

No. N/321/17

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.157/2017

BETWEEN:

M/S G. Arakeri Solar Power Private Limited,
Having its registered Office at,
No. 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. The KREDL
Shanthi Gruha, No.39,
Bharath Scouts and Guides Building,
Opposite The Chief Post Master General Office,
Palace road, Bangalore.
3. The Deputy Commissioner
Bijapur District, Bijapur.

...RESPONDENTS

(R1 represented by Sri Shahbaaz Husain, Advocate for Precint Legal,
R2 represented by Sri. Samarth Kashyap, Advocate,

ORDERS

This case is taken up for second time disposal as per directions given by Hon'ble High Court of Karnataka in Writ Petition WP No. 52028/2018 (GM-KEB) C/W WP No. 30716/2018 (GM-KEB) (filed against the orders in OP No. 157/2017) & Others (Annexure-W to the Amended Petition).

- 1) Originally, the Petitioner had filed the Petition in OP No. 157/2017 on 20.09.2017 under Section 86(1)(b) of the Electricity Act, 2003. During the initial proceedings, 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 27.09.2018 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 Commission order dated 27.09.2018, the Petitioner had approached the Hon'ble High Court of Karnataka, Bengaluru in Writ Petition bearing WP No. 30716/2018 (GM-KEB) challenging the orders of the Commission. After hearing both the parties the Hon'ble High Court of Karnataka passed order dated 20.09.2021 along with other writ petitions holding 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. 1 has filed objections on 10.01.2022 to the Amended Petition. This Commission has also 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 was 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 of 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) 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) 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) Direct the Respondent No. 1/HESCOM to refund the recovered liquidated damages and conditions precedent damages along with late payment surcharge in 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, issued a letter dated 16.03.2015 (Annexure-B filed along with Original Petition) in favour of a land owning farmer, Sri Ulhas Sidramappa Arakeri [the Solar Project Developer (SPD)] and allotted 3 MW capacity Solar Power Project to be commissioned at Hunshyal Village, Vijayapura Taluk, Vijayapura 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 for sale of power from 3 MW solar power plant at Hunshyal Village, Vijayapura Taluk, Vijayapura District, and as approved by HESCOM Board for purchase of power for this plant. Thereafter, a Supplementary agreement dated 16.08.2016 (Annexure-D filed along with Original Petition) was entered into between the HESCOM

and Petitioner for assigning the project into the name SPV M/s G. Ankeri Solar Power Project Limited.

- c) Immediately after entering into PPA the Petitioner has started project development work on the site, which includes crucial work like land levelling, fencing, obtaining necessary approvals and sanctions such as conversion of land, Evacuation line, mobilization of funds etc., from the Authorities, concerns and loan sanction from Banks for the establishment of a solar power plant. The Petitioner estimated an investment of Rs. 18,50,00,000/- (Eighteen Crores Fifty lakhs only) for the project. As per Article 2 of the PPA dated 24.06.2015 the said project has to be completed on or before scheduled commissioning date i.e., within 18 months from the effective date. The Effective date is the date of signing PPA i.e., 24.06.2015.
- d) It is stated that for completion of the project there are numerous approvals are required as per Clause 2.1.1 of Article 2 of PPA such as:-
- i. Land conversion from agricultural into non-agricultural to setting up from 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 PPA was signed on 24.06.2015, the same was to be approved by the KERC on 13.07.2015. 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 extension of time is to be granted along with the original tariff agreed as per PPA i.e., Rs. 8.40/KW.

- f) The Petitioner has sought permission and approval of format from 1st Respondent for enabling the Petitioner to form a SPV and sign up Supplemental Tariff as per provision 12.11 of the PPA. However, the 1st Respondent has no clarity on the formation of the SPV and signing of Supplementary Agreement. The Commission also aware that HESCOM 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, thereafter, the Commission had issued a new format for AOA, MOA and supplementary tariff agreement on 21.03.2016 (Annexure-D2 filed along with Original Petition). In between these two clarifications a period of 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 Petitioner to mobilize the required funds for the project. Because of the act of 1st Respondent causing delay in getting clarification and clarify itself, was 9 months had lapsed which tantamount to denying the 18 months window of opportunity available to the Petitioner to execute the project for which Petitioner is not responsible and the same to be treated as Force Majeure.

- g) Subsequent to the amendment 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 for 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 date of filing of the application for conversion of land before the Deputy Commissioner (Annexure-G to the Original Petition) on 07.12.2015. The Deputy Commissioner has passed order of conversion of land (Annexure-G1 to the Original Petition) on 19.08.2016, therefore, there was delay of about 8 months 13 days. This delay is to be construed as Force Majeure event and extension of time to be granted with original tariff.
- h) The Petitioner has also applied for power evacuation approval before the HESCOM/1st Respondent (Annexure-H1 to the Original Petition) on 18.12.2015, the same was approved by the HESCOM/1st Respondent (Annexure-H2 to the Original Petition) on 22.10.2016. There is a delay of 10 months from the HESCOM/1st Respondent for

power evacuation approval for which the Petitioner is not responsible. Therefore, the delay caused is to be treated as Force Majeure event under Article 8 of the PPA.

- i) The HESCOM/1st Respondent took 12 months for allocation of Bay-space, where breaker can be installed for injecting the power into grid. Since the bay-space can be allotted only after power evacuation approval, the 1st Respondent has allotted bay-space at Nagathan Village which is called as Nagathan 33/11 KV station (Annexure-J to the Original Petition) on 19.12.2016 which is 4 days prior to the initial Scheduled Commissioning Date. The 1st Respondent is responsible for the delay in Bay approval and 11 KV line work approval as 33KV station comes under the control of the HESCOM. The 1st Respondent has not defined the process with timeline to process power evacuation request, bay-space allocation, approval of single line diagram, TAQC approval etc. The Petitioner states that due to lack of specific guidelines/procedures both line work and Bay work was delayed for which the Petitioner cannot be blamed. This delay of about 12 months is to be condoned as Force Majeure Event.
- j) The 1st Respondent who insisted for using breaker equipment only from State Owned Public Sector Company which is Mysore Electrical Industries Limited, it took 3 months 15 days to get the product. The said breaker was received along with delivery note (Annexure-J1 to the Original Petition) on 15.12.2016 just 8 days prior to the Scheduled Commissioning Date. The MEI breaker could not be booked without

drawing approval, only after the drawing approval from HESCOM, the Petitioner could place the order for MEI breaker which was delivered on 15.12.2016. The delay was caused because of 1st Respondent instruction to use MEI breaker only. For this delay the Petitioner cannot be blamed. This 3 months 15 days delay has to be considered as event of Force Majeure.

- k) Subsequent to the power evacuation approval the 1st Respondent has granted work order to carry out substation work (Annexure-K to the Original Petition) only on 16.12.2016 and there was a delay of 11 months 24 days by HESCOM as this can be obtained only after the approval of regular power evacuation scheme. Therefore, the delay caused by HESCOM has to be treated as Force Majeure event. Subsequent to the regular power evacuation approval, the Petitioner could obtain 11 KV work order (Annexure-K1 to the Original Petition) to construct 11 KV line only on 16.12.2016 and there was delay of 11 months 24 days. Hence, the delay caused by the Respondent No. 1 has to be treated as Force Majeure Event.
- l) It is stated that time extension 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, after a delay of 2 months. Since, the above said approvals are valid for 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 in granting extension of time and the same is to be treated as Force Majeure event.

- m) 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 limited for very small amount. The formal Bank system has not been available at the peak time of project implementation and the cash withdrawal also was not possible. As the Petitioner's work was in the rural area, unless there is a cash for labour work, tractors and other local men and materials, it was not possible to execute work and this situation was continued for 3 months and the same has to be treated as Force Majeure event for which the Petitioner is not responsible.
- n) It is stated that the dates 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 were 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 delay by the Government Instrumentalities or Authorities who are required to facilitate the permissions and sanctions. On account of there being no sanctions and approvals the Petitioner was only left with the work of executing things on paper. 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.

- o) 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 the Petitioner proposes for 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 along with original tariff by producing all relevant documents under Force majeure event, hence the present Petition is filed.
- p) 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 Authorities for requisite permissions and the same has not been provided in time. Hence, request of the Commission to consider and approve the time extension granted by the HESCOM.
- ii) There was a delay of 3 months 24 days after signing the PPA dated 24.06.2015 for getting the copy of the PPA approved by the Commission as the same was delivered on 17.10.2015. Unless approved PPA documents were received by the Petitioner, the Petitioner could not take any 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, extension of time required to be considered by the Commission along 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 thereafter HESCOM constituted a committee for verifying the applications including the Petitioner's application and thereafter the 1st Respondent has issued letter to the Petitioner extending the time for a period of 6 months and thereafter, the

Government wrote a letter dated 23.06.2017 to the Commission recommending for approval of the extension of time under Force Majeure Event and the views taken by the HESCOM. However, the Commission has not approved extension of the tariff as agreed in the PPA. Therefore, the extension of time along with original tariff agreed in the PPA requires approval of the Commission.

- 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 is necessitated to the Petitioner however same has been delayed for 2 months, during this period the Petitioner could not carry out certain 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 the 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 have sought for extension of time.

- vi) The Petitioner has invested 18.5 Crores and committed revenue sharing with farmer assuming the original tariff. If any change to the original tariff granted in the PPA the same is violation of original PPA conditions and also causes heavy loses to the Petitioner and livelihood of the farmers since he has surrendered entire farmer 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, all these events are beyond the control of the Petitioner and hence to be treated as Force Majeure.
- viii) The delays were due to reasons beyond the control of the Petitioner and the Commission was achieved within the set SCOD, 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, with all this the Petitioner prays to allow the Petition as prayed for in the interest of justice and equity.

- 6) Upon notice, the Respondent No. 1 & 2 appeared through their Learned counsel. Respondent No. 1 did not file any objections to the Original Petition but now filed statement of objections separately to the Amended Petition and Respondent No. 2 filed statement of objections to the Original Petition and Respondent No. 3 who is formal party, remained absent.
 - a) The 1st Respondent has filed objections to the Amended Petition on 10.01.2022 stating that, the Petition is devoid of merits and the same needs to be dismissed in limine.
 - b) The Petitioner further challenged the Order of the Commission before the Hon'ble High Court of Karnataka in WP No. 30716/2020. The Hon'ble High Court on 20.09.2021 pronounced Orders directing the Commission to re consider the matter in the 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.
 - c) Pursuant to the grant of letter of award the Respondent entered into PPA with the Petitioner on 24.06.2015. The Commission has accorded

approval on 13.07.2015, SPPA was entered into between the Petitioner and 1st Respondent on 16.08.2016. As per Article 1.1(xxxi) mandates that the project be commissioned within 18 months from the effective date i.e., 24.12.2016, but the project was delayed on account of the negligence of the Petitioner and was commissioned only on 31.03.2017. Under Article 2.5 of the PPA, subject to the approval of KERC, the Respondent has granted an extension of 6 months from the SCOD without altering the provisions of the PPA on 04.02.2017. Wherefore, although an extension was granted it was subject to the approval of the KERC and the terms and conditions stipulating the damages in the PPA remained enforceable regardless of the extension.

- d) On 16.03.2017 the Commission addressed a letter to all ESCOMs instructing to not allow any extension of time beyond the Scheduled Commissioning Date without obtaining prior opinion of the Commission. Further vide letter dated 05.04.2017 the ESCOMs were directed by the KERC to advise all land-owning solar developers to approach the Commission for approval on the extension of time requests. Thereby, the Petitioner has approached with this Petition.
- e) The Petitioner has falsely averred that the delay in commissioning the project is attributable to the actions of the Government agencies. He conveniently shifted the blame on the Government Authorities and failed to show cause on its own delays. The Petitioner has belatedly

and negligently applied for requisite approvals/clearances, which can be made out from the following table: -

| Particulars | Date of Application | Effective Date of PPA | Delay |
|-----------------------------|----------------------------|------------------------------|--------------|
| Land Conversion Application | 07.12.2015 | 24.06.2015 | 5 months |
| Power Evacuation Approval | 18.12.2015 | 24.06.2015 | 6 months |

The table produced above clearly shows the delays on the part of the Petitioner that have resulted in delayed commissioning of the project. A period of 18 months is provided to the Petitioner while considering the time taken in receiving approvals from the Government Authorities, as the Government Authorities have to undertake strict scrutiny and grant approvals at several stages. It is incumbent on the Petitioner to apply before the Authorities in a timely manner to avoid any delays in commissioning of the project. But he has not placed any explanation.

- f) The Petitioner has exhibited considerable delay of 5 months in applying for land conversion and has not provided any reasons explaining the delay. Furthermore, the land conversion charges were only paid on 18.07.2016. It is relevant to note that land conversion Order was passed on 19.08.2016, in about one month from the date of the payment of charges.
- g) The Petitioner has averred that the Respondent No. 1 has delayed in issuing power evacuation approval. It is also alleged that the

Respondent No. 1 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 18.12.2015 for power evacuation approval was made and the same was granted on 22.10.2016. The application for evacuation approval was submitted nearly after 6 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.

- h) The Petitioner falsely contends that the delay in achieving SCOD is on account of Force Majeure Event, hence the same shall be condoned

by extending the SCOD. But the Petitioner has grossly violated the Clauses in Article 8 of PPA which provides for the Force Majeure Event and also the conditions for their applicability. The delays which are caused is the result of pure negligence on the part of the Petitioner. The Petitioner has not provided any notice on the resumption of performance after the purported Force Majeure events. The Force Majeure Clause in no way excuses the obligations of a party that are prior to the occurrence of Force Majeure events. In the instant case the Petitioner admittedly has horribly failed in reasoning the delays in filing various applications before the Government Authorities which delay as provided in the above Clause cannot be excused. Thereby, the delay in execution of project cannot be condoned.

- i) The Petitioner has averred that the Respondent No. 1/HESCOM has accorded extension of 6 months to Commission the project only after scrutinizing the application of the Petitioner and such decision of the Respondent is binding. When the Committee was formed to approved the extension of time request of several developers were brought before the Respondents. On account of requests from many developers each and every application could not be scrutinized individually. These applications for extension of time inevitably have tremendous implications on the tariff and consequently would impact the consumers. Therefore, the decisions ought to have been taken with more time and the Respondent did not have the benefit of time nor man power to sufficiently analyze the applications. The

other 17 developers who have signed the PPA with the Respondent under the Farmers' scheme, have commissioned their projects without raising issues pertaining to land conversion. The Commission has considered the facts and circumstances giving rise to every single delay and has drawn a comparison between the delays faced by the Petitioner and the Respondent, to rule that the Petitioner was entitled to a lower tariff. In this regard, the 1st Respondent has relied upon the order of Hon'ble APTEL in the case of Chennammagathihalli Solar Power Project Vs BESCO in Appeal No. 351/2018 dated 14.09.2020.

- j) The Petitioner in the original proceedings before the Commission and before the Hon'ble High Court had not prayed for late payment surcharge. The Hon'ble High Court has remitted the matter only to bring forth fresh facts and circumstances to the notice of the Commission. Furthermore, the matters remitted back for resolution of the dispute keeping in mind the observations made by the Hon'ble High Court in its order. At no point of time, the Hon'ble High Court opined about LPS and neither has the Petitioner brought the same to the notice of the Hon'ble High Court, therefore, the Petitioner cannot at this point as an afterthought pray for LPS, such contention must be denied at the outset. As per PPA the LPS is payable only when Respondent has delayed in making payments to the Petitioner. The payments to the Petitioner are being made as per the final orders of the Commission and there is no question of paying the difference

amount along with the LPS, when there is no direction either from the Commission or from the Hon'ble High Court to pay the Petitioner a higher tariff. The other contentions taken by the Petitioner in the Petition are denied as false hence, the Petition is liable to be dismissed.

- k) The Respondent No. 2 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. 2 is not a necessary party, no relief is claimed as against it and hence, the Respondent requested to dismiss the Petition 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 applicable tariff is 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 Hunshyal Village, Vijayapura Taluk, Vijayapura District under 1-3MW Farmers Scheme. The SCOD as per Clause 1.1(xiv) of the PPA was 23.12.2016 i.e., 18 months from the effective date i.e., from 24.06.2015 the date on which both parties have signed 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 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, 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., Hunshyal Village, Vijayapura Taluk, Vijayapura District and unless there was 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 as to how the 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) and 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 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 (Annexure-G to the Original Petition) on 07.12.2015, but the Deputy Commissioner has passed conversion order (Annexure-G1 to the Original Petition) on 19.08.2016. Thereby, there is a delay of 256 days in getting land conversion order from the Deputy

Commissioner and requested for considering this delay as under 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 agreement was executed on 16.08.2016, 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 19.08.2016 for conversion of land. Thereby, the Respondents are not responsible in causing delay in obtaining land conversion order, hence this ground urged by the Petitioner cannot be accepted.
- iv) As per PPA Clause 1.1(xiv) 'Effective Date shall mean date of signing of PPA.' In the present case on hand the Effective Date is the date on which both parties have signed the PPA i.e., on 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) dated 24.06.2015, the Petitioner has applied for evacuation approval before HESCOM (Annexure-H1 to the Original Petition) on 18.12.2015. The HESCOM has issued Tentative evacuation (Reference 3 to Annexure-H2 to the Original Petition) on 04.08.2016. The

Petitioner had applied for conversion of land before Deputy Commissioner on 07.12.2015 along with all relevant documents. Though the Petitioner has furnished requisite documents at the time of application for conversion of land, but the non-agricultural conversion order was issued on 19.08.2016 after a delay of about 256 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) has observed and held as here 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 19.08.2016 taking total of about 256 days. Hence, the delay for 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 HESCOM on 18.12.2015, the same was approved and issued on 22.10.2016. There was a

delay of 10 months from the HESCOM/1st Respondent. Even though solar policy of 2014-21 assured a speedy approval process and that the Department of Energy and 2nd Respondent has facilitated speedy approval keeping the farmers in mind and who are not familiar with the process, the 1st Respondent has delayed by about 10 months for approval of power evacuation which is basis for remaining approvals such as substation works and 11KV line work. Therefore, the Petitioner requesting this Commission to treat the delay as under Force Majeure under Article 8 PPA.

- ii) The Petitioner further submitted that subsequent to the power evacuation approval the 1st Respondent has granted work order to carryout substation work only on 16.12.2016 and there was a delay of 364 days by the HESCOM 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 18.12.2016. Therefore, there was delay of 12 months. Further stated that he had made a request for extension of time before the HESCOM on 08.12.2016 but the same was granted on 04.02.2017 and there was a delay of 58 days. 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 due to the fault of the Respondent/HESCOM.

- iv) In this regard the Petitioner has furnished table of events in Annexure-X (filed along with Amended Petition) which reads as hereunder: -

| | | M/S S. G. ARAKERI SOLAR POWER 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 | 18.12.2016 | 04.02.2017 | 58 Days Delay | | 03.02.2017 | |
| 4. | Extension Period | 6 months | | | 6 months | | |
| 5. | Land NA (conversion) order | 07.12.2015 | 19.08.2016 | 256 Days Delay | 16.02.2016 | 29.09.2016 | 7 months |
| 6. | Power Evacuation Approval | 18.12.2015 | 22.10.2016 | 309 Days Delay | 18.01.2016 / 15.02.2016 | 22.08.2016 | 7 months |
| 7. | Bay extension approval/substation work order | 18.12.2015 | 16.12.2016 | 364 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 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 and requested for approval of extension of SCOD.

- v) Further, the Petitioner submitted that the details of various sanctions and permissions would reveal that inspite of having applied for the requisite permissions and sanctions, the Petitioner suffered on account of inordinate delay in procuring the same. The said delay was beyond the control of the Petitioner. These sanctions and approvals are pre-requisite in securing the confidence of the financial institutions and Government Authorities. Hence, the Petitioner prays this Commission to treat the delay as under Force Majeure Events.
- vi) By way of reply the Learned Counsel for the Respondents has submitted that, the Petitioner has alleged that there was a delay of 10 months on the part of the 1st Respondent in approving the power evacuation. This allegation is denied as false. He has made application for evacuation on 18.12.2015. The 1st Respondent had issued Tentative evacuation approval on 04.08.2016 and Regular Evacuation on 22.10.2016. The Deputy Commissioner, Vijayapura has issued OM for land conversion on 19.08.2016, then the 1st Respondent has issued regular evacuation on 22.10.2016.
- vii) Further stated all these chains of events make it clear that the Respondent No. 1 has not denied the delay in according power evacuation approval to the Petitioner and considering all the

above facts and circumstances, the Petitioner requested the Commission to issue directions to the Respondent for repayment/refund of liquidated damages recovered.

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 BESCOB 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 BESCOB or due to Force Majeure, the SPD shall pay to BESCOB 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, BESCOB 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 BESCOB Event of Default; or
- (b) Force Majeure Events affecting BESCOB; 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 BESCOB through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or BESCOB, or till such time such Event of Default is rectified by BESCOB.

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 and as per these documents the Petitioner and the 1st Respondent have entered into PPA (Annexure-C to the Original Petition) dated 24.06.2015. The Supplementary PPA has been executed (Annexure-D to the Original Petition) on 16.08.2016. The Commission has approved the PPA on 13.07.2016. The Revenue Department has issued Circular (Annexure-F to the Original Petition) dated 01.12.2015 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) on 19.08.2016 regarding conversion of land bearing Survey No. 2/1 to an extent of 15 Acres 1 Gunta for non-agricultural purpose i.e., for establishing Solar Power Project. The Petitioner has written a letter (Annexure-H1 to the Original Petition) to the Executive Engineer (Ele), HESCOM, Bijapur dated 18.12.2015 with a request to issue evacuation approval for Solar Power Plant under Farmers' Scheme. On 22.10.2016 HESCOM has issued regular evacuation approval to the Petitioner (Annexure-H2 to the Original Petition). The General Manager of 1st Respondent Company has written a letter to the SE (Ele), O & M Circle, HESCOM (Annexure-J to the Original Petition) on 19.12.2016 stating that the Petitioner has requested for sparing of land for setting up of 11KV Terminal Bay at 33/11KV Nagathan substation for evacuation of 3MW Solar Power from proposed solar power plant located at Survey No.

2/1 in Hunsyala Village, Vijayapura Taluk & District and in view of the report submitted as per Reference No. 3, directed to spare the land duly collecting the lease charges and duly obtaining consent letter from the Applicant stating that he is ready to pay the charges and carry out any modification/alteration, if necessary, duly considering the HESCOM rules and regulations. Further instructed the Petitioner that the action taken details in this regard shall be sent to HESCOM. The line work estimate was sanctioned (Annexure-K1 to the Original Petition) on 16.12.2016 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 was 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. 2/1 of Vijayapura Taluk. 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. | 18.12.2015 | Application given by the Petitioner to 1 st Respondent for Regular evacuation | "H1" filed along with Original Petition |

| | | | |
|----|------------|--|---|
| 3. | 22.10.2016 | Letter written by 1 st Respondent to the Petitioner regarding approval of Regular Evacuation Scheme | "H2" filed along with Original Petition |
| 4. | 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 |

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 tables disclose that the time taken for granting sanctions and approvals by the Government Authorities and other Authorities and Demonetization induced delay which were before the control of the Petitioner thereby, the prayer of the Petitioner squarely fall 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 the 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 passed by Hon'ble APTEL, New Delhi (Annexure-T2 to the Amended Petition), has observed and held as here under: -

“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 hercules 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 passed by Hon'ble APTEL, New Delhi (Annexure-T3 to the Amended Petition), it is observed and held as here 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 GESCO (Annexure-U to the Amended Petition), this Commission has held as under: -

“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 BESCO & 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 BESCO (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 BESCO, has allowed the extension of time on the ground of delays by the Governmental agencies which is also the case in the present Petition.

- 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) dated 23.06.2017 in which the Under Secretary to the Government requested the Commission to consider approval of the extension of SCOD 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 from the date of SCOD for completion of Solar Power Project was granted 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 is clear that, the HESCOM has accorded approval to commission the project within 6 months from the date of original SCOD dated 23.12.2017. Further it is stated that this approval is issued is purely based on the request of Solar Power Developer for the purpose of commissioning of the project. While issuing this approval to the Petitioner, the Respondent had referred the letters 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 the 3 MW Solar Power Project of the Petitioner in Survey No. 2/1 of Hunshyala Village, Vijayapura Taluk, Vijayapura District has been commissioned on 31.03.2017.
- 26) In view of the discussions made above and also in Page 37 (Para 14 in Table-2), which disclose the time taken for each event of delay for

approval and other delays, 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 i.e., within the extended period as approved on 23.06.2017 accorded by the 1st Respondent as per Annexure-L (filed along with Original Petition). As per observations made herein above, the judgements relied by the Counsel for the Petitioner and the grounds urged by the Petitioner in the Petition, these events fall under the Clause of Force Majeure as described in the PPA. The delay of 97 days is condoned and SCOD is extended by 97 days under Force Majeure. 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 23.12.2016 to 31.03.2017 (i.e., 84 days earlier) and the Petitioner is entitled for the tariff as agreed in PPA 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. Hence, this Issue No. 2 is answered accordingly.

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 Hunshyala 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