signing the agreement. As per Article 1.1 (xxvii) mandates that the project be commissioned within 18 months from the effective date i.e., 23.12.2016. The project was said to be commissioned only on 31.03.2017 which date is well beyond the SOCD as per the PPA.
- i) A request for extension of time to commission the plant was made before the Respondent No. 1 under Article 2.5 of the PPA on 08.12.2016 subject to the approval of the Commission. The Respondent No. 1 vide its letter dated 04.02.2017 granted an extension of 6 months from the SCOD without altering the provisions of the PPA. Therefore, although an extension was granted, it was subject to the approval of the Commission and the terms and conditions stipulating the damages in the PPA remained enforceable regardless of the extensions.

- j) On 16.03.2017, the Commission addressed a letter instructing all the Distribution Licensees to not allow any extension obtaining prior opinion of the Commission. Further, vide letter dated 05.04.2017, the Distribution Licensees in Karnataka were directed by the Commission to advise all land-owning Solar Developers/SPVs, to approach the Commission for approval on extension of time requests. In pursuance thereof, the Petitioner approached the Commission vide O.P. No. 155/2017 and the Petitioner was rightly denied of any extension to commission the project and was further granted a lower tariff of Rs. 4.36 per unit on account of the Petitioner's negligent attitude in commissioning the project. The Petitioner was further held liable to pay damages to the Respondent as per Article 2.2 and 2.5.7 of the PPA.
- k) The Petitioner further challenged the Order of the Commission before the Hon'ble High Court of Karnataka in WP No. 7782/2020. The Hon'ble High Court on 20.09.2021 pronounced Orders directing the Commission to re consider the matter in light of the fresh facts and circumstances developed post the passage of the impugned Order. The Hon'ble High Court has permitted the parties to bring forth new facts and circumstances on record before the Commission.
- l) The Petitioner has averred that the Respondent No. 2 has delayed in issuing power evacuation approval. It is also alleged that the Respondent No. 2 has delayed in granting the work order. It is submitted that such contentions of the Petitioner are highly erroneous

and misleading, and the same are hereby denied as false. The application dated 02.02.2016 for power evacuation approval was made on 08.02.2016 nearly after 7 months from the date of signing the PPA. No explanation is forthcoming, either in the submissions placed by the Petitioner before the Commission explaining such delay. The Petitioner has submitted that immediately after entering into the PPA, work pertaining to land levelling, fencing, obtaining necessary approvals and sanctions such as a conversion of land, evacuation line, loan sanctions had commenced. Contrary to this contention the Petitioner has stated that owing to the delay in handing over the PPA, the Petitioner could not apply for necessary approvals to commence the project. The Petitioner on one hand claims to have started working on the project immediately on signing the PPA; on the other hand, the Petitioner states that the purported delay in handing over the PPA hindered the Petitioner from applying to the concerned authorities. Such contrary claims placed by the Petitioner are a clear indication of its attempt to suppress its negligence. Such statements ought to be dismissed at the very outset.

- m) The Application for evacuation approval was sent (Annexure-A to the objections Statement of the 2nd Respondent) on 02.02.2016. The application for availing the evacuation approval was received by the Respondent No. 2 on 08.02.2016 and the same was processed on the very next day (i.e., 09.02.2016) (Annexure-B to the objections

Statement of the 2nd Respondent), wherein the Respondent had intimated the processing fees as well as instructions to the field staff regarding obtaining the feasibility report.

- n) Upon receipt of the filed report from the Superintending Engineer (Elec) Tr. (W&M) Circle, KPTCL, Bagalkot on 30.03.2016, the Respondent No. 2 accorded tentative evacuation approval on 18.04.2016. Wherefore, the contention of the Petitioner that the Respondent No. 2's actions have caused inordinate delay in commissioning the project is baseless and misleading. It is most humbly submitted that such contentions ought to be dismissed at the very outset. The regular evacuation approval was issued (Annexure-C to the objections Statement of the 2nd Respondent) on 15.06.2016.
- o) The Petitioner has contended that, subsequent to the power evacuation approval, the Respondent No. 2 granted the work order to carry out sub-station work after a delay of 11 months which allegation is denied by the Respondent No. 2. The work order can be sanctioned only subsequent to the approval of the power evacuation and the Regular evacuation was granted on 15.06.2016. The Respondent No. 2 submits that the O.M. was placed for sanctioning of estimate on 28.11.2016 with receipt of supervision charges on 24.11.2016. From the above it can be seen that the grant of work order has been issued within a reasonable time and the same cannot be termed as a 'delay.' In light of the aforementioned facts

and submissions, it is prayed that the instant Petition may be dismissed in its entirety, in the interest of justice and equity.

p) The Respondent No. 3 in its statement of Objections has stated that it is for the Respondent No. 1 to counter the contentions urged by the Petitioner and Respondent No. 3 is not a necessary party, no relief is claimed as against it and hence, the Petition may be dismissed as against it.

7) Heard the arguments on both sides, perused the written submissions of the Petitioner and the records.

8) At this stage the below mentioned issues arise for our consideration.

1. **Issue No. 1:** Whether the Petitioner proves that he is entitled for extension of time on the grounds of Force Majeure events as claimed in the Petition?

2. **Issue No. 2:** For what relief the Petitioner is entitled to?

3. **Issue No. 3:** What Order?

9) **Issue No. 1:** Whether the Petitioner proves that he is entitled for extension of time on the grounds of Force Majeure events as claimed in the Petition?

10) The present Petition is filed seeking for a declaration that the delay in commissioning the project was due to reason outside the control of the Petitioner and therefore amount to Force Majeure as per Article 8.3 of PPA and also to declare that the KERC applicable tariff as stated in Article 5.1 of the PPA dated 24.06.2015 and with other reliefs. The present Petition arises in the context of the delay of 97 days in commissioning the

Petitioner's project at Jalageri Village, Bijapur Taluk, Bijapur District under 1-3MW Farmers Scheme. The SCOD as per the PPA was 24.06.2015 i.e., 18 months from the effective date i.e., from 23.12.2016 on which both parties have signed the PPA as per Clause 1.1(xii) of the PPA. The actual commissioning of the project as on 31.03.2017.

11) The Petitioner has taken three major grounds under the head of Force Majeure Events for extension of time in commissioning the power project, which are detailed as below: -

- a) Demonetization.
- b) Land conversion from DC.
- c) Delay in issuing Evacuation approval.

a) Demonetization: -

- i) It is the case of the Petitioner that, after entering into the PPA on 24.06.2015 as per Annexure-C (filed along with Original Petition) The Government of India by way of notification dated 09.11.2016 withdrew the legal tender status of INR 500/- and INR 1,000/- denominations of Bank notes. This demonetization has had a domino effect from 09.11.2016 to the end of January 2017 on the land acquisition and other project activities thereby, there was a delay in commissioning the SCOD.
- ii) The specific contention taken by the Petitioner was that, the Government of India has taken extra ordinary steps towards Demonetization by banning 500 and 1000 notes and restricted for withdrawal of cash limited for very small amount and formal Bank system has not been available at the peak time and the

cash withdrawal also was not possible. It is true that the Petitioner had to commission the project work in the rural area i.e., Jalageri Village, Bijapur Taluk, Bijapur District and unless there is a cash for labour work, tractors and other local men and materials, it was not possible for him to avail their service. This contention is not disputed by the Respondents either in their objection or at the time of arguments. Hence, there is a delay of 3 months which has to be treated as Force Majeure event which is not in the control of the Petitioner.

- iii) During the course of arguments, the Learned Counsel for the Respondent submitted that the Petitioner has failed to produce documents to explain how demonetization has caused delay in commissioning of the plant. The Petitioner also has not issued Force Majeure notice as contemplated under Article 8.3(b). The contentions regarding demonetization are only an afterthought which ought not to be considered by the Commission.

b) Land conversion from DC: -

- i) During the course of arguments, the Learned Counsel for the Petitioner has submitted that Section 95(10) of the Karnataka Land Revenue Act had been amended (Annexure-E to the Original Petition). According to that amendment, if any occupant of any agriculture land assessed or held for the purpose of agriculture wishes to divert such land or part thereof, for the purpose of setting up of solar power generation project

in accordance with Karnataka Solar Policy 2014-21 issued in Government Order bearing No. G.O. EN 21 VSC 2014 dated 22.05.2014 which has been approved by the State and Central Government and which has been approved by the Competent Authority, the permission applied for conversion of such land shall be deemed to have been granted for that purpose so long, as they use for purpose for which permission is granted subject to payment of the conversion fine and all such other fees payable if any, in this regard. Further, stated that subsequent to this amendment of Land Reforms Act, the Government of Karnataka has issued circular (Annexure-F to the Original Petition) RD69/01.12.2015 fixing the time for grant of deemed conversion as 15 days.

- ii) Further, the Petitioner submitted that as per the Government circular the Petitioner has submitted all requisite documents like PPA, KREDL letter, RTC, PTCL, NOC and other relevant documents as on the date of filing of application on 07.12.2015, but the Deputy Commissioner has passed conversion order (Annexure-G1 to the Original Petition) on 22.08.2016. Thereby, there was a delay of 8 months 16 days in getting land conversion order from the Deputy Commissioner and this delay may be construed as Force Majeure Event.
- iii) During the course of arguments, the Learned Counsel for the Respondents submitted that, the PPA was executed on

24.06.2015 and Supplemental PPA was executed on 10.06.2016, but the Petitioner had made application before the Deputy Commissioner on 07.12.2015 i.e., with a delay of nearly 6 months. Thereafter, the Deputy Commissioner has passed orders on 22.08.2016 for conversion of land. Thereby, the Respondents are not responsible in causing delay in obtaining land conversion order, hence this ground cannot be accepted.

- iv) As per PPA Clause 1.1(xiv) 'Effective Date shall mean date of signing of this agreement by the parties.' In the present case on hand the Effective Date is the date on which both parties have signed the PPA dated 24.06.2015.
- v) On perusal of the records, it appears that the Government of Karnataka has issued circular on 01.12.2015 fixing the time for grant of deemed conversion as 15 days. After execution of PPA (Annexure-C to the Original Petition) on 24.06.2015, the Petitioner has applied for evacuation approval before KPTCL on 23.12.2015. The KPTCL has issued Tentative evacuation on 18.04.2016 and it seems the Developer accepted Tentative Evacuation on the same day as 18.04.2016 and Regular Evacuation was issued on 15.06.2016. The Petitioner had applied for conversion of land before Deputy Commissioner on 07.12.2015 along with all relevant documents, the non-agricultural conversion order was issued as 22.08.2016 after of a delay of about 8 months 16 days.

- vi) In this regard the Petitioner relied on the judgement (Annexure-R to the Amended Petition) in the case of Chennammagathihalli Solar Power Project Vs BESCO in appeal No. 351/2018 dated 14.09.2020, the Hon'ble APTEL has held as: -

"8.10) Regarding force majeure events, Clause 8.3 of PPA, it is noted that under sub-clause (vi), it is provided that "inability despite complying with all legal requirements to obtain, renew or maintain required licenses or legal approvals" will also attribute to force majeure. In view of these provisions under the PPA, we are of the opinion that the delay in receiving various approvals / clearances by the Govt. and its instrumentalities which were beyond the control of the Appellants should also be treated as an event of force majeure under sub-clause (vi) of clause 8.3 which has directly and severely affected the execution of the solar projects. To be more specific, if the approval for land conversion is received on last day of September, 2016, it becomes extremely difficult to achieve COD on 03.01.2017 as envisaged under the PPA. Moreover, the grant of extension of the Scheduled COD was accorded by Govt. of Karnataka and in turn, by first Respondent after complying with due procedures and applying its diligence and prudence under the four corners of the PPA and not beyond."

"8.15) In view of the above, we are of the considered opinion that considering facts and circumstances of the matter, the 1st Respondent was justified in extending COD up-to 6 months as per the relevant provision (Clause 2.5) of the PPA. Besides, it is also crystal clear that the approvals/clearances from various Government instrumentalities were accorded after considerable delays (of 7-8 months) which in turn attributed to delay in Commissioning of the Solar Projects. As these approvals were beyond the control of the Appellants, the State Government and 1st Respondent have rightly considered them

as an event of Force Majeure and accordingly granted approval for COD extension."

- vii) In another case of M/s Panchakshari Power Projects LL.P Vs KERC & Others in Appeal No. 279/2018 dated 12.08.2021 by Hon'ble APTEL, Delhi (Annexure-M to the Amended Petition) held as under: -

"27) ... In almost all the appeals pertaining to these farmers Solar power plants between 1MW to 3MW, the question came up for our consideration is what would be the effective date for implementation of the PPA? In terms of PPA, the effective date is the day on which the parties execute PPA agreeing to the terms and conditions mentioned there under. It is an admitted fact that mere execution of PPA between the parties the developer cannot establish the power plant unless it has to pass through process ultimately resulting in approval or rejection of PPA.'

'28) Therefore the first and primary requirement is to have approval of the PPA. Approval of PPA is required in order to approach several Authorities to secure permission/consent/ approval from the concerned Authorities for the purpose of establishing solar power plant and commissioning the solar power plant. Even to secure finances for development of solar plant either from the Banks or from any financial institutions, the SPD must have in his hand copy of the approved and signed PPA, since based on such approvals, these Banks/Financial Institutions can decide to sanction/give financial assistance to the Developer.'

Finally, the Hon'ble APTEL on the basis of the order passed in SEI Aditi Power Private Limited in Appeal No. 360/2019 dated 14.07.2021 and so also in SEI Diamond Private Limited in Appeal

No. 374/2019 has held that the date of execution of PPA though envisaged in terms of PPA as effective date, in effect the date on which the PPA is implementable is the effective date which come to the aid of the Appellant as held by the Tribunal.

- viii) As per the observations made by the Hon'ble APTEL and the facts on hand, it is seen that as per the GOK notification the Authorities concerned were required to grant deemed conversion within 15 days. The contention taken by the Petitioner that he had submitted all requisite documents to the Deputy Commissioner on 07.12.2015 is not denied or disputed by the Respondents. The Deputy Commissioner had passed land conversion order on 22.08.2016 taking total of about 256 days. Hence, the delay on land conversion beyond 15 days has to be treated as Force Majeure Event.

c) Delay in issuing Evacuation approval: -

- i) It is the case of the Petitioner that, he has applied for power evacuation approval before the KPTCL on 23.12.2015, the same was approved and Regular Evacuation approval was issued on 15.06.2016. There was a delay of 6 months from the KPTCL/2nd Respondent. Even though solar policy of 2014-21 assured a speedy approval process and that the Department of Energy and 3rd Respondent has facilitated speedy approval keeping the farmers in mind and who are not familiar with the process despite of the same the 2nd Respondent has delayed about 6

months for approval of power evacuation which is the basis for remaining approvals such as substation works and 11KV line work. Therefore, the delay caused has to be treated as Force Majeure under Article 8 of PPA.

- ii) The Petitioner submitted that subsequent to the power evacuation approval the 2nd Respondent has granted work order to carryout substation work only on 28.11.2016 and there was a delay of 11 months by the KPTCL as this work order has to be obtained only after approval of regular power evacuation scheme.
- iii) That subsequent to the regular power evacuation approval, the Petitioner could obtain 11KV work order to construct 11KV line only on 16.12.2016. Therefore, there is delay of 12 months. Further stated he had made a request for extension of time before the HESCOM on 08.12.2016 but the same was received on 04.02.2017 with a delay of 2 months. The above said approvals are valid upto 18 months from the date of signing of PPA and the Petitioner could not carry out substation work as extension was not granted immediately on application. This delay needs to be treated as under Force Majeure Event.
- iv) In this regard the Petitioner has furnished table of events in Annexure-X (filed along with Amended Petition) which reads as hereunder: -

		NAGAGOUDA ENERGIES PVT. LTD			CHENNAMANAGATHIHALLI SOLAR POWER PROJECT LLP		
	Particulars	Applied/ Target Date	Received Date	DELAY (in Days)	Applied Date/ Target	Received Date	DELAY (in Days)
1.	PPA Delivery	24.06.2015	17.10.2015	115 days	03.07.2015		
2.	Commissioning Date	23.06.2017 SCOD	31.03.2017	84 Days earlier	02.07.2015	30.06.2017	3 Days Before
3.	Extension Approval	08.12.2016	04.02.2017	58 Days Delay		03.02.2017	
4.	Extension Period	6 months			6 months		
5.	Land NA (conversion) order	07.12.2015	22.08.2016	259 Days Delay	16.02.2016	29.09.2016	7 months
6.	Power Evacuation Approval	18.12.2015	15.06.2016	180 Days Delay	18.01.2016/ 15.02.2016	22.08.2016	7 months
7.	Bay extension approval/su bstation work order	18.12.2015	28.11.2016	346 Days Delay	25.05.2016	12.12.2016	7 months
8.	11 K V Line Approval	18.12.2015	16.12.2016	364 Days Delay			

In the above table of events the Petitioner has taken the shelter of events discussed in the case of Chennammagathihalli Solar Power Project Vs BESCO in appeal No. 351/2018 dated 14.09.2020 passed by the Hon'ble APTEL, New Delhi and compared the said events to the present case.

- v) Further submitted that the details of various sanctions and permissions would reveal that inspite of having applied for the requisite permissions and sanctions, Petitioner suffered on account of inordinate delay in procuring the same. The said delay is beyond the control of the Petitioner. The various

sanctions and approvals are pre-requisite in securing the confidence of the financial institutions and Government Authorities. Hence, the Petitioner prays that the delays caused could be treated as under Force Majeure Events.

- vi) By way of reply the Learned Counsel for the Respondents have submitted that, the Petitioner has alleged that there was a delay of 6 months on the part of the 2nd Respondent in approving the power evacuation. This allegation is denied as false. Petitioner has made application for evacuation on 02.02.2016, soon after receiving application a letter was addressed to the Petitioner (Annexure-B filed along with statement of objections R2 dated 28.01.2022) dated 09.02.2016 to pay processing fee of Rs. 57,250/- along with copy of the RTC for Survey No. 79/2 of Jalageri Grama. The Deputy Commissioner, Vijayapura has issued OM for land conversion on 22.08.2016. On 02.02.2016 the Petitioner has submitted a request to issue evacuation approval and the regular evacuation approval was granted on 15.06.2016.
- vii) Further stated that all these chains of events make it clear that the Respondent No. 2 has not denied the process of according power evacuation approval to the Petitioner. Thereby, it is submitted considering all the above facts and circumstances, suitable directions could be given to the Petitioner to pay damages including liquidated damages.

12) We have perused the relevant clauses of the PPA such as: -

“2.1 Conditions Precedent:

The obligations of BESCO and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.

2.1.1 (i) *The SPD shall obtain all permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the Project (hereinafter referred to as “Approvals”):*

(ii) The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:

- (a) The DPR to BESCO and achieve financial closure and provide a certificate to BESCO from the lead banker to this effect;*
- (b) All Consents, Clearances and Permits required for supply of power to BESCO as per the terms of this Agreement; and*
- (c) Power evacuation approval from Karnataka Power Transmission Company Limited or BESCO, as the case may be.*

2.1.2 *SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and BESCO shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent.*

2.1.3 *The SPD shall notify BESCO in writing at least once a month on the progress made in satisfying the Conditions Precedent. The date, on which the SPD fulfils any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify BESCO of the same.*

2.2 Damages for delay by the SPD

2.2.1 *In the event that the SPD does not fulfill any or all of the Conditions Precedent set forth in Clause*

2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to BESCO or due to Force Majeure, the SPD shall pay to BESCO damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days, BESCO at its discretion may terminate this Agreement."

"2.5 Extensions of Time

2.5.1 In the event that the SPD is prevented from performing its obligations under Clause 4.1 by the Scheduled Commissioning Date due to:

- (a) Any BESCO Event of Default; or
- (b) Force Majeure Events affecting BESCO; or
- (c) Force Majeure Events affecting the SPD.

2.5.2 The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than 'day for day' basis, to permit the SPD or BESCO through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or BESCO, or till such time such Event of Default is rectified by BESCO.

2.5.3 In case of extension occurring due to reasons specified in clause 2.5.1 (a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6(six) months.

2.5.6 As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined date shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement.

- 13) We have perused the documents furnished by the parties shows that the Petitioner and the 1st Respondent have entered into PPA (Annexure-C to the Original Petition) dated 24.06.2015 and a Supplementary PPA was

executed (Annexure-D to the Original Petition) on 10.06.2016. The Commission has approved the PPA on 13.07.2015. The Revenue Department had issued Circular dated 01.12.2015 (Annexure-F to the Original Petition) regarding deemed conversion as per the Section 95 of Karnataka Land Revenue (Amendment) Act, 2015. Thereafter, OM was issued by the Deputy Commissioner, Vijayapura District (Annexure-G1 to the Original Petition) dated 22.08.2016 regarding conversion of land bearing Survey No. 79/2 to an extent of 19 Acres 39 Guntas for non-agricultural purpose i.e., for establishing of Solar Power Project. The Petitioner has written a letter (Annexure-H to the Original Petition) to the Executive Engineer (Ele), HESCOM, Bijapur dated 23.12.2015 with a request to issue evacuation approval for Solar Power Plant under Farmers' Scheme. On 15.06.2016 KPTCL has issued regular evacuation approval to the Petitioner (Annexure-H1 to the Original Petition). Proceedings of 65th TB Committee Meeting (Annexure-J to the Original Petition) held on 27.06.2016 in the chambers of CEE (P & C), KPTCL, Bengaluru for sparing of KPTCL land for Terminal Bay to IPP's/EHT installations as per C.O. No. KPTCL/B28(a)/32543/12-13 dated 17.08.2012, the Committee decided to spare available land for construction of one number of 11KV TB along with metering arrangement at 110/11KV Takkalki Substation to the Petitioner. The sanction of estimate for construction of 11KV line was issued vide certificate (Annexure-K to the Original Petition) dated 16.12.2016 issued by HESCOM for construction of 11KV link line. The Petitioner has requested for extension of time (as per Reference-2 in Annexure-L to the Original

Petition) on 08.12.2016 and extension is allowed (Annexure-L to the Original Petition) on 04.02.2017 for 6 months from the date of SCOD for completion of 3MW Solar power project at Survey No. 79/2 of Jalageri Village. Accordingly, the Petitioner has commissioned the project (Annexure-N to the Amended Petition) on 31.03.2017.

- 14) The following events would go to show the time taken by the Authorities concerned in granting sanctions, approvals and etc., in execution of the project: -

Table 1

Sl. No.	Date	Description of the documents	Annexures
1.	24.06.2015	PPA signed between the Petitioner and the 1 st Respondent	"C" filed along with Original Petition
2.	23.12.2015	Application given by the Petitioner to KPTCL for Regular evacuation	"H" filed along with Original Petition
3.	09.02.2016	Letter written by KPTCL to the Petitioner regarding remittance of processing fee and furnishing documents	"B" filed along with Objections of 2 nd Respondent
4.	18.02.2016	Processing fee is paid	Reference No. 4 in "H1" filed along with Original Petition
4.	15.06.2016	Letter written by KPTCL to the Petitioner regarding approval of Regular Evacuation Scheme	"H1" filed along with Original Petition
5.	27.06.2016	65 th TB Committee meeting held and approval was accorded for utilization of space available in the substation for construction of one number of 11KV terminal bay	"J" filed along with Original Petition

6.	13.04.2017	Commissioning Certificate issued by Executive Engineer (Ele), O & M Division, HESCOM, Vijayapura certifying the project was commissioned on 31.03.2017	"N" filed along with Amended Petition
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Table 2

Sl. No.	The difference of Period shown from 24.12.2016 (after 18 months period as per Article 1.1 (xiv) of the PPA) and Annexure-N (filed with Amended Petition)	Days
1.	24.12.2016 to 31.12.2016	08 days
2.	January 2017	31 days
3.	February 2017	28 days
4.	March 2017	30 days
Total		97 days

The above table disclose the time taken for granting sanctions and approvals by the Government Authorities and other Authorities and Demonetization induced delay which were out of the control of the Petitioner thereby, the prayer of the Petitioner squarely falls within the parameters under Force Majeure events.

- 15) In support of the arguments, the Learned Counsel for the Petitioner further relied upon the following judgements: -
- i) In the case of Basaragi KM Solar Power Project LL.P & Another Vs HESCOM & Another in Appeal No. 328/2018 dated 12.08.2021 by Hon'ble APTEL, New Delhi (Annexure-T1 to the Amended Petition).
 - ii) In the case of Hukkeri Solar Power Project & Another Vs HESCOM & Another in Appeal No. 342/2018 dated 12.08.2021 by Hon'ble APTEL, New Delhi (Annexure-T2 to the Amended Petition)

- iii) In the case of Kurugunda Solar Power Project LL.P & Another Vs HESCOM & Another in Appeal No. 12/2019 dated 12.08.2021 by Hon'ble APTEL, New Delhi (Annexure-T3 to the Amended Petition).
- iv) In the case of Madamageri Solar Power Project LL.P & Another Vs HESCOM & Another in Appeal No. 322/2018 dated 12.08.2021 by Hon'ble APTEL, New Delhi (Annexure-T4 to the Amended Petition).
- v) In the case of Yarganavi Solar Power Project LL.P & Another Vs HESCOM & Another in Appeal No. 10/2019 dated 12.08.2021 by Hon'ble APTEL, New Delhi (Annexure-T5 to the Amended Petition).
- vi) Clearsky Solar Power Limited Vs KERC & others in Appeal No. 160/2020 dated 02.08.2021 by Hon'ble APTEL, New Delhi (Annexure-T6 to the Amended Petition).
- vii) Cambria Solar Private Limited Vs GESCOM & Others in OP No. 188/2017 dated 23.03.2021 by KERC, Bengaluru (Annexure-U to the Amended Petition).

16) We have perused the Judgement passed by the Hon'ble APTEL, NewDelhi, in Appeal No. 328/2018 in the matter of Basaragi KM Solar Power Project LL. P & Sri Channaraj Hattiholi Vs HESCOM & KERC dated 12.08.2021 and Hon'ble Appellate Tribunal for Electricity has held and observed as follows: -

- I. *“Having regard to the fact that securing these approvals from various instrumentalities of the Government/ Government officer, 18 months period was envisaged to complete the project. Having regard to the fact that there could be circumstances or events which could delay the happening of COD within the original time slot, six months’ time for extension of commissioning the project at the level of concerned distribution licensee was envisaged. For events beyond that, they had to approach the Respondent Commission.’*
- II. *‘The above procedure was envisaged keeping in mind that possibility of delay happening on account of laches on the part of the offices of Governmental Instrumentalities, though Solar Developer or SPV do not contribute to such delay. Unforeseen happening could possibly delay commissioning of the project, therefore force majeure event clauses were introduced in the terms of PPA as stated above. These force majeure clauses definitely take within its fold, the delay caused by offices of the Government or Governmental Instrumentalities.’*
- III. *‘Arguments of the Respondent HESCOM that KPTCL is not a party to the PPA, therefore, the delay on their part cannot come to the aid of the Appellant cannot be accepted. KPTCL is also a public utility and instrumentality of the Government. Therefore, even if the project is delayed on account of KPTCL, in not issuing approval for evacuation of power and grid connectivity within a reasonable time, it amounts to event of Force majeure.’*
- IV. *‘The Respondent HESCOM contends that there was delay in submitting applications to various departments by the Appellant. One has to analyze the circumstances in a holistic approach is whether there was negligence on the part of the Developer to approach and obtain these approvals? It cannot be said that the considerable time lapsed in obtaining these approvals from various instrumentalities of the Government was at the instance of the Appellants.’*

- V. *'Having invested huge amounts taking loans from Banks/financial institutions, one cannot even imagine that the Developer will be negligent in pursuing his project.'*
- VI. *'However, the same set of Force Majeure Events could not convince the Respondent Commission. The Respondent Commission being a neutral body is expected to discharge its functions in a judicious manner. If delay has occurred on account of reasons beyond the control of the Appellant, the Appellant cannot be punished. The intention of the Government to assist to the farmers should not become otherwise a weapon to punish them''*

17) In the case of Hukkeri Solar Power Project & Another Vs HESCOM & Another in Appeal No. 342/2018 dated 12.08.2021 by Hon'ble APTEL, New Delhi (Annexure-T2 to the Amended Petition) has held and observed as follows: -

“108) It is seen that the Government of Karnataka brought in its special scheme for promoting renewable energy generation to harness the solar sources available in the State. This was meant to create opportunities to land owning farmers. In response to the promotion of the solar development by Government of Karnataka, several farmers including the Appellant came forward to set up solar plants. We judiciously take notice of the facts which were discussed/considered in other Appeals that in terms of guidelines issued by the State Government for developing solar project, there was a mention that the land used for setting up of the solar plant requires land conversion permission, however, the land pertaining to solar development under Farmer's Scheme will have deemed conversion. However, there was lot of confusion in issuance of executive direction/orders to implement the guidelines for deemed conversion which compelled many farmers to approach the revenue authorities for regular land conversion route. This regular land conversion route involves herculean task which required several documents from several

Department to submit the application for conversion of the land. Most of the cases, the delay seems to be with regard to conversion of the land.'

'109) Apart from conversion of land, there seems to be delay in obtaining evacuation either provisional or final approval, so also in approving the drawing and intimating the estimation of the charges to be paid. Similarly, once application is submitted to CEIG to certify safety of the plant in order to start commissioning of the solar plant, in many cases time is taken to come and inspect the site. Even in this Appeal, we note that the drawings required for the bay terminal and other requirements for connectivity at the bay of the substation of the transmission/distribution system, the authorities took some time. All this could happen only in October 2016. Only after approval of the grid connectivity finally granted the Appellant could approach the Chief Electrical Inspector with drawings pertaining to the electrical installation of the Solar power plant.'

'110) Apparently, the scheme was meant to benefit small land holding farmers, who could establish solar plants between 1 MW to 3 MWs. This also definitely requires business prudence apart from minimum knowledge in the field concerned. As per the policy, the establishment of solar plant was to be in the agricultural land. On account of restrictions to use agricultural land for non-agricultural purpose, conversion of agricultural land use is a must. In terms of Karnataka Revenue Act, it has laborious process to get conversion of agricultural land into non-agricultural one. To establish solar power plant, it is not just conversion of agricultural land permission, but several other approvals/consent/permissions were required.'

'111) Till SPV was established, it was the individual Appellant i.e., SPD who had to run from officer to office to secure required approvals/ consents. Having regard to laborious process to secure these permissions from various Government instrumentalities, it would have been a wise decision to have infrastructure under one roof (like single window agency) to get all these clearances which would have saved lot of time for the establishment of these

small solar power plants in question. Since either the SPD or SPV had to run from office to office situated at different places to secure approval and permission which would not have been possible to secure on any one particular day also seems to have caused hardship and delay in procuring the approvals, be it land conversion or power evacuation and grid connectivity of safety certificate from CEIG etc. To apply for conversion of land to non-agriculture purpose itself, more than 13 documents are required, which have to be secured not from single place but various departments of Government. The scheme which was expected to be a boon to the farmers seems to have become a bane.'

'112) Therefore, it is quite evident that there was no fault of the Appellant in approaching various Governmental Instrumentalities for necessary sanctions/approvals. Though all care and caution was duly exercised considerable time was lapsed by the time the Appellant obtained the necessary approvals. Definitely, the fault does not lie with the Appellant One cannot blame the Appellant, since the delay has occurred from the Govt. Instrumentalities in issuing necessary approvals and sanctions.'

- 18) In the case of Kurugunda Solar Power Project LL.P & Another Vs HESCOM & Another in Appeal No. 12/2019 dated 12.08.2021 by Hon'ble APTEL, New Delhi (Annexure-T3 to the Amended Petition) has observed as under: -

''109) We also note that it is not a simple application for land conversion. This requires several other documents to be collected before applying for land conversion. The set of documents that are required had to be obtained from different departments. All this would take sometimes, therefore, one cannot expect the SPD straight away to apply for conversion of land the moment the PPA was approved by the Commission. Similarly, to get CEIG safety approval, several safety steps have to be completed like submission of drawings, approval of the drawings, intimation for payment of processing fee and final approval followed by safety certificate has to be issued. This safety certificate could be granted only if there is permission for Grid connectivity and final

approval for evacuation obtained. In most of the cases, the Developers have sought lease of the land for setting up bay terminal. The land on lease basis also consumer time to secure the final approval of evacuation with so many formalities that have to be complied with by the Solar Developers. It is not just one single window agency where they could secure all these approvals. They had to approach office to office to secure different certificates, documents to secure the approvals that are required.'

'110) Therefore, the Association of farmers meant for Farmer's Scheme made presentation to the HESCOM who in turn brought to the notice of the Energy Department of the State explaining the difficulties faced by the Solar Plant Developers in getting the approvals/sanctions to set up the solar plants. A special Committee was formed to look in to the reasons for the delay being caused. On appraisal of the difficulties faced by the farmers, the three members Committee recommended for acceptance of the reasons explained as force majeure event. Based on that the State Government through the Secretary requested KERC to consider the same and grant PPA tariff to the Solar Developers. In this regard, even MNRE also addressed a letter to encourage the Solar Developers.'

'112) According to us, the considerable lapse of time to secure these certificates necessary was not on account of negligence on the part of the Appellants, but on account of the concerned officers who took time to issue these certificates. Therefore, we are of the opinion that none of the delay in securing the approvals was on account of Appellants and in fact they approached and started the process with utmost care and diligence.'

- 19) We have perused the Judgement passed by the Hon'ble APTEL, NewDelhi, in Appeal No. 322/2018 in the matter of Madamageri Solar Power Project LL. P & Smt. Girija B. Hattiholi Vs HESCOM & KERC dated 12.08.2021, Hon'ble Appellate Tribunal for Electricity (Annexure-T4 to the Amended Petition) has held and observed as follows: -

- I. *"In terms of guidelines issued by State Government to set up solar plants several sanctions/approvals/ clearances had to be obtained by the farmers like land conversion, grid connection and power evacuation approvals, plant safety approval from chief electrical inspector etc. Apparently, right from the date of signing of the PPA, the Appellant was running from office to office to secure these approvals/sanctions as stated above. If time was taken for getting these approvals as stated above, we note that considerable time was lapsed. Definitely it was not on account of the Appellants' negligence or lethargic approach.'*
- II. *'We are of the opinion that the time taken to obtain the above-mentioned approvals would definitely become impossible for the Appellants to achieve COD of the solar plant within SCOD of the PPA.'*
- III. *'In fact, as stated above, the HESCOM taking into consideration all these facts and in line with the terms of PPA extended time for COD within the extended SCOD. This action of the HESCOM has support from the fact that the State Government also, after due diligence and prudence, accorded extension of COD by six months. On account of such extension, the SCOD automatically get postponed by six months.'*
- IV. *'Apart from that, in terms of Clause 10.5 of PPA, it says despite complying with the legal requirements to obtain, renew or maintain require licensee or legal approval will also amount to Force Majeure Event. Therefore, we are of the opinion that if at all there was delay in receiving various clearances/approvals by the State Government and its instrumentalities which are beyond the control of the Appellants, the same has to be treated as event of force majeure, since the same would directly and seriously affect the implementations of the solar project.'"*

- 20) In OP No. 188/2017 dated 23.03.2021 between Cambria Solar Private Limited Vs GESCOM (Annexure-U to the Amended Petition), this Commission has held that as: -

“In view of the principles laid down by the Hon’ble APTEL in a recent judgment cited (in Appeal No. 351/2018 in the matter of Chennamangathihalli Solar Power Project LL. P Vs BESCOM & another case, dated 14.09.2020), above and we are also relying on the above judgement in view of the facts are quite similar to the instant case. In view of the extension of time granted by the BESCOM (Respondent-2), holding that the Petitioner has fulfilled the conditions of PPA and extended time, we are of the opinion that the circumstances and events narrated by the Petitioner in the petition are ‘Force Majeure’ events and they are not under the reasonable control of the Petitioner. Therefore, the Petitioner has proved that events or circumstances alleged by it amounts to ‘Force Majeure’ events entitling for extension of time for achieving the Conditions Precedent and Scheduled Commissioning Date.”

In this order, the Commission placing reliance on the Hon’ble APTEL’s decision in the case of Chennammangathihalli Solar Power Project vs BESCOM, has allowed the extension of time on the ground of delays by the Governmental agencies which is also the case in the present Petition.

- 21) Under these circumstances, basing on the observations of Hon’ble APTEL in the cases referred supra as well as the reasons assigned by the Petitioner, the grounds urged by the Petitioner under the head of Force Majeure Events has to be accepted.
- 22) During the course of arguments, the Learned Counsel for the Petitioner has submitted that, he has placed all the communications sent to the Respondents intimating them on the Force Majeure Events affecting the

timely commissioning of the project. In support of his arguments, he has relied upon the letter written by the Additional Chief Secretary to the Government, Energy Department, to the KERC (Annexure-P to the Amended Petition) on 23.06.2017 in which the Government requested the Commission to consider approval to the extension of COD of Solar Power Projects of capacity 1 to 3MW under Land Owning Farmers' category. Another document i.e., the letter written by HESCOM/1st Respondent to the Petitioner (Annexure-L to the Original Petition) dated 04.02.2017 in which the time extended for 6 months extension was granted from the date of SCOD for completion of Solar Power Project by the Petitioner under Clause 2.5 and Article 8 of PPA. By way of reply the Learned Counsel for the Respondents submitted that the Petitioner has not followed the Article 8.3(b) of the PPA.

23) We have perused the Force Majeure Clause of the PPA: -

"8.3 Force Majeure Events:

- (a) Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following:*
- (i) Acts of God;*
 - (ii) Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;*

- (iii) *Strikes, work stoppages, work slowdowns or other labour dispute which affects a Party's ability to perform under this Agreement;*
 - (iv) *Acts of war (whether declared or undeclared), invasion or civil unrest;*
 - (v) *Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the SPD or BESCO of any Law or any of their respective obligations under this Agreement);*
 - (vi) *Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
 - (vii) *Fire, Earthquakes, explosions, accidents, landslides;*
 - (viii) *Expropriation and/or compulsory acquisition of the Project in whole or in part;*
 - (ix) *Chemical or radioactive contamination or ionizing radiation; or*
 - (x) *Damage to or breakdown of transmission facilities of either Party;*
- (b) *The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:*
 - (i) *The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;*
 - (ii) *The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.*
 - (iii) *The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;*
 - (iv) *The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;*

(v) *In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."*

- 24) On perusal of Annexure-L (filed along with Original Petition) it appears that, the HESCOM has accorded approval to commission the project within 6 months from the date of SCOD dated 24.12.2016. Further it is stated in this letter that the approval issued is purely based on the request of Solar Power Developer for the purpose of commissioning of the project. Apart from that the Respondent No. 1 while issuing this approval had referred to the letter written by the Petitioner dated 08.12.2016 (Reference No. 2 in Annexure-L filed along with Original Petition). On the direction of the 1st Respondent/HESCOM, the Petitioner filed the present Petition challenging the directions issued by the 1st Respondent/HESCOM to file a Petition before the Commission seeking approval for extension of SCOD. Thereby, the allegations of the Respondents that no Force Majeure notice was given by the Petitioner are baseless and false.
- 25) Further the Petitioner has also produced Commissioning certificate (Annexure-N to the Amended Petition) dated 13.04.2017 which shows that the 3 MW Solar Power Project of the Petitioner in Survey No. 79/2 of Jalageri Village, Vijayapura Taluk, Bijapur District has been commissioned on 31.03.2017.
- 26) In view of the discussions made above and also in Page 39 (Para 14 in Table-2), the table disclose the time taken for sanctions/approvals in each event of delays and the prayer of the Petitioner falls within the parameters

as discussed under Force Majeure events and in the present case on hand though the Petitioner has suffered delay in issuing evacuation approval, Demonetization induced delay and delay in conversion of land, has commissioned the project on 31.03.2017 within the extended period of SCOD approved by the 1st Respondent as per Annexure-L (filed along with Original Petition). As per observations made herein above judgements relied on by the Counsel for the Petitioner and the grounds urged by the Petitioner in the Petition the events of delay fall under the Clause of Force Majeure as described in the PPA. Hence Issue No. 1 is answered in affirmative.

- 27) **Issue No. 2:** For what relief the Petitioner is entitled to?
- 28) As per discussions made herein above paragraphs, and also answering issue No. 1 in affirmative by holding that the Petitioner is entitled for extension of time of 97 days from 24.12.2016 to 31.03.2017 and the Petitioner is entitled for the tariff as agreed in PPA as per letter (Annexure-Q to the Amended Petition) dated 09.04.2018 and also as per the findings given by the Hon'ble APTEL in its judgement dated 28.02.2020 in Appeal No. 340/2016 between Azure Sunrise Private Limited Vs Chamundeshwari Electricity Supply Corporation Limited, wherein the tribunal has held that "once extension of Scheduled Commissioning Date is approved by the concerned DISCOM, the question of reduced tariff does not arise". Hence, the Petitioner is entitled for Rs. 8.40/kWh tariff.
- 29) As stated above, once the SCOD is extended by the Respondent the revised SCOD is to be reckoned for determining the Tariff as well as

liquidated damages. Since the time extended upto 31.03.2017, the Petitioner is not liable to pay liquidated damages. Accordingly, this Issue No. 2 is answered.

30) **Issue No. 3:** What Order?

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

ORDER

- a) The Petition is allowed.
- b) The delay is condoned upto 31.03.2017 in commissioning of Solar Power Project in Jalageri Village, Vijayapura Taluk, Vijayapura District and the Petitioner is entitled tariff at Rs. 8.40/- as per PPA.
- c) The 1st Respondent is directed not to levy liquidated damages and if already levied the same shall be refunded to the Petitioner within two months.

Sd/-
(H.M. MANJUNATHA)
Officiating Chairperson

Sd/-
(M.D. RAVI)
Member