



**TELANGANA STATE ELECTRICITY REGULATORY COMMISSION**  
5<sup>th</sup> Floor, Singareni Bhavan, Red Hills, Lakdi-ka-pul, Hyderabad 500 004

**O. P. No. 27 of 2021**

**Dated 17.11.2021**

**Present**

Sri T. Sriranga Rao, Chairman  
Sri M. D. Manohar Raju, Member (Technical)  
Sri Bandaru Krishnaiah, Member (Finance)

Between:

M/s Paramount Minerals & Chemicals Limited,  
231, A-Z Industrial Estate, GK Marg,  
Lower Parel (W), Mumbai. – 500 018.

... Petitioner.

AND

1. Sothern Power Distribution Company of Telangana Limited,  
Corporate Office, H.No.6-1-50, 5<sup>th</sup> Floor, Mint Compound,  
Hyderabad – 500 063.
2. The Chief General Manager (IPC & RAC),  
Corporate Office, H. No.6-1-50, 5<sup>th</sup> Floor,  
Mint Compound, Hyderabad – 500 063.
3. The Chief Engineer (Comm., Plg. & Coordn.),  
TSPCC, Vidyut Soudha, Hyderabad – 500 082.

... Respondents.

The petition came up for hearing on 11.08.2021, 06.09.2021 and 25.10.2021. Sri Sridhar, Advocate representing Sri Challa Gunaranjan, Advocate for petitioner on 11.08.2021, Sri Deepak Chowdary, Advocate representing Sri Challa Gunaranjan, Advocate for petitioner on 06.09.2021 and 25.10.2021 and Sri Mohammad Bande Ali, Law Attaché for respondents on 11.08.2021, 06.09.2021 and 25.10.2021 have appeared through video conference. The matter having been heard and having stood over for consideration to this day, the Commission passed the following:

## ORDER

The petitioner has filed a petition under section 86(1)(f) and (k) of the Electricity Act, 2003 (Act, 2003), seeking extension of scheduled commercial operation date (SCOD) and consequently reimbursement of the penalty.

2. The petitioner has stated in the petition as below:
  - a. The petitioner stated that the petitioner is a company incorporated under the provisions of the Companies Act, 1956 engaged in the business of generation and sale of solar power. It is stated that, the petitioner herein has set up a 2 MW solar power project as SPV under the solar competitive bidding, 2015 located at Turmamidi, Rangareddy District, Telangana for onward sale of solar power to Southern Power Distribution Company of Telangana Limited (TSSPDCL) (respondent No.1).
  - b. The petitioner stated that the respondent No.2 is a company incorporated under the Companies Act, 1956 having office at 6-1-50, Mint compound, Hyderabad - 500063, supplying power to consumers in 13 districts in the State of Telangana and respondents 3, 4 and 5 are officers of respondent No.2. (erroneously mentioned as there are only 3 respondents)
  - c. The petitioner stated that Government of Telangana (GoTS), in order to harness the vast solar power generation potential of the state of Telangana and to encourage and promote renewable energy by way of letter dated 18.03.2015 directed Transmission Corporation of Telangana Limited (TSTRANSCO) and Telangana State Power Coordination Committee (TSPCC) to initiate a bidding process for purchase of 2000 MW solar power through competitive bidding route with a maximum cut off rate of Rs.6.45 per unit on behalf of TSDISCOMs.
  - d. The petitioner stated that TSTRANSCO and TSPCC by way of letter dated 31.03.2015, instructed TSSPDCL to initiate the competitive bidding process on behalf of TSDISCOMs for purchase of 2000 MW solar power.
  - e. The petitioner stated that in furtherance thereof TSSPDCL, issued 'Request for Selection (RFS) document for selection of solar power developers in the state of Telangana for procuring 2000 MW through

tariff based competitive bidding process on 01.04.2015 to invite proposals for setting up grid connected solar PV projects in Telangana on "Build Own Operate" basis for an aggregate capacity of 2000 MW (RFS).

- f. The petitioner stated that it (solar power developer) was selected as the successful bidder in the aforesaid open competitive bidding process for sale and supply of 2.0 MW solar power to 2<sup>nd</sup> respondent DISCOM. Thereafter, the 3<sup>rd</sup> respondent had issued Letter of Intent (LOI) dated 31.12.2015 for sale and supply of 2.0 MW solar power to the 2<sup>nd</sup> respondent DISCOM with a quoted tariff of Rs.5.7249 per kWh. This Commission by way of order dated 15.02.2016 in O.P.No.3 of 2016, in exercise of its power under section 63 of the Act, 2003 adopted the tariffs discovered by TSSPDCL through the tariff based competitive bidding process.
- g. The petitioner stated that in continuation of Lol, it was required to submit performance bank guarantees (PBG) and also execute the power purchase agreement (PPA). The petitioner complied with same and submitted PBG amounting to Rs.20,00,000 lakh and also executed the PPA on 26.02.2016 for sale and supply of power to the 2<sup>nd</sup> respondent for a period of 25 years.
- h. The petitioner stated that in terms of the said PPA it agreed to develop 2.0 MW at Turmamidi, Rangareddy District, Telangana (project) and sell solar power generated from the project exclusively to the 2<sup>nd</sup> respondent at the 33/11 KV Turmamidi SS interconnection point. As per clause 1.43, the SCOD was to be 12 months from the date of execution of the PPA. It is further provided in clause 6.1 [xiv (I)] of the PPA that SCOD is 12 months from the date of signing of the PPA.
- i. The petitioner stated that pursuant to signing of the PPA it had taken earnest steps for the development of the project and had achieved SCOD on 31.03.2017. However, despite its best efforts to complete the project and achieve SCOD as per timelines provided under PPA, it had faced various constraints/difficulties while executing the project which were beyond its control. Subsequent to the signing of PPA, owing to various unforeseeable events and circumstances, the development and

setting up of all solar power projects across the state of Telangana was materially and adversely affected. The said events which had state-wide ramifications across sectors, were entirely beyond the reasonable control of power developers including the petitioner and could not have been prevented even by employing prudent utility practices or exercise of reasonable skill and care and as such, fall within the definition of force majeure events in terms of Article 9 of the PPA. It is stated that the material and adverse effect of these force majeure events was felt by the solar power developers in all 4 stages of development and setting up of solar power projects viz land acquisition, funding from the bank/investors, equipment supplies from India/abroad and project site construction. The force majeure events which occurred across the state of Telangana and delayed the commissioning of the petitioner's solar power projects mainly fall within 4 categories discussed below:

**A. Force Majeure events affecting land acquisition:**

The petitioner stated that certain force majeure events occurred in the state of Telangana, which delayed the process of acquisition of land by the petitioner. These events, which were unforeseeable and beyond the control of the petitioner, are discussed below:

i. Sada Bainamas:

a) It is stated that most of the land that had to be procured for the solar power projects was found to be owned by the farmers under unregistered and unstamped transfer deeds, locally called as 'Sada Bainamas'. Despite the GoTS giving opportunity from time to time to the farmers to regularize such Sada Bainamas, many extents continued to remain under Sada Bainamas. In view thereof, GoTS again by way of G.O.Ms.No.153, Revenue (SS.I) Department, dated 03.06.2016 issued order for regularization of certain alienation/transfers of land by issuing amendments to sub-rule (2) of rule 22 of A.P.Rights in Land and Pattadar Pass Books Rules, 1999 read with section 5 (A) of A.P.Rights in Land and Pattadar Pass

Books Act, 1971. This order was issued for the purpose of regularizing 'Sada Bainamas' throughout the state of Telangana as one-time settlement so that people who acquired land in the past under unstamped and unregistered agreements/sale deeds, could apply and get their documents regularized by the Government.

b) The petitioner stated that the regularization of Sada Bainamas, which is proof of title of land, is still underway, making it difficult for the petitioner to acquire and register the land. It is pertinent to note that the lenders of the project insist on 33 year clear title and their legal due diligence does not permit Sada Bainamas. This made it practically difficult for it to acquire land with the marketable title. It was obliged to go on a witch-hunt for lands with proper marketable title, which was further constrained by the substation wise bidding under the 2015 bid scheme, which meant procurement of lands within a certain radius of the said substation.

ii. District Re-organization:

GoTS by way of notification in G.O.Ms.No.236, in exercise of its powers under section 3 of the Telangana Districts (Formation) Act 1974 and in the interest of better administration and development of Telangana, notified new Districts and reorganized boundaries of existing districts, revenue divisions, mandals / tehsils and villages with effect from 11.10.2016. This involved over-hauling of the existing revenue machinery since land revenue records were moved from existing to newly created districts and mandals. The district re-organization process, inter alia, involved:

- a. change of circle rates, causing land owners to re-negotiate / renege on land sale agreements;
- b. shift of revenue records from old district to the new district;

- c. non-availability of proper revenue records in the Tehsil Offices; and
- d. non-availability of contiguous land parcels since some land owners who were willing to offer land for development of projects, changed their decision post reorganization.

The petitioner stated that this district re-organization process initiated by the GoTS made it practically difficult for it to acquire land and ascertain the marketable title of owners.

iii. GoTS policy for non-allotment of Government-owned land for the setting up of power projects -

The petitioner stated that it discovered that as a policy decision, GoTS does not allow allotment of any Government owned land for the purpose of development of power projects, thereby forcing solar power project developers to look for privately owned land for setting up the projects. It is pertinent to point out that some of these Government- owned land parcels were found to be situated in between privately owned land parcels identified by the developers for development of solar power projects, making it practically difficult for the developers to acquire a single, contiguous stretch of land.

iv. Demonetization:

The petitioner stated that Government of India by way of notification dated 08.11.2016 withdrew the legal tender status of INR 500 and INR 1,000 denominations of banknotes (Demonetization). Demonetization has had a domino effect on land acquisition and other project activities which were delayed considerably for the following reasons:

- a) the country witnessed a major cash crunch as 86% of the currency under circulation was rendered invalid and new currency distribution was curtailed. Banks were busy handling cash disbursements in

lieu of old notes and did not issue DDs, receive challans towards stamp duty, registration charges etc.;

- b) landowners were not keen to sell their land as payments would be made to them by cheque and proceeds from such sale of land could not be withdrawn from the banks due to acute shortage of cash in semi urban and rural banks; and
- c) encumbrances created over land by way of loans taken by the landowners could not be settled as banks could not process loan repayments in time, making it impossible for developers to proceed for registration;

The petitioner stated that the delay in acquiring land resulted in a delay in achieving financial closure as per the timelines provided in the PPA. This delay attributable to a Government policy, has also been acknowledged by the Ministry of New and Renewable Energy (MNRE) by way of its office memorandum dated 02.12.2016.

**B. Force Majeure events affecting funding of projects:**

The petitioner stated that in view of force majeure events affecting the entire state of Telangana, investor and lender sentiment were affected adversely, thereby creating a domino effect on disbursements and project overheads. The petitioner stated that since investors and lenders were unsure about the future of solar power projects in the state, disbursements for power projects were delayed, leading to periodic increase in project overheads and consequent escalation of project cost. It is because of these reasons that viability of the projects was hampered thereby causing lenders further discomfort and uncertainty as regards making further investments in solar power projects, including but not limited to the petitioner's project. The delay in land acquisition, as detailed above had a cascading effect on the funding as well.

C. **Force majeure events affecting site execution:**

- i. Unprecedented incessant rains: The state of Telangana experienced excessive rains in the months of June 2016 till October, 2016, going beyond the regular monsoon season. These rains were unprecedented in the past 100 years and as such could not be predicted by the solar power project developers. It stated that the incessant rains have resulted in flooding of project sites, idling of labour and equipment at project sites and severely hampering construction works.
  - ii. Demonetization led to further delays in site execution and implementation of project timelines. It is stated that due to unavailability of cash and the requirement of paying labour in cash on a daily basis, contractors/suppliers refused to provide any services pending cash payments thereby seriously affecting and delaying the project development activities.
- j. The petitioner stated that it understands that GoTS in response to diverse representations by way of letter dated 21.04.2017, after careful consideration and acknowledgment of the diverse force majeure events encountered by the solar project developers across the state and across sectors, directed TSDISCOMS to extend the SCOD as specified in the respective PPAs of all solar power projects upto 30.06.2017, without any penalties. This generic extension was given in view of the undisputed force majeure events which affected solar power developers across the state, thereby making it impossible for GoTS to do a case by case analysis.
- k. The petitioner stated that the Energy Department, GoTS in response to diverse representations by way of letter dated 29.06.2017, after careful consideration and acknowledgment of the diverse force majeure events encountered by solar power developers across the state and across sectors, extended the SCOD of solar power projects, without any penalties upto 30.06.2017 and directed the TSDISCOMS to take further action and extend the SCOD.

- l. The petitioner stated that while so, it was expecting that the respondents will follow the directions of the GoTS contained in its letter dated 23.08.2017 and extend the SCOD pursuant to Article 9.2 of the PPA. But it received letter dated 03.02.2018 from TSSPDCL whereby, in furtherance of directions issued by this Commission by way of letter dated 03.02.2018, it was directed to file a petition for extension of SCOD before this Commission.
- m. The petitioner stated that the 3<sup>rd</sup> respondent had in a high handed manner unilaterally without issuing any notice to it had invoked the bank guarantees furnished by the petitioner on account of the aforesaid delay, which is beyond it's control for causing delay in commissioning at Turmamidi, Rangareddy district, amounting to Rs.20.00 lakh.
- n. The petitioner stated that while that being so, the petitioner herein has addressed letter dated 30.09.2019 to the 2<sup>nd</sup> respondent and cited the time extended by the Government of Telangana State till 31.10.2017 vide letter dated 29.06.2017. The petitioner further submitted in the said letter that since the project was commissioned well within the SCOD, the petitioner is not liable to pay any penalty. It was also informed by the petitioner that bank guarantee amounting to Rs.20.00 lakh was encashed by the respondents for an amount of Rs.6,93,000/- at Central Bank of India. However, Central Bank of India did not honour the same. The petitioner under protest vide letter dated 30.09.2019 have requested the 2<sup>nd</sup> respondent to deduct the said amounts from the monthly invoices of the petitioner. The 2<sup>nd</sup> respondent vide letter dated 23.10.2019 had informed it that commercial operational date was to be within 12 months from the effective date of signing the agreement that is 26.02.2017 and that there has been a delay of 34 days as per clause 10.5 of the PPA and further directed it to pay the penalty amount of Rs.6.93 lakh plus GST from the power sale bills and credit the same into the 1<sup>st</sup> respondent's account. Further, the respondents themselves have deducted the said penalty of Rs.8,17,740/- (Rupees Eight Lakh Seventeen Thousand Seven Hundred Forty Only) (comprising penalty of Rs.6,93,000/- + GST @ 18% amounting to Rs.1,24,740/-) from it's monthly power sale invoices for the month of October, 2019.

- o. The petitioner stated that it is a genuine developer and has done everything possible within its control. Despite taking timely steps to achieve the objects and fulfil the obligations, the execution of the projects was beyond its control and it is a force majeure event occurred in terms of clause 9.1 (b) of the PPA and therefore, in the given circumstances, the respondents were supposed to condone the delay in execution of the project as per the PPA timelines. It is stated that, various constraints, difficulties and obstacles as narrated in the above paragraphs, faced in executing the project by the petitioner were beyond the control of the petitioner and fall squarely within the definition of 'force majeure' as stated above.
- p. The petitioner stated that various constraints, difficulties and obstacles as narrated in the above paragraphs, faced in executing the project by it were beyond the control of the petitioner and fall squarely within the definition of 'force majeure' as defined in the PPA quoted herein below:

***“FORM MAJEURE:***

***"9.1 Definition of Force Majeure:***

*(a) Force Majeure shall mean any event or circumstance or combination of events or circumstances that materially and adversely affects the performance by either party (the "Affected Party") of its obligations pursuant to the terms of this Agreement (including by preventing, hindering or delaying such performance), but only if and to the extent that such events and circumstances are not within the Affected Party's reasonable control and were not reasonably foreseeable and the effects of which the Affected Party could not have prevented by Prudent Utility Practice or, in the case of construction activities, by the exercise of reasonable skill and care. Any events or circumstances meeting the description of Force Majeure which have the same effect upon the performance of any of the Solar Power Project and which therefore materially and adversely affect the ability of the Project or as the case may be, the DISCOM to perform obligations hereunder shall constitute Force Majeure with*

*respect to the Solar Power Developer or the DISCOMs, respectively.*

*(b) Force Majeure circumstances and events shall include the following events to the extent, that they or their consequences satisfy the above requirements.*

*(i) Non Political Events such as acts of GOD including but not limited to any storm, flood, draught, lightning, earthquake or other natural calamities, fire, accident, explosion, strikes, labour difficulties, epidemic, plague or quarantine, air crash, shipwreck. train wrecks or failure (Non-Political Events)*

*(ii) Indirect Political Events such as acts of war sabotage, terrorism or act of public enemy, blockades, embargoes, civil disturbance, revolution or radioactive contamination (Indirect Political Events)*

*(iii) Direct Political Events such as Governmental Agencies or the DISCOM's unlawful or discriminatory delay, modification, denial or refusal to grant or renew, or any revocation of any required permit or Change in Law (Direct Political Events)*

*9.2 In the event of delay in COD due to:*

*(a) Force Majeure Events affecting the Solar Power Developer*

*or*

*(b) DISCOM Event of Default as defined in 10.2, the scheduled COD shall be deferred, for a reasonable period but not less than, day-for-day basis subject to a maximum period of 6 months from the scheduled COD as per this Agreement. to permit the Solar Power Developer or DISCOM through the use of Due Diligence, to overcome the effects of the Force Majeure events affecting the Solar Power Developer or DISCOM, or till such time such event of Default is rectified by Solar Power Developer or DISCOM, whenever is earlier.*

6.5 (iv) *In Case of Inability of the SPD to fulfil any one or more of the conditions specified in Article 6.1 (xv) due to any Force Majeure Event, the time period for fulfilment of the conditions subsequent as mentioned in Article 6.1 (xv), shall be extended for the period of such Force Majeure Event.*

*Law Relating to Force Majeure*

- q. The petitioner stated that the principles relating to force majeure have been crystallized and settled by the Hon'ble Supreme Court in various judgments particularly in the judgement titled *Dhanrajamal Gobindram v. Shamji Kalidas & Co.* wherein the Supreme Court has clearly interpreted the term force majeure by holding that:

*"An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to force majeure', the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to force majeure', and even if, this be the meaning, it is obvious that the condition about force majeure' in the agreement was not vague. ... .."*

The petitioner stated that the aforesaid ratio, laid down by the Hon'ble Supreme Court squarely applies to the present case in as much as the events and the circumstances narrated in the aforesaid paragraphs were beyond its control and squarely fall within the meaning of force majeure clause contained in the PPA.

- r. The petitioner stated that various Commissions and also the Hon'ble APTEL have recognized the force majeure like situations that are faced by the renewable energy power developers and applied the ratio laid down by the Hon'ble SC on the issue as what constitutes 'force majeure' under PPA's or such other concluded contracts between the parties.
- s. The petitioner stated that in the case of *GUVNL v. GERC, Cargo Solar*, the APTEL vide its order/judgment dated 04.02.2014 in Appeal No.123 of 2012 held that:

*"The approvals under Bombay Tenancy and Agriculture Land (Vidharba Region and Kutch Area) Act, 1958 and for water source*

*under the Environment (Protection) Act, 1986 and CRZ Regulations sought by Cargo Solar are the statutory/legal approvals under the PPA. The delay in obtaining these approvals by the Government instrumentalities by Cargo Solar would fall in the category of Force Majeure Events under Article 8.1 (a) (v) of the PPA. As such the period of such delay is required to be suspended or excused and to that extent the period of Commercial Operation Date, Date of Construction default and Scheduled Commercial Operation Date are to be extended in terms of the PPA."*

- t. The petitioner stated that in the case of M/s Lanco Anpara, in Petition No.882 of 2012 before the Uttar Pradesh Electricity Regulatory Commission (UPERC) enumerated certain factors leading to delay in commercial operation of project, including delay in project construction, earthquake, in China leading to delay in procurement of equipment's, delay in water supply from river Ganga, labour strike, etc. In its order dated 09.11.2012, UPERC granted extension of SCOD and considered the actual commercial operation date as the revised COD while observing as under:

*"Hence, in consideration of the fact that the reasons for delay were force majeure in nature and were not in control of any party to the PPA, the Commission opines that the plea for extension of CoDs is justified. Therefore, the Commission approves actual dates of commissioning as RCoDs i.e. for Unit-1 as 10.12.2011 and for Unit-2 as 18.1.2012. Consequently, the 'Expiry Date' shall be extended by 258 days (no of days between scheduled and actual RCoD of Unit – 1) in the PPA dated 12.11.2006. The requisite amendments in the PPA and SPPA shall be made accordingly. All other terms and conditions shall remain as provided in the PPA and SPPA. The above would not have any financial implication in tariff."*

- u. The petitioner stated that as per the PPA dated. 06.12.2014, the commissioning date of the project is 12 months from the agreement date. However, due to force majeure events as narrated in the above

paragraphs, it was prevented from achieving SCOD as per PPA. It has already achieved final synchronization/commissioning on 31.03.2017 with a delay of 34 days and since then it has been duly raising the monthly invoices. It is entitled for the refund of the penalty imposed by the 3<sup>rd</sup> respondent for the delay in achieving SCOD for the reasons above stated which are not attributable to it.

- v. The petitioner stated that in view of the afore stated facts and the directions of the Commission by way of letter dated 03.02.2018, it has no option but to file the instant petition to put forth its case in regard to the position of law on extension of SCOD under the PPA. It reiterates that the extension of SCOD is pursuant to the express provisions of the PPA and so long as the parties are ad idem that force majeure has impacted the solar power project, there is no dispute and therefore, this Commission's consent is not required for such extension. Further, the decision of the GoTS, a shareholder of the TSDISCOMS, in respect of the generic extension of SCOD granted to all solar power developers on account of force majeure events outlined above, is binding on the TSDISCOMs.

2. The petitioner has sought the following prayer in the petition:

- “a) Declare the Scheduled Commercial Operation Date (SCOD) of the 2.0 MW solar power project as 31.03.2017.
- b) Consequently, declare that the petitioner is not liable to pay any penalties as per the PPA and direct the respondents to refund the amounts adjusted towards penalty amounting to Rs.8,17,740/- (Rupees eight lakh seventeen thousand seven hundred forty only) (i.e., Rs.6,93,000/- along with OST (@18%) of Rs.1,24,740/-)”.

3. The respondents have filed counter affidavit and the contents of the counter affidavit are as below:

- a. It is stated that the PPA was entered with the petitioner on 26.02.2016 for purchase of 2 MW Solar power from its solar power project connected at 33 / 11 Turmamidi Substation, Rangareddy District. As per the terms of PPA, the petitioner has to commission its solar power project within

12 months from the date of signing of the PPA i.e., 25.02.2017. However, the solar power project of the petitioner was synchronized to the grid on 31.03.2017 with delay of 34 days as against the SCOD that is 25.02.2017.

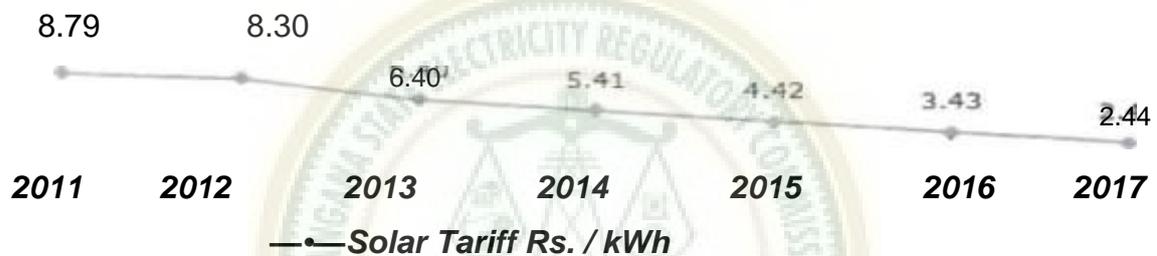
- c. It is stated that as per the PPA, this respondent is entitled to encash the performance bank guarantee in the following manner in case the petitioner fails to commission the project within the stipulated period:
- a) Delay upto one (1) month - Rs.3 lakh per MW on per day basis proportionate to the capacity not commissioned.
  - b) Delay of more than one (1) month and up to three (3) months - Rs.7 lakh per MW on per day basis proportionate to the capacity not commissioned, in addition to the amount stated above.
  - c) Delay of more than three (3) month and up to five (5) months - Rs.10 lakh per MW on per day basis proportionate to the capacity not commissioned, in addition to the amount stated above.
- d. It is stated that this respondent is entitled to encash the performance bank guarantee furnished by the petitioner in terms of the PPA since the petitioner commissioned its project with a delay of 34 days. However, petitioner vide letter dated 30.09.2019 has informed that an amount of Rs.6,93,000/- has to be paid towards penalty in terms of clause 10.5 of the PPA for the delay of 34 days in commissioning the project and the same has to be deducted from the payment due on account of sale of power to DISCOM. Accordingly, the same has been deducted from October, 2019 bill.
- e. It is stated that the events such as land acquisition, district reorganization, funding of projects and project site construction do not fall under the head of force majeure covered by Article 9 of the PPA. Therefore, the contention of the petitioner that the delay in commissioning of the project due to force majeure event becomes untenable and hence cannot be accepted. The reasons cited by the petitioner are to avoid performance of its obligations under the PPA and to gain extension of time for SCOD on the pretext of alleged force majeure event. Further petitioner cannot arbitrarily declare an event or circumstance a 'force majeure' and also cannot arbitrarily declare its

cessation. It is stated that petitioner is trying to gain time under the guise of force majeure. Hence the reasons cited by petitioner do not deserve consideration.

- f. It is stated that moreover, petitioner had never informed this respondent about the stalling of execution of the work of the project due to unprecedented incessant rains, demonetization and difficulty in procurement of land for setting up of solar power project.
- g. It is stated that after extension of the SCOD for additional 4 months that is from 30.06.2017 to 31.10.2017 by the GoTS to the solar power projects in the State who entered PPA with DISCOMs who participated in the bidding of 2015, the respondent communicated the same to this Commission seeking consent/ approval for extension of SCOD up to 31.10.2017. There upon the Commission vide letter dated 30.11.2017 communicated the following without extending SCOD upto 31.10.2017.
  - i the ratio laid down by the Apex Court in Civil Appeal No.6399 of 2016; Gujarat Urja Vikas Nigam Limited Vs. Solar Semiconductor Power Company (India) Private Limited and Others is binding on the stakeholders and in view of the Supreme Court decision in the above case, no general order can be issued for extension of time.
  - ii) For extension of time, each case has to be examined with reference to the terms of PPA by following the principle of natural justice.
  - iii) Each developer has to file a petition before the Commission furnishing the reason for extension of time which can be examined within the framework of the PPA.
- h. It is stated that the aforementioned order of the Commission was communicated to the petitioner vide letter No.148, dated 03.02.2018, but the petitioner failed to file petition before the Commission till 29.06.2021 and on the other hand the petitioner paid Rs.6,93,000/- in lieu of the amount to be paid for the delay of 34 days in Commissioning the project towards penalty.
- i. It is stated that the petitioner having done so now filed the present petition after a lapse of about 3 years 3 months seeking extension of

SCOD from 25.02.2017 to 31.03.2017. Therefore, the petitioner is not entitled to seek refund of the amount paid by it.

- j. It is stated that agreed tariff of the petitioner is Rs.5.7249 per unit as per PPA which is discovered competitively through bidding in the year 2015 expecting the synchronization of the solar plant in the year 2017. Since the petitioner could not commission the project within the SCOD, the very purpose of fixing SCOD stood defeated causing monetary loss to this respondent. Hence this respondent prays the Commission to dismiss the petition and to re-fix/revise the tariff as per the prevailing rates in case the Commission is inclined to extend SCOD. The prices discovered through competitive bidding has been falling down and the same is illustrated as follows:



4. The Commission has heard the counsel for the petitioner and the counsel for the respondent at first instance and subsequently the representative of the respondents in the matter on the dates mentioned in the preamble to this order. It has perused the material available on record. Briefly stated the submissions are extracted for the relevant days of hearing.

“Record of proceedings dated 11.08.2021:

... .. The counsel for petitioner stated that the matter is coming up for hearing today for first time and the counter affidavit of the respondents is to be filed. The representative of the respondents sought time for filing counter affidavit in the matter. Accordingly, the matter is adjourned.

Record of proceedings dated 06.09.2021:

... .. The advocate representing the counsel for petitioner stated that the matter is covered by the orders of the Commission, however, another date may be given for arguing the matter. The representative of the respondents also sought adjournment of one week to make submissions in the matter. Accordingly, the matter is adjourned.

Record of proceedings dated 25.10.2021:

... .. The advocate representing the counsel for petitioner stated and explained the factual matrix relating to the petitioner. It is his case that the prayer in the petition is already covered by the orders of the Commission in O.P.No.28 of 2020, wherein the Commission had ordered extension of SCOD and also refund of the amounts. At this stage, the Commission pointed out that the petitioner has approached the Commission after three years of the encashment of bank guarantee and the lapse of period for completion of the project. The advocate representing the counsel for petitioner stated that the respondents have addressed a letter in the month of September, 2019 about termination of the agreement, as such the petition filed is within time. The representative of the respondents stated that originally there was a delay of 34 days in completing the project, however, the Government of Telangana had extended the SCOD in the year 2017. Thus, this project could have been saved due to such extension. Later, the Commission directed the respondents that the extension of SCOD cannot be done unless each of the cases is examined thoroughly. As such a communication had been sent to the petitioner also in terms of the directions of the Commission. Now the petitioner has approached the Commission after invocation of bank guarantee. The Commission may consider the delay in commissioning the project and approaching the Commission for extension of SCOD. Having heard the arguments of the parties, the matter is reserved for orders.”

5. The short issue that arises for consideration in this petition is that -  
*'Whether the petitioner is entitled to the relief as claimed by it or not?'*
6. The issue raised in this petition is covered by several orders passed by this Commission in the year 2018 and 2021. This Commission had in several cases allowed the extension of SCOD and also accepted the directions of the Government to the respondents herein that generic extension be given upto 30.06.2017 and further period upto 31.10.2017.
7. The petitioner was a successful bidder in the open competitive bidding process for setting up solar photovoltaic power project of 2 MW to be connected to 33/11 kV voltage level Turmamidy substation. The petitioner has entered into PPA with the

respondent No.1 on 26.02.2016. As per the terms of the PPA, the petitioner has to complete the project and make it operational within 12 months from the date of execution of PPA. The date of SCOD of 2 MW as per PPA is 25.02.2017 and whereas, the actual SCOD achieved for 2 MW was on 31.03.2017.

8. The Energy Department of Government of Telangana (GoTS) gave extension of SCOD upto 30.06.2017 to the solar power projects in the state, who have concluded PPAs with TSDISCOMs without any penalty by following all the technical requirements under CEA and TSTRANSCO guidelines.

9. The petitioner pleaded delay due to re-organisation of districts, the confusion in the offices of the revenue authorities, difficulty in cash flow, difficulties in procuring labour to carry out project work. The petitioner further pleaded that Sada Bainamas and land acquisition lead to the delay in setting up the project. The respondents, on the other hand contended that the incidents of force majeure and others as pleaded by the petitioner are not force majeure events and the petitioner is not entitled to such benefit and the reasons given by the petitioner for delay cannot be termed as force majeure events covered by Article 9 of the PPA.

10. Some of the incidents mentioned by the petitioner have some force to treat them as non-political events mentioned in Article 9 of the PPA as one of the force majeure events. Further, Article 9.1 (a) of PPA clearly mentions that if the *“any event or circumstance or combination of events or circumstances that materially and adversely affects the performance by either party (the “Affected Party”) of its obligations pursuant to the terms of this agreement (including by preventing, hindering or delaying such performance), but only if and to the extent that such events and circumstances are not within the affected party’s reasonable control and were not reasonably foreseeable and the effects of which the affected party could not have prevented by prudent utility practice or, in the case of construction activities, by the exercise of reasonable skill and care. Any events or circumstances meeting the description of force majeure which have the same effect upon the performance of any of the solar power project and which therefore materially and adversely affect the ability of the project or as the case may be, the DISCOM to perform obligations hereunder shall constitute force majeure with respect to the solar power developer or the DISCOM, respectively.”* which clearly encompasses the reasons given by the

petitioner for the delay of 34 days as events termed as force majeure. The petitioner had no control or dominance over the incidents mentioned causing the delay in completing the project and therefore, the said delay cannot be totally attributable to the petitioner.

11. The SCOD should have been achieved for the project as per PPA by 25.02.2017. The PPA provides for condonation of delay up to 12 months for reaching SCOD in case of force majeure events under clause 9.2 of the PPA, which would be 25.02.2018 with penalties as per clause 10.5 of the PPA. Therefore, the PPA would be still in force upto 25.02.2018, since SCOD has been extended up to 30.06.2017 with the concurrence of the Commission, the respondents can apply clause 10.5 of the PPA for the period beyond 30.06.2017 to regularise the project. The instant case does not even call for this consideration as the project is well within the extended period of SCOD by the Government, which the Commission had earlier accepted it.

12. The Commission is of the view that if the delay exceeds beyond the period stipulated in the PPA, the respondents could have terminated the contract. An important aspect regarding termination of PPA has been dealt with by the Hon'ble Supreme Court while upholding imposition of penalty in a decision rendered in M. P. Power Management Company Ltd., Vs. Renew Clean Energy Pvt. Ltd., & Others reported in AIR 2018 SC 3632.

In paragraph 11, the Hon'ble Supreme Court observed as follows:

*“The delay in commissioning the project appears to be due to unavoidable circumstances like resistance faced at the allotted site in Rajgarh District and subsequent change of location of the project. These circumstances, though not a Force Majeure event, time taken by respondent no.1 in change of location and construction of the plant have to be kept in view for counting the delay. Having invested huge amount in purchasing the land and development of the project at Ashok nagar district and when the project is in the final stage of commissioning, the termination of the contract is not fair.”*

In paragraph 12 of the above said judgement, it has been observed as follows:

*“The High Court observed that the delay in completing the project was only for sixteen days. But according to the appellant, respondent No.1 was granted time period of 210 days to complete the conditions subsequent after which the*

*penalty was leviable for the delay and if the delay exceeded more than nine months, the appellant could terminate the contract. According to appellant, the delay was not of sixteen days; but the said delay of sixteen days is beyond the period of nine months permissible under the PPA. In the light of our observations above, we are not inclined to go into the merits of this contention. Suffice to note that in cases of delay, Articles 2.5 and 2.6 provide for levy of penalty. As observed by the High Court, since the contract permits imposition of penalty, respondent No.1 is liable to pay penalty in terms of clause 2.5.1 of the PPA for the delay. But the action of the appellant in terminating the contract is arbitrary and was rightly set aside by the High Court”*

13. This observation of the Hon'ble Supreme Court with equal vehemence applies to the present matter too. In the light of the above judgement, the Commission is not inclined to go into the merits of the contention of the delay beyond the date of SCOD under the terms of clause 10.5 of the PPA, which provide for levy of penalty. However, in the instant case, the delay that is attributed to the petitioner is 34 days only and even that period got merged into the extension granted by the Government upto 30.06.2017. The extension granted by the Government has been accepted by the Commission in several cases decided in the years 2018 and 2021. That being the case, the petitioner cannot be fastened with any sort of penalty in view of the provisions of the PPA.

14. Undoubtedly, the obligation to obtain all approvals and bearing the cost of establishing the project lies with the project developer as per the terms of PPA. However, the question is whether it is not the obligation of the project developer to obtain such approvals but whether the delay in obtaining such approvals from the Government instrumentalities despite the project developer complying with the legal requirements to obtain such approvals could be covered under force majeure event or not. In a case between Gujarat Urja Vikas Nigam Limited (GUVNL) Vs. Cargo Solar, a project developer, the Gujarat State Electricity Regulatory Commission has examined the provisions of PPA dated 30.04.2010 entered between the parties and the Commission had held that the delay caused due to obtaining the permission/ approval for land, water, etc., are prerequisite for the project and fall under the category of force majeure events. Accordingly, the state Commission decided that the

period of delay in obtaining such clearances, it is required to be suspended or excused and to that extent the period of commercial operation date, date of construction default and scheduled commercial operation date are to be extended.

15. The GUVNL filed an appeal before the Hon'ble ATE against the ruling of the State Commission in Appeal No.123 of 2012 and I.A.No.396 of 2012. The Hon'ble ATE in its judgment dated 04.02.2014 concluded that;

*“(i) The approvals under Bombay Tenancy and Agriculture Land (Vidharba Region and Kutch Area) Act, 1958 and for water source under the Environment (Protection) Act, 1986 and CRZ Regulations sought by Cargo Solar are the statutory/legal approvals under the PPA. The delay in obtaining these approvals by the Government instrumentalities by Cargo Solar would fall in the category of Force Majeure Events under Article 8.1 (a) (v) of the PPA. As such the period of such delay is required to be suspended or excused and to that extent the period of Commercial Operation Date, Date of Construction default and Scheduled Commercial Operation Date are to be extended in terms of the PPA.*

*(ii) The findings of the State Commission and the consequential relief granted to Cargo Solar are correct and therefore, upheld.”*

16. This observation of the Hon'ble ATE applies to the present matter also. In the light of the above judgment, the petitioner is also entitled to receive the relief in terms of Article 9 of the PPA. The licensee attempted to encash the bank guarantees for an amount of Rs.6,93,000/- against a sum of Rs.20,00,000/- provided by the petitioner under guarantees and when the banker did not honour the same then the petitioner sent a letter dated 30.09.2019 to licensee consenting to deduct the said amount from the monthly invoices in respect of the power supplied by the petitioner and accordingly, the licensee deducted Rs.8,17,740/- (Rs.6,93,000/- towards 34 days penalty and Rs.1,24,740/- towards 18% GST) from power sale invoice for the month of October, 2019. Subsequently, it has realised its action and is now before the Commission, seeking extension of SCOD as well as refund of the penalty paid by it, keeping in view the decision of the Government and the Commission.

17. The petitioner ought to have approached the Commission with a proper petition as has been informed to it by the licensee in its letter dated 03.02.2018. For whatever reasons that may be attributable to the petitioner, the petitioner has chosen not to

invoke the jurisdiction of the Commission for a period of three years eight months and no reasons are set forth in the petition.

18. The Commission notices that the petitioner having accepted the delay ought not have reverted to the Commission seeking to recover the amounts which it has voluntarily allowed the licensee to deduct from power sale invoice of October, 2019. But at the same time, the delay as occasioned has been already accepted by the Commission based on the acceptance of the Government of the force majeure events. Since the Commission has considered these aspects in several cases and that the extension of SCOD as accepted by the Government insofar as several other generators are concerned, the present request made by the petitioner can be accepted.

19. The present prayer is to accord approval for extended SCOD, as such the same can be considered for allowing. Thus, the SCOD of the petitioner's project would stand to be synchronized on 31.03.2017, which date is not denied by the licensee. In fact, this will fit into the generic extension given by the Government as accepted by the Commission as stated above. Accordingly, as the SCOD is within the time granted by the Government and accepted by the Commission, the petitioner is not liable to pay any penalty in terms of the PPA.

20. The Commission, in the circumstances and for the reasons observed above, allows the petition and declares the SCOD as 31.03.2017. Consequently, the petitioner is entitled to refund of the penalty collected by the licensee for a sum of Rs. 8,17,740/- (Rupees eight lakh seventeen thousand seven hundred and forty only).

21. Subject to the findings and observations recorded above, the petition is allowed as prayed for, but in the circumstances, without costs.

**This order is corrected and signed on this the 17<sup>th</sup> day of November, 2021.**

<b>Sd/-</b> (BANDARU KRISHNAIAH) MEMBER	<b>Sd/-</b> (M.D.MANO HAR RAJU) MEMBER	<b>Sd/-</b> (T.SRIRANGA RAO) CHAIRMAN
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