

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Thiru M.Chandrasekar	 Chairman
Dr.T.Prabhakara Rao	 Member
	and	
Thiru. K.Venkatasamy	 Member (Legal)

I.A. Nos. 1 to 4 of 2020
in
D.R.P. No.5 of 2020
and
D.R.P. No.5 of 2020

M/s. BTN Solar Private Limited
Through: Authorised Signatory
239, Okhla Industrial Estate
Phase III
New Delhi – 110 020.

... Petitioner
(Thiru R.R. Raman, Senior Advocate
for HSA Advocates, Advocate for the Petitioner)

Vs.

1. Tamil Nadu Generation & Distribution
Corporation Limited (TANGEDCO)
Through: Its Chairperson / MD
144, Anna Salai
Chennai – 600 002
Tamil Nadu.

2. Tamil Nadu Transmission Corporation
Limited (TANTRANSCO)
144, Anna Salai
Chennai – 600 002
Tamil Nadu.

3. Non-Conventional Energy Sources (NCES)

Through : Its Chief Engineer
2nd Floor, Eastern Wing
NPKRR Maligai
144, Anna Salai
Chennai – 600 002.

...Respondents
(Thiru S.R. Rajagopal,
Additional Advocate General for
Thiru M.Gopinathan,
Standing Counsel for TANGEDCO and
Thiru V.Anil Kumar,
Standing Counsel for TANTRANSCO)

Dates of hearing : **25-02-2020; 10-03-2020; 09-06-2020;
14-07-2020; 28-07-2020; 04-08-2020;
25-08-2020; 08-09-2020; 23-09-2020
and 29-09-2020**

Date of Order : **24-11-2020**

The DRP No. 5 of 2020 came up for final hearing on 29-09-2020. The Commission upon perusing the affidavit filed by the petitioner, counter affidavit filed by the respondent, Surrejoinder affidavit filed by the respondent and all other connected records and after hearing both the parties passes the following:-

ORDER

1. Prayer of the Petitioner in DRP No.5 of 2020:-

The prayer of the Petitioner in the above DRP No. 5 of 2020 is to-

- (a) allow the present petition;
- (b) issue appropriate direction to the respondent complete construction / commissioning of requisite infrastructure beyond the Delivery Point required for evacuation of the entire contracted capacity of 100 MWs in a time bound manner;

- (c) declare and hold that the delay in commissioning of the project is for the reasons not attributable to the petitioner and that the Scheduled Commercial Operation Date as prescribed under the Power Purchase Agreement dated 28-09-2017 will be modified and shall be extended as per the schedule of commissioning of new 230/110 kV substation at Ganguvarpatty Village;
- (d) declare and hold that the petitioner will not be liable to bear any liquidated damages of Rs.20 crores and / or contractual penalty for not commissioning its project as per the Scheduled Commercial Operational Date as prescribed under the Power Purchase Agreement dated 28-09-2017 since the delay is for reasons beyond the control of the petitioner.

2. Prayer of the Petitioner in I.A. No.1 of 2020 in DRP No.5 of 2020:-

The prayer of the Petitioner in the above I.A.No.1 of 2020 in DRP No. 5 of 2020 is to direct the Respondents not to take any precipitative and / or coercive actions against the petitioner due to delay in commissioning of the project since the same is for reasons not attributable to the petitioner herein.

3. Prayer of the Petitioner in I.A. No.2 of 2020 in DRP No.5 of 2020:-

The prayer of the Petitioner in the above I.A.No.2 of 2020 in DRP No. 5 of 2020 is to direct the Respondents to inform / apprise the Commission about the date / timeline by which the interconnectivity line / facilities at new 230/110 kV substation at Ganguvarpatty Village will be commissioned.

4. Facts of the case:-

This petition has been filed by the petitioner M/s. Solitaire BTN Solar Private Limited seeking the indulgence of the Commission to direct the respondent

- (i) to complete construction / commissioning of requisite infrastructure beyond the Delivery Point required for evacuation of the entire contracted capacity of 100 MWs in a time bound manner;
- (ii) to declare and hold that the delay in commissioning of the project is for the reasons not attributable to the petitioner and that the Scheduled Commercial Operation Date as prescribed under the Power Purchase Agreement dated 28-09-2017 will be modified and shall be extended as per the schedule of commissioning of new 230/110 kV substation at Ganguvarpatty Village and
- (iii) to declare and hold that the petitioner will not be liable to bear any liquidated damages of Rs.20 crores and / or contractual penalty for not commissioning its project as per the Scheduled Commercial Operational Date as prescribed under the Power Purchase Agreement dated 28-09-2017 since the delay is for reasons beyond the control of the petitioner.

5. Contentions of the Petitioner:-

5.1. The State of Tamil Nadu itself in its vision 2023 has targeted to achieve 5000 MW solar grid connected capacities by FY 2020.

5.2. In order to meet the RPO targets, for the forthcoming FY 19-20 and FY 20-21, TANGEDCO proposed to invite bids for procurement of 1500 MW solar grid

connected power. In order to facilitate developers to establish Solar Power Plants of capacity 1 MW and attract investments in the State, TANGEDCO through such proposed bid assured the investors for a long term power procurement by TANGEDCO considering the tariff of Rs.4.00 per unit as upper limit.

5.3. On 25-04-2017, the Commission vide its order of same date in M.P. No.8 of 2017 granted approval to TANGEDCO to invite bids to establish, maintain and operate solar power plants of minimum of 1 MW capacity and maximum 500 MW capacity in a single location for a single Solar Power Generator or a company in State of Tamil Nadu for a total capacity of 1500 MW and to supply the generated solar power to TANGEDCO under long term Power Purchase Agreement at a rate to be finalised through reverse bidding considering the tariff of Rs.4.00 per unit as upper limit.

5.4. On 15-05-2017, TANGEDCO issued Request for Submission (hereinafter referred to as "RfS") for procurement of Solar Power from Developers establishing Solar Power Plants in the State of Tamil Nadu through a reverse bidding process. As per the RfS, both TANGEDCO and TANTRANSCO were obligated to provide transmission system to facilitate evacuation of power from the project. The relevant extracts from the RfS are stated below:-

"22.0) Role of STU/TANGEDCO:

The STU/TANGEDCO will provide transmission system to facilitate evacuation of power from the projects which may include the following:-

(a) Provide connectivity to the solar projects with the grid.

(b) Support during commissioning of projects.

(c) STU/TANGEDCO will execute bay extension work and any other improvement works under Deposit Contribution Works (DCW) basis on payment of estimated cost by the SPG and to carry out the operation and maintenance of the bay extension and improvement works on payment of 50 per cent of material cost of bay extension work and improvement work by the SPG”.

5.5. On 15-06-2017, the petitioner herein submitted its bid to build and establish solar power plants and sell the generated electricity from therein to TANGEDCO from the three locations set out below, jointly having a total capacity of 150 MW:

Sl. No.	Location	Capacity
1	Thulukankulam Village, Kariapatti Taluk, Virudhunagar District	50 MW
2	Melakumilankulam Village, Kariapatti Taluk, Virudhunagar District	50 MW
3	Esali Village, Kariapatti Taluk, Virudhunagar District	50 MW

5.6. On 06-07-2017, the petitioner participated in the meeting held at TANGEDCO office and accepted the negotiated tariff at the rate of Rs.3.47 per unit which was L1 discovered during the bidding process for supplying power from 100 MW. On 29-08-2017, TANGEDCO vide its letter of same date issued Letter of Intent bearing No. CE/NCES/SOLAR/EE/SCB/AEE3/F.M/S.Solitaire BTN Solar/D.768/17 (hereinafter referred to as “Lo1”) in favour of the petitioner on terms and conditions stipulated in Tender Specification along with its amendments.

5.7. Subsequently, the Lol dated 29-08-2017, reiterated that the obligation to provide connectivity to the project will be with TANGEDCO and TANTRANSCO.

The relevant extracts of which are as follows:-

“11.0) Role of STU/TANGEDCO:

The STU/TANGEDCO will provide transmission system to facilitate evacuation of power from the projects which may include the following:-

- (a) Provide connectivity to the solar projects with the grid.*
- (b) Support during commissioning of projects.*
- (c) STU/TANGEDCO will execute bay extension work and any other improvement works under Deposit Contribution Works (DCW) basis on payment of estimated cost by the SPG and to carry out the operation and maintenance of the bay extension and improvement works on payment of 50 per cent of material cost of bay extension work and improvement work by the SPG”.*

5.8. On 04-09-2017, the petitioner herein communicated its acceptance to Lol dated 29-08-2017 and subsequently on 28-09-2017, the petitioner herein executed a Power Purchase Agreement with TANGEDCO for supply of 100 MW of power from the aforesaid locations.

5.9. As per the terms of the PPA dated 28.09.2017, the Project was embedded In the distribution utilities network with the delivery point being at the substation owned and operated by TANGEDCO/TANTRANSCO.

5.10. As per the agreed terms of the PPA, the Petitioner herein was made responsible for obtaining Transmission Connectivity and Access to the transmission system owned by the TANGEDCO /TANTRANSCO. The relevant extracts of which from the PPA dated 28.09.2017 is set out below:-

“2. Interfacing and Evacuation Facilities:

(a) The responsibility of getting Transmission Connectivity and access to the transmission system owned and operated the Distribution licensee/ STU will lie with the SPG and will be at the cost of SPG.”

5.11. The petitioner herein complying with the aforesaid obligation applied for Evacuation Approval to the nodal agency NCES. On 06-01-2018, NCES vide its letter of same date communicated that a load flow study has been conducted in respect of the proposed Solar Project being developed by the petitioner. NCES wing of TANGEDCO informed that the load flow study was undertaken considering the network conditions in FY 2018-19 and accordingly finalised the following transmission scheme for the petitioner and informed as follows:-

“Your proposed 2x50 MW solar PV Power Plant can be interfaced at Batlagundu SS at 110 KV level by erecting 110 KV DC line from the plant after completion of following works:

(a) Conversion of 110 kV Theni – Sembatti Feeder I and II by Wolf equivalent HTLS conductor.

- (b) Transferring of Batlagundu 110 KV SS from Theni – Sembatti feeder II to Theni – Sembatti Feeder I.*
- (c) Erection of Sembatty – Checkanuarani 230 KV second circuit (work under progress)*
- (d) Transferring of the WEG connected substations of both 10(1) and TANGEDCO viz., Kamatchipuram, Kadamalaikundu, Rasingapuram, Srirangapuram and Kandamanur substations from Theni-Periyar feeder I, II and III and Theni – Pasumalai feeder to Thappakundu 400 KV SS.”*

5.12. As per the Evacuation Approval dated 06.01.2018, the works as detailed thereunder including construction and augmentation of the identified transmission system was to be undertaken by TANGEDCO.

5.13. As per the agreed terms of the PPA dated 28.09.2017, the Petitioner was under obligation to commission the entire capacity of the Project on or before 24 months from the date of signing of the PPA dated 28.09.2017 i.e. by 25.09.2019 (hereinafter referred to as “**SCOD**”).

5.14. On 07.05.2018, the Petitioner having completed its initial obligations such as acquisition of 100 per cent land, Design and Engineering of AC & DC electrical packages done, Soil testing of the Project site etc., *vide* its letter of same date informed TANGEDCO that the Petitioner has already acquired the land for the Project and is planning to commission the Project by March 2019. It was therefore, requested that the connectivity works that are undertaken by TANGEDCO be expedited.

5.15. The Petitioner did not receive any response from NCES or TANGEDCO and therefore, was forced to write multiple letters/reminders to both the entities for their expeditious actions.

5.16. On 21.08.2018, the officials at NCES and TANGEDCO met the Petitioner to discuss the progress of the connectivity lines and augmentation of the transmission system. It was discussed that as per the Evacuation Approval the Point No. 1 i.e. *Conversion of 110 kV Theni–Sembatti Feeder I and II by Wolf equivalent HTLS conductor* will not be possible due to certain commercial constraints. It was therefore, requested by the Petitioner that the said condition be removed from the Evacuation Approval and directions may be given to TANTRANSCO to expedite the completion of the remaining pre-connectivity works to effectuate power supply from the Project.

5.17. Despite passage of time and continuous follow ups and letters for early completion of all pre-connectivity points to enable 100% evacuation from plant, no formal response or status was received from either NCES or TANGEDCO. Therefore, the Petitioner *vide* its letter dated 11.09.2018, wrote to TANTRANSCO explaining its difficulty in obtaining necessary disbursements from its lenders who had subjected the disbursement to the completion of the pre-connectivity works. It was once again requested that the works be expedited since the same is affecting the project timelines and commissioning schedule. Pertinently, the difficulty in getting disbursements from the lenders goes to the root of the matter impacting

the financial viability of the project. Letters were written to NCES and TANGEDCO on 26.09.2018 however no response was received by the Petitioner.

5.18. The Petitioner acting in a prudent manner, consistently and rigorously approached the appropriate authorities seeking their intervention and assistance for expeditious fulfilment of pre-connectivity works. The Petitioner is acting as a prudent utility undertook certain project related activities to keep up with the project timelines, which were getting deferred/delayed due to non – fulfilment of pre-connectivity works by TANGEDCO/TANTRANSCO.

5.19. On 14.12.2018, the Petitioner learnt that the certain activities as provided in the Evacuation Approval have been successfully completed partially by the TANGEDCO/ TANTRANSCO. Accordingly, once again the Petitioner wrote to the NCES seeking its indulgence to obtain the exact status of the Project and the detailed timelines for completion of the remainder of works. The Petitioner further wrote multiple reminders on 31.12.2018, 09.01.2019, 05.03.2019, 01.04.2019, 15.04.2019, 20.04.2019 and 25.04.2019 requesting intervention of the office of CMD–TANGEDCO and CE – NCES for expeditious completion of pre-connectivity works. Despite writing on several occasions to NCES, TANGEDCO and TANTRANSCO, the Petitioner did not receive any certainty on timelines for completion of pre-connectivity works or any status thereof.

5.20. On 02.05.2019, the Petitioner being aggrieved by arbitrary, illegal and irresponsible conduct of the NCES, TANGEDCO and TANTRANSCO, once again

wrote a letter explaining the difficulties being faced by the Petitioner's project and how the same shall also affect the project timelines and commissioning schedule.

5.21. Finally, on 15.05.2019, the Chairman Cum Managing Director – TANGEDCO afforded opportunity to the Petitioner and heard the difficulties being faced by it in implementation of project. It was only subsequently that on 31.05.2019, that the Petitioner was informed by (Director Generation) - TANGEDCO that a new 230/110 KV sub-station is being planned and to be constructed near to the location of the Project and after completion of this substation, 100% power evacuation will take place from Solar plant.

5.22. Subsequently, on 04.06.2019 a meeting was held between the Petitioner and officials of NCES and TANGEDCO. It was informed that two of the pre-connectivity works identified under the Evacuation Approval dated 06.01.2018 for the Project, could not be completed in a time bound manner to effectuate power supply from 25.09.2019 as agreed under the terms of the Power Purchase Agreement dated 28.09.2017. However, the power from the same cannot be supplied due to delay of the pre-connectivity works as identified under Evacuation Approval which ought to be undertaken by TANGEDCO/TANTRANSCO. Hence, to expedite evacuation and supply from the Project and to provide a permanent solution, it was suggested in the meetings to establish a new 230/110 kV substation at Ganguvarpatty Village, Theni District at nearby premises of the Project. The Project can be interfaced at this 230/110 kV substation level at Ganguvarpatty Village by erecting 110 kV SC line from the Project after completion of new 230/110 kV substation.

5.23. After a site inspection was carried out by the GCC Wing, Madurai and Operation Wing, Madurai of TANGEDCO/TANTRANSCO, it was reported that the private land identified in SF No. 2619/1B & 2 in Ganguvarpatty -I Village in Periyakulum Taluk of Theni District was found suitable for the establishment of new 230/110 kV substation as proposed. Accordingly, it was advised that for the purpose of evacuation of 100 percent of power from the Project, necessary land be procured (a minimum of 10 acres) by the Petitioner at its own cost and expenses for the establishment of a 230/110 kV new substation. Pertinently, the arbitrariness in the actions of the Respondents could be gauged from the fact that as per original evacuation approval plan, Petitioner is undertaking implementation of approximately 6 Kms Transmission Line interconnecting the project with the Batlagundu substation with an estimated capex of approximately Rs.7 Crores at its own cost and expense. This connectivity line is due for completion on 20.09.2019 and will connect the project for the intervening period i.e. prior to operationalization of the new 230/110 kV sub-station. However, as indicated by SE-Operations, Madurai vide its letter dated 10.06.2019 and Petitioner's understanding, the same will be able to accommodate only partial evacuation to the extent of maximum of 30-40 MW out of 100 MW due to evacuation constraints.

5.24. On 16.07.2019, the Petitioner vide its letter informed the Director (Generation) TANGEDCO that considering the pre-connectivity activities / works undertaken by TANGEDCO/TANTRANSCO will take longer to be completed and to ensure 100 per cent of power evacuation from the Project, there is a need to resolve this situation permanently. It was informed that as per the discussion with

the Director (Generation) it emerged that there is a proposal for setting up of new sub-station near the Project site with which the Petitioner's Project be connected for successful evacuation of 100 per cent of the Project capacity. However, the government would at least take 8-9 months to acquire land and thereafter similar time to construct the sub-station. Therefore, it was suggested that the Petitioner could purchase 10 acres of land for the new sub-station. The Petitioner had accordingly shortlisted parcels of land, which were shown to the officials of TANGEDCO/TANTRANSCO for their approval. Further, it was requested by petitioner that as an interim arrangement to ensure maximum evacuation from project, shifting of balance WEG feeders from Theni SS to Thapakundu SS should be prioritised with work completion by September 2019. Petitioner also requested from TANGEDCO to review and reconfirm the maximum quantum of power evacuation allowed from the project as 30 -40 MW of power evacuation will make the project completely unviable.

5.25. In furtherance of its commitment to complete the project within the prescribed timelines, the Petitioner who was already lagging with the project timelines for reasons solely attributable to the Respondents, promptly acquired the necessary land (10 acres) and the same was to be shortly be handed over to TANTRANSCO as approval of Sale Deed of this 10 acre land had been received from SE Operations, Madurai on 10.09.2019. Shortly thereafter, the Petitioner also commenced working on the 1.5 km (approx.) inter-connecting line to connect to the Project with this new 230/110 kV substation at Ganguvarpatty Village, Theni District after completion of substation by TANTRANSCO.

5.26. On 22.07.2019, the Petitioner once again wrote to NCES and TANGEDCO / TANTRANSCO seeking information to confirm the maximum quantum of power that can be evacuated through the existing Batlagundu sub-station and time extension should be granted for the balance capacity. Petitioner also requested TANGEDCO that due to evacuation constraint, petitioner did not want to be in a situation wherein petitioner incurred huge generation loss on one side and pay huge interest cost on disbursed loan for idle capacity. It is material to point out that although the authorities indicated that around 30-40 MW of power may be evacuated through existing sub-station there was no assurance that the same will be allowed as a certainty. The Solar Modules cannot be allowed to be mounted on mere assurance of the authorities that 30-40 MW of power may be allowed to be evacuated through the existing sub-station, since any variation in the assurance will result in rendering the Project capacity idle.

5.27. During the 16th Coordination Meeting, the Petitioner's special situation was considered and it was decided that CE – NCES shall indicate the maximum capacity that may be evacuated through the existing sub-station and shall provide extension of timelines (SCOD) for the balance capacity.

5.28. Neither NCES nor TANGEDCO / TANTRANSCO has provided any details in this regard to the Petitioner until 27.08.2019 i.e. less than a month from the SCOD (25.09.2019).

5.29. A period of almost 9-10 months may be required for completion of above-mentioned new 230/110 kV substation construction for the purpose of evacuation of 100 MW power from the Project. Therefore, the Petitioner wrote to the

Respondents *vide* its letter dated 29.07.2019, seeking such information and support from NCES and TANGEDCO / TANTRANSCO.

5.30. On 29.07.2019 the Petitioner formally once again approached NCES and TANGEDCO / TANTRANSCO seeking extension of project timelines and commissioning schedule as provided under the PPA dated 29.08.2017 since the delay in commissioning has been attributed solely due to delay in pre-connectivity works and that the same cannot be attributed to the Petitioner. As per the original evacuation approval, Petitioner is undertaking implementation of approximately 6 Kms Transmission Line interconnecting the Project with the Batlagundu 110 kV sub-station with an estimated cost of approximately Rs. 7 Crores. Further, the Petitioner acquired the desired 10 acres land and is going to transfer the same in favour of TANTRANSCO as directed/advised by the Govt. for the purpose of establishing the new 230/110 kV sub-station at Ganguvarpatty area. Despite having acquired the 10 acres land as promptly in June 2019, the approval of Sale Deed has been received only on 10.09.2019 by SE Operations, Madurai.

5.31 The lenders of the Project are concerned with the slow progress of all pre-connectivity works and in fact have approached the CMD TANGEDCO seeking his indulgence for expediting the pre-connectivity works. Due to uncertainty and slow progress, the lenders have withheld further disbursement of funds.

5.32. On 27.08.2019, TANTRANSCO *vide* its letter addressed to Chief Engineer, System Operations, informed the Petitioner that after considering the system study, 60 MW of power may be injected at Batlagundu SS. However, this maximum limit of 60 MW may increase or decrease depending upon the actual flow of generation

after commissioning of the Petitioner's Project and will be allowed accordingly. A perusal of the said letter shows that even the Respondents themselves are not clear regarding the exact amount of power that will be evacuated from the power plant. It was confirmed that the 100 per cent Project capacity would only be evacuated once the new sub-station is commissioned.

5.33. Having consistently followed up with NCES, TANGEDCO and TANTRANSCO seeking status update on evacuation and confirmation of the capacity that may be evacuated through the existing sub-station, it was only at the belated stage i.e. on 27.08.2019 that the Petitioner was informed about the possible evacuation limit from the existing sub-station. As per understanding of the Petitioner no work has started on two of the pre-connectivity works being undertaken by TANGEDCO / TANTRANSCO while other two works were only partially completed. Compelled by such reasons, the Petitioner herein is constrained to approach this Commission seeking reliefs as prayed.

5.34. The Petitioner has already brought to the notice of the Respondents that due to evacuation constraints on account of non-completion of pre-connectivity works, it is being financially and commercially prejudiced and its lenders have also withheld further reimbursement of funds. Considering the same, the CE – NCES had affirmed to allow extension of timelines (i.e. Project related timelines including SCOD). , The Petitioner, once again apprised the Respondents of the impending circumstances *vide* its letter dated 17.09.2019, however, no appropriate response has been received by the Petitioner at the time of filing of the present Petition.

6. Grounds urged by the Petitioner:-

6.1. The Petitioner cannot be compelled to bear any liability or contractual hardship for reasons not attributable to it. The inability of the Respondents to coordinate and plan the transmission system required for evacuation of the power from the Project cannot be the reason for casting any contractual liability upon the Petitioner.

6.2. Section 39(2)(c) and 40(a) of the Electricity Act casts a statutory obligation on TANGEDCO and TANTRANSCO to build, operate and maintain an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centres which are set out below:-

“Section 39. (State Transmission Utility and functions):

...

(2) The functions of the State Transmission Utility shall be –

(a) to undertake transmission of electricity through intra-State transmission system;

(b) to discharge all functions of planning and co-ordination relating to intra-State transmission system with –

(i) Central Transmission Utility;

(ii) State Governments;

(iii) generating companies;

(iv) Regional Power Committees;

(v) Authority;

(vi) licensees;

(vii) any other person notified by the State Government in this behalf;

(c) to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centres;

(d) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee or generating company on payment of the transmission charges ; or

*(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:
...*

“Section 40. (Duties of transmission licensees):

It shall be the duty of a transmission licensee –

(a) to build, maintain and operate an efficient, co-ordinated and economical inter-State transmission system or intra-State transmission system, as the case may be;

(b) to comply with the directions of the Regional Load Despatch Centre and the State Load Despatch Centre as the case may be;

(c) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee or generating company on payment of the transmission charges; or

*(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:
...*

6.3. Section 39 and Section 40 of the Electricity Act, 2003 postulates the statutory objective of the TANGEDCO and TANTRANSCO, which includes ensuring the development of an efficient, co-ordinated and economical system of Inter-State Transmission lines for smooth flow of electricity from generating stations to the load centres. It is the bounden duty of the Respondents to act in accordance with their statutory obligations without subjecting the Petitioner to unnecessary hardship.

6.4. The Respondents are statutory authorities and bodies and instrumentality of State under Article 12 of the Constitution of India. Thus, they are bound to act in an impartial, transparent and fair manner. The inaction or delayed performance on the

part of Respondents has subjected the Petitioner to a great financial hardship. The Petitioner having informed as early as in May 2018 that it was going to commission its Project in March 2019, did not receive any support whatsoever from the Respondents who chose not to act promptly as statutorily required under the provisions of the Electricity Act, 2003. The inactions on the part of Respondents smacks of abdication of statutory duties cast upon them under the Electricity Act.

6.5. The Petitioner is legally and contractually entitled to seek extension of SCOD since the delay in pre-connectivity works that is under the scope of the TANGEDCO / TANTRANSCO has led to delay in achieving of SCOD. The Petitioner has set up the project by investing huge sums of money, based on the representations given by the Respondents which were made with a view to ensure that the Petitioner would be paid tariff for the entire contracted capacity. However, due to inactions on the part of Respondents, the Petitioner will incur huge recurring losses. Moreover, the petitioner has written innumerable letters and representations requesting the Respondents to complete the work which, they are statutorily bound to carry out, however to no avail. As such, in terms of the settled principles of law, the Respondents are liable to compensate Petitioner for the losses that it has incurred and will incur due to delay in commissioning of the entire contracted capacity. The Petitioner undertakes to provide calculation for losses suffered by it during the course of hearing.

6.6. The Respondents have acted against the settled principles of fairness, transparency and equity and knowingly by their inactions prejudiced the vested rights and interests of the Petitioner. The arbitrariness and inactions on the part of Respondents could be gauged from the fact that Petitioner is forced to construct at

its own costs evacuation facilities both at Batlagundu sub-station as well as new 230/110 kV sub-station at Ganguvarpatty Village with huge costs. In fact, the land for the new sub-station has also been acquired by the Petitioner. Despite this, the Petitioner was only informed at the fag end i.e. on 27.08.2019 that about 60 MW power may be injected at the Batlagundu sub-station, which may increase or decrease upon the commissioning of the Petitioner's Project.

6.7. The Petitioner herein has invested huge sums of money on the basis of representations/warranties by the Respondents that evacuation facilities and connectivity will be provided to the project. The representations made under the Bidding Documents were that the evacuation will be the sole responsibility of the TANGEDCO and TANTRANSCO. The same was also reiterated in the Lol issued by TANGEDCO subsequently in favour of the Petitioner. These promises/representations are thus, enforceable on the principles of 'promissory estoppel' and 'legitimate expectation'. The doctrine of promissory estoppel essentially provides that if a party changes its position substantially, either by acting or forbearing from acting in a certain way, after relying upon a promise made by another party, then the first party can enforce the said promise, even in the absence of a formal contract to that effect. Over a period of time, the law with respect to 'promissory estoppel' has developed in a way where the requirement of changing the position based on a representation to one's detriment is also not necessary and mere action on the basis of a representation/promise is sufficient to plead the doctrine of 'promissory estoppel' against such person who made the representation/promise. Further, the doctrine of legitimate expectation can be said to be a synthesis of the principle of administrative fairness and the rule of estoppel.

A case for applicability of the doctrine of legitimate expectation thus arises when an administrative body, by reason of a representation or by past practice or conduct, arouses an expectation which it would be within its powers to fulfil unless some overriding public interest comes in the way. These principles are very well settled and have been expounded upon by various Courts/judicial forums from time to time. In this regard, it is pertinent to set out the relevant excerpt from the case of **GUVNL v. GERC & Ors.**, Appeal No. 279 of 2013, wherein APTEL, after relying on the landmark cases on both these principles, held as follows:

“164. In respect of the issue of Promissory Estoppel the Honble Supreme court has decided the ratio in the case of Southern Petrochemical Industries Co Ltd Vs Electricity Inspector and ETIO and Ors, AIR 2007, SC 1984 and also in the case of Kusumam Hotels (P) Ltd V Kerala Seb 2008 (13) SCC 213.

165. The Doctrine of Promissory Estoppel and Legitimate Expectations are applicable in the present case since it is settled position of law that the doctrine of Promissory Estoppel and Legitimate Expectations are applicable when:

- (a) A party makes an unequivocal promise or representation to the other party, which in effect create legal relations or affect the legal relationship to arise in the future.*
- (b) The other party believing it is induced to act on the faith of it to act to its detriment/to invest. In other words, the party invoking the doctrine has altered its position relying on the promise.*
- (c) Private parties in dealing with the Government have legitimate expectation to be dealt with regularity, predictability and certainty.*
- (d) Legitimate Expectation is capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis.*

(e) *Denial of legitimate expectation amounts to denial of rights guaranteed to a party by the Government. In this regard, the following judgments are noteworthy:*

- (i) *Delhi Cloth and General Mills Ltd Vs Union of India (1988) 1 SCC 86;*
- (ii) *Monnet Ispat and Energy Ltd vs Union of India (2012) 11 SCC;*
- (iii) *Gujarat State Financial Corporation vs M/s. Lotus Hotel Private Ltd (1983) 3 SCC 379;...”*

6.8 The Petitioner due to inactions and delayed performance of the statutory and contractual mandate by TANGEDCO and TANTRANSCO has been financially prejudiced since now it is compelled to delay commissioning of its Project whereas otherwise it would have commissioned its Project earlier to SCOD and gained financially and contributed towards the state solar capacity targets. However, the inactions on the part of Respondents has led to a situation where the Petitioner has no clarity regarding the exact status of power that can be and will be evacuated from the project. Due to arbitrary actions of the Respondents, Petitioner is and will be forced to suffer huge recurring losses due to stranding of Batlagundu evacuation facility, losing the incentive for commissioning of the project prior to scheduled date, generation losses etc. The inactions on the part of Respondents are contrary to the object sought to be achieved by the Electricity Act i.e. promotion of efficient and environmentally benign policies.

6.9. Unless the prayers made herein below are granted in favor of the Petitioner, the Petitioner shall suffer irreparable loss and harm to its business which also affects the viability and feasibility of its Project.

6.10. The present Petition is made *bona fide* and in the interests of justice. The Petitioner has not filed any other application / petition before any other court, Tribunal or Commission in relation to the issues raised herein.

7. Memo filed on behalf of the Respondents:-

In the Memo filed on 10-03-2020, the Respondent, TANGEDCO has submitted as follows:-

The following appraisal may be considered as a part of the Counter Affidavitto be filed by TANGEDCO in DRP.No.5 of 2020 and IA.No.1 & 2 of 2020 filed by the petitioner.

- a. With the present loading conditions, the entire 100 MW solar power can be evacuated from the proposed 100 MW solar power plant of M/s.Solitaire BTN Solar Private Limited through existing Batlagundu 110 KV SS till commissioning of Ganguvarpatti 230 KV SS.
- b. The load flow study has been conducted for the proposed 230 KV Ganguvarpatti SS and the estimate is under process for sanction.
- c. As per the terms and conditions of Letter of Intent and Power Purchase Agreement, as the company has not commissioned the entire contracted capacity within scheduled date of commissioning, the PBG has to be forfeited in proportionate for the capacity not commissioned i.e. 50 MW.
- d. M/s. Solitaire BTN Solar Private Limited has furnished Additional Bank Guarantee for an amount of Rs.7.6 crores for the balance capacity not commissioned i.e. 50 MW and the genuineness of the same is to be obtained.
- e. As TANGEDCO shall evacuate 100 MW power with the present loading conditions until commissioning of 230 KV Ganguvarpatti SS, the request of

the petitioner to modify the scheduled date of commissioning of 28.09.2019 may not be considered.

8. Counter Affidavit filed on behalf of the Respondents (TANGEDCO):-

In the counter affidavit filed on 14-07-2020, the Respondents TANGEDCO have submitted as follows:-

8.1. The Government of India with a vision of promoting renewable energy has fixed an ambitious target of 100 GW of Renewable energy by 2022 out of which 60 GW is to be from Solar power. In order to achieve this target, the Ministry of Power has fixed Solar RPO target as 9398 MW for the State of Tamil Nadu by 2022.

8.2. In order to achieve the Solar RPO target fixed to the State, TANGEDCO started procuring solar power through 'Reverse bidding process' with due approval of this Commission. The first tender was floated for procurement of 500 MW of solar power with an upper limit of Rs.5.10 and PPA was signed with two developers for a combined capacity of 20 MW @ Rs.4.50 per unit.

8.3. While the second phase was lodged by TANGEDCO, another tender (Phase III) against Specification CE/NCES/OT.No.1/2017-18 for the procurement of 1500 MW of solar power from the developers for establishing solar power plants in Tamil Nadu under reverse bidding process (e-tender), with an upper ceiling limit of Rs.4.00 per unit, with due date of opening as 15.06.2017. Before floating the tender, TANGEDCO has filed Miscellaneous Petition in MP.No.8 of 2017 before this Commission seeking approval for the "Procurement quantum" and for the draft Tender Specification, prepared in line with the draft guidelines issued by the

Ministry of Power, Government of India for grid connected Solar PV power plants. As there was no bidding guideline at that time, TANGEDCO has followed draft guidelines issued by Ministry of Power for the preparation of Tender Specification. The Commission in its daily order dated 25.04.2017 has directed TANGEDCO to proceed with the tendering process.

8.4. The Board of TANGEDCO has accorded approval for floating tender for the procurement of 1500 MW of solar power from the developers establishing solar power plants in the State of Tamil Nadu under reverse bidding process (e-tender).

8.5. TANGEDCO has filed Additional Affidavit in MP.No.8 of 2017 before the Commission seeking permission for certain amendments in draft Tender Specification (RFS document) already filed along with the main Miscellaneous Petition as follows:

- (a) The applicable EMD to be furnished by the bidder is Rs.25,000/- per MW for capacity upto 100 MW and Rs.50,000/- per MW for capacity exceeding 100 MW instead of Rs.5 lakhs per MW and it shall be accepted in the form of BG or DD or Cash or Banker's Cheque.
- b) The execution period of establishing solar power plant is 12 months from the date of signing of PPA for capacities upto 50 MW and 24 months from the date of signing PPA for capacities more than 50 MW.

8.6. The Commission in its order dated 10.07.2017 has accorded approval in MP.No.8 of 2017 for the "Procurement quantum", draft Tender Specification (RFS

document) and for the amendments in RFS document requested by TANGEDCO in its additional affidavit.

8.7. Before opening the tender, pre-bid meeting was conducted with the developers and the queries raised by the developers were replied and uploaded in the websites. As requested by most of the developers, the value of Performance Bank Guarantee was reduced from Rs.30 Lakh per MW to Rs.20 Lakhs per MW and land requirement was changed to 1.5 hectares per MW. Further, with regard to “Change in Law” requested by some of the developers, it was clarified that the price would be “FIRM” only.

8.8. 39 bidders had participated in the tender for establishment of solar power plants of combined capacity of 3932.5 MW in various districts of Tamil Nadu. The tender documents of all the bidders were scrutinized and based on the approval of the Board of TANGEDCO, price bids of eligible 25 bidders of combined capacity of 2673 MW were opened on 30.06.2017. M/s. Raasi Green Earth Energy (P) Limited, Bangalore, who quoted a tariff of Rs.3.47 per unit in respect of their proposed 100 MW solar power plant at Ramnad District was the L1 bidder.

8.9. After price negotiation and price matching the following 16 developers of combined capacity of 1500 MW have been finalized by TANGEDCO for supplying solar power at the rate of Rs.3.47 per unit on long term basis, including the petitioner company.

Sl. No.	Name of the bidder	Capacity in MW	Negotiated rate
1	M/s.Raasi Green Earth Energy Pvt.Ltd.,	100	3.47 (L1)

2	M/s.Sai Jyothi Infrastructure Ventures (P) Limited	54	3.47
3	M/s.Solitaire BTN Solar Private Limited	100	3.47
4	M/s.Narbheram Vishram	100	3.47
5	M/s.Rays Power Infra (P) Limited	100	3.47
6	M/s.NVR Energy Private Limited	100	3.47
7	M/s.Dynamize Solar (P) Limited	5	3.47
8	M/s.ReNew Solar Energy (Rajasthan) Private Ltd.	100	3.47
9	M/s. Sunlight (Udayasooriyan)	1	3.47
10	M/s.Talettutayi Solar Project Two (P) Limited	50	3.47
11	M/s.Dev International	1	3.47
12	M/s.G.R.Thanga Maligai (Firm)	10	3.47
13	M/s.G.R.Thangamaligai & Sons	10	3.47
14	M/s.G.R.T. Silverwares	10	3.47
15	M/s.Shapoorji Pallonji Infrastructure Capital Company (P) Ltd.	50	3.47
16	M/s. NLC India Limited	709	3.47
	Total	1500	

8.10. Subsequently, the Board of TANGEDCO has accorded its approval for issuing Letter of Intent to the above eligible 16 bidders and subsequent signing of PPA for the total capacity of 1500 MW.

8.11. Thereafter, TANGEDCO has filed Power Procurement Approval Petition (PPAP.No.5 of 2017) before the Commission seeking approval for the procurement of 1500 MW of solar power from the developers at the rate of Rs.3.47 per unit on long term basis.

8.12. The Commission in its order dated 29.08.2017 in PPAP.No.5 of 2017 has accorded approval to TANGEDCO for the procurement of 1500 MW of solar power from the developers mentioned at the rate of Rs.3.47 per unit on long term basis. The Commission has also directed TANGEDCO to execute Power Purchase

Agreement (PPA) with the successful bidders within 1 month from the date of order in PPAP.No.5 of 2017.

8.13. Consequent, on the approval of the Commission in PPAP.No.5 of 2017, TANGEDCO have issued Letter of Intent to all the 16 successful bidders including the petitioner company for the procurement of solar power at the rate of Rs.3.47 per unit from their proposed solar power plants of combined capacity of 1500 MW.

8.14. 14 out of 16 successful bidders have executed PPA with TANGEDCO within the stipulated time (from 26.09.2017 to 28.09.2017). As M/s. Sai Jyothi Infrastructure Ventures (P) Limited (54 MW) and M/s. Talettutayi Solar Project Two (P) Limited (50 MW) have not come forward to execute PPA with TANGEDCO, the EMD furnished by them have been forfeited as per tender norms. Due to non-execution of PPA by above said two bidders, the quantum left out was 104 MW, out of the bidden quantum of 1500 MW.

8.15. M/s. Sai Jyothi Infrastructure Ventures Private Limited (54 MW) and M/s. Talettutayi Solar Project Two (P) Limited (50 MW) did not execute PPA within the due dates, their LOI were cancelled and the available 104 MW was allotted to the following developers in the order of merit as they also accepted to match their quoted rate with that of L1 rate (Rs.3.47 per unit), with the approval of the Board of TANGEDCO.

Sl. No.	Name of the bidder	Capacity in MW	Negotiated rate per unit (Rs.)
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1.	M/s. G.R.Thangamaligai Jewellers (India) Private Limited, Chennai	44	3.47
2.	M/s. VSR Solar (P) Limited, Vellore	50	3.47
3.	M/s. Indira Industries, Vellore	5	3.47
4.	M/s. Indira Damper Industries, Vellore	5	3.47

8.16. The Board of TANGEDCO has also accorded approval for the issuance of Letter of Intent and subsequent signing of PPA with the above 4 developers for a combined capacity of 104 MW for purchasing solar power at the rate of Rs.3.47 per unit to achieve the targeted capacity of 1500 MW.

8.17. The main terms of the “Letter of Intent” dated 29.08.2017 are as follows:

- (i) The tariff of Rs.3.47 per unit is “FIRM and FIXED” for the entire agreement period.
- (ii) Performance Bank Guarantee of Rs.20 crores has to be furnished at the time of signing of PPA and it should be valid for a period of 36 months.
- (iii) Copy of land documents, plant layout, detailed project report to be furnished within 3 months from the date of PPA or else the PPA can be terminated by TANGEDCO.
- (iv) SPG shall report Project Financing Arrangements within 180 days from the date of signing of PPA and in case of delay TANGEDCO shall encash Performance Bank Guarantee and shall remove the project from the list of selected projects.
- (v) Part commissioning is applicable for this project.

- (vi) Plant has to be commissioned within 24 months from the date of signing of PPA and in case of failure to do so, Performance Bank Guarantee shall be encashed on per day basis with 100% encashment for 5 months delay and for delay beyond 5 months in addition to the above, the SPG has to pay a sum of Rs.10,000/- per MW per day of delay in the form of BG calculated for a period of 5 months. In case of non-furnishing of PBG, the PPA will stand terminated automatically without any notice/order.

8.18. Accordingly, TANGEDCO has issued Letter of Intent to M/s. Solitaire BTN Solar Private Limited for the establishment of solar power plants of capacity 50 MW each at Thulukkankulam Village, Kariapatti Taluk, Virudhunagar District and Melakumilankulam Village, Kariapatti Taluk, Virudhunagar District respectively, totaling 100 MW for supplying solar power to TANGEDCO at the rate of Rs.3.47 per unit on long term basis. Subsequently, M/s. Solitaire BTN Solar Private Limited has executed Power Purchase Agreement (PPA) with TANGEDCO on 28.09.2017.

8.19. M/s. Solitaire BTN Solar Private Limited has requested change of location in respect of the proposed 2X50 MW project location from Thulukkankulam & Melakumilankulam Villages, Kariapatti Taluk, Virudhunagar District to Ganguvarpatti village, Dindigul District vide letter dated 24.10.2017. The same was accepted by TANGEDCO.

8.20. Based on the request of the petitioner company, load flow study was conducted considering 2018-19 network condition for the new location and it has

been proposed to interface the 100 MW solar power plant of M/s. Solitaire BTN Solar Private Limited at Batlagundu 110 KV SS at 110 KV level by erecting double circuit line subject to the completion of following works:

- (a) Conversion of 110 KV Theni-Sembatti Feeder I and II by Wolf equivalent HTLS conductor.
- (b) Transferring of Batlagundu 110 KV SS from Theni-Sembatti feeder II to Theni-Sembatty feeder I.
- (c) Erection of Sembatty-Checkanurani 230 KV second circuit (work under progress).
- (d) Transferring of the WEG connected substations of both 10(1) and TANGEDCO viz, Kamatchipuram, Kadamalaikundu, Rasingapuram, Srirangapuram and Kandamanur substations from Theni-Periyar feeder I,II & III and Theni-Pasumalai feeder to Thappakundu 400 KV SS.

8.21. The load flow study result has also been communicated to the petitioner company on 06.01.2018. As per the terms and conditions of tender, Letter of Intent and Clause 14 of PPA, the Scheduled Date of Commissioning for the proposed 100 MW solar power plant of M/s. Solitaire BTN Solar Private Limited shall be on or before 27.09.2019. Further as per the terms and conditions of tender and Letter of Intent, the bidders shall commission their project beyond 5 months from the Scheduled Date of Commissioning subject to forfeiture of Performance Bank Guarantee in proportionate to the capacity not commissioned for the first 5 months and for any further delay beyond 5 months upto 10 months the developer is liable to pay Liquidated Damages in the form of Bank Guarantee at the rate of Rs. 10,000/- per MW per day for the delay.

8.22. The petitioner has furnished Performance Bank guarantee (PBG) in the form of BG (Bank Guarantee (Value- Rs.20 Crores, BG.No. 003GM01172710003 dated 28.09.2017, YES Bank, Chanakyapuri, New Delhi with validity upto 27.09.2020) in respect of the proposed 100 MW project as per tender norms. As per the terms and conditions of tender, the entire PBG amount of Rs.20 crores furnished by the petitioner shall be forfeited if the project shall not be commissioned on or before 27.02.2020. The validity of above said BG expires on 27.09.2020 and the BG issued bank is "Yes Bank". Therefore, the petitioner company shall assure extension of BG and also shall assure issuance of a new BG for a value of 20 crores as required.

8.23. As per the terms and conditions of tender, the due date of commissioning the proposed 100 MW solar power plant of M/s. Solitaire BTN Solar Private Limited with forfeiture of Performance Bank Guarantee (PBG) shall be on or before 27.02.2020. The petitioner has commissioned the solar project partially i.e. 50 MW capacity out of the proposed 100 MW on 20.02.2020 with a delay period of 145 days. As there is a provision in the tender for partial commissioning, TANGEDCO has accorded grid tie up approval for partial commissioning and the petitioner has commissioned their 50 MW solar project accordingly.

8.24. The petitioner has not commissioned their entire contracted capacity of 100 MW within the scheduled date of commissioning i.e. on or before 27.09.2019. As the petitioner has commissioned their project only partially i.e. 50 MW capacity out of the proposed 100 MW on 20.02.2020 beyond the scheduled date of commissioning as per the terms and conditions of tender, the PBG has to be

forfeited in proportionate to the capacity not commissioned as well as for the capacity commissioned for a delay period of 145 days. Hence an amount of approximately **Rs.10 crores** has to be forfeited towards part commissioning of 50 MW on 20.02.2020.

8.25. As per the terms and conditions of tender, the due date of commissioning the proposed 100 MW solar power plant of M/s. Solitaire BTN Solar Private Limited subject to payment of Liquidated Damages (Rs.10,000/- per MW per day) in the form of Bank Guarantee shall be on or before 27.07.2020. As per clause 16 of Letter of Intent and clause 14 of Power Purchase Agreement, the petitioner shall furnish Additional Bank Guarantee calculated @ Rs.10,000/- per MW for 5 months prior to expiry of first five months i.e. on or before 27.02.2020.

8.26 After part commissioning of 50 MW, the petitioner has approached the Commission seeking directions to declare and hold that the Petitioner is not liable to bear any liquidated damages and/or contractual penalty for not commissioning its project as per the Scheduled Commercial Operation Date as prescribed under the Power Purchase Agreement dated 28.09.2017 .

8.27. Based on the hearing held on 25.02.2020 the petitioner have furnished two separate Additional Bank Guarantee in the form of BG for a value of Rs.7.6 crores (Rs.4 crores, BG.No. 08240100000174 dated 27.02.2020 with validity upto 27.09.2021 and Rs.3.6 crores, BG.No. 08240100000175 dated 28.02.2020 with validity upto 27.09.2020) for the non-commissioned portion of 50 MW, issued by Axis Bank Limited, Anna Salai Branch, Chennai.

8.28. The prime issue raised by the petitioner company in its Dispute Resolution Petition is as follows:

- (a) Alleged delay in executing the pre-connectivity works by Respondents resulting in delay in commissioning of entire contracted capacity of 100 MW within scheduled date of commissioning by the petitioner company.
- (b) As the alleged delay in executing the pre-connectivity works are under the scope of Respondents, the penalties shall not be imposed and the petitioner is legally and contractually entitled for COD extension.

8.29. TANGEDCO & TANTRANSCO is a well established DISCOM with a sturdy Transmission network serving the consumers in Tamil Nadu. Both TANGEDCO & TANTRANSCO are in the constant process of upgrading their system matching the advent of new technology, minimizing line losses, to avoid low voltage and system improvement to accommodate load growth both in urban and rural areas. Hence as a matter of routine, in order to upgrade the system, the pre-connectivity works were recommended by Planning Wing taking into account the load growth and these works were initiated during 2014-15 itself for strengthening the existing infrastructure of TANGEDCO/TANTRANSCO. Hence, the pre-connectivity works mentioned in load flow study result are already under consideration/implementation, but not specific to this 100 MW load flow study for evacuating the proposed 100 MW solar power plant of petitioner company. Hence, the reason for the delay in commissioning the contracted capacity of 100 MW within

scheduled date of commissioning stated by the petitioner is not at all related to the delay caused in executing pre-connectivity works by TANGEDCO/TANTRANSCO.

8.30. The petitioner has stated that there is no response from the Respondents with regard to time line for executing the pre-connectivity works for evacuating 100 MW solar power. The averments of the petitioner are not correct. Being a funding agency to the petitioner company, M/s. REC Limited vide letter dated 06.08.2019 has requested TANGEDCO to complete the subject pre-connectivity works for commissioning and evacuation of power from the 100 MW SPV plant of M/s. Solitaire BTN Solar Private Limited. In this regard, TANGEDCO has replied M/s. REC Limited vide CE/NCES letter dated 05.09.2019 that "TANGEDCO shall extend all support for evacuating the power from the SPV plant".

8.31. The petitioner company vide letter dated 17.09.2019 has requested TANGEDCO for COD extension for commissioning their proposed 100 MW SPV plant due to delay in executing the pre-connectivity works by TANGEDCO/TANTRANSCO. In this regard, TANGEDCO had replied M/s. Solitaire BTN solar Private Limited vide CE/NCES letter dated 27.09.2019 that "on completion of 100 MW SPV plant activities by M/s. Solitaire BTN solar Private Limited, as per the terms and conditions of Letter of Intent dated 29.08.2017, TANGEDCO shall extend all support for evacuating the power from the SPV plant".

8.32. The letter dated 17.9.2019 of M/s. Solitaire BTN Solar Private Limited seeking COD extension is a material piece of evidence that the petitioner has not

taken any effort to execute the plant related activities even after two years while the Power Purchase Agreement (PPA) was executed during September 2017 itself.

8.33. TANGEDCO has been extending all supports to the bidders for evacuating solar power from its proposed solar power plants. The pre-connectivity works mentioned in evacuation approval of the petitioner company is not at all a constraint for evacuating solar power from the proposed 100 MW solar power plant and these pre-connectivity works were proposed by TANGEDCO long back for strengthening the existing infrastructure of TANGEDCO/TANTRANSCO. TANGEDCO has assured the petitioner company for evacuating the entire 100 MW solar power but the petitioner has not completed the entire contracted capacity within scheduled date of commissioning. The petitioner has commissioned partial capacity of 50 MW out of the proposed 100 MW and that too have been commissioned beyond scheduled date of commissioning.

8.34. The petitioner has put forth that the reason for delay in commissioning of the project is due to delay in executing the pre-connectivity works by TANGEDCO/TANTRANSCO. The averments of the petitioner are denied. The actual reason for delay in commissioning the project by the petitioner company might be due to delay in achieving financial closure and issues in getting fund from the lending agency, M/s. REC Limited.

8.35. As per the terms and conditions of the Letter of Intent (LOI) dated 29.08.2017 the SPG shall report Project Financing Arrangements within 180 days from the date of signing of PPA and in case of delay TANGEDCO shall encash

Performance Bank guarantee and shall remove the project from the list of selected projects. While so, the petitioner vide letter dated 06.01.2020 has stated as follows:-

“.....we have further approached our lenders (REC Limited) to release further fund for commissioning of balance capacity of 48 MW within this quarter.....”.

As per the terms and conditions of Letter of Intent, the company has not achieved Financial Closure within 180 days from the date of PPA for the contracted project capacity of 100 MW and as per their letter dated 06.01.2020, they have approached M/s.Rural Electrification Corporation of India only after 2 years from the date of PPA for financing for the balance capacity out of 100 MW.

8.36. As per the field report received from SE/NCES/Udumalpetthe developer has not initiated any erection activities in respect of the balance proposed 50 MW solar power plant. While the developer has not taken initiative for funding or for purchase of raw materials such as solar panels, inverters etc., for the 50 MW SPV capacity, the petitioner's claim seeking extension of time and stating that they are not liable to bear any liquidated damages and/or contractual penalty for not commissioning its project as per the Scheduled Commercial Operation Date as prescribed under the Power Purchase Agreement dated 28.09.2017 is not acceptable on any ground. The petitioner, in order to cover-up his failures has made allegations against the Respondents. In the absence of compliance on its part, the petitioner is not entitled to rely on any other issue.

8.37. The petitioner's main intention seeking COD extension without any valid grounds is to captivate the purchase rate of Rs.3.47/- per unit discovered during

2017. TANGEDCO would have honoured the purchase price of Rs.3.47/- for the balance 50 MW if the developer had in fact initiated any panel and inverter erection activities, subject to levy of Liquidated damages. The developer is in the process of seeking fund/loans for executing the balance 50 MW.

8.38. The Commission has accorded approval to TANGEDCO in MP.No.8 of 2020 and PPAP.No.1 of 2020 for the procurement of 500 MW of solar power from M/s. Solar Energy Corporation of India at the rate of Rs.2.78 per unit and Power Sale Agreement (PSA) executed on 05.05.2020. TANGEDCO is in a process of procurement of another 500 MW of solar power from M/s. National Hydro Power Corporation Limited (NHPC) at the rate of Rs.2.62 per unit under bidding route to meet its RPO. At this juncture when the solar power rate is in the declining trend, if the request of the petitioner seeking COD extension that too without levy of penalties as per the PPA is considered, would have a severe financial impact for TANGEDCO.

8.39. In the same tender, the PPAs of similar two projects under this scheme i.e. Thiru Udaya Sooriyan and M/s Dynamize Solar Private Limited of capacities 1 MW and 5 MW respectively, were terminated for not commissioning within the due date and any privilege of granting time extension to the petitioner is not acceptable and not justifiable. As per the terms and conditions of tender, the petitioner was granted adequate time of more than 2 years i.e. nearly 29 months to complete the balance capacity of 50 MW and the reasons stipulated by the petitioner for the delay in commissioning of partial capacity of 50 MW is not acceptable and denied. Hence, as per the terms and conditions of Letter of Intent and Power Purchase Agreement,

as the company has not commissioned the entire contracted capacity within scheduled date of commissioning, the PBG has to be forfeited in proportionate to the capacity not commissioned i.e. 50 MW.

8.40. During the hearing on 10.03.2020, TANGEDCO has furnished its appraisal before the Commission in memo format, as follows:

- (a) With the present loading conditions, the entire 100 MW solar power can be evacuated from the proposed 100 MW solar power plant of M/s. Solitaire BTN Solar Private Limited through existing Batlagundu 110 KV SS till commissioning of Ganguvarpatti 230 KV SS.
- (b) The load flow study has been conducted for the proposed 230 KV Ganguvarpatti SS and the estimate is under process for sanction.
- (c) As per the terms and conditions of Letter of Intent and Power Purchase Agreement, as the company has not commissioned the entire contracted capacity within scheduled date of commissioning, the PBG has to be forfeited in proportionate to the capacity not commissioned i.e. 50 MW.
- (d) M/s. Solitaire BTN Solar Private Limited has furnished Additional Bank Guarantee for an amount of Rs.7.6 crores for the balance capacity not commissioned i.e. 50 MW and the genuineness of the same is to be obtained.
- (e) As TANGEDCO shall evacuate 100 MW power with the present loading conditions until commissioning of 230 KV Ganguvarpatti SS, the request of the petitioner to modify the scheduled date of commissioning of 28.09.2019 may not be considered.

8.41. During the hearing on 09.06.2020, the Commission has directed TANGEDCO to file counter affidavit and adjourned the case to 14.07.2020. Further, the Commission has directed TANGEDCO to appraise the present status & time line for commissioning the proposed new Ganguvarpatti 230 KV SS, present status with time line for completing the pre-connectivity works and possibility of evacuating 100 MW solar power of the petitioner company through existing Batlagundu 110 KV SS with available infrastructure. In this regard, a status report has been called for from SE/NCES/Udumalpet and in this regard a status report dated 01.07.2020 has been received from SE/NCES/Udumalpet, as follows:

“.....the status report on M/s. Solitaire BTN Solar Private Limited, received from the Superintending Engineer/Operation/Madurai vide reference (2) cited is submitted here under.

“Present status with date and time line for commissioning the proposed Ganguvarpatti 230/110 KV Sub-Station.

The proposal for the establishment of new 230/110 KV Ganguvarpatti (Batalakundu) substation with 2 X 100 MVA, 230/110KV ratio Auto transformers at Ganguvarpatti Village, Periyakulam taluk, Theni District located near Batalakundu in Madurai operation circle of Madurai region at an estimated cost of Rs.18,772 Lakhs (Rupees Eighteen Thousand Seven Hundred and Seventy two Lakhs only) Gross & Nett was submitted and additional particulars requested vide reference Letter no CE/Plg/SE/PLG/EMPI/A2/F.Ganguvarpatti 230KVSS/D.91/20 dated 08.05.20 was submitted vide reference Lr No: SE/O/MDU/EA/AE/F.SBTY Dkt/D.No.370/2020, dated 29.06.2020. On getting administrative approval, work is proposed to be taken up.

(a) Conversion of 110 KV Theni-Sembatti Feeder I and II by Wolf equivalent HTLS conductor.

(1) Administrative approval was accorded for Strengthening of existing 110 KV DC Theni – Sembatty I & II feeder with Wolf conductor by HTLS Conductor in Madurai Operation Circle at an estimated cost of Rs. 3337.55 Lakhs Gross & Rs 2903.28 Lakhs Nett vide Permanent CH.TANTRANSCO Proceedings No.05 dated 06.01.2015.

(2) For the above work, in principle approval was accorded for availing grant from PSDF vide (Per) CH TANTRANSCO Proceedings No; 122 dated 09.08.2018. But this work has not been considered in PSDF and hence instructions were received for obtaining revised administrative approval vide Lr No: CE/C/SE/C-II/EE4/AEE/TR/F.Theni, Sem, Theni, Periyar/D.1215/20 dated 29.02.2020. Revised estimate is pending to be prepared.

b. Transferring of Batlagundu 110 KV SS from Theni-Sembatti feeder II to Theni-Sembatty feeder I. - Works completed.

c. Erection of Sembatty-Checkanurani 230 KV second circuit (work under progress).

Revised proposal for strengthening of existing Kundah conductor in 230 KV Sembatty – Checkanurani feeder with Zebra conductor is sent up for sanction from the Superintending Engineer/GCC/Madurai to the Chief Engineer/Civil Transmission/Chennai vide Letter No: SE/GCC/MDU/AEE/MONI/F.SEM-CKNI/D.No.721/2020 dated 04.06.2020.

d. Transferring of the WEG connected substations of both 10(1) and TANGEDCO viz, Kamatchipuram, Kadamalaikundu, Rasingapuram,

Srirangapuram and Kandamanur substations from Theni-Periyar feeder I,II& III and Theni-Pasumalai feeder to Thappakundu 400 KV SS.

TANGEDCO viz, Kamatchipuram, Kadamalaikundu, Rasingapuram and Kandamanur substations.

- Rasingapuram Board SS with 3 x 25 MVA and 2 x 10 MVA was transferred to Thappagundu 400 KV SS through 110 KV Thappagundu – Rasingapuram I and II DC feeder from 21.03.2019.
- Estimate for erection of 110 KV DC line on DC tower with Panther conductor for a distance of 3.00 KM to connect 110/22 KV Kamatchipuram and Kadamalaigundu (TANTRANSCO) substations with Thappagundu 400/110 KV SS for an amount of Rs. 201.00 Lakhs Gross and Nett was sent to HQ vide Letter No: CE/SO/Try/F.14/C.1108/2019 dated 01.07.2019. Sanction awaited.

Transferring of the WEG connected 10(1) substations:

- 110 KV Regen Kamatchipuram 10 (1) SS with 2 x25+ 1x 50 MVA limited to a maximum load of 75 MW was transferred to Thappagundu 400 KV SS through a dedicated SC line on DC tower with Panther conductor from 21.03.2019
- Estimate for erection of 110 KV DC line on DC tower with Panther conductor for making LILO of 110 KV Thappagundu – Rasingapuram II feeder at the 110 KV Siemens Gamesa Renewable Power Pvt Ltd @ S.R.puram SS under 10(1) sec for a length of 0.6 Kms for an amount of Rs 51.56 Lakhs Gross and Nett was sent to HQ vide Lr No: CE/SO/TRY/F.14/C.1150/2019 DT 11.07.2019. On getting sanction of this estimate, the amount already

paid by M/s. Siemens Gamesa Renewable Power Pvt Ltd for Rs. 5,51,44,100/- vide Pr No: 220190 dated 03.11.2016 will be adjusted.

- During the meeting on 04.06.2019, conducted by the Director/Generation and Director/Transmission Project/Chennai, it was suggested to transfer Kadamalaikundu 110/33 KV 10(1) SS with 1 x 25 MVA to Thappagundu 400 KV SS by erecting the other 110 KV SC line in the free arm of the DC tower erected by M/S ReGen Power tech Pvt. Ltd in consultation with them.

But M/s. Siemens Gamesa Renewable Power Pvt Ltd @ Kadamalaikundu 110/33 KV 10(1) SS has requested for connecting them with the proposed 110 KV DC line on DC tower with Panther conductor for a distance of 3.00 KM to connect 110/22 KV Kamatchipuram and Kadamalaigundu (TANTRANSCO) substations. Feasibility is furnished subject to the condition that the cost of the above 3.00 Km line has to be borne by the company vide reference Letter No: CE/SO/Try/F.14/C.3130/2019 dated 26.11.2019.

- (3) A detailed report for evacuating only 15 to 20 MW out of the commissioned 50 MW capacity through existing Battalagundu 110 KV Sub-Station with available infrastructure

The average generation of M/s. Solitaire BTN Solar Private Limited is around 35 MW and peak generation is 40.1 MW on 20.4.2020, during the period from 22.2.2020 to 29.6.2020. As per the instruction of SLDC/Madurai partial solar generation block was effected only seven days during the above period as it has been done for all solar generators. Generation details from 22.02.2020 to till date are furnished in a separate sheet.

It is further submitted that the 100 MW capacity of M/s.Solitaire BTN Solar (P) Limited plant if commissioned and connected to Batlagundu Sub-Station can be managed till commissioning of Ganguvarpatti 230/110 KV Sub-Station, as concluded in the minutes of meeting held on 06.03.2020 in the chamber of Director (Generation).”

8.42. In view of the position stated above, the averment/grounds of the petitioner are untenable and the Dispute Resolution Petition is liable to be dismissed.

8.43. The petitioner is not entitled to any relief in this Dispute Resolution petition on merits. In fact, the Dispute Resolution petition itself is not maintainable. Therefore, the petitioner is not entitled to any interim relief and the Dispute Resolution petition is liable to be dismissed. By dismissing the same no prejudice will be caused to the petitioner. Otherwise, serious prejudice will be caused to the TANGEDCO and to the end consumers as well.

9. Rejoinder to the counter filed on 28-07-2020 by TANGEDCO:-

9.1. The captioned petition has been filed by the Petitioner – M/s Solitaire BTN Solar Private Limited, under Section 86(1)(f) of the Electricity Act, 2003, (“**Act**”) read with Section 86(1)(k) of the Act and Regulation 48 of the Tamil Nadu Electricity Regulatory Commission (Conduct of Business) Regulations, 2004, (“**CoB Regulations**”).

9.2. The Petitioner filed the present petition seeking indulgence of this Commission's to mitigate the issues arising due to delay in achieving Scheduled Commercial Operation Date ("**SCOD**") of the 100 MW Solar PV Project at village Ganguvarpatti, Periyakulum Taluk, District – Theni, Tamil Nadu ("**Project**"), as stipulated in the Power Purchase Agreement dated 28.09.2017 executed between the Petitioner and the Respondent No. 1 – Tamil Nadu Generation & Distribution Corporation Limited ("**TANGEDCO**") for being affected by the reasons beyond the control of the Petitioner.

9.3. It is respectfully submitted that despite the progress of the Project being affected by for the reasons *not* attributable to the Petitioner and beyond its control, the Petitioner was still able to commission 50 MW out of 100 MW capacity on 20.02.2020. It is the case of the Petitioner that the delay in achieving commercial operation of the 50 MW capacity by 20.02.2020 and thereafter the balance capacity of 50 MW, has been on account of *inter alia* (a) unavailability of transmission evacuation system and unconditional evacuation approval and (b) outbreak of Covid -19 in China and India, events which have been recognised as Force Majeure Events under the express terms of the PPA.

9.4. At outset, it is respectfully submitted that the submissions/ averments made by TANGEDCO in its Counter Affidavit dated 14.07.2020 are denied for being unsustainable, unjustifiable and devoid of merits. It is submitted that the contents of the Counter Affidavit dated 14.07.2020 clearly reflect the knowing and deliberate attempt of TANGEDCO to mislead this Commission. It is also humbly submitted that the averments made therein are founded on a palpably erroneous and

deliberate misapplication of the express provisions of Tamil Nadu Electricity Regulatory Commission (Grid connectivity and Intra-State Open Access) Regulations, 2014 ("**Connectivity & Access Regulations 2014**"), the express terms of the PPA, and the judicial precedents.

9.5. The present proceedings have been initiated by the Petitioner to seek adjudication of the following issues:

- (a) Whether the delay in achieving commercial operation of the Project is for the reasons beyond the control of the Petitioner?
- (b) Whether the progress and implementation of the Project was impacted on account of two primary reasons i.e. (i) unavailability of transmission evacuation system and unconditional evacuation approval and (ii) outbreak of Covid -19 in China and India, events which have been recognised as Force Majeure Events under the express terms of the PPA?
- (c) Whether the Respondent No. 1 can take advantage of its own wrong (i.e. not providing unconditional evacuation approval for the entire 100 MW capacity of the Project) by not extending the Scheduled Commercial Operation Date and subjecting the Petitioner to financial prejudice?

9.6. TANGEDCO by way of its Counter Affidavit dated 14.07.2020, has failed to demonstrate its case justifying its failure to provide unconditional evacuation approval for the entire contracted capacity of 100 MW from the Petitioner's Project. Following are the admitted / un-disputed positions in fact and in law that emerges from the Counter Affidavit dated 14.07.2020 filed by TANGEDCO:

- (a) The pre-connectivity works indicated in the Evacuation Approval dated 06.01.2018, contingent upon which the Petitioner was granted connectivity and access to the Batlagundu substation, have not been completed in its entirety.
- (b) There is no work undertaken in relation to the implementation of the Ganguvarpatty substation, which has been identified as the ultimate transmission system through which the entire 100 MW capacity will be evacuated.
- (c) The Petitioner has achieved commercial operation of 50 MW capacity on 20.02.2020.
- (d) No timeline for completion of either the pre-connectivity works or construction of Ganguvarpatty substations were ever communicated to the Petitioner.
- (e) The Petitioner has been suffering delays in achieving commercial operation for the balance 50 MW capacity since it was affected by the occurrence of outbreak of Covid – 19 in China and India, which impaired Petitioner's ability to commission the Project.
- (f) TANGEDCO has submitted that it would have honoured the purchase of power from the Petitioner at the PPA tariff for the balance 50 MW if the Petitioner had in fact initiated any panel and inverter erection activities. Clearly, it has been demonstrated by the Petitioner herein that works in relation to 50 MW balance capacity were initiated as

soon as clarification dated 24.01.2020 was received from TANGEDCO. Accordingly, TANGEDCO must honour its contractual commitment to offtake the contracted capacity from the Project without subjecting the Petitioner to any financial prejudice.

9.7. Following are the incorrect statements made by TANGEDCO which are contrary to its earlier stand or in teeth of the provisions under the regulations framed by this Commission and the PPA executed with the Petitioner:

- (a) The Evacuation Approval was delayed due to change in location request of the Project made by the Petitioner. This statement has no legal basis. It is admitted that the Petitioner requested for change in location of the Project on 24.10.2017. Such request letter of the Petitioner was submitted along with the requisite demand drafts for load flow study to be undertaken by TANGEDCO. However, despite such application being made on 24.10.2017, the Evacuation Approval was only given on 06.01.2018 i.e. after delay of more than 2 months. Notably, as per the Connectivity & Access Regulations, 2014, once the application for connectivity / access is made, the same must be responded to either way, within 30 days from such application. There is a clear deviation from the statutory mandate by TANGEDCO/Respondents.
- (b) The Evacuation Approval dated 06.01.2018 granted in favour of the Petitioner was not contingent upon completion of the pre-connectivity works. This is a factually incorrect statement.

- (c) The pre-connectivity works were undertaken to augment the network as a matter of routine and has nothing to do with the Evacuation Approval granted to the Petitioner. This is a factually incorrect statement.
- (d) TANGEDCO assured the Petitioner for evacuation of 100 MW capacity but the Petitioner failed to commission the Project. This statement is erroneous since the confirmation in relation to evacuation of 100 MW capacity was only made to the Petitioner on 24.01.2020.
- (e) The actual reason for delay in achieving SCOD by the Petitioner has been delay in achieving financial closure and issues in getting funds by its lenders. This statement is erroneous since the Petitioner achieved Financial Closure prior to any confirmation received from TANGEDCO in relation to availability of the evacuation system to effectuate 100 per cent power evacuation from the Project. Further, it was due to a non-committal position adopted by TANGEDCO in relation to providing clarity on evacuation of power from the Petitioner's Project, that the lenders of the Petitioner restricted disbursements.
- (f) As per the field report received from SE/NCES/Udumalpet, there is no progress in relation to balance 50 MW capacity of the Project. This statement is factually incorrect. The Petitioner has undertaken various activities for the balance 50 MW of the Project once the intimation

dated 24.01.2020 was received from TANGEDCO regarding allowing evacuation of 100 MW from the existing Batlagundu substation. In fact, despite being affected by the outbreak of Covid -19 in China and India, the Petitioner was able to ready its infrastructure for 20.9 MW additional capacity out of which 16.8 MW is complete in all respect, the balance is waiting for just one 4.2 MVA transformer which got delayed due to COVID-19 restrictions imposed by the authorities on the manufacturer's facility .The CEIG inspection and certification is awaited for the 20.9 MW.

- (g) The Petitioner did not take any initiative for funding or for purchase of raw materials such as solar panels, inverters etc., for the balance 50 MW capacity and accordingly its request for seeking extension of SCOD is not acceptable. This is statement is factually incorrect since the Petitioner has already entered into contracts in February 2019 itself, for supply of materials for the balance 50 MW capacity and was expecting dispatch of the same, however, the these activities were affected due to outbreak of Covid -19 in China and India and consequent measures adopted by the Central Government and the State Government of Tamil Nadu.
- (h) TANGEDCO has submitted that if the request of the Petitioner seeking SCOD extension that too without levy of penalties as per the PPA is considered, as the PPA executed with the petitioner is of long term for 25 years, and considering recently discovered tariffs are less than the tariff discovered in the bid with the Petitioner, the same will

have severe financial impact on TANGECO. This statement is factually incorrect and legally non-est. The PPA tariff is sacrosanct and cannot be tinkered with unilaterally. It is settled principal of law that no one can take advantage of its own wrong. The delay caused in the commissioning of the Project is primarily attributed to TANGEDCO's inaction. Therefore, the Petitioner cannot be subjected to any financial prejudice.

- (i) TANGEDCO has submitted that two other PPAs of the projects bid out under the same scheme as that of the Petitioner, were terminated since they failed to commission the project within the stipulated time. Any extension granted to the Petitioner will not be justifiable. This statement is legally impermissible and contractually unsustainable. It is not known whether these two other projects were similarly affected by (a) non-availability of transmission system and unconditional evacuation approval and (b) outbreak of Covid-19 in China and India and consequent measures taken by the Government. Regardless, the express terms of the PPA clearly states that the Petitioner cannot be in any manner stands to be prejudiced where it is unable to meet any milestone / perform any obligation under the contract if the same is for the reasons of force majeure. Therefore, the Petitioner cannot be treated similar to those other projects where the PPAs have been terminated by TANGEDCO.

9.8. In view of the fact that PGCIL has not made any para-wise rejoinder but has dealt with the contest made by the Petitioner through its preliminary submissions itself, the Petitioner also craves the leave of this Commission to make submissions in the following manner:

(A) *The pre-connectivity works mentioned in evacuation approval of the petitioner company is not at all a constraint for evacuating solar power from the proposed 100 MW solar power plant.*

(a) It is not a disputed fact that as per the RfS, Lol and PPA, the Respondent No. 1 is bound to provide connectivity to the Project of the Petitioner for evacuation of power into the grid. However, the Respondents have failed to confirm evacuation of 100 MW of power from the Project till as late as 24.01.2020.

(b) In this regard it is submitted that as per Respondents own admission in para 20 of the Counter Affidavit, that subsequent to acceptance of change in location of the Project, the Respondents conducted a load flow study and proposed to connect the Project to Batlagundu SS. However, the said was subject to completion of 4 conditions, being:

- Conversion of 110 KV Theni-Sembatti Feeder I and II by Wolf equivalent HTLS conductor.
- Transferring of Batlagundu 110 KV SS from Theni-Sembatti feeder II to Theni-Sembatti feeder I.
- Erection of Sembatty-Checkanurani 230 KV second circuit (work under progress).
- Transferring of the WEG connected substations of both 10(1) and TANGEDCO viz, Kamatchipuram, Kadamalaikundu, Rasingapuram, Srirangapuram and Kandamanur substations

from Theni-Periyar feeder I,II & III and Theni-Pasumalai feeder to Thappakundu 400 KV SS.

- (c) It is reiterated that by way of an approval letter dated 06.01.2018 for connectivity of the Project to Batlagundu SS, the Respondents have themselves apprised the Petitioner that the capacity of the Batlagundu SS was full and for any further evacuation, including evacuation of power from Petitioner's Project, the Respondent will have to undertake the above mentioned 4 conditions, being condition precedent to evacuation of power from the Project of the Petitioner.
- (d) In compliance with the direction of this Commission, the Respondents have submitted a status report dated 01.07.2020 providing the timeline for commissioning of the proposed Ganguvarpatti SS and timeline for evacuation of power from the Project into Batlagundu SS, and same has been reiterated by the Respondents in para 41 of the Counter Affidavit.
- (e) It also pertinent to note, that as per the status report the Respondents have complied with one out of the four afore-mentioned conditions and are still under process to get approval for two. It is submitted that as per the status report and Respondents own admission it is evident that Respondents have failed to fulfil the conditions, subject to which the Project of the Petitioner was to be connected to Batlagundu SS. Therefore, due to non-compliance by the Respondents to the condition precedent to the connectivity of the Project to Batlagundu

SS, and for no fault of the Petitioners, the Petitioners have suffered delay in confirmation of connectivity.

- (f) Even on present day the Project is connected to Batlagundu SS which is primarily a wind power sub-station and is not connected with Ganguvarpatty SS, which is the approved sub-station for the Project. In this regard, it is pertinent to note that during the peak season of wind generation, evacuation of wind power is given priority over the solar power generated by the Petitioner's Project, leading to generation loss for the Petitioner.
- (g) Further, from the time of the approval i.e. 06.01.2019 of Project's connectivity to Batlagundu SS, where the Respondents informed the Petitioner that the evacuation capacity of the sub-station is full and for any further evacuation the conditions mentioned above needs to be fulfilled. In this regard it is pertinent to point out that since the time of said conditional approval no generator has been disconnected from the substation, and therefore, the Project even if connected to Batlagundu SS will not be able to supply power as the capacity of evacuation from the substation was already full and no subsequent disconnection has taken place.
- (h) Further, it is also submitted that there is no concept of conditional connectivity/access to the grid. Therefore, the connectivity to be provided by the Respondents as per the RfS should be absolute and shall give certainty to the developer that the power will be evacuated

once the project is commissioned. For any prudent business utility to invest in erection of a power plant needs the assurance that the power produced therefrom will be evacuated into the grid for consumption.

- (i) However, in the present scenario Respondents have still not been able to complete the conditions subject to which connectivity granted to the Petitioner will become absolute. Therefore, for no mistake of the Petitioner and due to the delay caused by the Respondents in completion of the above-mentioned conditions has led to severe loss to the Petitioner in erection of two connectivity lines.

(B) *That the Petitioner did not report for achieve Financial Closure and the same delayed the Project Implementation:*

- (a) At the outset, it is submitted that the Financial Closure for the project was submitted on 09.07.2018 itself. The Respondents herein are misconceiving the disbursement of money from the lender with submission of Financial Closure within 180 days from the issuance of the Lol.
- (b) It is submitted that the Lol was issued to the Petitioner on 29.08.2017, where after on 26.03.2018 the Petitioner wrote a letter to the Respondent No.1 informing that the Petitioner has submitted the required land details, has received load flow approval and other requirements as per the Lol. Petitioner further informed the Respondent that subsequent to the land and evacuation permission Petitioner has also approached various financial institutions for

sanctioning of loan for the Project. However, due to certain developments in the leading public sector banks with regard to examining of the approvals for loan sanction was resulting in delay in granting of sanctions as against ordinary/ expected timeline. Petitioner further informed the Respondent that in spite of the above challenges the Petitioner have already crossed several milestones on the sanctioning of the project loan from M/s Rural Electrification Corporation Limited ("**REC**"). Further, Petitioner along with the said letter also submitted a letter from REC confirming that Petitioner's Project was under review and Project loan was likely to be confirmed by April 2018.

- (c) Subsequently, on 09.07.2018 the entire Project loan was sanctioned by REC and same was also communicated to the Respondents on 12.07.2018.
- (d) Evidently, the Project loan was approved by REC for the entire project on as early as 09.07.2018, therefore, the contention raised by the Respondents that the actual reason for delay in commissioning the Project might be due to delay in achieving Financial Closure and issues in getting fund from the lending agency i.e. REC is completely baseless and has no reasonable standing.
- (e) It is submitted that the Petitioner in compliance with the Lol, reported its Project Financial Arrangements within 180 days from the Lol and further procured loan sanction from REC within a reasonable time.

Therefore, the Respondents by way of the said contention are trying to digress this Commission from the subject matter of the present petition and are trying to mislead the Commission by making such baseless submissions. It is submitted that the Respondent No. 1 is a State Utility and is responsible for distribution of power within the State of Tamil Nadu, it is believed that the Respondent is dealing with arrangements similar to that with the Petitioner on daily basis. Therefore, it would not be wrong to assume that the Respondents are well aware of the financial arrangements and obligations of the party under the contract. It is submitted that as per general business norm, the complete projects debt is sanctioned before commencing the development and like any other prudent developer Petitioner has also achieved Financial Closure on 09.07.2018, soon after signing of the PPA.

(C) *That the petitioner has not taken any effort to execute the plant related activities.*

(a) As already stated above, the Petitioner has taken various activities in relation to balance 50 MW of the Project capacity once it received intimation and confirmation dated 24.01.2020 from TANGEDCO allowing evacuation of 100 MW capacity from the existing Batlagundu substation. The Petitioner had undertaken the following activities for the balance 50 MW capacity in January 2020

- Pile Foundation Works
- Progress for Inverter Control Room

- Civil Works at HT Control Room
- Civil Works in relation to Area Grading (Acre), Boundary Wall Fencing, Internal Road, Switchyard, Transformer Foundation, Watch Tower and Culverts, etc.
- Transmission Line Works and Bay Works

(b) As evident, the Petitioner has already achieved readiness of all infrastructure except one transformer for an additional capacity of 20.9 MW. The Petitioner was able to ready its infrastructure for 20.9 MW additional capacity out of which 16.8 MW is complete in all respect, the balance is waiting for just one 4.2 MVA transformer which got delayed due to COVID-19 restrictions imposed by the authorities on the manufacturer's facility. The CEIG inspection and certification is awaited for the 20.9 MW.

9.9. In view of the foregoing submissions it cannot be disputed that that the delay in achieving commercial operation of the 50 MW capacity by 20.02.2020 and thereafter the balance capacity of 50 MW, has been on account of *inter alia* (a) unavailability of transmission evacuation system and unconditional evacuation approval and (b) outbreak of Covid -19 in China and India, events which have been recognised as Force Majeure Events under the express terms of the PPA.

9.10. Pertinently, the Petitioner has invoked the force majeure clause under the PPA and multiple letters have been issued to TANGEDCO, indicating various

difficulties being faced by the Petitioner herein while implementing the Project as a direct consequence of outbreak of Covid -19 in China and India, and subsequent mitigation measures undertaken by the Central and State Government.

9.11. Notably, the Ministry of New and Renewable Energy (“**MNRE**”) *vide* its Office Memorandum dated 17.04.2020 read with 30.06.2020 has considered the difficulties being faced by the Renewable Power Developers in implementation of their Projects due to lockdown announced by the Government of India and followed by the State Government. Accordingly, it has been directed by MNRE that the period of lockdown i.e. the date of lockdown by the Government of India was imposed till the date on which the lockdown has been removed, will be considered as the period affected by “force majeure” and accordingly, it has been directed by MNRE to allow extension of Scheduled Commercial Operation Date, corresponding to the period of lockdown plus 30 days (after end of lockdown).

9.12. In view of the foregoing it is humbly submitted that the period from 25.03.2020 (announcement of lockdown) and 31.07.2020 (proposed end date of lockdown in the State of Tamil Nadu) is required to be allowed as a Force Majeure Period and extension upto 31.07.2020 has to be allowed to the Petitioner, without subjecting it to any financial prejudice.

9.13. Accordingly, it is prayed that this Commission may be kindly be pleased to:

- (a) Grant extension of Scheduled Commercial Operation Date i.e. 27.09.2019 as stipulated under the Power Purchase Agreement dated 28.09.2017 for a period being suffered by the Petitioner on account of unavailability of transmission evacuation system and unconditional

evacuation approval and outbreak of Covid -19 in China and India, events which have been recognised as Force Majeure Events under the express terms of the PPA, without subjecting the Petitioner to any financial prejudice; and

- (b) Direct the Respondents to indicate the timelines for construction of the Ganguvarpatty substation; and
- (c) Pass any such other and further order(s) that this Hon'ble Commission may deem fit in the facts and circumstances of the present case and in the interest of the justice and equity.

9.14. In view of the detailed submissions made hereinabove, no para-wise rejoinder is being made to the submissions made by TANGEDCO and it is once again humbly prayed that the present Petition be allowed. The Petitioner craves leave of this Commission to supplement its present Rejoinder through additional submissions during the course of arguments as this Commission may deem necessary and proper in the interest of justice.

10. Surrejoinder filed by TANGEDCO on 04-08-2020:-

10.1. The Petitioner has enlarged the scope of D.R.P. and sought fresh reliefs in the name of "Rejoinder Affidavit" which is impermissible and cannot be maintained. In the event this Commission takes this rejoinder affidavit on file and admits it, it will tantamount to enlarging and amending the relief and thus, enlarging the scope of dispute from one which is subject matter of the application in D.R.P. No. 5 of 2020.

10.2. Since, on the merits of the case, the Respondent has already placed its in-depth counter, the Respondent seeks for this Commission to place reliance on the same and treat the counter as part and parcel of this surrejoinder.

10.3. The prime issue raised by the petitioner in its rejoinder is the delay in commissioning of 50 MW solar power plant beyond scheduled date of commissioning and delay in commissioning of balance capacity of 50 MW are due to unavailability of evacuation facility and Covid-19 issue. The same is disputed. From the pleadings, it is evident that the applicant has failed to adhere to the timeline provided in the PPA. Therefore, the Petitioner is not entitled to any reliefs.

10.4. While this Respondent has in detail already dealt with the averments on merits of the case, to the extent averments have been made inconsistent and beyond the pleadings, the Respondent makes the following submissions:

- a. With reference to the averments made in paragraph 2-5, and 8 (A), the same is denied. As per the tender norms and letter of intent, the petitioner has to commission their solar power plant of contracted capacity of 100 MW within scheduled date of commissioning. Commissioning partial capacity of 50 MW and seeking time extension for balance capacity of 50 MW without any contractual penalty is not provided for under the Agreement. It is a default on the petitioner side for not completing their contracted capacity of 100 MW within due date. There are admitted correspondence from the petitioner dated 17.07.2020, assuring the Respondents that the same would be completed shortly. Also, there is a provision in tender specification (page no.16 of typed set-Off take constraints) to grant generation compensation to the bidders for grid unavailability.
- b. The Covid-19 issue started only during November 2019 in China and much recently in India (post January 2020), while the 100 MW was due for commissioning without penalty on 27.09.2019 and with penalty, invocation of

Bank Guarantee, on 27.02.2020 and with liquidated damages till 27.07.2020.

The reason for not achieving the Scheduled Commercial Operation Date (COD) due to Covid-19 issue mentioned by the petitioner in its Rejoinder does not justify the delay from the scheduled date of commissioning.

- c. The reasons for delay in commissioning due to unavailability of transmission system and unconditional evacuation approval stated in the Rejoinder by the petitioner is also unacceptable and the same has been clarified in para 29 of the TANGEDCO's counter affidavit.
- d. With reference to the averments made in paragraph 6, the same is disputed. The Petitioner has failed to themselves establish completion and readiness of unit for commissioning. Even as on 17.07.2020, the Petitioner has admitted non-completion since a transformer, which was necessary for completion, was pending transit. Without having established performance of their part of the Agreement, the Petitioner is only attempting to fasten liability on the Respondents. The status report has been filed dated 17.07.2020, after site inspection, wherein, it was found that:-

“...

2) At location 18 the transformer was not yet erected. The firm informed that the 4.2 MVA transformer is under transit.

3) The safety certificate is also not yet received from CEIG. The developer is instructed to inform to this office after completion of all the pending works at site.”

- e. Moreover, Clause 26 of PPA/Clause 16 of Letter of Intent, stipulates as follows:-

“In case, the Commissioning of the Project is delayed beyond 10 months from the scheduled date of commissioning, the PPA capacity shall stand reduced/amended to the Project Capacity Commissioned and the PPA for balance capacity will stand terminated and shall be reduced from the select Project Capacity. Also, if the project is not commissioned beyond 10 months from the scheduled date of commissioning, the PPA will stand terminated.”

- f. The PPA/Letter of Intent governing the parties does not provide for extension of time for commissioning beyond 10 months from the scheduled date of commissioning (i.e., 10 months from 28.09.2019), while so the relief sought for extension cannot be maintained before this Hon'ble Commission, especially since the Petitioner have in their pleadings not justified delay.
- g. With reference to the averments made in paragraph 7, the same is denied. Especially para 7(d), since TANGEDCO has informed the petitioner vide letter dated 31.05.2019 that “TANGEDCO shall extend all support for evacuating the power from the proposed 100 MW solar power plant at Ganguvarpatti Village, Periyakulam Taluk, Theni District under tender scheme on completion of all works within due date”. (Please refer page no.67 of typed set).
- h. In para 8(A) (f) of the Rejoinder, the petitioner has stated that the Batlagundu SS is not connected with Ganguvarpatti SS. TANGEDCO has issued connectivity approval to the petitioner to evacuate solar power from the proposed 100 MW solar power plant through Batlagundu 110 KV SS, on

06.01.2018. The petitioner company has also commissioned their 50 MW solar power plant on 20.02.2020 and evacuating power through Batlagundu SS only. The proposed Ganguvarpatti 230 KV SS is a new substation and erection activities are under initial stage. It was never the stand of TANGEDCO in its affidavit that Batlagundu SS will be connected with Ganguvarpatti SS.

- i. While also, the similar contenders and bidders who are placed along with the Petitioner, with the similar tender conditions and contract terms, have completed their end of the PPA. Hence, the Petitioner cannot attempt to blame the Respondents for its own default.
- j. With reference to the averments made in paragraph 8 (B), the same is denied. The petitioner states that they have submitted financial closure of the project on 09.07.2018. As per the tender norms, the petitioner shall achieve financial closure within 180 days from the date of signing of PPA i.e on or before 27.03.2018. They are evidently and as per their own admission, in breach of the PPA.
- k. With reference to the averments made in paragraph 8 (C), the same is denied. Even in para 8(C)(b), the 1st Respondent admits to the delay, with a transformer for an additional capacity of 20.9 MW not yet installed and in transit. While the Petitioner attempts to take shelter behind Covid-19, no justification as to the delay for readiness of the 20.9 MW from 27.09.2019 till inception of Covid period has been stated.
- l. With reference to the averments made in paragraph 9 to 14, the same is denied. Force Majeure is inapplicable to the current situation, especially when the delay pertains to the period of 2019, hence neither the 'Force

Majeure' nor the Office Memorandum dated 30.06.2020 shall come to the rescue of the Petitioner.

10.5. For all other averments in the Rejoinder, the details have already been furnished in TANGEDCO's counter affidavit.

10.6. The 1st Respondent reserves its right to make further objections in due course.

11. Counter Affidavit filed on behalf of the 2nd Respondent (TANTRANSCO):-

In the counter affidavit filed on 25-08-2020, TANTRANSCO has submitted as follows:-

11.1. The prime issue raised by the petitioner is the delay in commissioning of 50 MW solar power plant beyond scheduled date of commissioning and delay in commissioning of the balance capacity of 50 MW are due to unavailability of evacuation facility and Covid-19 issue. The same are disputed. From the pleadings, it is evident that the petitioner had failed to adhere to the timeline provided in the PPA. Therefore, the petitioner is not entitled to any relief.

11.2. While the 1st and 3rd Respondents have in detail already dealt with the averments on merits of the case, this respondents intends to counter only to the limited extent of inconsistent pleadings made by the petitioner in the rejoinder, this Respondent makes the following submissions:

- a. As per the tender norms and letter of intent, the petitioner has to commission their solar power plant of contracted capacity of 100 MW within scheduled

date of commissioning. Commissioning partial capacity of 50 MW and seeking time extension for balance capacity of 50 MW without any contractual penalty is not provided for under the Agreement. It is a default on the part of the petitioner, for not completing their contracted capacity of 100 MW within due date. There is an admitted correspondence dated 17.07.2020 from the petitioner, assuring the Respondents, that the commissioning would be completed shortly. Also, there is a provision in tender specifications to grant generation compensation to the bidders for grid unavailability.

b.I. Strengthening of existing 110 KV DC Theni- Sembatty I and II feeder with Wolf conductor by HTLS conductor was administratively vide (Per) CH T ANTRANSCO Proceedings No: 5 dated 06.01.2015 for an amount of Rs.2903.28 Lakhs. The current carrying capacity of HTLS (Wolf equivalent) conductor is 1.5 times of the ampacity of the conventional wolf conductor i.e. about 105 MVA.

II. For the above works, in principle approval accorded for availing grant from PSDF vide (Per) CH T ANTRANSCO Proceedings No; 122 dated 09.08.2018 for an amount of Rs 3841.23 Lakhs for reconductoring of 110 KV Theni - Sembatty I and II feeders with Carbon composite core conductor. But not accepted for PSDF grant. Revised proposal is to be sent up for sanction.

III. Strengthening of existing Kundah conductor in 230 KV Sembatty - Checkanurani feeder with Zebra conductor was administratively approved (Per) CH T ANTRANSCO Proceedings No: 178 dated 21.10.2016 for an amount of Rs.2394.95 Lakhs Gross.

- iv Dependent on the previous work. Erection of an additional 230 KV line between Sembatty 230 KV SS and Checkanurani 230 KV Switching Station was administratively approved (Per) CH TANTRANSCO Proceedings No.39 dated 14.02.2017 for an amount of Rs.948.48 Lakhs.

11.3. TANGEDCO and TANTRANSCO are in the constant process of upgrading their systems matching the advent of new technology, minimizing the losses, to avoid low voltage and system improvement to accommodate the load growth both in rural and urban areas. The above works have been sanctioned during the year 2015-2018.

11.4. As a matter of routine, in order to upgrade the system, pre connectivity works were recommended by Panning Wing taking into account the load growth and these works were initiated as early as in the year 2014-15 itself for strengthening the existing infrastructure of TANGEDCO/TANTRANSCO. Hence, the pre-connectivity works mentioned in load flow study result are already under consideration/implementation, but not specific to this 100 MW load flow study for evacuating the proposed 100 MW solar power plant of petitioner company. Hence, the reason for the delay in commissioning the contracted capacity of 100 MW within scheduled date of commissioning stated by the petitioner is not at all related to the delay caused in executing pre-connectivity works by TANGEDCO / TANTRANSCO.

11.5. The Covid-19 Pandemic originated only during November 2019 in China and much recently in India (post January 2020), while the 100 MW was due for commissioning as per the power purchase agreement dated 28.09.2017 mentioned below:-

Without penalty	27.09.2019
With penalty - invocation of Bank Guarantee	27.02.2020
With Liquidated Damages	27.07.2020

11.6. The reason for not achieving the Scheduled Commercial Operation Date (COD) due to Covid-19 issue mentioned by the petitioner in its Rejoinder does not justify the delay from the scheduled date of commissioning.

11.7. The petitioner has stated that the Batlagundu SS is not connected with Ganguvarpatti SS. TANGEDCO has issued connectivity approval to the petitioner to evacuate solar power from the proposed 100 MW solar power plant through Batlagundu 110 KV SS, on 06.01.2018. The petitioner company has also commissioned their 50 MW solar power plant on 20.02.2020 and evacuating power through Batlagundu SS only. The proposed Ganguvarpatti 230 KV SS is a new substation and erection activities are under initial stage. It was never the stand of the respondents that Batlagundu SS will be connected with Ganguvarpatti SS

- (a) As per the revised Master Plan XII, approval was accorded for proposing a 230 KV substation in and around Batlagundu 110 KV SS or Nilakottai 110 KV SS as per Lr No.SE/PLG/EMP/A3/F.Revised Master Plan/D.134/14 dated 28.03.2014. Land identification for the same and the corresponding works are being carried out by

TANTRANSCO and TANGEDCO. During the above process, land has been identified at Ganguvarpatty Village for establishment of a 230 KV Substation near Batlagundu. It is evident that the above 230 KV Substation is planned long back and not for the power evacuation of the project by M/s. Solitaire BTN Solar Private Power plant.

- (b) In the letter ref: SolitarireBTN/100 MW Solar-TN/DG/2018-19/29052019 dated 29.05.2019 addressed by M/s. Solitaire BTN Solar Private Power plant to the Director/Generation/Chennai, it has been stated that "there is already an approval to set up a 230 KV Substation near their plant. However, government process of acquiring land is time consuming and may take 9 months. In these circumstances, "if we arrange 10 acres of land near solar plant area and give it to TANGEDCO, then 230 KV SS can be set up in a very short time". From the above statement, it is evident that the petitioner is aware that a Substation at Ganguvarpatty village is going to be established only for the sake of network improvement and not for the power evacuation of the M/s. Solitaire BTN Solar Private Power Plant.
- (c) In case of establishment of the Substation at Ganguvarpatty is primarily for the power evacuation of the petitioner, the entire cost of the establishment of the Substation Rs.18,772/- Lakhs (Approx) has to be borne by the petitioner as per rules and regulations for the Deposit Contribution Works in TANGEDCO /TANTRANSCO. Similar commitments have not been made or fulfilled by the petitioner.

- (d) The cost of the land offered by M/s.Solitaire BTN Solar Private Power plant, at Ganguvarpatty Village as per the Registration of sale deed is Rs.5,64,000/- (Five Lakhs sixty four thousand only) registered on 26.09.2019. Registration charges, stamp duty, etc borne by TANTRANSCO is Rs.62,850/- for the above sale deed. Whereas the estimated cost of the establishment of new 230/110 KV Ganguvarpatti (Batlakundu) substation with 2 X 100 MVA,230/110KV ratio Auto transformers at Ganguvarpatti Village, Periyakulam taluk, Theni District located near Batlakundu in Madurai operation circle of Madurai region is Rs.18,772/-Lakhs (Rupees Eighteen Thousand Seven Hundred and Seventy two Lakh only) Gross&Nett.

11.8. The similar contenders and bidders who were declared as successful bidders along with the petitioner, with the similar tender conditions and contract terms, have completed their end of the PPA. Hence, the Petitioner cannot attempt to blame the Respondents for its own default.

11.9. The 1stRespondent admits to the delay, with a transformer for an additional capacity of 20.9 MW not yet installed and in transit. While the Petitioner attempts to take shelter behind Covid-19, no justification as to the delay for readiness of the 20.9 MW from 27.09.2019 till inception of Covid period has beenstated.

12. Reply affidavit by the petitioner filed on 07-09-2020 to the Sur-Rejoinder affidavit filed by the Respondent No.1 (TANGEDCO):-

12.1. Despite the progress of the Project being affected by the reasons *not* attributable to the Petitioner and beyond its control, the Petitioner was still able to commission 50 MW out of 100 MW capacity on 20.02.2020. The delay in achieving commercial operation of the balance capacity of 50 MW, has been on account of *inter alia* (a) unavailability of transmission evacuation system and unconditional evacuation approval and (b) outbreak of Covid -19 in China and India, events which have been recognised as Force Majeure Events under the express terms of the PPA.

12.2. The Respondent is wrong to claim that seeking time extension without any contractual penalty is not provided for under the Agreement. As per the Clause 16 of the PPA i.e. Force Majeure, *inter alia* provided that “*Both parties shall ensure compliance of the terms of this agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of this agreement to the extent that such failure is due to force majeure events*”

12.3. If a delay is caused due to an event beyond the control of the Petitioner then in that case, as per the PPA an extension of SCOD shall be granted and no claim for any loss or damage can be made.

12.4. As per the tender norm i.e. RfS, as well as the letter of intent, it is Respondent's responsibility to provide connectivity for the Project being developed by the Petitioner. In this regard it is pertinent to note that as per industry practice and judicial precedent the transmission/connectivity work and project development are kept in sync to assure timely commissioning and commercial operation of the power plant.

12.5. The Respondents have completely ignored the fact and are trying to surpass the default on part of the Respondents i.e. providing a conditional connectivity, wherein subject to completion of certain conditions the connectivity would become absolute.

12.6. The existing power being generated by the Petitioner is being evacuated from an alternate substation i.e. Ganguvarpattisubstation instead of the original substation as per letter dated 06.01.2018 i.e. Batlagundu substation. Further, as per Respondents own admission it is evident that once the construction work of Ganguvarpatti substation is complete the connectivity from the Petitioner's Project will be shifted from Batlagundu substation causing expense of another connectivity line to constructed by the Petitioner.

12.7. The subsequent to confirmation for availability of connectivity being provided by the Respondent on 27.08.2019 for 60 MW of the Project, Petitioner being ready with all the precast work was able to commission 50 MW of the Project within 176 days i.e. 20.02.2020, from such approval being granted by the Respondents. Further, subsequent to approval for 100 MW connectivity being provided by the Respondent on 24.01.2020, the Petitioner has been making all the efforts to commission the remaining 50 MW of the plant at the earliest and even with all the disruptions caused at the Project site as well as the in movement of labors and project development material due to COVID-19, the Petitioner achieved readiness of another 25 MW on 18.08.2020.

12.8. 15 of the RfS clearly provide that "during the operation of the plant, there can be some period where the plant can generate power but due to temporary transmission unavailability, the same does not happen". The Respondent has

unjustifiably relied upon the said provision and the same applies during the operations of the plant, whereas the Respondent has completely ignored clause 22 of the same documents, where is specifically provided that TANGEDCO will provide the transmission system to facilitate evacuation of power from the project, including connectivity with the grid.

12.9. It is reiterated that the delay in achieving the SCOD was on account of delay in providing connectivity by the Respondents and that since the Respondents gave connectivity confirmation of 60 MW out of 100 MW Project on 27.08.2019 i.e. 30 days before the SCOD, subsequent to which Petitioner has commissioned 50 MW of the Project on 20.02.2020, and confirmation for complete 100 MW of Project was provided only on 24.01.2020, subsequent to which the Petitioner has made all the efforts to commission the Project at the earliest.

12.10. The disruption due to COVID-19 was already in effect at the time of granting of the 100 MW connectivity i.e. 24.01.2020, therefore, the delay caused in commissioning of the Project was beyond Petitioner's control and therefore, the same shall be considered to be a force majeure event under per the PPA.

12.11. Even though the Respondents conducted a load flow study and proposed to connect the Project to Batlagundu SS, however, the said connectivity was subject to completion of four conditions. The Respondents have themselves apprised the Petitioner that the capacity of the Batlagundu SS was full and for any further evacuation, including evacuation of power from Petitioner's Project, the Respondent will have to undertake the four conditions, making them a condition precedent to evacuation of power from the Project of the Petitioner.

12.12. The Respondents have failed to provide an unconditional/reliable connectivity to the Petitioner. Further, even though the pre-connectivity works mentioned in load flow study result was conducted by the Respondent are already under consideration/implementation, however, only one out of the four pre-connectivity works has been completed till date.

12.13. The above connectivity approval another 40 MW on 24.01.2020, the Petitioner though being affected by COVID-19 since January 2020 has still made continuously efforts to commission to remaining project at the earliest and as on 18.08.2020, Petitioners has successfully received CEIG approval for another 25 MW, in addition to the 50 MW which achieved commercial operation on 20.02.2020, subsequent to which Respondent No. 1 has inspected the site on 20.08.2020, and we are awaiting for connectivity to the grid.

12.14. Clause 14 of the PPA relied upon by the Respondents cannot be read in isolation with the rest of the PPA and has to be read along with the other clauses of the contract/PPA. In this regard it is pertinent to note that Article 16 of the PPA i.e. Force Majeure, and has been already quoted in para 8 above, it is submitted that since the delay caused due to COVID-19 is beyond the control of the Petitioner, therefore, the same would be covered under the Force Majeure clause of the PPA. Accordingly, the date for automatic termination as per Clause 14 of PPA has to be considered extended corresponding to such delay caused due to COVID-19 and delay on account of non-availability of connectivity.

12.15. In the present case the express terms of the PPA clearly states that the Petitioner cannot be in any manner stands to be prejudiced where it is unable to

meet any milestone / perform any obligation under the contract if the same is for the reasons of force majeure. Therefore, the Petitioner cannot be treated similar to other projects where the bidders have completed their end of the PPA.

12.16. The Lol was issued to the Petitioner on 29.08.2017, where after on 26.03.2018 the Petitioner wrote a letter to the Respondent No.1 informing that the Petitioner has submitted the required land details, has received load flow approval and other requirements as per the Lol.

12.17. The Petitioner further informed the Respondent that subsequent to the land and evacuation permission Petitioner has also approached various financial institutions for sanctioning of loan for the Project. However, due to certain default made by the lenders and fraudulent undertaking discovered in the Punjab National Bank Scam by Nirav Modi, caused developments in the leading public sector banks with regard to examining of the approvals for loan sanction, resulting in delay in granting of sanctions as against ordinary/ expected timeline.

12.18. The Petitioner had kept the Respondent regularly informed about such developments, wherein the Petitioner on 26.03.2018 had conveyed to the Respondents that in spite of the above challenges the Petitioner has crossed several milestones on the sanctioning of the project loan from M/s Rural Electrification Corporation Limited ("**REC**").

12.19. The Petitioner along with the said letter also submitted a letter from REC confirming that Petitioner's Project was under review and Project loan was likely to be confirmed by April 2018. Subsequently, on 09.07.2018 the entire Project loan

was sanctioned by REC and same was also communicated to the Respondents on 12.07.2018.

12.20. The Respondent in the Counter Affidavit under para 35 contended that “*As per the terms and conditions of Letter of Intent, the company has not furnished Financial Closure within 180 days from the date of PPA for the contracted project capacity of 100 MW and as per their letter dated 06.01.2020, they have approached M/s.Rural Electrification Corporation of India only after 2 years from the date of PPA for financing for the balance capacity out of 100 MW*”, however, by way of the Surrejoinder dated 05.08.2020, the Respondents for the first time are now claiming that submission of financial closure on 09.07.2018 is a breach of the PPA.

13. Rejoinder filed on 08-09-2020 to the Counter Affidavit filed by TANTRANSCO:-

13.1. The present petition seeking indulgence of the Commission to mitigate the issues arising due to delay in achieving Scheduled Commercial Operation Date (“SCOD”) of the 100 MW Solar PV Project at village Ganguvarpatti, Periyakulum Taluk, District – Theni, Tamil Nadu (“Project”), as stipulated in the Power Purchase Agreement dated 28.09.2017 executed between the Petitioner and the Respondent No.1 – Tamil Nadu Generation & Distribution Corporation Limited (“TANGEDCO”) for being affected by the reasons beyond the control of the Petitioner.

13.2. Despite the progress of the Project being affected by, for the reasons *not* attributable to the Petitioner and beyond its control, the Petitioner was still able to commission 50 MW out of 100 MW capacity on 20.02.2020. It is the case of the

Petitioner that the delay in achieving commercial operation of the 50 MW capacity by 20.02.2020 and thereafter the balance capacity of 50 MW, has been on account of *inter alia* (a) unavailability of transmission evacuation system and unconditional evacuation approval and (b) outbreak of Covid -19 in China and India, events which have been recognised as Force Majeure Events under the express terms of the PPA.

13.3. The submissions/ averments made by TANTRANSCO in its Counter Affidavit dated 24.08.2020 are denied as being unsustainable, unjustifiable and devoid of merits. The contents of the Counter Affidavit clearly reflect the knowledge and deliberate attempt of TANTRANSCO to mislead this Commission. The averments made therein are founded on a palpably erroneous and deliberate misapplication of the express provisions of Tamil Nadu Electricity Regulatory Commission (Grid connectivity and Intra-State Open Access) Regulations, 2014 ("Connectivity & Access Regulations 2014"), the express terms of the PPA, and the judicial precedents.

13.4. TANTRANSCO vide its Counter Affidavit dated 24.08.2020, has failed to demonstrate its case justifying its failure to provide unconditional evacuation approval for the entire contracted capacity of 100 MW from the Petitioner's Project. By way its Counter Affidavit, TANTRANSCO has made the following averments:

- I. That as per the Request for Selection dated 20.05.2017 ("RfS") and letter of intent dated 29.08.2017 ("LoI"), the Petitioner has to commission its Project of contracted capacity of 100 MW within SCOD. Commissioning partial

capacity of 50 MW and seeking time extension for balance capacity of 50 MW without any contractual penalty is not provided under the PPA.

- (a) In this regard the contention raised by the TANTRANSCO is based on misinterpretation of the terms of the RfS and Lol, and hence is devoid of merits. TANTRANSCO is wrong in claiming that seeking time extension without any contractual penalty is not provided under the Agreement.
- (b) Clause 16 of the PPA i.e. Force Majeure, provides as under:

“Both parties shall ensure compliance of the terms of this agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of this agreement to the extent that such failure is due to force majeure events as defined here under.

....

“Force Majeure” events means any event which is beyond the control of the parties involved which they could not foresee or with a reasonable amount of diligence could not have been foreseen or which could not be prevented and which substantially effect the performance by either party such as but not limited to:-

- (i) Acts of natural phenomena, including but not limited to floods, droughts, earthquake, lightning and epidemics;*
- (ii) Acts of any Government domestic or foreign, including but not limited to war declared or undeclared, hostilities, priorities, quarantines, embargoes;”*

- (c) Therefore, as per the RfS, the Lol and the PPA if a delay is caused due to an event beyond the control of the Petitioner then in that case an extension of SCOD shall be granted and no claim for any loss or damage can be made.
- II. The pre connectivity works mentioned in the load flow study are already under consideration/implementation. However, the same has nothing to do with Petitioner's Project as TANGEDCO has issued connectivity approval to the Petitioner to evacuate power from the Solar Plant on 06.01.2018.
- (a) Even though the TANTRANSCO conducted a load flow study and proposed to connect the Project to Batlagundu SS, however, the said connectivity was subject to completion of four conditions. The Respondents have themselves apprised the Petitioner that the capacity of the Batlagundu SS was full and for any further evacuation, including evacuation of power from Petitioner's Project, the Respondents will have to undertake the four conditions, making them a condition precedent for evacuation of power from the Project of the Petitioner.
- (b) As per TANTRANSCO's own admission as well as the Status Report, it is evident that TANTRANSCO till date has completed only one out of the four conditions under the conditional connectivity approval granted on 06.01.2018.
- (c) The RfS and the Lol specifically provided that TANTRANSCO/ TANGEDCO will provide the transmission system to the Petitioner to

facilitate evacuation of power from the Project, including connectivity with the grid. The relevant clause of the RfS is captured hereunder:

“22.0) Role of STU/TANGEDCO:

The STU/TANGEDCO will provide transmission system to facilitate evacuation of power from the projects which may include the following:

a. Provide connectivity to the solar projects with the grid.”

The same provision is also mirrors under the Lol as Clause 11.0.

- (d) Since the pre-connectivity works mentioned in load flow study result conducted by the Respondents are under consideration/implementation, however, only one out of the four pre-connectivity works has been completed till date. Therefore, due to non-compliance by the Respondents to the condition precedent to the connectivity of the Project to Batlagundu SS, and for no fault of the Petitioners, the Petitioners have suffered delay in confirmation of connectivity and consequently a delay in commissioning of the Project.

III. Clause 15 of the RfS provides for generation compensation in case of grid unavailability, therefore non availability of evacuation cannot be a ground for delay in commissioning of the Project.

- (a) Clause 15 of the RfS cannot be relied upon in the present case, as the same applies only during the ‘operation period’ of the plant. Clause 15 of RfS clearly provides that “during the operation of the plant, there can be some period where the plant can generate power but due to temporary transmission unavailability, the same does not happen.

(b) TANTRANSCO has wrongly relied upon the said provision, and has further ignored clause 22 of the same document wherein it is explicitly provided that the TANTRANSCO would be responsible for providing the connectivity for the Petitioner's Project to the grid.

(c) The non-performance of the Respondents (which led to non-availability of evacuation line for the Project) has inevitably caused delay in commissioning of the Project. The Lol provides as under:

"8.0) Connectivity with the Grid:

....

v. STU/TANGEDCO shall endeavour to match the commission of transmission system with the commissioning of the solar projects."

(d) The subsequent to confirmation for availability of connectivity being provided by the Respondents on 27.08.2019 for 60 MW of the Project, Petitioner being ready with all the precast work was able to commission 50 MW of the Project within 176 days i.e. on 20.02.2020.

(e) Further, subsequent to approval for 100 MW connectivity being provided by the Respondent on 24.01.2020, the Petitioner has been making all the efforts to commission the remaining 50 MW of the plant at the earliest and even with all the disruptions caused at the Project site as well as the movement of labourers and project development material due to COVID-19, the Petitioner achieved readiness by obtaining CEIG certificate for another 25.09 MW on 18.08.2020.

(f) TANTRANSCO has also taken a stand that the establishment of Substation at Ganguvarpatti is primarily for the power evacuation of the

Petitioner's Solar Plant, therefore, the entire cost of the establishment has to be borne by the Petitioner as per the rules and regulations, and that similar commitment has not been given or fulfilled by the Petitioner. It is incorrect for TANTRANSCO to take such a position since under the PPA, Petitioner is only obligated to bear the cost of the interconnecting line from the generating station to the Substation. In fact, such construction of interconnecting line since has already been undertaken by the Petitioner. The cost has been borne by itself. It is the case of the Petitioner that the reason for constructing Ganguvarpatti Substation is failure of TANGEDCO/TANTRANSCO to allow 100% power evacuation from Batlagundu Substation. There is no denying of the fact that the pre-connectivity activities for Batlagundu Substation have not been completed till date. It was in this background and with an intent to expedite evacuation from the Power Plant that the Petitioner suggested construction of an alternate Substation, which was accepted by the Respondents. Whereafter the Petitioner on its own cost acquired land for construction of Ganguvarpatti Substation and transferred the same to the Respondents.

- (g) The Petitioner cannot be saddled with the entire cost for the transmission assets created for evacuation of power from the Petitioner's Project since the same is contrary to law.

IV. The Covid-19 pandemic originated only during November 2019 in China and much recently in India (post January 2020), since the SCOD was

27.09.2019, the Covid-19 cannot be a reason for delay in achieving the SCOD of Solar Plant.

- (a) As per TANTRANSCO's own admission it is clear that disruption due to Covid-19 started "*during November 2019 in China and much recently in India (post January 2020)*". Therefore, even though the Petitioner have been making all the efforts in completion of the Project development, however, the disruption due to COVID-19 was already in effect at the time of granting of the 100 MW connectivity i.e. 24.01.2020.
- (b) Therefore, the delay caused in commissioning of the Project due to the disruption caused to the Petitioner and its supply vendors is beyond Petitioner's control and therefore, the same has to be considered to be a force majeure event under per the PPA. Accordingly, the Petitioner issued letters to TANGEDCO invoking the force majeure clause under the PPA, and indicating various difficulties being faced by the Petitioner while implementing the Project as a direct consequence of outbreak of Covid -19 in China and India, and subsequent mitigation measures undertaken by the Central and State Government.
- (c) Notably, the Ministry of New and Renewable Energy ("MNRE") *vide* its Office Memorandum dated 17.04.2020 read with 30.06.2020 and 13.08.2020, has also considered the difficulties being faced by the Renewable Power Developers in implementation of their Projects due to lockdown announced by the Government of India and followed by the State Government. Accordingly, it has been observed by MNRE that the

period from March 25, 2020 to August 24, 2020 shall be granted as a blanket extension to the RE Developers, including the Petitioner herein.

13.5. The Petitioner cannot be treated similar to other projects where the bidders have completed their end of the PPA. In the present case the express terms of the PPA clearly states that the Petitioner cannot be in any manner stands to be prejudiced where it is unable to meet any milestone / perform any obligation under the contract if the same is for the reasons of force majeure.

13.6. The non-availability of connectivity for evacuation of power from Petitioner's Project, which as per the RfS and Lol is Respondents obligation, is an event beyond the control of the Petitioner, and the Petitioner could not have done anything beyond applying for the connectivity approval and seeking time to time update on the same. Further, since Covid-19 pandemic is also an event beyond the control of the Petitioner, the period equivalent to the period of disruption caused due to Covid -19 and delay caused due to non-connectivity is required to be allowed as a Force Majeure Period and corresponding extension has to be allowed to the Petitioner, without subjecting it to any financial prejudice.

14. Amendment Petition in I.A. No.4 of 2020 in D.R.P. No.5 of 2020:-

The I.A. No. 4 of 2020 has been filed by the petitioner on 08-09-2020 to amend the petition in D.R.P. No.5 of 2020 and also he has made the following additional grounds:-

14.1. It is submitted that even though the approval for evacuation was provided by the Respondents on as late as 27.08.2019 for 60 MW, and on 24.01.2020 for remaining 40MW (total 100 MW), of power from the Project, causing delay in commissioning of the Project beyond SCOD. Nevertheless, the Petitioner being prepared with the pre-casting and other civil work was able to commission 50 MW of power on as early as 20.02.2020 itself. Further the Petitioner made continuous efforts to commission the remaining 50 MW of power at the earliest, in which the Petitioner has achieved readiness for 25 MW and Chief Electrical Inspector of Government (“**CEIG**”) certificate was issued on 18.08.2020.

14.2. The Petitioner is severely affected by the outbreak of novel COVID-19 virus from middle of January 2020. Since the consequent delay due to COVID -19 is beyond the control of the Applicant, the same falls squarely under the definition of a Force Majeure event as per terms of the PPA. Having regard to the said event being subsequent to the filing of the captioned Petition and is causing delay in commissioning of the Project on account of Force Majeure. Accordingly, the Applicant by way of the present application craves the leave of this Commission to bring on record the sequence of documents demonstrating the case of the Petitioner of being affected by the force majeure and consequent delay in achieving commercial operations of the balance 50 MW capacity of the Project and also bringing on record the subsequent documents/events. The subsequent para numbers and annexure numbers in the original Petition may stand added. The petitioner filed the above I.A. for amendment of the pleading for bringing on records which in its view are subsequent facts as follows:-

- (I) To be added after para 38 under the heading “RELEVANT BACKGROUND FACTS”

“38A. On 27.09.2019, TANGEDCO without clarifying the timelines for either completing the pre-commissioning works at Batlagundu SS or on the status of Ganguvarpatti SS, merely wrote to the Petitioner herein that “TANGEDCO shall extend all support for evacuating power from the SPV Project. Evidently, TANGEDCO even on the purported SCOD date could not provide clarity as to evacuation of power from the Petitioner’s Project.

38B. On 01.10.2019, the Petitioner handed over Sale Deed of the land identified for construction of Ganguvarpatti SS to TANGEDCO. It is submitted that once the assurance was given by TANGEDCO on 27.08.2019 that 60 MW of the Project capacity will be evacuated through Batlagundu SS (although with no certainty whatsoever), the Petitioner made all efforts towards completion of the Project and was able to achieve readiness of the 52 MW capacity as on 10.12.2019 (around 3 months). It is pertinent to point out that the readiness of 52 MW capacity as on 10.12.2019 was in fact accepted by TANGEDCO, however, the request for extension was not responded in affirmative. In fact, on 31.12.2019, the Respondent (NCES/TANGEDCO) inspected the Project Site for confirming the readiness of the Project to the extent of 52 MW. On 06.01.2020, the Petitioner herein once again informed

TANGEDCO about its readiness to the extent of 52 MW and sought grid tie-up to such extent. Therefore, by no stretch of imagination, the delay in commissioning of the first 50 MW capacity by the Petitioner can be made attributable to the Petitioner, since it was ready as early as on 10.12.2019 and the same was affirmed by TANGEDCO as well. It is pertinent to point out that TANGEDCO was continuously followed up and informed regarding the concerns raised by the lenders – REC Limited, on the limited evacuation allowed which in turn raised concerns on the viability of the Project. In fact, REC Limited also approached TANGEDCO seeking clarity in relation to the extent evacuation will be allowed from Batlagundu SS. However, even the lenders were not afforded any clarity by TANGEDCO.

- 38C. On 08.01.2020, once the CEIG certificate for the 50 MW capacity was received by the Petitioner, the Petitioner herein immediately approached TANGEDCO and requested to expedite the grid tie-up approval and a meeting in this regard was attended with TANGEDCO officials on 09.01.2020. It was after such meeting and continuous follow ups that the Petitioner was for the first time on 24.01.2020 assured of evacuation of the 100 per cent capacity i.e. 100 MW from the existing Batlagundu SS. It was also informed that once the Ganguvarpatti SS will be constructed, the Petitioner's load will be shifted to the new SS. Pertinently, TANGEDCO was able to

assure 100 MW evacuation from the existing Batlagundu SS only because, it has shifted certain other connected load from the Batlagundu SS to other SS. Such shifting of load since happened in December 2019, TANGEDCO was in a position to assure the Petitioner herein that 100 MW may be evacuated through the existing Batlagundu SS. Evidently, TANGEDCO could not have evacuated 100 MW power from the Petitioner's Project prior to December 2019.

38D. Meanwhile, in January 2020, the Petitioner was informed through its EPC about one of the solar module supplier, who was affected by the outbreak of Covid-19 in China and India. Therefore, the procurement schedule of the solar modules for the balance capacity was being affected due to such occurrence of Covid -19 in China and India. The Petitioner was affected by the outbreak of novel COVID-19 virus and consequent disruption caused in India and China, from middle of January 2020, as several materials required by Applicant's vendor for production of the supplies for the Project site are imported from China.

38E. The Petitioner herein, while keeping the constant check on the folding situations in China and India due to outbreak of Covid-19, was still able to achieve commissioning of its first 50 MW on 20.02.2020. Notably, during the month of February 2020, the Petitioner kept a constant vigil on the schedule of delivery

of various materials important for commissioning of the Project (balance 50 MW) and continued to undertake site related activities (such as civil works) to mitigate the delay being caused as a direct impact of the outbreak of Covid-19 in China and India.

38F. On 21.03.2020, considering the impairment caused to the completion of balance 50 MW capacity, by the outbreak of Covid-19 in China and India, the Petitioner issued a Force Majeure Notice to TANGEDCO. The Petitioner informed TANGEDCO about the disruption, including the difficulties being faced in deployment of work force, movement of supplies, and other such problems due to the outbreak of COVID-19, and its direct impact upon the Project completion timelines. Since the event causing the said disruption was beyond the control of the Petitioner, accordingly, the Petitioner invoked the Force Majeure Clause (Article 16) under the PPA and notified TANGEDCO that no cause of action for breach or liability will arise as a consequence of the said impact/delay, as COVID-19 falls squarely under the definition of a Force Majeure Event. Notably, the force majeure claimed by the Petitioner remains uncontested by TANGEDCO till date.

38G On 25.03.2020, the Ministry of Home Affairs, Government of India *vide* its Notification of same date announced country wide lockdown and restricting the movement (intrastate and interstate) till 14.04.2020. It was also announced that the State

Government were required to issue consequent notifications. With construction activities coming to a complete standstill, the Petitioner immediately informed that same to TANGEDCO *vide* its letter dated 31.03.2020 about the issues being faced in the completion of the balance 50 MW capacity of the Project.

38H. On 17.04.2020, the Central Government announced certain relaxation in intrastate and interstate movements w.e.f. 20.04.2020, however, despite such relaxation announced by the Central Government, the State Government continued with the restriction in movement. Notably, despite the relaxations allowed by the Government for construction by renewable projects, the Petitioner faced several constraints in availability of work force / skilled and unskilled labours, men and material etc. for proceeding with the construction related activities at the Project site. In this regard, such situation was also once again communicated to TANGEDCO *vide* letter dated 26.05.2020.

38I. Subsequently, the Petitioner herein in order to mitigate the already existing delays in commissioning of the balance 50 MW capacity, tried to engage local authorities to seek release of permits for getting the workforce from other states or neighbouring districts. However, due to restriction in movement still continuing in the State pursuant to the State Government notification, the same took time. In fact, many of the requests made by the vendors/suppliers/sub-contractors were not responded in affirmative by the local authorities. Considering

the partial impairment due to which the construction activities could not be undertaken with full efficiency, the Petitioner, immediately informed TANGEDCO of the same

38J. In view of the disruption caused due to COVID-19, the Ministry of New and Renewable Energy (“MNRE”) vide its Office Memorandum dated 17.04.2020 and 30.06.2020 has considered the difficulties being faced by the Renewable Power Developers, including the Petitioner, in implementation of their projects due to lockdown announced by the Government of India and followed by the State Government. Accordingly, it has been observed by MNRE that the period of lockdown i.e. the date of lockdown by the Government of India was imposed (25.03.2020), till the date on which the lockdown has been removed (31.07.2020), will be considered as the period affected by “force majeure” and accordingly, allow extension of SCOD, corresponding to the period of lockdown plus 30 days (after end of lockdown). In addition to above, it may also be noted that the State Government of Tamil Nadu has extended the lockdown in the State till 31.08.2020 *vide* its Circular dated 31.07.2020.

38K. The Petitioner continuing to be affected by the force majeure events as narrated hereinabove, i.e. disruption in supply chain of material in China and India along with unavailability of men and material during the lockdown period and further other consequent issues impacting the progress of the Project (being

squarely covered as Force Majeure Events under the PPA), still managed to put up around 20.9 MW on 09.07.2020 (expect one transformer of 4.182 MVA) was ready at the Petitioner's end. Subsequently, upon receiving the transformers, the Petitioner received CEIG certification of additional 25 MW (in excess of the already commissioned 50 MW) on 18.08.2020. Therefore, as on 14.08.2020 (i.e. the date of inspection by CEIG) the Petitioner achieved 25 MW of additional capacity. Meanwhile, on 12.08.2020, Solitaire *vide* its letter of the same date requested TANGEDCO / NCES to inspect the Project site for granting Grid Tie-Up Approval for the additional 25 MW capacity. Notably, on 20.08.2020, officials of TANGEDCO visited the Project site and confirmed the installation and readiness of 25 MW additional capacity. However, the Grid Tie-Up Approval was not granted and is still awaited.

38L. It is respectfully submitted that the Petitioner has been facing force majeure issues from mid January 2020 due to outbreak of Covid-19 in China and India and therefore, is continuing to be impaired to perform its obligation to establish the 100 MW Project capacity within a stipulated timeline. It is humbly submitted that these events are squarely covered under Article 16 of the PPA and therefore, the Petitioner herein is entitled to seek extension of SCOD on account of outbreak of Covid-19 in China and India.

38M. It is humbly submitted that while the Petitioner has achieved 75 MW out of 100 MW capacity of the Project, the balance 25 MW is endeavored to be achieved by October – November 2020. In this regard it is important to point out that, on 13.08.2020, MNRE, in suppression of the Office Memorandum dated 17.04.2020 and 30.06.2020, has notified as under:

“OFFICE MEMORANDUM

Sub: Time Extension in Scheduled Commissioning Date of Renewable Energy (RE) Projects considering disruption due to lockdown due to COVID-19

In supersession of this Ministry's earlier O.M.s of even no. dated 17th April, 2020 and 30th June, 2020 on the subject issue, the following is hereby conveyed:

- (1). The MNRE, vide its O.M. No. 283/18/2020-GRID SOLAR dated 20.03.2020, with the approval of Hon'ble Minister, had inter-alia, issued directions to SECT, NTPC and Addl. Chief Secretaries / Pr. Secretaries / Secretaries of Power / Energy / Renewable Energy (RE) Departments of State Governments / UT Govts. / Administrations, to treat delay on account of disruption of the supply chains due to spread of corona virus in China or any other country, as Force Majeure and that they may grant suitable extension of time for projects, on account of corona virus, based on evidences / documents produced by developers in support of their respective claims of such disruption of the*

supply chains due to spread of corona virus in China or any other country.

(2). Subsequently, RE developers had represented to this Ministry that they may be granted a general time extension on account of lock down (due to COVID-19) and additional time required for normalization after such lockdown.

(3). This issue has been examined in the Ministry and it has been decided that:

- a) All Renewable Energy (RE) implementing agencies of the Ministry of New & Renewable Energy (MNRE) will treat lockdown due to COVID-19, as Force Majeure.*
- b) All RE projects under implementation as on the date of lockdown, i.e. 25th March 2020, through RE Implementing Agencies designated by the MNRE or under various schemes of the MNRE, shall be given a time extension of 5 (five) months from 25th March 2020 to 24th August 2020. This blanket extension, if invoked by the RE developers, will be given without case to case examination and no documents/evidence will be asked for such extension.*
- c) The timelines for intermediate milestones of a project may also be extended within the extended time provided for commissioning.*

- d) *The Developers, of the projects covered under para 3(b) above, may also pass on the benefit of such time-extension, by way of granting similar time-extensions, to other stakeholders down the value chain like Engineering Procurement Construction (EPC) contractors, material, equipment suppliers, Original Equipment Manufacturers (OEMs), etc.*
- e) *The State Renewable Energy Departments (including agencies under Power/ Energy Departments of States, but dealing in renewable energy) may also treat lockdown due to COVID-19, as Force Majeure and may consider granting appropriate time extension on account of such lockdown.*

(4). This issues in line with approval of Hon'ble Minister, New and Renewable Energy and Power.”

Evidently, the MNRE vide its Office Memorandum dated 13.08.2020 has clearly provided a blanket extension of timelines by 5 months (i.e. the period falling between 25.03.2020 till 24.08.2020) to the renewable projects which were under implementation during the said time period. Therefore, in view of the MNRE's Office Memorandum dated 13.08.2020, the SCOD further stands extended by 5 months.

38N The Petitioner has already placed on record that the delay in commissioning of the Project within the stipulated SCOD i.e. by 27.09.2019, was due to occurrence of the following events, some of which are continuing to impact the progress of the Project:

- (a) Delay due to unavailability of transmission system for evacuation of power from the Project
- (b) Delay due to outbreak of Covid – 19 in China and India and consequent announcement of lockdown by the Central and State Governments.

38O. The Petitioner having clearly provided such intimation and information to TANGEDCO *vide* its letters and correspondences and especially the Force Majeure Notice and letters dated 21.03.2020, 31.03.2020, 26.05.2020 and 02.07.2020, are still awaiting extension of SCOD by TANGEDCO. Hence the present Petition.”

- (i) It is prayed to add the following Para “H” under the heading “GROUNDS” :-

"I. FOR THAT TANGEDCO failed to provide clear grid evacuation approval prior to stipulated SCOD under the PPA. TANGEDCO could only provide unambiguous and clear evacuation approval to the extent of 100 MW to the Petitioner on 24.01.2020 i.e. after passage of 118 days from SCOD. Therefore, TANGEDCO is restricted in law to

take advantage of its own wrong and levy / claim any kind of liquidated damages from the Petitioner. The Petitioner is entitled in law and under the PPA to seek extension of SCOD due to "unavailability of the transmission system".

J FOR THAT even once the unconditional evacuation approval came on 24.01.2020, the Petitioner is entitled to seek certain additional days for undertaking activities in relation to commissioning of the 50 MW capacity, which attained readiness on 10.12.2019, inspected by NCES on 31.12.2019 and received CEIG certification on 06.01.2020.

K FOR THAT the series of events disrupting the supply chain logistics, availability of men and material and results in impairing the efficiency of the Petitioner to construct the Project are squarely covered under the Force Majeure clause of the PPA caused by Covid-19 in China. In this regard, it has noted that Article 16 of the PPA i.e. Force Majeure, provides as under:-

xxx xxx

"Force Majeure" events means any event which is beyond the control of the parties involved which they could not foresee or with a reasonable amount of diligence could not have been foreseen or which could not be prevented and which substantially effect the performance by either party such as but not limited to:-

(i) Acts of natural phenomena, including but not limited to floods, droughts, earthquake, lightning and epidemics;

- (ii) Acts of any Government domestic or foreign, including but not limited to war declared or undeclared, hostilities, priorities, quarantines, embargoes;”

L. FOR THAT the MNRE *vide* its Office Memorandum dated 13.08.2020 has accorded 5 months extension to all renewable projects which have been affected by the outbreak of Covid-19 in China and India. The Petitioner is therefore, entitled to seek an additional extension for the period of at least 5 months as allowed by MNRE. These MNRE directions are binding on state utilities and are being issued in the interest of all the stakeholders involved.

M. FOR THAT the period from 10.12.2019 till 20.02.2020, the Petitioner is deemed to have achieved commissioning for 50 MW capacity and from 09.08.2020 till the date of synchronization of the additional 25 MW capacity, the Petitioner is deemed to have achieved commissioning for additional 25 MW capacity.”

11.2. It is also prayed to modify the prayer by add a new para “F” as follows:-

“(F) Grant extension of the Scheduled Commercial Operation Date prescribed under the Power Purchase Agreement dated 28-09-2017 corresponding to the period suffered by the petitioner due to the force

majeure events including as a direct consequence to outbreak of Covid-19 in China and India.”

14.3. The present application is bona fide in nature and severe prejudice will be caused to the applicant if the same is not allowed. Whereas, no injustice or harm will be caused to the Respondents, if the present Interlocutory Application is allowed by this Commission.

14.4. This application is curative in nature and does not in any manner alter and / or change the nature and character of the petition and the amendment sought to be carried out are formal in nature.

15 Reply of the Respondents filed on 23-09-2020 against the amendment of the prayer:-

15.1. The application cum affidavit is not maintainable since the same is beyond the scope of the pleadings and the relief sought by the petitioner before the Commission.

15.2. Since, on the merits of the case, the 1st Respondent has already placed its in-depth counter to the main petition and sur-rejoinder. The Commission may place reliance on the same and treat the same as part and parcel of this counter affidavit.

15.3. The prime issue raised by the petitioner in this Interlocutory Petition for the delay in commissioning of contracted capacity of 100 MW beyond scheduled date

of commissioning is due to unavailability of evacuation facility and Covid-19 issue and the same is objected to for the following reasons:

- a) The reason for delay in commissioning due to unavailability of transmission system stated by the petitioner is unacceptable and the same has been clarified in para 29 of the TANGEDCO's counter affidavit to the main petition. TANGEDCO has informed the petitioner vide letter dated 31.05.2019 that "*TANGEDCO shall extend all support for evacuating the power from the proposed 100 MW solar power plant at Ganguvarpatti village, Periyakulam taluk, Theni district under tender scheme on completion of all works within due date*". (Please refer page no.67 of typed set). Hence, the reason stipulated by the petitioner is unacceptable. It would be evident from the fact that the petitioner has altered their prayer citing COVID -19 pandemic attributable to the delay, as it is proven beyond doubt that there has not been any connectivity issues by TANGEDCO.
- b) The scheduled date of commissioning the 100 MW solar power plant of M/s. Solitaire BTN solar (P) Limited is on 27.09.2020. The Pandemic situation arose only during March 2020 end. The reason for not achieving the Scheduled Commercial Operation Date (COD) due to Covid-19 issue mentioned by the petitioner is not justifiable. It's an afterthought. The same is or cannot be a granted in the DRP.
- c) The petitioner in para (17) of the application has stated that "*the event of outbreak of Covid-19 in China and India, consequently the solar module supplier of Solitaire, its logistical partners, EPC and sub-contractors, qualifies to be a Force Majeure Even in terms of*

Article 16 of the PPA” proves beyond doubt that the raw materials have been sourced only in the later half of 2019 (beyond the due date of 25.9.2019) while the PPA has been executed during 2017.

- d) M/s. Solitaire BTN Solar (P) Limited has commissioned the solar project partially i.e. 50 MW capacity out of the proposed 100 MW on 20.02.2020 with a delay period of 145 days. As there is a provision in the tender for partial commissioning, TANGEDCO has accorded grid tie up approval for partial commissioning and the petitioner has commissioned their 50 MW solar project accordingly subject to forfeiture of the performance bank guarantee in proportionate to the capacity commissioned. While so, out of the remaining 50 MW, the petitioner vide letter dated 12.08.2020 has requested grid tie up approval now for 25 MW which is beyond 34 months from the date of signing of PPA, wherein Clause 14(b) of PPA states that “... *In case, the project is not commissioned, within such 34 months, the PPA will stand terminated automatically without any notice or Order and the Distribution Licensee will encash the Additional Performance Bank Guarantee furnished towards Liquidated Damages*” pending disposal of the DRP filed before the Commission.
- e) Based on the directions of the Commission, Additional Bank guarantee was accepted only on 27.2.2020 (which ought to have been submitted before 25.2.2020). Pending disposal of petition, mere Acceptance of Bank Guarantee cannot presume that TANGEDCO ought to issue tie up approval for the 25 MW commissioned beyond timelines when the solar tariff are declining.

- f) During the pendency of main petition, the petitioner represented vide letter dated 10.07.2020 that they are ready for commissioning 20.91 MW out of the balance capacity of 50 MW. When inspection was conducted, it showed that the statement was untrue.
- g) The petitioner has not mentioned about the timeline for commissioning the remaining 25 MW. The petitioner seeks to take advantage of the Pandemic to drag the issue mentioning the lockdown period due to Covid-19 and MNRE office memorandum, seeking COD extension. There is no question of applicability of Force Majeure owing to Covid-19 for the present issue.
- h) If the raw materials for this 25 MW for which tie up is sought for has been sourced only during November/December 2019, the applicability of tariff of Rs.3.47, which was discovered in the tender during 2017 based on the market conditions prevailed during that time, remains questionable when the solar tariff are declining worldwide.
- i) It is pertinent to note that M/s SECI through their letter dated 1.11.2019 requested TANGEDCO to confirm allotment of solar power through their 1200 MW ISTS, Tranche-VI tender at the rate of Rs.2.71 per unit plus trade margin of Rs.0.07/- per unit. Based on the approval of TNERC vide order dated 9.6.2020 for M.P.No.8 of 2020 and I.A No.1of 2020, PPA has been executed for purchase of 500 MW solar power from M/s SECI. As TANGEDCO have already executed agreement for procurement of solar power at Rs.2.78 per unit, without finalizing the tariff, TANGEDCO could not issue grid tie-

up approval for the capacity of 25 MW, which is allegedly ready for commissioning.

- j) The petitioner in its application has requested time extension upto 27.12.2020 for commissioning the balance capacity of 50 MW citing the office memorandum dated 13.08.2020 issued by MNRE. TANGEDCO has executed Power Sale Agreement with SECI for the procurement of 500 MW of solar power at the rate of Rs.2.78 per unit (i.e. Rs. 2.71 + 0.07 per unit) and it is also proposed to procure 500 MW solar power from M/s. NHPC at the rate of Rs.2.62 per unit (i.e. Rs. 2.55 + 0.07 per unit). Without prejudice, when the solar power rate is in the declining trend, if the request of the petitioner seeking COD extension that too without levy of penalties as per the PPA are considered, as the PPA executed with the petitioner is of long term for 25 years, would have a severe financial impact for TANGEDCO.
- k) It is submitted that the Commission is issuing preferential tariff orders for solar with a control period of one year only. Considering a CUF of 19%, if the 25 MW is accepted @ Rs.3.47 per unit the commitment for the next 25 years is Rs.360,96,67,500/- and if accepted for a rate of Rs.2.78 per unit, the commitment for the next 25 years is Rs.289,18,95,000/- and hence the additional burden is Rs. 71,77,72,500/-.
- l) MNRE has issued guidelines for extension of time line only for the ongoing projects. As per the MNRE guidelines for bidding of solar power, time line of the project is only 13 + 5 months. However, as a special case, in order to promote solar in the State of Tamil Nadu

based on the specific request of TANGEDCO the Hon'ble Commission permitted to float tender with commissioning period of 24 months. Hence applicability of MNRE guidelines for time extensions for the projects beyond the due date is questionable.

- m) As per the contractual obligations, the petitioner failed to commission the entire contracted capacity within scheduled date of commissioning. As the petitioner commissioned partial capacity of 50 MW beyond scheduled date of commissioning for a delay period of 145 days, the performance bank guarantee furnished by them is required to be forfeited in proportionate. TANGEDCO seeks relief from this Commission to invoke the performance bank guarantee in proportionate for the delay period. Further, the validity of BG furnished by the petitioner expires on 27.09.2020 and the BG issued bank is "Yes Bank".
- n) As per Clause 6.4 (2), National Tariff Policy 2016, states shall necessarily procure Renewable Energy through bidding route so as to obtain power at competitive rates ultimately to supply power to the consumers at affordable rates. Hence when the solar tariff rates are in the declining trend, specific directions are requested from the TNERC for issue of "Grid Tie up approval" for the part commissioning of the 25 MW of M/s Solitaire BTN Solar Pvt Ltd executed beyond the time lines which are totally attributable to the petitioner.
- o) This application cannot be entertained at this stage of the DRP. For all the aforesaid reasons, the application preferred by the Applicant deserves to be dismissed.

15.4. The Commission shall dismiss the application with exemplary costs and pass such further or other orders as this Commission may deem fit.

16. Additional Affidavit filed on behalf of the Petitioner in compliance of the directions of the Commission dated 23-09-2020:-

15.1. Pursuant to the direction of the Commission, the petitioner has filed an affidavit on 28-09-2020 wherein the petitioner has submitted as follows:-

(i) Upon receiving a conditional approval of 60 MW on 27-08-2019 (one month prior to SCOD – 27-09-2019) from TANGEDCO, the petitioner achieved readiness of the first 50 MW out of 100 MW on 10-12-2019 and was inspected by NCES/TANGEDCO on 31-12-2019. Once the CEIG certificate was received on 08-01-2020 followed by Grid Tie-Up Approval dated 24-01-2020, NCES/TANGEDCO formed the Commissioning Committee, which visited project site on 20-02-2020 and witnessed the commissioning of the first 50 MW on 20-02-2020.

(ii) Upon receiving the unconditional Evacuation Approval for evacuation of 100 MW project through Batlagundu SS on 24-01-2020 and despite facing hindrance in the project implementation due to outbreak of Covid-19 in China and India, the petitioner achieved readiness in relation to the additional 16 MW on 10-07-2020.

(iii) Upon receiving the unconditional Evacuation Approval for evacuation of 100 MW project through Batlagundu SS on 24-01-2020 and despite facing hindrance in the project implementation due to outbreak of Covid-19 in China and India, the petitioner achieved readiness in relation to the additional 09 MW on

14-08-2020. A combined CEIG certificate for the additional 25 MW capacity (16 MW + 9 MW) has been received on 18-08-2020.

(iv) Upon receiving the unconditional Evacuation Approval for evacuation of 100 MW project through Batlagundu SS on 24-01-2020 and despite facing hindrance in the project implementation due to outbreak of Covid-19 in China and India, the petitioner has been able to install additionally 15.5 MW (76 MW to 95.5 MW) and installation of 2.5 MW will be achieved by 08-10-2020. Therefore, by 08-10-2020, the petitioner will have installed an additional 18 MW. BOS, inverters, inverter-duty transformer etc. has been procured and received on site for the entire balance capacity i.e. 76 MW to 100 MW. The balance can only be undertaken, once REC Limited (lenders) disburse the amounts, which can be utilized to procure balance modules and undertake consequent installation works. It has already been submitted that, once the 25 MW capacity (51 MW – 75 MW) is allowed synchronization and commissioning, REC Limited will be able to disburse the remaining loan and enable the petitioner to complete the commissioning of its entire project expeditiously without any further delay.

(v) The petitioner has invested more than Rs.400 Cr in the project (100 MW) and the same are funded through promoters' equity and public monies, which unnecessarily will be put under stake, if the prayers of the petitioner are not allowed and resultantly, the project will be rendered unviable.

(vi) In view of the above submissions, it is prayed that this Commission may direct the Respondents to provide grid tie-up approval for 25 MW capacity of the project which is inspected and certified by appropriate authorities.

17. Findings of the Commission:-

17.1 This petition has been filed to direct the respondent TANGEDCO to complete construction / commissioning of requisite infrastructure beyond the Delivery Point required for evacuation of the entire contracted capacity of 100 MW in a time bound manner. It is also prayed to declare and hold that the delay in commissioning of the project is for the reasons not attributable to the petitioner and the Scheduled Date of Commercial Operation be extended as per the Schedule of Commissioning of new 230/110 kV substation at Ganguvarpatty Village. It has also been prayed to hold that the petitioner will not be liable to bear any liquidated damages of Rs.20 crores and / or contractual penalty for not commissioning as per the Scheduled Commercial Operational Date under the Power Purchase Agreement (PPA) dated 28-09-2017. It is also prayed to grant extension of the Scheduled Commercial Operation Date prescribed under the PPA dated 28-09-2017 corresponding to the period suffered by the petitioner due to the Force Majeure events including as a direct consequence to outbreak of Covid-19 in China and India.

17.2. The brief facts leading to the filing of this Dispute Resolution Petition is as follows:-

On 15-05-2017, TANGEDCO issued Request for Submission (RfS) for procurement of Solar Power from Developers establishing of Solar Power Plants in Tamil Nadu through Reverse Bidding Process. On 15-06-2017, the petitioner submitted its bid to build and establish Solar Power Plants and sell the generated electricity from therein to TANGEDCO from 3 locations jointly having a capacity of 150 MW. On 29-08-2017, TANGEDCO issued a Letter of Intent (LoI) in favour of

the petitioner for procurement of 100 MW of Solar Power at Rs.3.47 per unit vide Letter No. CE/NCES/Solar/EE/SCB/AEE3/F.M./S.Solitaire BTN Solar/D.768/17, dated 29-08-2017. A Power Purchase Agreement (PPA) has been entered between the Petitioner and the Respondent on 28-09-2017. As per the terms of the PPA, it is the obligation of the petitioner to get the Transmission Connectivity and it would be at its cost-*vide* clause 2 of PPA. The load flow study has been conducted by CE/NCES wing of the respondent on 06-01-2018 and a transmission scheme has been finalized. Accordingly, the power plant of the petitioner has been proposed to be interfaced at Batlagundu Substation at 110 kv level after completing necessary works. As per the contractual terms, the petitioner has to commission the project / plant on or before 25-09-2019 (i.e. within 24 months from the date of signing of the PPA). On 14-12-2018, the petitioner learnt that evacuation works have been successfully completed partially and wrote to the respondent (NCES) to complete the entire work within a time limit.

17.3. Subsequently, in a meeting held between the petitioner and the officials of the NCES and TANGEDCO, it was informed that two of the pre-connectivity works identified under the Evacuation Approval dated 06-01-2018 could not be completed in a time bound manner and hence it was suggested to establish a new 230/110 kv SS at Ganguarpatty Village, Theni District. Accordingly, it was advised that for the purpose of evacuation of 100% power from the project necessary land be procured by the petitioner at his own cost for establishment of a 230/110 kV SS. This is in modification of the original evacuation plan to establish a 230/110 kV SS at Batlagundu. But according to the petitioner, it is doubtful whether this SS at Ganguarpatti could accommodate only partial evacuation to the extent of 30-40 to

out of 100 MW to be evacuated. On 27-08-2019, TANGEDCO informed the petitioner that 60 MW power may be injected at Batlagundu SS.

17.4 It may be seen from the above prayers that though the prayers are couched in different language, essentially it leads to the question of extension of time limit for date of commissioning of the petitioner's plant and fastening of liability on the TANGEDCO for alleged indifference to the commissioning of the plant and it is to be seen whether such delay is attributable to such indifference of TANGEDCO. The main grounds on which the petitioner is making its claim are-

- (i) there is a delay in providing evacuation facility by the respondent;
- (ii) there is a Force Majeure situation arising out of the outbreak of Covid-19 and
- (iii) Ministry of Renewable Energy, Government of India has granted extension of time for the ongoing projects considering Covid-19 situation.

Viewed in the said background, we find that the following issues arise for consideration:-

17.5. Issue No.1:

Whether the Commission has the power to extend the scheduled dates of commissioning of the plant?

- (i) In order to answer the said issue, it is necessary to refer to the provisions of the Electricity Act, 2003 and the power procurement from New and Renewable Sources of Energy Regulations, 2008. There is nothing in the Electricity Act which explicitly deals with the extension of time limit for the power projects by the State Commissions.

(ii) In the New and Renewable Sources of Energy Regulations, 2008 also the question of extension of the control period for extension of time for a project has not been dealt with, though the said Regulations provide for a control period of 2 years for the tariff fixation in regard to the non-conventional sources. Thus, we find that there is no provision either in the Electricity Act, 2003, or in the Regulations for acceding to the relief sought for herein. If at all such power is to be exercised, it is to be done only by way of invocation of inherent powers vested with the TNERC Commission in the Conduct of Business Regulations, 2004.

(iii) The issue of the powers of the Commission to extend the control period or the extension of date of commissioning of the project by invocation of inherent power is no longer *res integra* and has been well settled by the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. Vs. Solar Semi Conductor Power Company (India) Pvt. Ltd. and others in Civil Appeal No. 6399 of 2016 dated 25-10-2017 wherein it has been held as follows:-

“The control period is not something prescribed by the Commission under the Conduct of Business Regulations. The control period is also not an order by the Commission for doing any act. Commissioning of a project is the act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser, viz., the respondent No.1 and appellant. Hence, the Commission cannot extend the time stipulated under the PPA for doing any act contemplated under the agreement in exercise of its powers under Regulation 85. Therefore, there cannot be an extension of the control period under the inherent powers of the Commission.”

(iv). The above decision will equally apply to the case on hand. When a time limit is prescribed in the PPA for commissioning of the project, the Commission has

no power to extend such time limit. The Commission could only examine the rights and liabilities of the parties within the frame work of the contract i.e. PPA and can grant relief to the affected parties only as per the provisions contained in the PPA. It is to be observed here that the Hon'ble Supreme Court was categorical on the point that the control period cannot be extended by exercise of inherent powers and such an exercise of power can be done only with reference to the specific powers conferred by the Act or a Regulation. Needless to say that if at all an extension is to be granted it can be done only by invocation of inherent powers of the Commission. As the ratio laid down by the Hon'ble Apex Court has deprecated the extension of control period by exercise of inherent powers, the Commission cannot invoke its inherent powers conferred in the Regulations. Also it may be noted that the extension of control period and the extension of date of commissioning of a project, though, factually stand on a different footing, the principle with regard to the extension in both the cases, in our view, cannot be differentiated and stand on the same footing. It is so because, the extension of a project, as per the Apex Court verdict cannot be done in project specific cases in the absence of express statutory provisions. In view of the same, we cannot agree to the plea of the petitioner to direct the Respondents to extend the commissioning of the project.

17.6. Issue No.2:-

The next issue which arises for consideration is whether the PPA has provisions for mechanism to deal with the cases of delay in commissioning of the projects and whether the Commission has the power to adjudicate the disputes arising out of the PPA executed between the Petitioner and Respondent?

(i) Having concluded that the Commission has no power to extend the control period or extend the date of commissioning of the power plant by exercise of inherent powers, we now proceed to examine contours of the PPA which has been executed between the parties. The PPA executed between the parties have specific clauses for extending the time limit for commissioning of the plant in clause 14 which is extracted as follows:-

“14. Commissioning:

(a) Part Commissioning:

As per the terms and conditions of tender specification, Part commissioning will be applicable to your project. However, Part commissioning will be accepted by the Distribution Licensee for minimum of 50% of the plant capacity (location wise).

(b) Commissioning Schedule and Liquidated Damages for Delay in Commissioning:

The solar power plant shall be commissioned on or before 24 months i.e. 25.09.2019 from the date of Signing of this Power Purchase Agreement. In case of failure to achieve this milestone, Distribution Licensee shall encash the Performance Guarantee in the following manner:-

Delay up to five months : The Distribution Licensee will encash the Performance Bank Guarantee on per day basis proportionate to the Capacity not commissioned within next 5 (Five) months, after the expiry of commissioning schedule of 24 months. In case of non-commissioning within the said 29 months, the Distribution Licensee will encash the entire (100%) Performance Bank Guarantee.

Delay beyond 29 months: In case the commissioning of project is further delayed beyond 29 months and upto 34 months, the SPG shall, in addition to 100% encashment of Performance Bank Guarantee, shall pay a Liquidated Damages to the Distribution Licensee a sum of RS.10,000/- per MWac per day basis in the form of BG, to the extent of Capacity not Commissioned.

Prior to expiry of 29 months from the date of signing of PPA, the SPG shall furnish an Additional Performance Bank Guarantee calculated @ Rs.10,000/-per MWac for five months to the Distribution Licensee to the extent of capacity not commissioned. In case of non-furnishing of Additional Performance Bank Guarantee, the PPA will stand terminated automatically without any notice/order.

The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and payment of liquidated Damages shall be 34 months from the date of signing of PPA. The amount of Liquidated Damages shall be recovered by TANGEDCO from the payments due of the Project Developer on account of Sale of Solar Power to TANGEDCO. In case, the Commissioning of the Project is delayed beyond 34 months from the date of Signing of PPA, the PPA capacity shall stand reduced/ amended to the extent of Project Capacity Commissioned and the PPA for the balance Capacity not commissioned will stand terminated and shall be reduced from the selected Project Capacity. In case, the project is not commissioned, within such 34 months, the PPA will stand terminated automatically without any notice or

Order and the Distribution Licensee will encash the Additional Performance Bank Guarantee furnished towards Liquidated Damages.”

(ii) It may be noted from the above, that the PPA is a self-contained document which provides for a situation where a project proponent is unable to commission the project within a time limit for certain reasons and the remedy available to the parties. It may be further noted that the normal time limit for the commissioning of the plant as per PPA is 24 months from the date of execution of the PPA. In the instant case, the PPA was executed on 28-09-2017 and in the regular course, the commissioning of the plant should have been completed before 25-09-2019. The PPA also provides that in case of failure to achieve the commissioning the date of commissioning within the said date of commissioning, can be extended to the next 5 months and the same is subject to encashment of Performance Bank Guarantee by the Distribution Licensee on proportionate basis to the extent of the capacity not commissioned within the date of the original date of commissioning. The PPA also provides that in case the project is further delayed by 5 months, the petitioner shall in addition to Bank Guarantee pay liquidated damages @ Rs.10,000/- per MW per day to the extent of capacity not commissioned.

(iii) The clause 13 of the PPA provides that any dispute under the PPA shall be referred to the Commission. The said clause is reproduced below:-

“Settlement of Disputes:-

If any dispute or difference of any kind whatsoever arises between the parties relating to this agreement, it shall, in the first instance, be settled amicably, by the parties, failing which either party may approach the

Commission for the adjudication of such disputes under section 86 (1) (f) of the Electricity Act, 2003 in accordance with the Conduct of Business Regulations, 2004 and Fees and Fines Regulations, 2004 of the Commission. This agreement shall be governed by the Laws of India and the Courts at Chennai alone shall have jurisdiction”

It is clear from the above that the Commission has the powers to adjudicate the disputes arising out of the PPA executed between the petitioner and the respondent within the contours of the PPA and hence we now proceed to discuss the issues arising out of the PPA in the coming portions of the order.

17.7. Issue No.3

Whether the stand of the petitioner that extension can be granted in view of the communication of Government of India dated 17-04-2020 is sustainable and whether the Force Majeure factor can be accepted for discharging the petitioner from the liability arising out of the PPA for non-commissioning of the project in time?

(i) We have gone through the communication from the Government of India in F.No.283/18/2020-GRID SOLAR, dated 17-04-2020. It is seen that the direction has been given by the Government of India, only to the implementing agency i.e. TANGEDCO to consider the extension of time limit for the project affected by Covid-19. The letter also states that there shall be a blanket extension of the period of commissioning without insistence on the documentary evidence. However, it is to be noted that Commission is not the implementing agency in the communication

relied upon by the petitioner. The TANGEDCO is the implementing agency and TANGEDCO it has considered the above factor and declined to extend the commissioning date and hence it would not be proper on our part to extend the date of commissioning period on the strength of the above said Government of India letter.

(ii) Further, the Petitioner would have had a fair case on the strength of the above said Gol letter for consideration if the actual date of commissioning period contemplated in the PPA fell within the pandemic period which is not the case here. The Government of India's communication in this regard was issued much after the expiry of the Scheduled Date of Commissioning of the project in the instant case and hence the said communication cannot be relied upon by the petitioner for sustaining its case. It is further seen that the petitioner has also sought to treat the pandemic as a Force Majeure for supporting its stand for extension of control period. In this connection, we have gone through the relevant provision of the PPA namely clause 16 which deals with the Force Majeure. The said clause is reproduced for reference:-

"16. Force Majeure:

Both the parties shall ensure compliance of the terms of this agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of this agreement to the extent that such failure is due to force majeure events as defined hereunder. Any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event(s) by giving notice to the other party in writing within 15 days from the occurrence of such Force Majeure.

“Force Majeure” events means any event which is beyond the control of the parties involved which they could not foresee or with a reasonable amount of diligence could not have been foreseen or which could not be prevented and which substantially affect the performance by either party such as but not limited to:-

- (i) Acts of natural phenomena, including but not limited to floods, droughts, earthquakes, lightning and epidemics;*
- (ii) Acts of any Government domestic or foreign, including but not limited to war declared or undeclared, hostilities, priorities, quarantines, embargoes;*
- (iii) Riot or Civil Commotion; and*
- (iv) Grid / Distribution System’s failure not attributable to parties to this agreement.”*

(iii) It is true that meaning of “Force Majeure” under the said clause includes epidemic as well. Even for moment considering the expression “epidemic” can be extended to pandemic such as Covid-19, still any relief can be extended only when such pandemic occurred within the period of PPA. Here the pandemic period is posterior to the Scheduled Date of Commissioning and hence we find no reason to accept the contentions in this regard. Accordingly, the issue is decided in favour of the respondent.

17.8. Issue No.4

Whether the delay in the commissioning of the project and pre-evacuation facility is attributable to the Respondent and whether any relief can be granted to the petitioner and if so, to what extent?

(i) Having held that the Commission is empowered to grant relief in terms of the PPA, we now proceed to examine whether there is any delay which is attributable to the Respondent and whether the onus is placed on the Respondent to extend to co-operation for the pre-evacuation facility. In terms of the para 11 of the Letter of Intent dated 29-08-2017 issued to the petitioner by the Respondent, the role of STU/TANGEDCO is as follows:-

“11.0. Role of STU/TANGEDCO:

The STU/TANGEDCO will provide transmission system to facilitate evacuation of power from the projects which may include the following:

- a. Provide connectivity to the solar projects with the grid.*
- b. Support during commissioning of projects.*
- c. STU/TANGEDCO will execute bay extension work and any other improvement works under Deposit Contribution Works (DCW) basis on payment of estimated cost by the SPG and to carry out the operation and maintenance of the bay extension and improvement works on payment of 50% of material cost of bay extension work and improvement work by the SPG.”*

From the above, it is clear that clause 11 of Lol casts an obligation on the part of the Respondent to provide support during commissioning of projects. It has

therefore become necessary to see whether there is any delay on the part of the Respondent in providing support for the commissioning of the project.

(ii) The bone of contention of the petitioner is that there is delay on the part of the respondent, TANGEDCO in extending the support to the petitioner during the pre-commissioning activities and hence, the petitioner is not liable to pay liquidated damages and the TANGEDCO is not entitled to encash the Bank Guarantee and consequently the petitioner is entitled for the extension of the period for commissioning of the project proportionate to the period of the said delay. The petitioner has attributed the delay in erection of 230 kv substation at Ganguvarpatti for the delay in commissioning of the project and for the purpose of seeking the present relief. However, as we see from the records, the original place where the project contemplated was at three different locations, namely, Thulukkankulam Village, Melakumilankulam Village and Esali Village in Virudunagar District in Tamil Nadu.

(iii) The connectivity as contemplated in the Lol dated 29-08-2017 was meant only for these three locations. The Power Purchase Agreement was entered only for the purpose of generation of power from these locations. The PPA also states explicitly that the responsibility of getting Transmission Connectivity and Access to the transmission owned and operated by the Distribution Licensee / STU shall be with the Solar Power Generator (SPG) i.e. the petitioner herein and at the cost of SPG. The evacuation approval issued by the NCES, TANGEDCO on 06-01-2018, contemplated only interfacing of the petitioner's project with Batlagundu SS 110 KV level by conversion of 110 KV Theni-Sempatti Feeder II and transfer of WEGs

connected substation of TANGEDCO from various places and there was no whisper about the 230 kv substation at Ganguvarpatti at any point of time in the initial stages. It is only at a later stage the interfacing of the project with 230/110 kv substation at Ganguvarpatti was contemplated consequent to the meeting that took place on 04-06-2019. The petitioner was advised to procure land for that purpose. Pending the same, it is seen that a communication dated 27-08-2019 was sent by TANGEDCO indicating that 60 MW of power may be injected at Batlagundu. Hence, it is clear that the original proposal for interfacing was not dropped and change of location as to the interfacing at Ganguvarpatti was not agreed to in entirety. We find that the proposal for interfacing at Ganguvarpatti was only an alternative proposal to accommodate the petitioner at a contiguous place to his project but it has no legal standing as the proposal to interface at Batlagundu which is as per the PPA was also pursued simultaneously.

(iv) The petitioner also accepted the interfacing at Batlagundu for 60 MW injection though there was alternative proposal for interfacing at Ganguvarpatti. Further, the establishment of a substation at Ganguvarpatti has been undertaken as early as in 2014 as a general measure to add transmission capacity formulated by Planning Wing of the respondent and not something which has been undertaken specifically at the instance of the petitioner.

(v). We have also gone through the other relevant documents which have been placed as material evidence before us for finding out whether any action or inaction of the respondent is attributable to the delay. It is noted that 60 MW of power was declared ready for evacuation by the Respondent on 27-08-2019 before the

scheduled date of commissioning through an internal communication from CE/Operation, Madurai and CE/System Operation, Madurai, a copy of which was marked to the petitioner also. The total 100 MW was declared ready for evacuation on 24-01-2020 vide Letter No. CE/NCES/ACE/Solar/EE/CB/AEE3/ F.M/ S.Solitaire. BTN/D.95/2020, dated 24-01-2020. This communication of the respondent indicating its readiness to evacuate the remaining 40 MW power is after the scheduled date of commissioning of the project (i.e. 25-09-2019). Therefore, we conclude that the respondent has fulfilled its obligation with regard to providing connectivity to the extent of 60 MW before the scheduled date of commissioning and remaining 40 MW after the scheduled date of commissioning. In the result, TANGEDCO is entitled for encashment of Performance Bank Guarantee or Additional Performance Guarantee as provided in the PPA to the extent of 60% only until the date of declaration of availability of 100% evacuation capacity and thereafter TANGEDCO is entitled to encash 100% from such date of declaration of 100% evacuation availability. In view of the above, I.A. No. 2 and 3 of 2020 is closed.

17.9. Issue No.5:-

Whether the readiness declared by the petitioner for commissioning of 16 MW on 10-07-2020 and 9 MW on 14-08-2020 can be construed as part commissioning under the PPA?

(i) In this connection, we would like to first examine the affidavit / memo filed by the petitioner on 28-09-2020 wherein, it has been stated as follows:-

“For additional 16 MW capacity of Project (51 MW to 66 MW out of 100 MW):-

Upon receiving the unconditional Evacuation Approval for evacuation of 100 MW project through Batlagundu SS on 24-01-2020 and despite facing hinderance in the project implementation due to outbreak of Covid-19 in China and India, the petitioner achieved readiness in relation to the additional 16 MW on 10-07-2020.

For additional 09 MW capacity of project (67 MW to 75 MW out of 100 MW):-

Upon receiving the unconditional Evacuation Approval for evacuation of 100 MW project through Batlagundu SS on 24-01-2020 and despite facing hinderance in the project implementation due to outbreak of Covid-19 in China and India, the petitioner achieved readiness in relation to the additional 09 MW on 14-08-2020

A combined CEIG certificate for the additional 25 MW capacity (16 MW + 9 MW) has been received on 18-08-2020.”

(ii) However, it may be seen from the report of the SE, NCES, Udumalpet dated 17-07-2020 addressed to the CE, NCES, Chennai that the developer was instructed to inform the office after completion of all pending works at site.

(iii) As regard 9 MW, we have no hesitation or doubt of whatsoever nature to hold that the same has to be declared as terminated as it was commissioned on 14-08-2020 after the cut-off date of 24-07-2020 stipulated in the PPA.

(iv) Further it is to be seen whether it can be construed as part commissioning within the frame work of the PPA. In this connection, clause 14 of the PPA is required to be reproduced:-

“14. Commissioning:

(a) Part Commissioning:

As per the terms and conditions of tender specification, Part commissioning will be applicable to your project. However, Part commissioning will be accepted by the Distribution Licensee for minimum of 50% of the plant capacity (location wise).

(b) Commissioning Schedule and Liquidated Damages for Delay in Commissioning:

The solar power plant shall be commissioned on or before 24 months i.e. 25.09.2019 from the date of Signing of this Power Purchase Agreement. In case of failure to achieve this milestone, Distribution Licensee shall encash the Performance Guarantee in the following manner:-

Delay up to five months : *The Distribution Licensee will encash the Performance Bank Guarantee on per day basis proportionate to the Capacity not commissioned within next 5 (Five) months, after the expiry of commissioning schedule of 24 months. In case of non-commissioning within the said 29 months, the Distribution Licensee will encash the entire (100%) Performance Bank Guarantee.*

Delay beyond 29 months: *In case the commissioning of project is further delayed beyond 29 months and upto 34 months, the SPG shall, in addition to 100% encashment of Performance Bank Guarantee, shall pay a Liquidated Damages to the Distribution Licensee a sum of RS.10,000/- per MWac per day basis In tile form of BG, to the extent of Capacity not Commissioned.*

Prior to expiry of 29 months from the date of signing of PPA, the SPG shall furnish an Additional Performance Bank Guarantee calculated @ Rs.10,000/-per MWac for five months to the Distribution Licensee to the

extent of capacity not commissioned. In case of non-furnishing of Additional Performance Bank Guarantee, the PPA will stand terminated automatically without any notice/order.

The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and payment of liquidated Damages shall be 34 months from the date of signing of PPA. The amount of Liquidated Damages shall be recovered by TANGEDCO from the payments due of the Project Developer on account of Sale of Solar Power to TANGEDCO. In case, the Commissioning of the Project is delayed beyond 34 months from the date of Signing of PPA, the PPA capacity shall stand reduced/ amended to the extent of Project Capacity Commissioned and the PPA for the balance Capacity not commissioned will stand terminated and shall be reduced from the selected Project Capacity. In case, the project is not commissioned, within such 34 months, the PPA will stand terminated automatically without any notice or Order and the Distribution Licensee will encash the Additional Performance Bank Guarantee furnished towards Liquidated Damages.”

(v) It is clear that clause 14 (a) of the PPA is very specific on the point that the Distribution Licensee can accept only a minimum of 50% of the plant capacity towards part commissioning. Obviously, the 16 MW reported as commissioned on 10-07-2020 by the petitioner does not qualify for part commissioning as the PPA is explicit enough to state in clause 14 (a) that the Distribution Licensee could accept only not less than 50% of the plant capacity as part commissioning. Needless to say that the first part commissioning of 50% MW on 20-02-2020 fulfilled the requirements of clause 14 (a) of the PPA, but the 16 MW commissioning has failed to pass test of part commissioning. At best, the 16 MW commissioning, in our opinion, could be termed only as a piece meal commissioning and not part commissioning. This distinction between part commissioning and piece meal commissioning is required to be understood and hence, we are of the firm

conviction that piece meal commissioning of the plant without a minimum of 50% capacity of the total capacity does not qualify for part commissioning and accordingly we have no hesitation to hold that the 16 MW reported to be commissioned on 10-07-2020 does not fall within the meaning of part commissioning. In the result, the commissioning of the 9 MW capacity commissioned on 14-08-2020 and 16 W capacity on 10-07-2020 do not fall within scope of the PPA, as they do not qualify to be treated as part commissioning.

17.10. Issue No.6:-

Whether the petitioner was ready for commissioning of the remaining 25 MW within the period of the PPA?

(i) The next issue which arises for consideration is whether the petitioner was ready for commissioning of the remaining 25 MW within the period of PPA. In this connection, it is necessary to reproduce the relevant portion of the additional affidavit filed by the petitioner on 28-09-2020.

“(d) *For balance 25 MW capacity of project (76 MW to 100 MW)*
Upon receiving the unconditional Evacuation Approval for evacuation of 100 MW project through Batlagundu SS on 24-01-2020 and despite facing hindrance in the project implementation due to outbreak of Covid-19 in China and India, the petitioner has been able to install additionally 15.5 MW (76 MW to 95.5 MW) and installation of 2.5 MW will be achieved by 08-10-2020. Therefore, by 08-10-2020, the petitioner will have installed an additional 18 MW. BOS, inverters, inverter-duty transformer etc. has been procured and received on site for the entire balance capacity i.e. 76 MW to 100 MW.”

The balance can only be undertaken, once REC Limited (lenders) disburse the amounts, which can be utilized to procure balance

modules and undertake consequent installation works. It has already been submitted that, once the 25 MW capacity (51 MW – 75 MW) is allowed synchronization and commissioning. REC Limited will be able to disburse the remaining loan and enable the petitioner to complete the commissioning of its entire project expeditiously without any further delay.”

(ii) From the above averment of the petitioner, it may be seen that the petitioner has not even attained the financial closure for commissioning of the remaining 25 MW capacity of the project and only when REC Limited (lenders) disburses the amount, the petitioner would be able to procure the necessary equipments like modules and thereafter install the same. Therefore, it is clear that the petitioner was not ready for commissioning of the said 25 MW capacity of the project within the period of PPA.

17.11 Issue No.7:-

Whether the Doctrines of Promissory Estoppel and legitimate expectation can be invoked by the petitioner?

(i) In regard to the above doctrine invoked by the petitioner, we find that no case arises for the same as the PPA executed by the parties is the governing document which defines the rights and liabilities of the parties. When there is a clearly defined PPA specifying the obligations of the parties, we cannot step into the question of promissory estoppel or legitimate expectation and therefore, the said common law doctrines cannot be invoked against a well defined PPA or any statutory provisions. Therefore the contention of the petitioner in this regard fails.

18 Conclusion:-

We conclude by observing that only 50 MW capacity can be allowed to be declared commissioned as per the PPA and a capacity to the extent of remaining 50 MW gets terminated for the reasons stated in para 17 and the PPA shall stand amended to the capacity of 50 MW only as per the clause 14 of the PPA. However, it is open to the parties to renegotiate with respect to the applicable tariff for the remaining 50 MW and enter a new PPA with appropriate regulatory approval of the Commission.

In the result, the petition is dismissed and connected I.As. are also dismissed.

(Sd.....)
(K.Venkatasamy)
Member (Legal)

(Sd.....)
(Dr.T.Prabhakara Rao)
Member

(Sd.....)
(M.Chandrasekar)
Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission