

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

and

Thiru.K.Venkatasamy

.... Member (Legal)

D.R.P. No.7 of 2020

VSR Solar Power Private Limited
No.5, RavaGounder Street,
Naduvoor, Jolarpettai,
Vellore District 635 851.
Tamil Nadu

..... Petitioner
(ThiruRahulBalaji
Advocate for the Petitioner)

Versus

1. Tamil Nadu Transmission Corpn. Ltd.
Represented by its Chairman,
144, Anna Salai,
Chennai 600 002.

2. The Chief Engineer ,
NCES - TANGEDCO
144, Anna Salai,
Chennai 600 002.

3. The Chairman,
NCES - TANGEDCO
144, Anna Salai,
Chennai 600 002.

4. The Superintending Engineer,
General Construction Circle,
Madurai 625 007.

....Respondents
(ThiruM.Gopinathan
Standing Counsel for TANGEDCO)

Dates of hearing : 09-06-2020; 14-07-2020; 04-08-2020;
01-09-2020; 15-09-2020; 23-10-2020;
12-11-2020; 17-11-2020; 20-11-2020;
01-12-2020; 02-12-2020; 08-12-2020
And 15-12-2020.

Date of Order : 02-02-2021

The DRP No. 7 of 2020 came up for final hearing on 15-12-2020. The Commission upon perusing the affidavit filed by the petitioner, counter affidavit filed by the respondent, Rejoinder 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.7 of 2020:-

The prayer of the Petitioner in the above DRP No. 7 of 2020 is to-

- a) Grant the Petitioner a project specific extension of the COD by eighteen months i.e. 21.3.2019 to 21.9.2020 in respect of the Petitioner's SPG under PPA dated 22.03.2018 and consequently quash the letters dated 05.12.2019.
- b) Direct the 1st and 2nd Respondents not to enforce any security including bank guarantees and allow for its continuance pending disposal of this petition upon such terms as the Commission may deem fit in the facts and circumstances of the case; and
- c) Direct the 1st and 2nd Respondent to repay a sum of Rs.5,10,00,000/collected under Bank Guarantee dated 21.03.2018 in order that the Petitioner can reinstate such bank guarantee and keep it alive in terms of the PPA dated 22.03.2018 and upon such terms as the Commission deems fit.

2. Facts of the case:-

The instant petition is being filed seeking an extension of the date of Commissioning (COD) in respect of the Petitioner's 50 MW power plant in respect of which the Petitioner entered into a power purchase agreement (PPA) dated 22.03.2018 with the 1st Respondent herein due to a substantial change in law in respect of levy of Safeguard Duty (SGD) by the Ministry of Finance, Government of India.

3. Contentions of the Petitioner:-

3.1. The Petitioner has entered into a PPA dated 22.03.2018 with the 1st Respondent 'TANGEDCO to construct, erect and commission a 50 MW solar PV power plant ('SPG') in Vilathikulam, Tuticorin, Tamil Nadu. In this respect, the Petitioner has obtained power evacuation approval vide letter dated 14.11.2018 bearing Lr. No. CE/NCES/SE/ Solar/ EE/ SCB/ AEE3/ F.M/s.VSR Solar - 50MW/D.924/18.

3.2. In view of the protocol to the Un Framework Convention, on climate change, Sections 3 and 86 (i) (e) of Electricity Act, 2003, Clause 5.2.20 of NEP, CERC (Terms and Conditions for recognition and issuance of REC for Renewable Energy Generation) Regulation, 2010, TNERC Notification TNERC/RPO/19/1 dated.7.2.2010, it is incumbent upon Respondent TANGEDCO to purchase power from renewable sources of energy including solar power generators like that of the Petitioner, to meet its purchase obligation under the 2010 RPO Regulations. Further, Commission has the bounden duty to protect and promote generation of electricity from non-renewable sources of energy in order to be

compliant with the Electricity Act, 2003 and also the various international conventions such as the UNFCCC and the Kyoto Protocol.

3.3. The Petitioner participated in the tender specification CE/NCES/OT.No.1/2017-2018 and was the most successful bidder in the same. Pursuant to the same, the Petitioner was awarded the Letter of Intent by the 2nd Respondent bearing reference number Lr.Ref. No. CE/NCES/ SE/SOLAR/ EE/SCB/AEE3/F.M/s.VSR Solar/D.02/18 dated 2.1.2018.

3.4. Thereafter, the Petitioner was sent a letter by the 2nd Respondent, directing the Petitioner to be present at the Secretariat, Government of Tamil Nadu for signing of the Power Purchase Agreement (PPA). Consequently, the Petitioner duly executed the PPA. As per clause 11 of the said PPA, the PPA is valid for a period of 25 years subject to the COD and the expiry date.

3.5. The important clauses in the PPA are set out as under in order to understand the essence of the PPA:

“14. Commissioning:

(a) Part Commissioning:

As per the terms and conditions of the 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: T7w solar power plant shall be commissioned on or before 12 months i.e. 21.03.2019 from the date of signing of this Power Purchase Agreement. In case of failure to achieve this milestone, Distribution Licensee shall encash the Performance Grantee in the following manner:

Delay up to five months: The Distribution Licensee will encash the Performance Guarantee on per day basis proportionate to the capacity not commissioned within a 5 (Five) months, after the expiry of commissioning schedule of 12 months. In case of non-commissioning within the said 17 months, the distribution licensee will encash the entire (100%) performance bank guarantee.

Delay beyond 17 months: In case the commissioning of project is further delayed beyond 17 months and up to 22 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 on a per day basis in the form of BG to the extent of capacity not commissioned.

Prior to expiry of 17 months from the date of signing of PPA the SPG shall furnish an additional performance bank guarantee calculated at Rs.10,000/- per MWac for 5 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 or 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 22 months from the date of signing of the PPA. The amount of liquidated damages shall be recovered by TANGEDCO from the payments due of project developer on account of sale of solar power to TANGEDCO. In case, the project is not commissioned within such 22 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.

15 Commercial Operation Date:

The projects commissioned during a month shall be considered for payment of energy at 50% of the PPA tariff as infirm power till commercial operation date (COD). The COD shall be considered 30 days from the actual date of commissioning of the first part capacity.

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 forcemajeure events as defined hereunder. Any party claiming the benefit of this clause shall satisfy the other party of the existence of such 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 no limited to:-

- (i) Acts of natural phenomena, including but not limited to the floods, droughts, earthquakes, lightning and epidemics;*

- (ii) Acts of any Government domestic or foreign including but not limited to war declared or undeclared, hosilities, priorities, quarentines, embargoes;
- (iii) Riot or civil commotion; ad
- (iv) Grid / Distribution system's failure not attributable to parties to this agreement."

3.6. From a bare perusal of the above clauses, it is pellucid that the Petitioner herein can avail part commissioning up to 50% of the plant capacity. It is also clear that thePetitioner is not liable for any loss or damage in cases where there is occurrence of a situation as defined under clause 16 of the PPA, provided theTANGEDCO is duly informed of the same by serving a notice beforehand.

3.7. In the instant case, the Petitioner ought to have commissioned its SPG by 21st March, 2019 i.e. 12 months from the date of signing of thePPA.

3.8. The Petitioner's SPG is fitted with modules and solar cells imported from China with the individual PV Module specification of 330Wp from the Tier 1 FV module manufacturer with high standard bill of materials like EVA, Backsheet, Frame, Glass and Junction Boxes. This PV module is the primary source (Transducer) of solarPV Project. PV modules are made up of many solar cells and cells are made of silicon like semiconductors, they are constructed with a positive layer and a layer which together create an electric field. PV solar panels generate Direct Current (DC Electricity) which in turn converted into Alternating current (AC Electricity) using suitable Inverters. Hence, PV module is the primary functional equipment without which SPG cannot construct this 50MW project.

3.9. However, vide Notification No.01/2018 -- Customs (SG) dated 30th July, 2018,

the Ministry of Finance has imposed a 'Safeguard Duty'(Hereinafter, 'SGD') on the above mentioned modules and solar cells from all developed countries such as China, Taiwan and Malaysia. The said notification imposed a safeguard duty of 25% on the ad valorem value of the modules, thus increasing the price of modules by 25%. This will result in an increase of the overall project cost by 17%. Consequently, this translates into an increase in the fixed costs incurred by the Petitioner herein affecting the entire project commercial viability of the Petitioner.

3.10. Vide letter dated 18.12.2018, the Petitioner intimated to the 2nd Respondent that due to the unforeseen natural disaster that hit the coast of Tamil Nadu during December, 2018, the Petitioner's project was severely affected and the Petitioner suffered set back in project development by four months and sought COD extension by 4 months, i.e. from 21.03.2019 to 21.7.2019. To the same, the 2nd Respondent TANGEDCO replied stating that the Petitioner had time till 21.01.2020 to Commission its power plant, as per the PPA dated 22.03.2018, during which time the TANGEDCO would be entitled to invoke the bank guarantee for every day's delay.

3.11. In the meantime, the Petitioner was shocked to receive a letter dated 03 .09.2019 from 2nd Respondent intimating it that the performance guarantee furnished to the tune of Rs.5,10,00,000/- lying with the ICICI Bank, Thiruvannamalai would be invoked for the delay of 5 months in commissioning the SPG as per the terms of the PPA. The Respondent TANGEDCO invoked the said bank guarantee of Rs.5,10,00,000/- and encashed the same on

7.09.2019. On 3.9.2019, the Petitioner received another letter from TANGEDCO intimating that the performance bank guarantee of Rs.4,90,00,000/- lying with the Central Bank of India, Hosur would also be encashed in view of the delay in commissioning the SPG. The Petitioner responded to the above letters vide letter dated 22.10.2019 to the 2nd Respondent reiterating that the Petitioner was prevented from developing and commissioning the SPG at Tuticorin because of the natural disaster that hit the coast of Tamil Nadu in December 2018 and further stated that it has signed an MoU with the Government of Tamil Nadu to erect the 50MW SPG on 24.01.2019 wherein the Government of Tamil Nadu promised infrastructural and regulatory facilitation to the Petitioner in erecting the 50MW SPG and it has succeeded in obtaining financial assistance from various banks and requested the TANGEDCO not to encash the two bank guarantees. The Petitioner did not receive any response from TANGEDCO thus far.

3.12. On 15.11.2019, the Petitioner was in receipt of a letter bearing Lr.No.SE/OCC/MSU/AEE/MONI/F.M/s.VSR.Solar (P) Ltd./D.No.1413/2019 from the 4th Respondent Superintending Engineer seeking Rs.1,69,000/- for drawing scrutinizing charges. The Petitioner has duly remitted the same on 19.11.2019 to the Tamil Nadu Transmission Corporation and has received an acknowledgement of the receipt number GCMDURA1D665I. This shows that the Petitioner has been ready and willing to honour its obligations under the PPA and has constantly been taking efforts in that regard.

3.13. Thereafter, the Petitioner received a letter dated 05.12.2019 from the 2nd

Respondent stating that the Petitioner has to finish commissioning of its power plant by 21.1 2020, on which date the 22 month period ends. In the said letter, the 2nd Respondent has denied the Petitioner's request for extension of time for COD on the ground that it is not feasible for compliance. Thereafter, the Petitioner received another letter dated 20.12.2019 from the 2nd Respondent, directing the Petitioner to furnish performance bank guarantee of Rs.7,60,00,000/- calculated at Rs.10,000/- per MW for the further period of 5 months.

3.14. The Petitioner has, in fact, obtained financial closure from the Indian Renewable Energy Development Agency Limited vide letter dated 11.09.2019 and the same was communicated to the 2nd Respondent vide letter date 06.1.2020. In the said letter, the Petitioner also informed the 2nd Respondent that the term loan was also sanctioned to it on 11.09.2019. However, the Respondent TANGEDCO has not responded to any of the Petitioner's above mentioned letters.

3.15. It is apposite to set out the industry wide problem faced by solar power generators which is the sudden levy of SGD at 25% on the ad valorem value of the modules proposed to be imported by the Petitioner for the 50MW SPG. Such a sudden levy immensely affected the Petitioner's project viability. The Petitioner submits that several SPGs are faced with the same issue since neither the generators nor the TANGEDCO contemplated such a sudden levy of SPG.

3.16. The petitioner wrote two letters to the Respondent seeking extension COD on the ground of natural disaster and low bank credit rating of TANGEDCO by the Petitioner dated 18.12.2018 and 22.10.2019. However, the Petitioner

has received response from the Respondent dated 7.1.2019 and 5.12.2019, in which the Respondent denied the extension of COD stating not feasible.

3.17. The Petitioner's Company is incorporated with a green initiative, with the sole intention of setting up and commissioning the 50MW SPG thereby reducing the carbon footprint. The instant 50MW SPG is the first venture of the Petitioner Company.

3.18. The petitioner made solid development at site to ensure the 50MW SPG commissioning well within time line. A brief summary of the steps taken by the Petitioner are as follows:

- a) *Project Site Acquisition done 100% with all required conversions and Government approvals of site land,*
- b) *Land Levelling and land development (which was redone due to unforeseen natural calamity),*
- c) Site boundary Fencing work done,
- d) Debt Financial closure done with IREDA,
- e) EPC contractors have been finalized for this good Project,
- f) A German based Solar Engineering consultant Namely "Sgurr India" has been appointed as Owners Engineers to validate all contractors drawings and design to get the Highest quality ,performance and Reliability,
- g) *All the Petitioner's project Scheme (SLD) and design basis are being finalized,*

- h) *All Major long leading capital items vendors have been identified and commercial terms finalization is underway.*
- i) *On transmission work and Bay works - root Survey done and TANTRASCO have been paid for drawing scrutiny work,*
- j) All bay components Purchase orders have been rolled out and advance amount against those purchase orders have been paid, those vendors drawings have been submitted to SE GCC, Madurai and waiting for drawing approval to give manufacturing clearance to Vendors. However, the Approval from SE GCC, Madurai (4th Respondent) is pending due to Clearances from NCES (2nd Respondent). Hence, the Petitioner is stuck on transmission line works which is causing huge delay in this transmission task progress.

3.19. Aggrieved by the Respondent TANGEDCO's failure to extend the COD for the Petitioner by 18 months for all the above mentioned reasons, the instant petition is filed on the following other grounds:

3.20. When the tariff payable is determined through a transparent bidding process, the Commission adopts the said tariff under Section 63 of the Electricity Act, 2003. Therefore, the Commission has the power to review its decision to adopt the said tariff and the terms contained therein under section 86(1)(a) of the Act,. Hence, the instant petitioner is maintainable in law and in facts.

3.21. The Commission has powers to extend the CoD for the Petitioner on a project specific basis to meet the ends of justice. Clause 48 (1) of TNERC

(Conduct of Business) 2004 provides that *"Nothing in these Regulations shall be deemed to limit or otherwise the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission."* In the instant case, despite all efforts put in by the Petitioner to complete construction of its project well before 21.03.2019, the Petitioner was prevented from commissioning the said SPG due to industry wide levy of SGD by the Ministry of Finance and the poor financial credit rating of TANGEDCO, which delayed the process of obtaining financial closure from the IREDA and further funds from other financial creditors. The Petitioner has expressed its readiness and willingness to perform its PPA on multiple occasions. Even Ministry of New and Renewable Energy Resources has issued a notification bearing number 23/43/2018-R&R dated 27.08.2018 by Ministry of Power to CERC setting out that solar power generators can be duly compensated for the sudden levy of SGD as the same amounts to a change in law situation. In furtherance of the same, several State Distribution Licensees have allowed generators to claim for an extension of COD as being a change in law situation. The sudden levy of SGD was not contemplated by either of the two parties, i.e. the Petitioner, and the TANGEDCO, when the said PPA was signed. Several crores have been invested in the Petitioner's project towards commissioning and the Petitioner has made arrangements for additional funds to meet out the increased project costs due to the unexpected levy of SOD. In such a scenario, it will be grossly unjust to penalise the Petitioner for the delay in commissioning in the SPG when the reasons for the same cannot be controlled the Petitioner. By doing so, the TANGEDCO will be unjustly enriched at the cost of the Petitioner. Indeed, Regulatory Commissions in the

past have invoked such inherent powers vested in them and granted project specific extension of the COD to project developers whose project commissioning had been delayed for no fault of theirs. For example, the Central Electricity Regulatory Commission has allowed for an extension of the CoD in the case of MEIL Green Power Ltd v NTPC Vidyut Vyapar Nigam Limited and Ors. 16/MP/2014 on the ground that the sudden reduction in DNI levels, the Petitioner therein forced to redesign the entire project which was the cause of the delay.

3.22. When the Petitioner participated in the tender floated by TANGEDCO, there was no concept of SGD on the solar modules proposed to be imported by the Petitioner for the purpose of setting up the SPG. Therefore, the Petitioner proposed the project cost of Rs.3.47 crore per MW (excluding land and part of preoperative expenses) and became the successful tenderer. An analysis of the Petitioner's tender will demonstrate that either parties never contemplated such a cost while the Petitioner has indeed considered other escalations before quoting its price. A brief calculation table setting out how the entire project cost currently stands enlarged due to the levy of SDG is set forth below:

3.33. As per the projected project cost of Rs.3.47 crores per MWp, of which, approx. 52% constitute the cost for PV module, suffered by 25% SD thereby the Project cost increased by 17% expensive.

Period	Poly crystalline PV module price (USF/Wp)	SGD (%)	Poly crystalline PV module price with SGD (USF/Wp)
Baseline scenario while bidding			
Sep-17	0.275	0	0.275
Project scenario after PPA			
Jan-	0.35	0	0.35

18			
Jul-18	0.33	25	0.4125
Dec-18	0.31	25	0.3875

Per Wp price While Bidding (INR)	17,875
Per Wp price after SGD (INR)	23.94
Per Wp increase in cost (INR)	6.065
1 MWp cost while Bidding (INR) @ER INR 65	17875000
1 Mwp cost after SGD (INR) @ ER INR 68.4	23940000
1MWp increase in cost (INR)	6065000
1MWp project cost considered while bidding (INR)	34700000
1Mwp project cost after SGD (INR)	40765000
1Mwp project increase in cost (%)	17.47838617

3.34. Therefore, it is now clear that the change in law is causing a surge of 17% in the quoted project cost. The Petitioner ought to be granted an extension of time to make suitable arrangements for funds to meet the surge. Further, it is pertinent to note that even though the Petitioner is now seeking an extension of COD, it has paid the drawing scrutinization charges as early as 19.11.2019, even though the Petitioner has been denied extension of CoD. This establishes that the Petitioner is ready and willing to perform its obligations under the PPA and the same cannot be questioned.

TANGEDCO's actions have the potential to seriously and detrimentally affect the Petitioner's project viability.

3.35. The Petitioner is facing immense opposition from banks and other financial institutions due to the abysmal financial position of the Respondent TANGEDCO. Even the Petitioner's investors have pulled out their funds since TANGEDCO has been repeatedly failing to honour its commitments under the PPA. Consequently, the

Petitioner is now being forced to provide 9 months bill payments(TANGDECO Receivable as bank guarantee to the debt funder on considering the bill payment track record, which is very arduous for the Petitioner, given that several crores have already been invested in the proposed subject SPG.

3.36. In such a financial scenario, it would be grossly unjust to allow the Respondent to encash the bank guarantee for every day's delay. If the same is permitted, the same would amount to allowing the Respondent TANGEDCO to profiteer from its own mistakes and breaches of contracts. The Respondent TANGEDCO would also be unjustly enriched at the cost of the petitioner who is ready and willing to perform the PPA.

3.37. The Respondent TANGEDCO will not suffer in any manner if the Petitioner's request for extension of time is granted. In fact, the PPA entered into by the Petitioner and TANGEDCO benefits TANGEDCO two fold, i.e. TANGEDCO is assured of 50 MW of power from the Petitioner's SPG and TANGEDCO will be complying with its RPO. Therefore, the commissioning of the Petitioner's SPG is more beneficial to TANGEDCO than to the Petitioner itself. Further, TANGEDCO has not invested any sums so far in respect of the Petitioner's SPG and therefore will not be suffering any losses.

3.38. It is universally acknowledged that conventional source of energy, in particular, coal and hydrocarbon, result in significant environmental degradation and adverse impact. The last few decades have seen a global recognition of the adverse environmental impact (extremely) of conventional energy (particularly coal

and hydrocarbons) and the need to promote gradual but steady development of renewable energy sources to substitute conventional power. These stated legislative and policy objectives of environment and sustainable development are now well established in our jurisprudence in context of Articles 48-A, 51, 51-A (g) and 21 of the Constitution of India. India is a party to the global move on climate change-committed to sustainable development, viz.,- The United Nation's Framework Convention on Climate Change ("UNFCCC") signed by India on 10.06.1992 and ratified on 01.11.1993. Adoption of Protocol to the UNFCCC adopted in Kyoto, Japan on 11.12.1997 ("Kyoto Protocol") acceded to by India on 26.8.2002. The Electricity Act 2003, the National Electricity Policy and Tariff Policy mandate the encouragement to be provided to non-conventional energy sources. The consequence of TANGEDCO'S default would have a direct effect of negating such mandate and therefore on this ground also, the Petitioner's project is entitled to the relief sought for.

4. Counter affidavit filed on behalf of the Respondents:-

4.1. 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. 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 the 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.

4.2. While the second phase was lodged by the Respondent, 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 was floated 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 filed Miscellaneous Petition in MP.No.8 of 2017 before the 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, the Respondent 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 the Respondent to proceed with the tendering process.

4.3. The Board of Respondent has accorded approval in its 70th meeting held on 10.05.2017 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).

4.4. The Respondent 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.

4.5. The Commission in its order dated 10.07.2017 has accorded approval in M.P.No.8 of 2017 for the "Procurement quantum", a draft Tender Specification (RFS document) and for the amendments in RFS document requested by TANGEDCO in its additional affidavit.

4.6. 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 and 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.

4.7. 39 bidders 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 (By circulation) on 28.06.2017, price bids of eligible 25 bidders of combined capacity of 2673 MW were opened on 30.06.2017. M/s RaasiGreen Earth Energy (P) Limited, Bangalore, which quoted a tariff of

Rs.3.47per unit in respect of their proposed 100 MW solar power plant at Ramnaddistrict was the L1 bidder.

4.8. 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.

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.SaiJyothi Infrastructure ventures (P) Limited	54	3.47
3	M/s.Solitaire BTN Solar Private Limited	100	3.47
4	M/s.Narbheramvishram	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.ThangaMaligai (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. ShapoorjiPallonji Infrastructure Capital Company Ltd.	50	3.47
16	M/s. NLC India Ltd.	709	3.47
	Total	1500	

4.9. Subsequently, the Board of TANGEDCO in its 72nd meeting held on 24.08.2017 has accorded approval for issuing Letter to eligible 16 bidders and subsequent signing of PPA for the total capacity of 1500 MW.

4.10. Thereafter, TANGEDCO 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 mentioned as above at the rate of Rs.3.47 per unit on long term basis.

4.11. The Commission in its order dated 29.08.2017 in PPAP.No.5 of 2017 accorded approval to TANGEDCO for the procurement of 1500 MW of solar power from the developers mentioned as above at the rate of Rs.3.47 per unit on long term basis. The Commission has also directed TANGEDCO to execute PPA with the successful bidders within 1 month from the date of order in PPAP.No.5 of 2017.

4.12. Consequent on the approval of the Commission in PPAP.No.5 of 2017, TANGEDCO issued Letter of Intent to all the 16 successful bidders 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.

4.13. All the successful bidders have executed PPA with TANGEDCO within the stipulated time (from 26.09.2017 to 28.09.2017) except M/s. SaiJyothi Infrastructure Ventures (P) Limited (54 MW) and M/s. Talettutayi Solar Project Two (P) Limited (50 MW). As M/s. SaiJyothi 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.

4.14. As M/s. SaiJyothiInfrastrucure Ventures Private Limited (54 MW) and M/s. Teletutayi 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 which was approved by the Board of TANGEDCO in its 77th meeting held on 26.02.2018.

Sl. No.	Name of the bidder	Capacity in MW	Negotiated rate
1	M/s.G.R.ThangaMaligaiJewellers (India) Pvt. Ltd.	44	3.47
2	M/s.VSR Solar (P) Limited	50	3.47
3	M/s. Indira Industries, Vellore	5	3.47
4	M/s.Indira Damper Industries, Vellore	5	3.47
	Total	1500	

4.15. The Board of TANGEDCO has also accorded approval for the issuance of Letter of Intent and subsequent signing of PPA with 4 developers as above 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.

Certain important terms of the "Letter of Intent" 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 Rs10000/- 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.

4.16. Accordingly, TANGEDCO has issued Letter of Intent to M/s. VSR Solar Power (P) Limited for the establishment of 50 MW solar power plant at Shoolagiri village, Krishnagiri district and for supplying solar power to TANGEDCO at the rate of Rs.3.47 per unit on long term basis. Subsequently, M/s. VSR Solar Power (P) Limited was issued with Letter of Intent in second respondent's letter dated 02.01.2018 and the petitioner/tenderer has executed Power Purchase Agreement (PPA) with TANGEDCO on 22.03.2018.

4.17. M/s. VSR Solar Power (P) Limited has requested change of location in respect of the proposed 50 MW project location from Shoolagiri village,

Krishnagiridistrict to Amanakkunatham&Kurundamadam villages, Virudhunagar district vide letter dated 05.01.2018 and same was accepted by TANGEDCO. M/s. VSR Solar Power (P) Limited vide letter dated 02.08.2018 has once again requested to change the location of the proposed 50 MW solar power plant from Amanakkunatham&Kurundamadam villages, Virudhunagar district to Zaminsengalapadaipanchayat, Vilathikulam Village, Tuticorin district. The petitioner has simply requested change of location of the proposed project twice without furnishing land documents which is to be furnished within 3 months of PPA as per tender norms, which shows that thePetitioner even not identified the land for a period of about 7 months from the date of issue of Letter of Intent.

4.18. As per the terms and conditions of tender, the projects having capacity upto 50 MW shall be commissioned within 2 months from the date of signing of PPA. The petitioner has not even identified the land for a period of 7 months from the date of issue of Letter of Intent for the proposed 50 MW solar plant. 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 50 MW solar power plant of M/s. VSR Solar Power (P) Limited at Vilathikulam, 110/33 11 KV SS at 110 KV level. The load flow study result has also been communicated to the petitioner on 14.11.2018.

4.19. As per the terms and conditions of Letter of Intent, and Clause 14 of the PPA dated 22.03.2018, the Scheduled date of Commissioning for the proposed 50 MW solar power plant of M/s. *VSR Solar Power (P) Limited shall be on or before 21.03.2019*. But the petitioner has not commissioned its project within the due date,

However, as per the conditions governing tender, Letter of Intent and PPA, there is a provision to allow bidders to commission their project beyond 10 months from the Scheduled Date of Commissioning with penalty viz, forfeiture of Performance Bank Guarantee in proportionate to capacity not commissioned for the first 5 months delay from the due date and Liquidated Damages at the rate of Rs.10,000/- per MW per day for the delay beyond first 5 months delay.

4.20. As per the terms of contract, the due date of commissioning the proposed 50 MW solar power plant of M/s. VSR Solar Power (P) Ltd. was 21.03.2019 and with forfeiture of Performance Bank Guarantee (PBG) was on 21.08.2019, both dates already expired much before. But the petitioner has not commissioned its project till date.

4.21. The petitioner has furnished two separate Performance Bank Guarantees in the form of BG's (Rs.5,10,00,000/-, BG.No.6196BGFD000418 dated 20.03.2018 with validity upto 20.03.2020 issued by ICICI Bank, Tiruvannamalai Branch and Rs.4,90,00,000/- BG.No.37/07 dated 15.03.2018 with validity upto 14.03.2020 issued by Central bank of India, Hosur Branch in respect of the proposed 50 MW project as per tender norms.

4.22. As the petitioner did not commission its proposed 50 MW solar power plant on or before 21.08.2019 i.e. within penalty zone 1, the PBG amount of Rs.10 crores (Rs.5.1 crores + Rs.4.9 crores) furnished by the petitioner company, the same stood forfeited as per the terms and conditions of tender. Hence, the Respondent vide letter dated 03.09.2019 has addressed the concerned banks (ICICI Bank, Tiruvannamalai Branch and Central Bank of India,

Hosur Branch) to invoke the BG amount and to transfer the same to TANGEDCO account. TANGEDCO has received confirmation from both the banks that the BG amount has been transferred to TANGEDCO's account. Accordingly, the BG amount was received by TANGEDCO.

4.23. As per the terms and conditions of tender, the further due date of commissioning the proposed 50 MW solar power plant of M/s. VSR Solar Power (P) Limited with Liquidated Damages (Rs.10,000/- per MW per day) shall be on or before 21.01.2020. While so, as per clause 16 of Letter of Intent and as per clause 14 of Power Purchase Agreement, the petitioner has to furnish Additional Bank Guarantee calculated @ Rs.10,000/- per MW for 5 months prior to expiry of penalty zone-1 i.e. 21.8.2019. But the petitioner has not furnished the Additional Bank Guarantee. Clause 16 of Letter of Intent and clause 14 of Power Purchase Agreement, inter-alia provides that *"In case of non-furnishing of Additional Performance Bank Guarantee the PPA will stand terminated automatically without any notice / orders."*

4.24. As per clause 16 of Letter of Intent and as per clause 14 of Power Purchase Agreement, the maximum time period allowed for commissioning of full project capacity with encashment of PBG and payment of liquidated damages shall be 22 months from the date of signing of PPA i.e. on or before 21.01.2020. In case the project is not commissioned within such 22 months, the PPA stand terminated automatically without any notice or order. As the petitioner neither commissioned its 50 MW project within 21.08.2019 nor furnished the Additional Performance BG so as to keep the PPA in live condition beyond 21.08.2019

and upto 21.01.2020, as per contract conditions stated above, the PPA stood terminated on 21.08.2019 itself. On this ground alone, the Dispute Resolution Petition is liable to be dismissed in limini.

4.25. The petitioner in para 22 of its petition has stated that the imposition of safeguard duty on solar panels by Central Government affected the entire project's commercial viability. Under this scheme, TAGEDCO has executed PPA with 18 developers for the procurement of solar power of combined capacity of 1500 MW at the rate of Rs.3.47 per unit. Out of 18 Developers, 14 developers of combined capacity of 1294 MW have commissioned their projects within scheduled date of commissioning without raising "Safeguard duty" issue. Two developers have not commissioned their Project of combined capacity of 6 MW within the stipulated time and their PPAs were terminated. One developer has commissioned 50 MW partially out of the proposed 100 MW. Hence, the alleged increase in "Safeguard duty issue" for not commissioning the proposed 50 MW SPV plant within stipulated time is not acceptable and justifiable. In fact the said reason is an afterthought.

4.26. The petitioner in para 23 of its petition has stated that it has been prevented from developing and commissioning the solar power plant at Tuticorin district because of natural disaster that hit the coast of Tamil Nadu in December 2018. Further 5 developers have commissioned solar power plants of combined capacity of 500 MW within scheduled date of commissioning at Tuticorin district under this scheme and they have not claimed any time extension due to the reasons stated above by petitioner company. Hence the reason stated by the petitioner is not acceptable and justifiable and such a reason is stated to cover up its commissions

and omissions in pursuing the contract conditions.

4.27. The present status of petitioner's proposed 50 MW solar power plant at Tuticorin district has been obtained from the Superintending Engineer/NCES/Tirunelveli vide letter dated 17.03.2020 and also letter dated 04.07.2020 as follows:

- (a) 110 Kv power evacuation line - erection work yet to be started.
- (b) Solar PV plant side-Land leveling work has been completed and other works yet to be started.
- (c) 110 Kv bay extension work at Vilathikulam 110/33/11 KV SS —Erection work yet to be started.

4.28. From the field report it is noted that the petitioner has not even started its erection activities of the proposed 50 MW SPV plant, power evacuation line works and 110 KV bay extension work at Vilathikulam 110/33- 11 Kv-SS even after lapse of 2 years from the date of signing of PPA. Hence, for these reasons as well, time extension of 18 months requested by the petitioner is not acceptable. In fact, the petitioner has obtained loan sanction on 11.09.2019 only (i.e.) after about 18 months from the date of PPA.

4.29. However, much before 11.09.2019, i.e. on 21.08.2019 itself, the PPA got terminated automatically as per the contract conditions. This fortifies the level of performance of the petitioner in executing the PPA conditions, Therefore the petitioner is not entitled to shift his burdens and inactions on the respondents on the pretext or other.

4.30. As per the RPO target fixed by the Central Government to the State, Distribution Licensee (TANGEDCO) is an obligated entity to meet the RPO targets. Achieving the RPO targets shall be under the purview of TANGEDCO and the petitioner is no way connected to this issue.

4.31. 18 developers including the petitioner company have executed PPA with TANGEDCO. Out of 18 developers, 14 developers have commissioned their projects without raising the issue with regard to imposition of Safeguard duty on solar panels issued by the Central Government and proceeded on PPA terms. The petitioner alone raised this issue and requesting time extension for a period of 18 months, violating the PPA terms, which is unacceptable.

4.32. There is no provision of "Change in law" in the tender. The tender specification has already been approved by the Commission in MP.No.8 of 2017 and the petitioner knows it very well. Hence, the intention of the petitioner claiming time extension for commissioning the plant on the alleged "Change in law" situation in violation of PPA terms, is also not acceptable, as it is an afterthought. More so, having agreed to come under uniform tender/PPA conditions, the petitioner is estopped in law to change its plea to project specific basis, as it was not applied and obtained contract by filing petition to fix tariff for its plant separately. Hence, the decision relied on has no application to the case on hand,

4.33. The "Change in law" situation is not applicable. 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 (i.e. Rs.2.71 + Rs.0.07 as trade margin). If the request of the petitioner seeking time extension for a period of 18 months (from 21.03.2019) is considered @ Rs.3.47 per unit, when the solar tariff is declining, TANGEDCO will be at severe loss, as these are all long term PPAs. Further, the developer has not initiated any erection activities in respect of its proposed 50 MW solar power plant. Moreover, for violations as per the terms and conditions of tender, the PPA dated 22.03.2018 stood automatically terminated on 21.08.2019 itself. The PPAs of similar two projects under this scheme were terminated for not commissioning within the due date, hence privilege of granting time extension to the petition is not acceptable and not justifiable. Mere payment of a small amount cannot be a ground to seek extension of time in violation of PPA terms.

4.34. It is evident that the petitioner intending to cover up its failures has made bald and irrelevant allegations against the respondents. At present, TANGEDCO is in severe financial crunch. TANGEDCO has executed Power Sale Agreement (PSA) with M/s. Solar Energy Corporation of India for the procurement of 500 MW of solar power at the rate of Rs.2.78 per unit on long term basis. After the automatic termination of the PPA as early as on 21.08.2019 due to failure on the part of petitioner to comply the PPA terms, it cannot as a matter of right seek purchase power at the rate of Rs.3.47 per unit now, as TANGEDCO has executed PSA with SECI for procurement of 500 MW of solar power at the rate of Rs.2.78/- per unit and it also would amount to paying premium for wrong doer. TANGEDCO will suffer if the petitioner is granted time extension for commissioning the petitioner's proposed 50 MW solar power plant.

4.35. The impugned letter, dated 05.12.2019 is a consequential one to the termination of PPA on 21.08.2019. It cannot be challenged without challenging the termination. In any case, the impugned order was as per agreed PPA terms and as such it is sustainable in law. The second prayer is not maintainable as the available BGs were already enforced. The BGs were enforced for violating PPA terms and as such third prayer is also not maintainable. Hence the petitioner is not entitled to any relief in this Dispute Resolution Petition. In fact, after automatic termination of PPA dated 21.08.2019 the prayers in the Dispute Resolution petition itself are 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 TANGEDCO and to the end consumers as well.

5. Rejoinder to the Counter Affidavit of Respondents:-

5.1. The instant petition has been filed seeking an extension of the date of commissioning ("**COD**") in respect of the Petitioner's 50MW power plant in respect of which the Petitioner has entered into a Power Purchase Agreement dated 22.03.2018 ("**PPA**") with the 1st Respondent, owing to a substantial change in law pursuant to levy of Safeguard Duty (SGD) by the Ministry of Finance. The status of its 50MW power plant project ("**Project**") as on date is as follows:

Status of the Petitioner's Project

S.No.	Letter of Intent (LOI)	Date of Issue : 2.1.2018 Date of Acceptance : 25.7.2018
1.	Bank Guarantee	As required under Clause 5.0 of the Lol issued by the Respondents, the Petitioner had approached two banks in order to obtain bank guarantee worth

		<p>INR. 10,00,00,00 (Ten Crores only). The details of the Bank Guarantees submitted by the Petitioner are as follows:</p> <p>a) INR 4,90,00,000 (Four Crores Ninety Lakhs only) issued from Central Bank of India, Hosur. Bank Guarantee No: 37/07 Dated 15/03/2018 in favour of the beneficiary "TANGEDCO".</p> <p>b) INR 5,10,00,000 (Five Crores Ten Lakhs only) issued from ICICI Bank Limited, Tiruvannamalai Bank Guarantee No: 6196BGFD000418 dated 21/03/2018 in favour of the beneficiary "TANGEDCO".</p>
2.	Power Purchase Agreement (PPA)	Power purchase Agreement between the Petitioner and the Respondent was signed on 22.03.2018
3.	Acquisition of Land	<p>The Petitioner faced difficulties in identifying lands, suitable for establishing the project. At the time of signing of the PPA, the Petitioner had identified land at Virudhunagar District. However, subsequently, the Petitioner found that the said land was not suitable for Project. Hence, the Petitioner identified another land parcel at Zaminsengalpadai Village, Vilathikulam Taluk, Tuticorin District of Tamil Nadu and the said land parcel was acquired and registered in the Petitioner's name on 11.06.2018.</p> <p>The Petitioner also obtained a No Objection Certificate (NoC) from local panchayat office on 23.07.2018 and the same has been submitted to TANGEDCO on 25.07.2018.</p>
4.	Load Flow Study	<p>As per LOI issued by TANGEDCO, the Petitioner remitted a sum of Rs.1,18,000/- (Applicable Fee) to TANGEDCO, to conduct a load flow study. Thereafter, on 14.11.2018, the Petitioner received the load flow study approval from TANGEDCO and was informed that the Project can be interfaced to Vilathikulam 110/33-11 KV SS at 110 KV level through a dedicated 110 KV power evacuation line from the proposed project location. In fact it would be pertinent to state that the Petitioner had paid charges for the load flow study three times for three different sites. This would only show that the Petitioner was keen on completing the project and was committed to identifying the most suitable site to establish the Project.</p>
5.	Financial Assistance	The lenders of the Petitioner viz., Indian

	from IREDA	Renewable Energy Development Agency (IREDA) were reluctant to release funds for the Project, given the precarious financial position and poor credit rating of TANGEDCO. However, with continuous efforts, the Petitioner managed to persuade IREDA to sanction a term loan for the Project. A term loan of Rs.128 Cr. (Rupees one hundred and twenty-eight crores only), was sanctioned on 11.09.2019. The Petitioner also remitted a sum of Rs.1,26,26,000/- being the full 'Front End Fee' for the said loans. While so, IREDA has now indicated that funds will be released only upon the CoD being extended.
6.	Drawing Approved	<p>To commence work to set up the Sub-Station, the Petitioner had submitted the following drawings and got approval from SE, NCES, Tirunelveli:</p> <ol style="list-style-type: none"> a) 110KV Bay Extension Switchyard Layout 110/33-11KV Vilathikulam Substation. b) 110KV Bay Extension Single Line Diagram c) 110/33-11KV Vilathikulam Substation. d) 110/11KV Switchyard Earthing Layout. e) 110/11KV Switchyard General Arrangement Drawing f) 110/11KV Switchyard Single Line Diagram. <ul style="list-style-type: none"> • Upon approval of Substation Drawings, a series of correspondence was exchanged between the Respondents regarding collection of Drawing Scrutiny Charges & Inspection, testing and commissioning charges. Thereafter the Petitioner received a letter dated 15.11.2019 from the 4th Respondent for payment of Rs.1,69,000/towards 0.25% of Drawing Scrutinizing Charges for extension of 110KV Bay at Vilathikulam 110/33-11 SS. Pursuant thereto, the Petitioner remitted the said amount by way of a demand draft (DD) on 19.11.2019 and obtained receipt no: G C M D U R A 1 D 6651. • Thereafter, the Petitioner received another communication

		<p>dated 25.11.2019 from the 4th Respondent, directing the Petitioner to remit a sum of Rs.14,16,000/- towards 10% Inspection, Testing and Commissioning charges for erection of 110KV SC line on DC tower from 110/3311KV SS to 50 MW Solar PV Plant was received. All the sub-station component drawings received from the Petitioner's vendors, have been submitted to TANGEDCO for compliance verification and approval. However, the approval was put on hold by TANGEDCO for the reason that the COD date was nearing and TANGEDCO expressed its concern as to whether the Petitioner would have the potential to complete the Project. Further, the 4 Respondent is yet to provide the drawing approval for want of payment advice from the 2nd Respondent. It is owing to this reason that the Petitioner has been unable to proceed further on the project.</p>
7.	Site activity	<ul style="list-style-type: none"> • Immediately upon acquiring the land, the Petitioner undertook land cleaning and bush removal work to ensure that the land is ready for easy installation & construction. The Petitioner also completed the fencing work for the approach road to the property. • The Petitioner had approached Sgurr Energy India (SEI), Pune one the India's reputed Engineering consultants and appointed them for preparing a Detailed Project Report (DPR) and as an Engineering Consultant for the Project. • Meanwhile, owing to Cyclone Gaja, there was severe water logging in the site and the Petitioner had to restart the preliminary work that had already been completed. The Petitioner has communicated the same in its letter dated 18.12.2018, to TANGEDCO. • <i>Further soil investigation test & soil resistivity test was carried out and completed</i> • After completion of land levelling the

		<p>topography study was carried out.</p> <ul style="list-style-type: none"> • <i>Upon receipt of the approved drawings for the Sub-Station, the Petitioner commenced the Bay Extension work in the Vilathikulam Sub-Station. The Petitioner also carried out feasibility and route survey for establishment of Transmission Line work for a total distance of 2.23 Kms between the Sub-Station and the site of the Project</i> • <i>Petitioner has also remitted advance for all the Sub-Station components, to the respective vendors. However, the approval for vendor component drawings are still pending approval of TANGEDCO.</i> • <i>The Petitioner is carrying out construction of the Main Control Room and the works are underway.</i>
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5.2. The contentions raised by the said Respondents in the Counter, are bereft of any merit and are legally untenable.

5.3. Out of (18) developers, fourteen (14) developers of combined capacity of 1294 MW have supposedly commissioned their projects within scheduled date of commissioning without raising the issue of imposition of 'safeguard duty'.

5.4. Five (5) developers have commissioned solar power plants of combined capacity of 500 MW within scheduled date of commissioning at Tuticorin district, without seeking any extension of time due to the natural disaster that hit the coast of Tamil Nadu, in December 2018,

5.5. There is no provision of "Change in law" in the tender

specification that has already been approved by the Commission in MP.No.8 of 2017 and that the Petitioner cannot seek a project specific relief on the said basis.

5.6. The PPA executed by the Petitioner stood automatically terminated on 21.08.2019, on account of the Petitioner's failure to commission the project by 21.08.2019 and since additional performance bank guarantee was not furnished to the Respondent to extend the period of the PPA, beyond 21.08.2019. Further, two similar projects under the scheme were terminated for not commissioning within the due date. Further, that the impugned letter dated 05.12.2019 has been issued consequent to the termination of the PPA on 21.08.2019 and therefore it cannot be challenged without challenging the termination.

5.7. The Petitioner had not identified the land for the proposed solar project for a period of nearly 7 months after issuance of Letter of Intent. (LOI)

5.8. The status of the Petitioner's project indicates that several works in the project are yet to commence. That the load flow study has been conducted for the new location identified by the Petitioner and the same was communicated to the Petitioner on 14.11.2018.

5.9. The Petitioner has obtained loan sanction for the proposed project only on 11.09.2018, after 18 months from the execution of the PPA.

5.10. In so far as the Respondent's contention that the other developers have commissioned the projects is concerned, the Petitioner states that any comparison of the Petitioner's proposed project with that of the other projects, is an entirely irrelevant exercise as the facts pleaded by the petitioner are project-specific constraints and hardships faced by the Petitioner and therefore, the merits of the Petitioner's case ought to be examined on the basis of the PPA and the facts and circumstances surrounding the Petitioner's project alone. Further, the Petitioner is not privy to the agreements executed by the said developers and TANGEDCO, the nature and details of such projects and other relevant facts and circumstances relating to the said projects. That being so, the Respondent cannot seek to place reliance on matters which are not within knowledge of the Petitioner.

The Respondent has failed to consider that in December 2018, when heavy rains hit the coast of Tuticorin, the Petitioner's project site was completely inundated owing to which the Petitioner's personnel were unable to access the project site. The Respondent has not taken cognizance of the fact that the Petitioner's project site consists of black cotton soil which is more susceptible to rain water stagnation, consequently, due to the stagnation, the Petitioner was unable to carry out any work.

5.11. The contention of the Respondent that the other developers have not cited the heavy rains to seek extension of time is misplaced in as much as the Respondent has failed to take cognizance of the nature and location of the project site, which are facts peculiar and unique to the petitioner's

project. Pertinently, in response to the letter dated 18.12.2018, seeking an extension of time for delay owing to the above mentioned unforeseen rain and cyclone, the Respondent has categorically stated in its letter dated 7.01.2019 that the petitioner had time until 21.01.2020 to commission the power plant. Further the 2nd Respondent had also reiterated that the Petitioner had time till 21.01.2020, to commission the project, in its letter dated 5.12.2020. That being so, the Respondent cannot at this juncture retract its stand and claim that the PPA had terminated on 21.08.2019.

5.12. The Respondent has misconstrued the Petitioner's claim for extension of time owing to change in law, in as much as it has stated that there is no provision in the PPA relating to 'Change in Law'. The Petitioner has based claim on Clause 16 of the PPA, 'Force Majeure'. As would be evident from the wording of the provision, the clause contains a non-exhaustive and illustrative list of situations which constitute events of force majeure under the contract. For an event to be considered a 'Force Majeure' under the PPA, it is required to be "beyond the control of the parties involved which they could not have foreseen 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."

5.13. In the case of the Petitioner, the sudden levy of Safe Guard Duty ('SGD') by the Ministry of Finance, on solar photovoltaic modules (PV) imported from countries such as China, Taiwan and Malaysia, vide Notification No. 01/2018 - Customs (SG) dated 30.07.2018 ("Notification") was clearly not

foreseeable by either of the parties or could not be prevented by either of the parties. The said levy was set at 25% of the ad valorem value of the modules, thereby enhancing price of the modules by 25%, which resulted in an increase of the overall project cost of the Petitioner by 17%. Therefore, the Notification substantially affected the performance of the Petitioner in as much as it had increased the fixed costs incurred by the Petitioner, adversely impacting the feasibility of the petitioner's project. The levy of SGD was therefore, clearly an event of 'Force Majeure' under Clause 16 and more specifically, an act of the Government under Clause 16 (ii) as it resulted in a change in law situation.

5.14. It would not be out of place to highlight that the Ministry of New and Renewable Energy Resources (MNRE) had taken cognizance of the unusual increase in project cost due to the sudden levy of SGD, in its notification bearing No.23/43/2018-R&R dated 27.08.2018 wherein the MNRE has stated that the levy of SGD amounts to a change in law so on. The same stance has been canvassed by the Solar Energy Corporation of India (SECI) in its letter dated 22.10.2019. The Respondent has failed to advert to any of the above in its counter affidavit.

5.15. In so far as Respondent's contention that the Petitioner had not identified land for the proposed project even after 7 months of issuance of Lol is concerned, there has been no deliberate delay on the part of the Petitioner. The Petitioner had initially identified land parcels for its project, in Shoolagiri, Krishnagiri District and had in fact registered a part of the project

land in its name. However, since the power evacuation conditions to set up a 50MW plant was not feasible at the said location, the Petitioner was constrained to look for the suitable locations in other parts of Tamil Nadu. During the execution of the PPA, the Petitioner had proposed two locations for the project one in Virudhunagar District and one in Vilathikulam, Tuticorin District (which is the present **location**). **While** so, the Petitioner was orally advised by TANGEDCO to *mention one of the said locations in the PPA. The Petitioner was further advised that it could change the location of the project, if the area was found to be unfit for the project, by requesting for change of location, by submitting the registration documents in respect of new location to TANGEDCO.*

5.16. Subsequent to the execution of PPA, the Petitioner had finalized its location at Vilathikulam, Tuticorin District and a portion of the land was registered on 26.04.2018 (i.e) within 35 days from the date of signing the PPA. The Lol acceptance letter, however, was submitted **after 4** months of signing of the PPA, pursuant to oral confirmation from **TANGEDCO**. Therefore, the Petitioner addressed a letter dated 25.07.2018 communicating its acceptance of the Lol and also requested **for change of** location from Virudhunagar District to Vilathikulam, Tuticorin District.

5.17. The Respondent's contention that the Petitioner has not commenced Work in respect of the project are ill founded inasmuch as the Petitioner has been actively engaged in implementing the project and working towards commissioning. Delay, if any was only account of the approvals granted by the

Respondent, as would be evident from the following:-

- (a) The Petitioner had remitted the applicable fee for conducting the load flow study at the 1st location on 04.01.2018, thereafter on 22.03.2018 for conducting the study at the 2nd location and finally on 01.08.2018 after acceptance of the Lol. However, the result of the study was communicated to the Petitioner only on 14.11.2018, after a delay of nearly 3 months and 14 days, from the date of last payment remitted by the Petitioner.
- (b) Subsequent to approval of loadflow study, the drawings for substation Bay Extension were submitted by the Petitioner to the SE Non-conventional Energy Sources, Tirunelveli and the same was forwarded to the 2nd Respondent for approval, vide letter SE / NCES/ TIN/AEE/ AE/ Tech/ F.M/s.VSR Solar/ D.No.852/19 dated 21.08.2019.
- (c) Thereafter, the Petitioner submitted 110/11KV VSR Solar side metering CT and PT drawings, to the SE, Non-conventional Energy Sources, Tirunelveli for approval, vide communication dated 30.09.2019.
- (d) Subsequently, the 3 drawings pertaining to (1) 110/11KV Switchyard Single Line Diagram, (2) 110KV Bay Extension Switch yard Layout, 110/33-11KV Vilathikulam Sub-station and (3) 110KV Bay extension Single Line Diagram, 110/33-11KV Vilathikulam Sub-station, came to be approved and signed by Executive Engineer, Transmission Line Construction, Tirunelveli & Assistant Executive Engineer, Transmission Line Construction, Tuticorin, & Executive Engineer, Electrical

Projects Erection, GCC/TANTRANSCO/TNEB, Tirunelveli, & Assistant Executive Engineer, Sub-Station Erection, TANTRANSCO/TNEB, Kovilpatti&Superintending Engineer, Non-conventional Energy Sources, TANGEDCO, Tirunelveli.

- (e) On 22.10.2019, the Executive Engineer, Electrical Project Erection, Tirunelveli vide his letter EE/ TIN/F.VSR/D.No.1268, submitted the estimation for drawing scrutiny charges & supervision, testing charges for the Petitioner's project, *to the Superintending Engineer, General Construction Circle.*
- (f) Thereafter, Executive Engineer, Transmission Line Construction, Tirunelveli vide his later No.1041/EE/TLC/TN/SDM/F.M/s.VSR Solar 10(1) SS/19 dated 31.10.2019 submitted the estimate fee for erection of 110 KV SC line on DC tower to the existing vathikulam sub-station and the cost of inspecting, testing and commissioning, to the Superintending Engineer, General Construction Circle. The cost of inspecting, testing and commissioning was estimated at Rs. 14,16,000/- (Rupees Fourteen Lakhs and Sixteen Thousand). The same was also communicated to the Petitioner.
- (g) However, in order to complete the project expeditiously, the Petitioner decided to carry out the bay extension work by themselves and in this regard addressed a letter dated 06.11.2019, to the 2nd Respondent. The Petitioner undertook to remit the necessary fee for establishment and supervision charges. The Petitioner also requested the 2nd Respondent to issue the necessary bay allotment tentative fee demand letter, for the Petitioner to take the

next steps.

- (h) In response to the aforesaid letter of the Petitioner, the 4th Respondent *vide* their letter SE/GCC/MDU/AEE/MONI/F.VSR Solar (P) Limited/D. No. 1413/2019, dated 15.11.2019, requested the Petitioner to remit a sum of Rs.1,69,000/- towards 0.25% of drawing scrutinizing charges for Bay Extension at Vilathikulam Sub-Station. Immediately thereafter, the Petitioner also remitted the said sum by way of Demand Draft (DD No. 007769 dated 18.11.2019) with an undertaking not to claim any refund of the amount and sought for receipt to be issued for the said payment, *vide* communication dated 19.11.2019. Pursuant to the said communication, a receipt was also issued by the Assistant Accounts Officer, Madurai on 19.11.2019 for the payment made by the Petitioner.
- (i) On 25.11.2019, the 4th Respondent *vide* his letter SE/GCC/MDU/AEE/MONI/F.M/s.VSR SOLAR (P) Limited/D. No. 1454/2019, Dt.25.11.2019 to VSR Solar Power Pvt Ltd. requested the Petitioner to remit a sum of Rs.14,16,000/- towards 10% Inspection, Testing & Commissioning charges for erection of 110KV SC line on DC tower from Vilathikulam 110/33- 11KV SS to the 50MW solar power plant. However, the Respondent insisted that the Petitioner also obtain a payment advice letter from the 2nd Respondent in respect of the aforesaid payment. Further, the 4th Respondent is yet to provide the drawing approval for want of payment advice from the 2nd Respondent and the 2nd Respondent has also not advised Respondent No.4 suitably. It is owing to this reason that the Petitioner

has been unable to proceed further on the project.

5.18. While the Petitioner has been taking active steps to complete the project and has been willing and ready to perform its obligation under the PPA, it has faced road blocks owing to lack of coordination between the departments of the Respondent since the 4th Respondent had refused to grant approval to the drawings unless payment advice is sought from the 2nd Respondent.

5.19. The Petitioner has placed purchase orders for various components and the same are ready to be dispatched, however, the transport of components to the project site from the Vendors, is on hold owing to restrictions in movement, imposed due to Covid-19 pandemic across the State.

S. No.	P.O.Date	Description	Contractor Details
1.	6.2.2019	Complete EPC Package for 52 MWp	DK Solar projects & Ventures Pvt. Ltd. 5/19 2 nd Floor, ChakrapaniSteet, Maduvankarai, Guindy, Chennai 60032.
2.	10.9.2019	Sub-station components	DK Solar Projects & Ventures Pvt. Ltd. 5/19 2 nd Floor, ChakrapaniSteet, Maduvankarai, Guindy, Chennai 60032.
3.	6.11.2019	Module Mounting Structure Pre Galvanized	P4Q Solutions, Flat No. 510 Road No.3, Bhavya Surya Sri Apartments, Gouthami Nagar, Nizampet Road, Hyderabad – 90.

5.20. It is the contention of the respondent, the Petitioner has obtained loan sanction, belatedly, on 11.09.2018. The Respondent is seeking to somehow pin the reason for delay on the Petitioner, when the fact of the matter is the Petitioner was unable to procure financial assistance primarily because of TANGEDCO's poor financial credentials. The Petitioner went to great lengths to convince its lenders IREDA, Delhi, as they were reluctant to fund the Petitioner's project owing to the TANGEDCO's precarious financial standing. The Petitioner has paid Rs.1,26,26,000/- (Rupees One Crore Twenty-Six Lakhs and Twenty Six Thousand) to the lender as full Front End Fee as part of the project funding, on the following dates.

Date	Payment details
09.12.2019	Rs.64,00,000/-
21.07 .2020	Rs. 30,00,000/-
10.08.2020	Rs.32,26,000/-
Total	Rs.1,26,26,000/-

5.21. The lender however, is reluctant to disburse the loan amounts to the Petitioner in view of the expiry of the COD. In fact, IREDA has categorically stated that the loan amount for the project would be released only upon extension of CoD. Pertinently, the Petitioner has invested more than Rs.20 Crore in the proposed project, for various activities. However, the progress of the project has been scuttled owing to the reasons set out above.

5.22. The Respondent has failed to address the following significant aspects

raised by the Petitioner in the present Petition:-

- (i) That the levy of SGD on import of solar PV cells from developing countries and China by the Ministry of Finance is a development of the law was not reasonably foreseeable by either of the parties, having a significant impact on the Petitioner's obligations under the PPA dated 29.08.2017, thereby falling within the teeth of the Force Majeure clause contained in Clause 16 of the PPA. In fact the Respondent misconstrued the contention of the Petitioner and averred that there is no provision for 'Change in Law' in the tender.
- (ii) That the levy of the SGD has a detrimental impact on solar power developers have been acknowledged by the MNRE and the SECI vide their Notification dated 27.8.2019 and letter dated 22.10.2019 respectively. The same have been conveniently ignored by TANGEDCO for reasons best known to them.
- (iii) That the Petitioner will suffer an overall increase in project cost by nearby 17% thereby threatening the Petitioner's project viability.
- (iv) That the project has always been ready and willing to perform its obligations under the PPA and the hardships faced by the Petitioner are on account of delays attributable to the Respondent.
- (v) That the project specific extension of COD will not affect the TANGEDCO in any manner whatsoever.
- (vi) That the project specific extension of the Petitioner's power plant will benefit the TANGEDCO immensely since the TANGEDCO being an obligated entity

has to purchase power from renewable sources.

6. Findings of the Commission:-

6.1. The instant petition is being filed seeking an extension of the date of Commissioning (COD) by 18 months from 21-03-2019 to 21-09-2020 in respect of the Petitioner's 50 MW power plant in respect of which the Petitioner entered into a power purchase agreement (PPA) dated 22.03.2018 with the 1st Respondent herein due to a substantial change in law in respect of levy of Safeguard Duty (SGD) by the Ministry of Finance, Government of India and also to direct the 1st and 2nd respondent to repay a sum of Rs.5,10,00,000/- collected under Bank Guarantee dated 21-03-2018 in order that the petitioner can reinstate such bank guarantee and keep it alive in terms of the PPA dated 22-03-2018.

6.2 The Petitioner participated in the tender specification CE/NCES/OT.No.1/2017-2018 and was the most successful bidder in the same Pursuant to the same, the Petitioner was awarded the Letter of Intent by the 2nd Respondent bearing reference number Lr.Ref. No. CE/NCES/ SE/SOLAR/ EE/SCB/AEE3/F.M/s.VSR Solar/D.02/18 dated 2.1.2018.

6.3 Thereafter, the Petitioner was sent a letter by the 2nd Respondent, directing the Petitioner to be present at the Secretariat, Government of Tamil Nadu for signing of the Power Purchase Agreement (PPA). Consequently, the Petitioner has entered into PPA dated 22.03.2018 with the 1st Respondent 'TANGEDCO to

construct, erect and commission a 50 MW solar PV power plant ('SPG') in Vilathikulam, Tuticorin, Tamil Nadu. In this respect, the Petitioner has obtained power evacuation approval vide letter dated 14.11.2018 bearing Lr. No. CE/NCES/SE/ Solar/ EE/ SCB/ AEE3/ F.M/s.VSR Solar - 50MW/D.924/18. As per clause 11 of the said PPA, the PPA is valid for a period of 25 years subject to the COD and the expiry date.

6.4. The important clauses in the PPA are set out as under in order to understand the essence of the PPA:

“14. Commissioning:

(a) Part Commissioning:

As per the terms and conditions of the 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: T7w solar power plant shall be commissioned on or before 12 months i.e. 21.03.2019 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 Guarantee on per day basis proportionate to the capacity not commissioned within a 5 (Five) months, after the expiry of commissioning schedule of 12 months. In case of non-commissioning within the said 17 months, the distribution licensee will encash the entire (100%) performance bank guarantee.

Delay beyond 17 months: In case the commissioning of project is further delayed beyond 17 months and up to 22 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 on a per day basis in the form of BG to the extent of capacity not commissioned.

Prior to expiry of 17 months from the date of signing of PPA the SPG shall furnish an additional performance bank guarantee calculated at Rs.10,000/- per MWac for 5 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 or 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 22 months from the date of signing of the PPA. The amount of liquidated damages shall be recovered by TANGEDCO from the payments due of

project developer on account of sale of solar power to TANGEDCO. In case, the project is not commissioned within such 22 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.

15 Commercial Operation Date:

The projects commissioned during a month shall be considered for payment of energy at 50% of the PPA tariff as in firm power till commercial operation date (COD). The COD shall be considered 30 days from the actual date of commissioning of the first part capacity.

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 forcemajeure events as defined hereunder. Any party claiming the benefit of this clause shall satisfy the other party of the existence of such 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 the floods, droughts, earthquakes, lightning and epidemics;
- (ii) Acts of any Government domestic or foreign including but not limited to war declared or undeclared, hosilities, priorities, quarentines, embargoes;
- (iii) Riot or civil commotion; and
- (iv) Grid / Distribution system’s failure not attributable to parties to this agreement.”

6.5. From a bare perusal of the above clauses, it is clear that the Petitioner herein can avail part commissioning up to 50% of the plant capacity. It is also clear that the Petitioner is not liable for any loss or damage in cases where there is occurrence of a situation as defined under clause 16 of the PPA, provided the TANGEDCO is duly informed of the same by serving a notice beforehand.

6.6 In the instant case, the Petitioner ought to have commissioned its SPG by 21st March, 2019 i.e. 12 months from the date of signing of the PPA. The

Petitioner's SPG is fitted with modules and solar cells imported from China with the individual PV Module specification of 330Wp from the Tier 1 FV module manufacturer with high standard bill of materials like EVA, Backsheet, Frame, Glass and Junction Boxes. This PV module is the primary source (Transducer) of solarPV Project. PV modules are made up of many solar cells and cells are made of silicon like semiconductors, they are constructed with a positive layer and a layer which together create an electric field. PV solar panels generate Direct Current (DC Electricity) which in turn converted into Alternating current (AC Electricity) using suitable Inverters. Hence, PV module is the primary functional equipment without which SPG cannot construct this 50MW project.

6.7. However, vide Notification No.01/2018 -- Customs (SG) dated 30th July, 2018, the Ministry of Finance has imposed a 'Safeguard Duty'(Hereinafter, 'SGD') on the above mentioned modules and solar cells from all developed countries such as China, Taiwan and Malaysia. The said notification imposed a safeguard duty of 25% on the ad valorem value of the modules, thus increasing the price of modules by 25%. This resulted in an increase of the overall project cost by 17%..

6.8. Vide letter dated 18.12.2018, the Petitioner intimated to the 2nd Respondent that due to the unforeseen natural disaster that hit the coast of Tamil Nadu during December, 2018, the Petitioner's project was severely affected and the Petitioner suffered set back in project development by four months and sought COD extension by 4 months, i.e. from 21.03.2019 to 21.7.2019. To the same, the 2nd Respondent TANGEDCO replied stating that the Petitioner had time till 21.01.2020 to Commission its power plant, as per the PPA dated 22.03.2018, during which

time the TANGEDCO would be entitled to invoke the bank guarantee for every day's delay.

6.9 In the meantime, the Petitioner received a letter dated 03 .09.2019 from 2nd Respondent intimating it that the performance guarantee furnished to the tune of Rs.5,10,00,000/- lying with the ICICI Bank, Thiruvannamalai would be invoked for the delay of 5 months in commissioning the SPG as per the terms of the PPA. The Respondent TANGEDCO invoked the said bank guarantee of Rs.5,10,00,000/- and encashed the same on 7.09.2019. On 3.9.2019, the Petitioner received another letter from TANGEDCO intimating that the performance bank guarantee of Rs.4,90,00,000/- lying with the Central Bank of India, Hosur would also be encashed in view of the delay in commissioning the SPG. The Petitioner responded to the above letters vide letter dated 22.10.2019 to the 2nd Respondent reiterating that the Petitioner was prevented from developing and commissioning the SPG at Tuticorin because of the natural disaster that hit the coast of Tamil Nadu in December 2018 and further stated that it has signed an MoU with the Government of Tamil Nadu to erect the 50MW SPG on 24.01.2019 wherein the Government of Tamil Nadu promised infrastructural and regulatory facilitation to the Petitioner in erecting the 50MW SPG and it has succeeded in obtaining financial assistance from various banks and requested the TANGEDCO not to encash the two bank guarantees. The Petitioner did not receive any response from TANGEDCO for the above representation of the petitioner.

6.10. Thereafter, the Petitioner received a letter dated 05.12.2019 from the

2nd Respondent stating that the Petitioner has to finish commissioning of its power plant by 21.01.2020, on which date the 22 month period ends. In the said letter, the 2nd Respondent has denied the Petitioner's request for extension of time for COD on the ground that it is not feasible for compliance. Thereafter, the Petitioner received another letter dated 20.12.2019 from the 2nd Respondent, directing the Petitioner to furnish performance bank guarantee of Rs.7,60,00,000/- calculated at Rs.10,000/- per MW for the further period of 5 months.

6.11. It is the case of the petitioner that industrywide problem faced by solar power generators due to the sudden levy of SGD at 25% on the ad valorem value of the modules proposed to be imported by the Petitioner for the 50MW SPG. immensely affected the Petitioner's project viability and that several SPGs are faced with the same issue since neither the generators nor the TANGEDCO contemplated such a sudden levy of SPG.

6.12. The petitioner wrote two letters to the Respondent seeking extension COD on the ground of natural disaster and low bank credit rating of TANGEDCO by the Petitioner dated 18.12.2018 and 22.10.2019. However, the Petitioner has received response from the Respondent dated 7.1.2019 and 5.12.2019, in which the Respondent denied the extension of COD stating that the request of the petitioner is not feasible.

6.13. Aggrieved by the Respondent TANGEDCO's failure to extend the COD for the Petitioner by 18 months for all the above mentioned reasons, the instant petition has been filed.

6.14. On a careful consideration of the issues raised by the petitioner and the response of the respondent thereto and after perusing the material records adduced as evidences, we find that the following issues arise for consideration:-

- (1) Whether Commission has inherent powers to extend the COD?**
- (2) Whether there has been a substantial change in law which falls within the scope of Force Majeure as contemplated under clause 16 of the PPA?**
- (3) Whether TANGEDCO's action has the potential to seriously and detrimentally affect the petitioner's project viability?**
- (4) Whether TANGEDCO will not suffer in any manner if the petitioner's COD is extended by 12 months?**

Issue No.1:-

- (1) Whether Commission has inherent powers to extend the COD?**

6.14.1 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.

6.14.2 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.

6.14.3 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 UrjaVikas 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.”

6.14.4 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.

6.14.5. Moreover, the project of the petitioner cannot be considered as a project specific one since the petitioner is one among the 16 bidders who participated in the tender and excepting the petitioner the other 13 bidders have discharged their obligations under the PPA and the petitioner cannot be granted any special concession by way of extension of commissioning period.

6.15 Issue No.2

(2) Whether there has been a substantial change in law which falls within the scope of Force Majeure as contemplated under clause 16 of the PPA?

6.15.1 In this connection, we have carefully gone through the provisions of clause 16 of the PPA which provides as follows:-

“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.”

6.15.2“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 on which could not be prevented and which substantially affect the performance of either party such as but not limited to-

- (i) Acts of natural phenomena, including but not limited to drought, earthquake, lightning and epidemics;
- (ii) Act 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”

6.15.3. From the above clause in the PPA, the levy of Safeguard Duty by the Central Government does not fall within the Force majeure clause. The petitioner relies upon the MNRE communication dated 27-08-2018 which according to it, clarifies that levy of SGD amounts to change in law. However, the issue here is not whether levy of SGD would come under change in law but whether change of law would come under Force Majeure. We do not see that change of law is contemplated under Force Majeure in the PPA. The case of the petitioner is hit on procedural count also. Even assuming that it is a case of change in law, in order to claim the benefit / exemption under this clause, the party claiming an event to be a force majeure one shall within 15 days of such occurrence shall give notice to the

other party in writing. No such letter claiming protection under Force Majeure written by the petitioner to the respondent has been brought to our notice nor filed in the Typed Set of Papers filed by the petitioner. We find from para 23 of the petition that change of law was intimated only on 08-03-2019. Though the MNRE's communication imposing SGD is dated 30-07-2018, the delay in intimating the change in law is inordinate and beyond comprehension. We also notice that as many as 13 developers who had executed PPAs along with the petitioner and none of them took shelter under this clause and all of them have executed these projects. We therefore, reject the claims of the petitioner under this ground for the following reasons:-

- (i) The provisions of clause 16 of the PPA do not encompass itself neither the levy of safeguard duty in specific nor change in law in general as one of the force majeure events.
- (ii) The procedure contemplated in the said clause 16, namely giving notice in writing to the respondent has not been complied with and this itself shows that this ground is an afterthought and it is well aware of the fact of non-existence of Force Majeure events.
- (iii) All other similarly placed generators who have executed PPAs along with the petitioner have commissioned their projects.
- (iv) It is clear that there was no readiness and willingness to complete the project on the side of the petitioner.
- (v) There has been an inconsistent stand in the approach of the petitioner. The Safe Guard Duty has been imposed by Gol on 30-07-2018. After the issue of Notification on 30-07-2018, the petitioner did not claim protection under Safe Guard Duty but on the ground of natural disaster that hit the coast of Tamil

Nadu during December 2018, the petitioner sought 4 months extensions of CoD vide its letter dated 18-12-2018. This shows that the petitioner is finding one reason or the other for seeking extension of commissioning period.

6.16. Issue No.3

(3) Whether TANGEDCO's action has the potential to seriously and detrimentally affect the petitioner's project viability?

6.16.1 On this ground, the petitioner has submitted that due to the abysmal financial position of the respondent, petitioner is unable to raise funds from the banks and other financial institutions. This ground is not acceptable inasmuch as the petitioner has knowingly entered the PPA with the respondent and in such case, the natural presumption can only be that only in order to hide its failure in meeting the contractual obligation with regard to achieving financial closure within the due date (i.e. within 180 days from the date of PPA), the petitioner is raising this ground. It is to be mentioned that the other 13 developers who entered PPA along with this petitioner had all achieved financial closure and commissioned their projects.

6.16.2. Moreover, as per the terms and conditions of Letter of Intent, the petitioner had to declare Financial closure within 180 days from the date of signing of PPA or else TANGEDCO reserves the right to encash the Performance Bank Guarantees. It is patently clear from the material records that even after a year of signing of PPA the petitioner failed to declare "Financial Closure" and did not furnish adequate Performance Bank Guarantee. Therefore, neither as per contractual terms nor on

equitable terms, the petitioner is entitled in any manner to prevent the respondent from invoking the bank guarantee as per the contractual terms. Doing so would amount to substituting the terms of a valid PPA, to which we are not agreeable.

6.17. Issue No.4

(4) Whether TANGEDCO will not suffer in any manner if the petitioner's COD is extended by 12 months?

6.17.1 Having set out the legal position in para I above that Commission has no inherent powers to extend the COD, in the absence of any specific provision in the Electricity Act, 2003 and in the PPA, it is not required on the part of the Commission to dwell upon the point urged by the petitioner on this ground as it is not within the province of the Commission to extend relief solely on the ground that TANGEDCO would not suffer any manner if COD is extended. Such relief, if granted would do violence to the terms of the PPA and hence we cannot subscribe to the said plea. However, we are still inclined to see as to whether any relief could be extended in the instant case. It is observed already, the petitioner's project is not a project specific one but only one amongst various generators, i.e. the petitioner has come under the tender route. It is to be noted that if everyone seeks one or relief or the other, there will always be uncertainty and chaos. More importantly, we would like to place on record that the very edifice on which the claim is rested falls for the reason that the extension, if any, cannot be contemplated even as a remotest possibility in a case of competitive bidding and only under MoU route extension of date of commissioning is feasible. To be more precise, there is no place for project specific extension in a case governed by bidding route. Let us also see the rejoinder.

6.17.2. In the rejoinder, the petitioner has raised two additional grounds, namely that (i) TANGEDCO was unwilling to accept part commissioning and (ii) TANGEDCO did not give tariff confirmation letter so as to enable to obtain funds from the financial institutions.

6.17.3 During the course of argument, the learned counsel for the petitioner has submitted fresh point which did not form part in the original pleadings. He has submitted that the respondent did not suffer any loss consequent upon the non-commissioning of the project since the case of solar energy has fallen and any purchase of energy due to non-commissioning of petitioner's project would have been on the lower side. We would like to point out that this is not the way in which a contract is to be looked into. It may be stated that TANGEDCO would have purchased deficit quantum of electricity from mixed sources including thermal power. In the case of thermal power, the price would have been much costlier than solar and the respondent would have suffered a loss due to non-commissioning of the project by the petitioner. If the learned counsel's argument is accepted then it could open Pandora's Box and embolden all the defaulters to approach the Commission with a plea of extension on the ground of no detriment to the other side. Such relief would amount to paying premium on non-performance of the contract and hence we cannot subscribe to such plea. Hence, this argument has to be rejected.

6.17.4. In the hearing, the learned counsel for the petitioner has also raised a plea that TANGEDCO was unwilling to accept part commissioning. In this connection,

the provisions contained in clause 14 relating to part-commissioning is worthy to quote:

“14. Commissioning:

(a) Part-Commissioning:

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

6.17.5 From the above, it is evident that concurrence of the Distribution Licensee is not required before taking a decision by the petitioner for part-commissioning of its project. It is not the case of the petitioner that it has put in all efforts to commission 50% of its capacity and the Distribution Licensee has failed to evacuate the same. The perusal of records presents an entirely different picture. It is seen from the status report of the S.E that the petitioner has not undertaken any physical activities in the project site, like laying of panels and construction of any infrastructure activities, the correctness of which was never disputed or controverted by the petitioner.

6.17.6. The learned counsel for the petitioner has relied on the judgment of Hon'ble APTEL in Appeal No. 266 of 2016 dated 19-05-2020 to urge the point that when the project could not commission due to the occurrence of a Force Majeure event, the Bank Guarantee should be returned to the person who has furnished it. It is the case of the petitioner that the levy of Safety Guard Duty is a Force Majeure event resulting in non-commissioning of the project and hence the PBG should be returned to the petitioner in terms of the above orders of the Hon'ble APTEL. The Commission has gone through the said judgment of Hon'ble APTEL and firmly convinced that the said judgment would not apply to the facts and circumstances of the case on hand for the following reasons:-

6.17.7 In the case cited by the petitioner, the Force Majeure event occurred after few months of signing Bulk Power Transmission Agreement (BPTA) and the petitioner informed the other parties namely CTU /Power grid. By then no activity had commenced by the Power Grid for the proposed Transmission System and the process started nearly after 2 years with investment approval. Further CTU / Power Grid in the said case has not discharged its vital responsibilities assigned to it under the Electricity Act with respect to Planning and Coordination relating to Intra-State Transmission System and taking the above factor, the Hon'ble APTEL came to the conclusion that the Appellant cannot be penalised for none of its default and ordered return of Bank Guarantee.

6.17.8. But in this case, the petitioner has not established the existence of Force Majeure at all more so, when all other similarly placed generators have fulfilled their obligation under PPA and commissioned their project. No physical activity has been carried out by the petitioner in this case whereas in the case law cited by the learned advocate for the petitioner, the contract was admittedly frustrated on the ground of impossibility of its performance. For the above reason, the case law cited by the counsel for the petitioner would not be of any help to the petitioner's case.

6.17.9. The other case law relied on by the learned counsel for the petitioner in Appeal No. 340 of 2016 by the Hon'ble APTEL also would not help the case of the petitioner in this case in any manner, since the issue dealt with by Hon'ble APTEL in the above case pertains to the order of the State Commission to reduce the extension of commissioning period by 25 days from 137 days and such extension

of time was granted vide clause 5.7 of the PPA. However, in this case, the PPA executed by the petitioner and the respondent does not contain any provision for extension of time. Hence, no parallel can be drawn between these two cases as in the present case there is no other alternative but to invoke the inherent power which is legally impermissible.

6.17.10 For the foregoing discussion, we conclude that the petitioner has failed to discharge its obligations under the PPA executed by it with the respondent on 26-09-2017.

6.17.11. Having decided so, we must now set out the consequences thereof. In this connection, the provision of clause 14 (b) of the PPA would be relevant which provides as follows:-

“14. Commissioning:

a) **Part Commissioning:**

As per terms and conditions of the 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 Guarantee on per day basis proportionate to the capacity not commissioned within (5 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 up to 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 on a 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 at Rs.10,000/- per MWac for 5 months to the distribution licensee to the extent of capacity not commissioned. In case of non-furnishing of additional performance bank guarantee the PPA shall stand terminated automatically without any notice or 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 the PPA. The amount of liquidated damages shall be recovered by TANGEDCO from the payments due of 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 or amended to the extent of project capacity commissioned when 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 the said 34 months the PPA will stand terminated automatically without any notice or order and the distribution licensee will encash the performance guarantee furnished towards liquidated damages.”

6.17.12 Thus, as per the terms of the PPA, if the commissioning of the project is delayed beyond 24 months and upto 29 months, the Distribution Licensee will encash the Performance Bank Guarantee on per day basis proportionate to the capacity not commissioned within 5 months after the expiry of commissioning schedule of 24 months. In case of non-commissioning within 29 months, the Distribution Licensee will encash the entire 100% Performance Bank Guarantee.

If the commissioning of the project is further delayed beyond 29 months and upto 34 months, the solar power generator, shall, in addition to 100% encashment of bank guarantee, pay liquidated damages to the distribution licensee amounting to a sum of Rs.10,000/- per MWac on per day basis in the form of Bank Guarantee to the extent of capacity not commissioned and in case the project is not

commissioned within 34 months the PPA will stand automatically terminated without any notice or order and the distribution licensee can encash the Performance Guarantee towards the liquidated damages.

6.17.13. In this case, it is clear that the petitioner's project was not commissioned within 34 months from the date of signing PPA. Therefore, the PPA shall stand automatically terminated as per the terms of the PPA and respondent is entitled to the relief provided in clause 14 of the PPA to the extent of non-commissioning of the project.

6.17.14. Accordingly, the plea for extension of date of commissioning as well as the prayer to direct the respondent to repay the Bank Guarantee already encashed on 07-09-2019 are rejected for the reasons stated supra.

In the result, the petition is dismissed. No costs.

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

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission