

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 126 of 2022

Dated: 10th February, 2025

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

M/s Solaire Surya Urja Private Limited

Through: Authorised Signatory
Office No. 203, Pentagon P3, 2nd Floor,
Magarpatta City, Hadapsar,
Pune, Maharashtra – 411013
Email Id.: court.clerk@hsalegal.com

... Appellant

Versus

1. Central Electricity Regulatory Commission

Through: The Secretary
3rd & 4th Floor, Chanderlok Building
Janpath, New Delhi – 110001
Email Id.: secy.cercind@gov.in

2. NTPC Limited

Through: General Manager (Commercial)
Core-7, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110003
Email Id.: cmd@ntpc.co.in

3. NTPC Vidyut Vyapar Nigam Limited

Through: Chief Operating Officer
NTPC Bhawan, Core – 7, Scope Complex
7, Institutional Area, Lodhi Road,
New Delhi – 110003

Email Id.: contact_nvvn@ntpc.co.in

4. Rajasthan Solar Park Development Company Limited

Through: Chairman & Managing Director

E-166, Yudhishtir Marg, C-Scheme,

Jaipur, Rajasthan – 302001

Email Id.: gmec.rrecl@rajasthan.gov.in

5. Rajasthan Rajya Vidyut Prasaran Nigam Limited

Through: Chairman & Managing Director

Vidyut Bhawan, Janpath,

Jaipur, Rajasthan – 302005

Email Id.: se.mis@rvpn.co.in

... Respondent (s)

Counsel on record for the
Appellant(s)

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1

Counsel on record for the
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Anant Singh
Mohit Mansharamani
Rishabh Sehgal for Res. 2

Dr. Shivendra Singh Rathore
Arun Tanwar
Perna Singh for Res. 4

Preetika Dwivedi for Res. 5

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The Appellant M/s. Solaire Surya Urja Private Limited, a solar power developer in the State of Rajasthan, is aggrieved by the Order dated 4th August, 2021 passed by 1st Respondent – Central Electricity Regulatory Commission (hereinafter referred to as “Commission”) in Petition No. 203/MP/2019.

2. The Appellant had approached the Commission by way of the said petition seeking inter alia, extension of Scheduled Commercial Operation Date (SCOD) in respect of its two solar power generating

projects with capacity of 70 MW each. The extension of SCOD was sought by the Appellant on account of the reasons stated to be not attributable to it i.e. non-availability of adequate evacuation transmission system which was the responsibility of 5th Respondent – Rajasthan Rajya Vidyut Prasaran Nigam Limited (in short “RRVPNL”).

3. The Commission, vide the impugned order dated 4th August, 2021 dismissed the petition thereby rejecting the prayers of the Appellant. The Commission also held the 2nd Respondent – NTPC Limited entitled to recover liquidated damages from the appellant on account of delay in supply of power by Appellant to NTPC by the Scheduled Commercial Operation Date in terms of the PPA.

4. Fact in brief, giving rise to the instant appeal are as under :-

(i) In March 2015, the Ministry of New and Renewable Energy (in short “MNRE”) issued “Guidelines for selection of 3000 MW Grid-Connected Solar PV Power Projects under Batch-II” which are hereinafter referred to as “NSM Guidelines”. These guidelines provide for bundling of solar power along with cheaper unallocated quota of thermal power generated at NTPC owned and controlled coal-based stations across the country and selling the same to the distribution agencies. Accordingly, the guidelines contemplated

that NTPC would enter into power purchase agreement with solar power developers with a commitment to purchase power at a fixed rate for a period of 25 years.

(ii) In pursuance to the Request for Selection (RFS) dated 21st May, 2015 issued by NTPC under these NSM Guidelines, the Appellant was selected as the successful bidder for establishing two Solar Power Generating Projects with a capacity of 70 MW each. Accordingly, Letter of Intent (LOI) dated 29th February, 2016 was issued by NTPC to the Appellant.

(iii) The Appellant accepted the LOI and entered into two identical PPAs dated 2nd May, 2016 with NTPC for sale of the total capacity of 2x70 MW from the project. Under these PPAs, the Appellant was required to commence supply of power from the project by 1st June, 2017.

(iv) On 29th November, 2016, the Appellant sent request to Rajasthan Renewable Energy Corporation Limited (RRECL) seeking approval of the two solar power projects of 70 MW each at Bhadla Solar Part Phase II. The approval for evacuation of power from the projects was granted by RRECL on 2nd December, 2016. It also communicated to the Appellant that 4 Nos. of 220 KV bays

for power evacuation at 400 KV, RVPNL, Grid Sub-Station (Bhadla) were allotted in its favour.

(v) The Appellant started implementing the project. On 19th April, 2017, RRVPNL informed the Appellant that evacuation infrastructure was not available at Bhadla sub-station and would likely to be available by 15th June, 2017. Accordingly, the Appellant informed 2nd Respondent, NTPC on 22nd May, 2017 regarding non-availability of necessary and adequate evacuation system.

(vi) The Appellant received approval for energization and synchronization of 50 MW and 40 MW on 31st May, 2017 and 11th June, 2017 respectively. However, it was directed not to inject power into the grid without prior approval of RRVPNL due to network constraints. Vide letter dated 20th June, 2017, the Appellant informed Respondent No. 2 regarding the delay in availability of necessary and adequate evacuation system and requested for extension of SCOD of the projects. The 2nd Respondent NTPC, vide letter dated 30th June, 2017, asked the Appellant to approach the solar power development agency in relation to the delay that was occurring and further informed the

Appellant by in case of delay, liquidated damages as provided under PPAs shall be levied.

(vii) On 3rd July, 2017, RRVPNL and RRECL was informed by the Appellant that the designated evacuation infrastructure was not ready and would likely to be commissioned only once the associated transmission becomes ready. They were also informed by the Appellant that injection of power into the grid was restricted till such time. Vide letter dated 7th July, 2017, RRECL intimated RRVPNL regarding the delay in commissioning of the power evacuation infrastructure and asked it to look into the matter on priority so as to enable un-restricted evacuation of power.

(viii) On 4th August, 2017, RRVPNL informed the Appellant that transmission system would be made available only by 31st August, 2017.

(ix) Evacuation of entire capacity of power from the project was allowed to the Appellant on 25th August, 2017.

(x) On 8th August, 2018, the 2nd Respondent issues a demand notice seeking liquidated damages amounting to Rs.7.60 on account of delay in supply of power beyond SCOD on the part of the Appellant.

5. It is in these circumstances that the Appellant has approached the Central Commission by way of Petition No. 203/MP/2019 with the following prayers :-

“a) Declare that the delay in the commencement of supply from the 2x70MW solar power projects being developed by the Petitioner in Plot No. 8 and 10, Bhadla Solar Park Phase-II, Rajasthan, was caused due to unforeseen, unavoidable and uncontrollable reasons not attributable to the Petitioner and waive any liabilities or any consequences under the PPAs owing to the said delay:

b) Extend the Scheduled Commissioning Date of the 2x70 MW projects, being developed by the Petitioner in Plot No. 8 and 10, Bhadla Solar Park Phase-II, till the date of actual commissioning:

c) Declare that NTPC is not entitled to recover any monies towards liquidated damages or otherwise from the Petitioner;

d) Direct NTPC to immediately refund the amount of Rs. 7.06 crore wrongfully and illegally collected by it purportedly as liquidated damages, along with carrying costs at 14% per annum on the said amount, from 25.09.2018 i.e. the date on which the said amount was collected from the Petitioner till the date of refund;

e) Direct NTPC to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition, and

f) Pass such other orders that this Commission deems fit in the interest of justice.”

6. On the basis of pleadings of the parties, the Commission framed following two issues for adjudication :

“Issue No.1: Whether the delay in the commencement of supply from the 2x70 MW solar power projects being developed by the Petitioner was on account of reasons not attributable to the Petitioner? And if it is so, whether the Scheduled Commissioning Date of the 2x70 MW

solar power projects being developed by the Petitioner should be extended?

Issue No.2: Whether NTPC is entitled to recover any monies towards liquidated damages or otherwise from the Petitioner?"

7. Both issues have been decided against the Appellant vide the Impugned Order. The Commission rejected the prayer of the Appellant for extension of SCOD and also held NTPC entitled to recover damages for the period of 1st June, 2017 to 10th June, 2017 (10 days) corresponding to 40 MW, from the period of 1st June, 2017 to 20th July, 2017 (50 days) corresponding to 20 MW and for the period of 1st June, 2017 to 10th August, 2017 (71 days) corresponding to 30 MW as per the provisions of the PPA.

8. We have heard Learned Senior Counsel for the Appellant as well as Learned Counsel appearing for the Respondents. We have also perused the Written Submission filed by the Learned Counsels.

9. Learned Senior Counsel appearing on behalf of the Appellant argued that the Commission, in the impugned order, acknowledged as well as recognized that non-availability of adequate transmission system is covered under Force Majeure clause in the PPA and is supported by the provisions under RFS/LOI but even then erroneously proceeded to hold NTPC entitled to levy liquidated damages from the

Appellant. He submitted that the commencement of power supply by the Appellant was contingent upon the establishment of necessary and adequate evacuation transmission system by the State Transmission Utility (STU) and the State Power Infrastructure Agency (SPIA). The absence of such system inhibited Appellant's project to supply power effectively.

10. He would further argue that the issue of availability of evacuation system is a pivotal factor in determining the operational readiness of the Appellant's project. He pointed out that for Project 1, the transmission capacity necessary to evacuate the first 50MW of generated power was available on 26th July, 2017, while the balance 20 MW became operational on 25th August, 2017. Similarly, for Project 2, the infrastructure to handle 40 MW was ready on 26th July, 2017 for additional 30 MW have been made available on 25th August, 2017. According to the Learned Counsel, this demonstrated Appellant's readiness to supply power despite unavailability of evacuation system. He submitted that since the readiness of the Appellant's project was dependent on the obligation of RRVPNL to establish adequate evacuation system, the delay in availability of the transmission system impacted the ability of the Appellant to fulfill power supply

commitments. He pointed out the letter dated 19th April, 2017 of RRVPNL, the State Transmission Utility, to the Appellant wherein it has been stated that full power evacuation would be available tentatively by 1st June, 2017 and thus indicated delay in the readiness of evacuation infrastructure.

11. It is further submitted by the Learned Senior Counsel that the Central Commission has not considered that the projects of the Appellant had achieved readiness much prior to the SCOD i.e 1st June, 2017, which is evidenced through the letters written to the CEIG requesting its visit for inspection of the project and the CIEG certificate which demonstrates that the capacity to the extent of 59 MW (Project 1) and 40 MW (Project 2) achieved readiness prior to 1st June, 2017.

12. Learned Counsel cited the judgement of Hon'ble Supreme Court in GUVNL vs. ACME Solar Technologies (Gujarat) Private Limited (2017 11 SCC 801), to canvass that the date of approval from the Chief Electrical Inspector to the Government (CEIG) marks the official readiness of a power developer's project for operation. He also cited the previous judgement of this Tribunal dated 5th July, 2021 in Appeal No. 67 of 2021 titled Solitaire BTN Solar Pvt. Ltd. Vs. Tamil Nadu

Electricity Regulatory Commission & Ors. to canvass that when a developer's operational delays are due to external factors – such as the absence of or delay in establishment of necessary evacuation infrastructure – it is unjust to hold the developer liable for liquidated damages.

13. Learned Counsels appearing for 2nd, 4th and 5th Respondents have vehemently refuted the submissions of the Appellant's counsel. They have argued that evidently, the Appellant was not able to supply power on or before SCOD. It is submitted that as per Clause 4.3.2 of the PPA, clause 3.6.2 of RFS and Clause 3 of ISA, the responsibility of getting transmission connectivity and access to transmission system owned by the STU was that of the Appellant at its own cost and, therefore, it cannot shift its onus of getting clearances/evacuation and thus is liable to liquidated damages.

14. Referring to the letters dated 11th May, 2017, 25th May, 2017, 26th May, 2017 and 30th May, 2017 issued by the Appellant, it is submitted that the Appellant was not ready and able to commission the projects before SCOD and, therefore, its contention that it has no part to play in the delay of commencing of power supply is erroneous.

15. It is further argued that the Appellant is attempting to blur the distinction between installation/energization of a power project and the commencement of power supply. It is submitted that material on record clearly shows that the Appellant was not ready to supply power to NTPC by the SCOD and there is no official document on record to show that connectivity was specifically denied to it.

16. On behalf of the 2nd Respondent – NTPC, it is further submitted that since the Appellant has failed to commission the project on SCOD, NTPC is entitled to levy liquidated damages for non-supply of power without furnishing any further/additional proof or factual data. In this regard, reliance is placed on Section 74 of the Indian Contract Act, 1872 as well as various judgement of the Hon'ble Supreme Court in which the said Section has been interpreted.

17. On behalf of 5th Respondent – RRVPNL, it is also argued that undisputedly, the commissioning of the power project could have been done by the Appellant without availability of connectivity and, therefore, no liability can be fastened upon RRVPNL due to delay in establishing the appropriate evacuation transmission system.

18. We have considered the rival submissions of the Learned Counsels and have perused the impugned order.

19. We find clauses 3.6 and 3.9.2 of the RFS material for our consideration and are extracted herein below :-

3.6 SPIA and Location of Solar Park

3.6.1 *The Solar PV Projects to be selected by NTPC under this scheme are to be developed inside Solar Park which is developed by Solar Park Implementing Agency (SPA).*

3.6.2 *Rajasthan Solar park Development Company Ltd. (RSDCL) is SPIA for this Solar Park which is a subsidiary of Rajasthan Renewable Energy Corporation Limited (RRECL). The Bidder will have to approach the SPIA for allotment of land, timelines for availability, possession and connectivity for the projects.*

"3.9 Technical Criteria and Connectivity with the Grid

...

3.9.2 *Connectivity with the Grid*

...

(v) *STU/CTU shall endeavour to match the commissioning of the transmission system with the commissioning of the solar projects."*

20. Similarly, Articles 1, 3 & 4 of the PPAs executed between the Appellant and the 2nd Respondent are also relevant and are extracted herein below :-

"ARTICLE 1: DEFINITIONS AND INTERPRETATIONS

...

"Scheduled Commissioning Date" shall mean 01st June 2017 i.e. thirteen (13) months from the Effective Date:

"Commercial Operational Date" shall mean the 30 days from the actual part commissioning date of the capacity where upon the SPD starts injecting power from the part commissioned capacity to the interconnection point/delivery point/ meeting point. COD is intended to match allocation and availability of thermal power for bundling:

3. ARTICLE 3: CONDITION SUBSEQUENT

3.1. Satisfaction of Conditions subsequent by the SPD

c) The SPD shall enter into an Implementation support Agreement with Solar Park Implementation Agency (SIPA) for Land & Associated infrastructure for development of the Project inside the Solar Park and for Connectivity with the STU/CTU System for confirming the evacuation of power by the Scheduled Commissioning date;

3.3 Performance Bank Guarantee

.....
3.3.4 If the SPD fails to commence supply of power from the Scheduled Commissioning Date specified in this Agreement, subject to conditions mentioned in Article 4.5, NTPC shall have the right to encash the Performance Bank Guarantee without prejudice to the other rights of NTPC under this Agreement.

ARTICLE 4: CONSTRUCTION & DEVELOPMENT OF THE PROJECT

4.1 SPD's Obligations

4.1.1. The SPD undertakes to be responsible, at SPD's own cost and risk, for:

- ...
- e) The commencement of supply of power upto the Contracted Capacity to NTPC no later than the Scheduled Commissioning Date and continuation of the supply of power through out the term of the Agreement;**

4.2 Information regarding Interconnection Facilities

4.2.1 The SPD shall be required to obtain all information from SPIA with regard to the Interconnection Facilities as is reasonably necessary to enable it to design, install and operate all system equipment's and apparatus on the SPD's side of the Interconnection Point/ Delivery Point/ Metering Point to enable delivery of electricity.

4.2.2 *The SPD has to bear entire cost of Transmission from the project up to the interconnection point including cost of construction of line. Losses etc. and the same will not be reimbursed by NTPC or met by the STU/ Rajasthan Utilities;*

4.2.3 *The responsibility of getting Transmission Connectivity and Access to the Transmission system owned by the STU will lie with the Project Developer and its cost is to be borne by SPD;*

.....
4.5 Extensions of Time

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

- a) *Any delay from SPIA in giving possession of land and connectivity with STU/CTU system: or*
- b) *any NTPC Event of Default; or*
- c) *Force Majeure Events affecting NTPC, or*
- d) *Force Majeure Events affecting the SPD,*

the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.5.2, for a reasonable period but not less than 'day for day' basis, to permit the SPD or NTPC through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or NTPC, or till such time such Event of Default is rectified by NTPC.

4.5.2 *Subject to Article 4.5.7, in case of extension occurring due to reasons specified in Article 4.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than three (3) months.*

4.5.2.1 *in case of extension is required to give beyond 3 months due to delay in Solar Park development or evacuation, NTPC will approach MNRE, who will be authorized to decide on further extension.*

4.5.3 *subject to Article 4.5.7, in case of extension occurring due to reasons specified in Article 4.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than twelve (12) months.*

4.5.4 *In case of extension due to reasons specified in Article 4.5.1(c) and (d), and if such Force Majeure Event continues even after a maximum period of three (3) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 13.5.*

4.5.5 *If the Parties have not agreed, within thirty (30) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 16.*

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

4.5.7 *Notwithstanding anything to the contrary contained in this Agreement, any extension of the Scheduled Commissioning Date arising due to any reason envisaged in this Agreement shall not be allowed beyond twenty five (25) months from the date of signing of PPA.*

4.6 ***Liquidated Damages for delay in commencement of supply of power to NTPC***

4.6.1 *If the SPD is unable to commence supply of power to NTPC by the Scheduled Commissioning Date other than for the reasons specified in Article 4.5.1, the SPD shall pay to NTPC, Liquidated Damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date as per the following:*

4.6.1.1 *Delay upto five (5) month: NTPC will encash the Performance Bank Guarantee on per day basis and proportionate to capacity not commissioned, with 100% encashment for 5 months delay.*

4.6.1.2 *Delay beyond five months: In case the commissioning of Project is delayed beyond 5 months, the SPD shall, in addition to encashment of Bank Guarantee by NTPC, additionally pay to*

NTPC the Liquidated Damages @ Rs 1,00,000/- per MW per day of delay for the delay in such remaining Capacity which is not commissioning.

The amount of liquidated damages would be recovered from the SPD from the payments due on account of sale of solar power to NTPC thirty (30) equal monthly instalments from first billing cycle.

4.6.2 The maximum time period allowed for commissioning of the full Power Project Capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be limited to twenty five (25) months from the Effective Date. In case, the commissioning of the Power Project is delayed beyond twenty five (25) months from the Effective Date, it shall be considered as an SPD Event of Default and provisions of Article 13 shall apply and the Contracted Capacity shall stand reduced/ amended to the Project Capacity Commissioned within twenty five (25) months of the Effective Date and the PPA for the balance Capacity will stand terminate and shall be reduced from the list of selected capacity.

...

5.1.1 The SPD shall give the concerned RLDC/SLDC and NTPC at least sixty (60) days advanced preliminary written notice and at least thirty (30) days advanced final written notice, of the date on which it intends to synchronize the respective units of Power Project to the Grid System.”

21. Clause 2 of the ISA dated 26th June, 2016 is also material and reproduced herein below:-

“2. Obligations of the SPIA: *The SPIA will provide the following infrastructure facility to the SPDs within the Solar Park for the effective development of the Solar Park:*

...

(c) 2 No. 132/ 220 kV Pooling Stations and associated transmission line for evacuation of power from Plot No. 08 power project of SPD are being constructed. The evacuation would be done on 132 kV from PV plot to pooling station. Interconnection from power project to 132 kV overhead line would be on part of the SPD.

...

(e) Connectivity with the State Transmission Utility will be provided by the SPIA on deposit of Connectivity charges with SPIA. SPIA will provide interconnection facility close to the plot at the voltage level 132 kV and the SPD will have to connect to that point at its cost."

22. A conjoint reading of these provisions of RfS, PPAs and ISA would reveal that :-

“(a) RSDCL/SPIA was required to facilitate allotment of land, connectivity etc. for the Solar Projects. (Clause 3.6 of RfS and Clause 2 of ISAs)

(b) The Appellant was required to approach RSDCL/SPIA for allotment of land, timelines for availability, possession and connectivity for the Solar Projects. RSDCL/SPIA was required to provide two 132/220 kV Pooling Stations and associated transmission line for evacuation of power. RSDCL/SPIA was also required to provide connectivity with STU on deposit of connectivity charges. However, the responsibility of getting transmission connectivity and access to the transmission system owned by the STU was of the Appellant and its cost was to be borne by the Appellant itself. (Clause 3.6.2 of RfS, Article 4.2.3 of PPAs, Clause 2 of the ISAs)

(c) STU/CTU were to endeavour to match the commissioning of the transmission system with the commissioning of the Solar Projects. (Clause 3.9.2(v) of RfS)

(d) In case the Appellant failed to commence supply of power from SCD (except for reasons covered under Article 4.5.1 of the PPAs), NTPC had the right to encash the Performance Bank Guarantee. (Article 3.3.4 of PPAs)

(e) If the Appellant was prevented from performing its obligations under Article 4.1 by the Scheduled

Commissioning Date due to any delay from RSDCL/SPIA in giving possession of land and connectivity with STU/CTU system, SCD shall be deferred (up to maximum of 25 months from the date of signing of PPAs; maximum of 12 months), for a reasonable period but not less than 'day for day' basis, to permit the Appellant through the use of due diligence, to overcome the effects of the force majeure Events affecting the Appellant, or till such time such Event of Default is rectified by NTPC. (Articles 4.5.1(a), 4.5.2, 4.5.3 and 4.5.7 of the PPAs)

(f) If the Appellant was unable to commence supply of power by SCD (other than for the reasons stipulated in Article 4.5.1 of the PPAs) and making the Contracted Capacity available for dispatch by SCD up to 5 months, the Appellant was to pay to NTPC, liquidated damages (encashment of the Performance Bank Guarantee on per day basis and proportionate to capacity not commissioned provided that 100% encashment would take place for 5 months delay) for the delay in such commencement of supply of power. (Articles 4.6.1 and 4.6.1.1 of the PPAs)

(g) The Appellant was required to give SLDC/RLDC and NTPC 60 days' advance preliminary written notice and 30 days advance final notice to synchronize the Power Projects to the Grid. (Article 5.1.1 of the PPAs)"

23. We may note that as per the PPA's dated 2nd May, 2016, both the projects of the Appellant with capacity of 70 MW each were to be commissioned by 1st June, 2017 i.e. within 13 months of the effective date of PPAs which is 2nd May, 2017. However, the Appellant got 50 MW of Project 1 commissioned on 1st June, 2017(no delay) while remaining 20 MW were got commissioned on 21st July, 2017 (delay of 50 days from SCOD). In respect of Project 2, 40 MW were got

commissioned on 11th June, 2017 (delay of 10 days from SCOD) while remaining 30 MW were got commissioned on 11th August, 2017 (delay of 71 days from the SCOD).

24. The case of the Appellant before the Commission was that it was unable to commission full capacity of the two solar power projects on account of unavailability of evacuation infrastructure which was the responsibility of State Transmission Utility i.e. RRVPNL (Respondent No. 5). It was stated that resultantly, the Appellant could commission the solar power projects and commence supply of power to NTPC only in parts, as and when adequate transmission/evacuation facility was made available by RRVPNL. Thus, it was contended that delay in supply of power to NTPC was due to reasons not attributable to the Appellant and, therefore, it cannot held liable for any consequences under the PPA for such delay.

25. Upon taking note of the relevant provisions of RFS, PPAs and ISA as well as the correspondence exchanged between the parties, the Commission has observed in paragraph Nos. 105 & 106 of the impugned order as under :-

“105. In the foregoing paragraphs, we have quoted and perused various communications related to availability/ non-availability

of evacuation system for the Solar Projects. Vide letter dated 19.05.2017, RVPNL (STU for the State of Rajasthan) informed the Petitioner that there was no power evacuation capacity margin available at 220 kV GSS Bhadla and that the 400 kV line from Bhadla to Bikaner would be ready by 15.06.2017. It is pertinent to note that 15.06.2017 was the tentative date given for the entire power evacuation by the RVPNL. As per letter dated 24.07.2017, there was restriction on the petitioner's power evacuation due to shortfall in transmission capacity owing to the non-completion of construction works on the transmission system. As per letter dated 04.08.2017, RVPNL informed the Petitioner that one ICT of capacity 500 MVA has been commissioned and the second ICT of 500 MVA may be commissioned by 31.08.2017. Further, the Petitioner was also made to execute undertakings on 31.05.2017 and 11.06.2017 by RVPNL that after receiving connectivity, it will not inject any power in the grid without prior approval of RVPNL authorities and in the event of any damage to RVPNL on account of unauthorized injection of power to grid, the Petitioner will be held responsible and liable to compensate the losses to RVPNL. We observe that the total commissioned capacity to be evacuated from the Bhadla Solar Park was 680 MW, which required commissioning of at least two interconnecting transformers of 500 MVA each on the 400/220 kV Bhadla GSS by SCD (01.06.2017) of the Solar Projects. As per the Petitioner, ICT-1 was commissioned on 21.07.2017 and the Petitioner was permitted to inject power on 26.07.2017. The permitted capacity was enhanced to 100 MW on 02.08.2017 but was later reduced to 40 MW on 06.08.2017 as ICT-1 suffered a breakdown. The Petitioner commissioned the entire project capacity by 11.08.2017 but was permitted to inject the entire 140 MW capacity into the grid only on 25.08.2017.

106. From the above highlighted facts, it is apparent that there was a constraint in the STU transmission system as regards evacuation of power from Bhadla Solar Park in general and the Solar Projects of the Petitioner in particular."

(Emphasis supplied)

26. Thus, the Commission has acknowledged that there was constraint in STU transmission system as regards the evacuation of power from Bhadla Solar Park in general and the Solar projects of the

Appellant in particular. It has also taken note of the undertakings dated 31st May, 2017 and 11th June, 2017 extracted from the Appellant by RRVPNL to the effect that even after receiving connectivity, Appellant shall not inject power in the grid without prior approval of RRVPNL authorities and in the event of any damage to RRVPNL on account of unauthorized injection of power to the grid, Appellant shall be held responsible to compensate for such loss.

27. Further, after taking note of Article 5.1.1 of the PPAs in paragraph No. 113 of the order, the Commission has stated in paragraph No. 114 is under :-

“114. From a plain reading of Article 5.1.1 of the PPAs, it is clear that such notice was to be given to concerned RLDC/SLDC and NTPC and not to the RSDCL/SPIA. Further, as Connectivity is a pre-requisite for any intent to synchronise the Solar Projects, we are not convinced with interpretation of RSDCL/SPIA as regards Article 5.1.1 of the PPAs to mean that unless the Petitioner gave preliminary/advanced notice, RSDCL/SPIA was not going to take up the matter of providing connectivity to STU system. We have already observed earlier that the Petitioner had taken up with the STU for connectivity of the Solar Projects.”

28. Despite acknowledging the connectivity constraints for the Appellant on account of non-availability of adequate transmission system in the absence of which it could not have supplied power to NTPC, the Commission has held that since the power projects could

have been commissioned by the Appellant without availability of connectivity, it is not entitled to extension of SCOD and the waiver of liquidated damages as per the PPA.

29. We are unable to concur with these findings of the Commission.

30. We may note that Scheduled Commercial Operation Date (SCOD) is a critical mile-stone in the development and operation of infrastructural projects, particularly in the power and renewable energy sectors and, therefore, every power developer is required to stick to the SCOD of the power project and to commission the same on or before the date stipulated for commissioning in the PPA. SCOD is the date when the power project is ready for commercial operation, supply of power to the Distribution Licensees and generation of revenue. However, there are various factors which may affect SCOD and prevent the power project from achieving commercial operation by the stipulated date. These factors vary from project to project and are often specified in the PPA executed between the power developer and the Distribution Licensee.

31. In the instant case, Article 4.5 of the PPAs executed between the Appellant and the 2nd Respondent, NTPC specified the

events/circumstances under which SCOD of the Appellant's power projects could be extended. We have already extracted the said provisions of the PPAs herein above. As per Clause (a) of Article 4.5.1, any delay from SPIA in giving possession of land and connectivity with STU/CTU system is a ground for extension of SCOD of the power projects.

32. It is not disputed in the instant case that the 5th Respondent – RRVPNL [STU for the State of Rajasthan] was responsible for making available adequate transmission/evacuation system for the Appellant's power projects. It is also not disputed that RRVPNL was unable to provide such transmission/evacuation system for the Appellant's power project by the SCOD i.e. 1st June, 2017. The Appellant was allowed connectivity for the first time on 26th July, 2017 for 40 MW capacity of Project 1 which was increased to 60 MW on 2nd August, 2017 but was reduced to 40 MW again on 6th August, 2017. Thereafter, the Appellant was allowed to enhance the injection into the grid from 40 MW to 70 MW on 19th August, 2017. The Appellant was permitted to inject entire 140 MW capacity into the grid only on 25th August, 2017.

33. It is true that the Appellant Commissioned the two power projects in parts commencing from 1st June, 2017. The entire project was commissioned by the Appellant on 11th August, 2017. The commissioning dates of the two power projects are summarized in the following table “-

Plot	Capacity (MW)	Due Date of Commissioning	Actual Date of Commissioning	Commercial Operation Date
Plot No. 8 (70 MW)	50	01/06/2017	01/06/2017	20/07/2017
	20	01/06/2017	21/07/2017	08/09/2017
Plot No. 10 (70 MW)	40	01/06/2017	11/06/2017	20/07/2017
	30	01/06/2017	11/08/2017	08/09/2017

34. The power evacuation status arranged by RRVPNL is clear from the following table :-

Month	June-17	July-17	August-17	September-17
Power evacuation Margin Offered by RVPNL /RSDCL after commissioning of the Plot 08 and 10	< 2 MW, only for commissioning	July 17 40 MW was offered from 26-July-17 onwards	- 40 MW was enhanced to 100 MW from 2-Aug-2017 onwards; - later it was downsized to 40 MW on 06-Aug-17 onwards (20 MW/Plot) due to 220/400 KV power T/F Fault in RVPNL GSS; - Upgraded to 70MW (35MW/plot) from 19-Aug-2017 onwards from both Plot-08 and 10. - Full capacity of 140 MW from 25-Aug-17 onwards	Full 140MW power evacuation capacity has been provided.

35. We may also note that vide letter dated 19th May, 2017, RRVPNL had informed the Appellant that there was no power evacuation capacity margin available at 220 KV GSS Bhadla and that the 400 KV line from Bhadala to Bikaner would be ready by 15th June, 2017. This date i.e. 15th June, 2017 also was a tentative date only for entire power evacuation given by RRVPNL. The perusal of the another letter dated 24th July, 2017 of RRVPNL indicates that there was restriction on Appellant's power evacuation due to short fall in transmission capacity owing to non-completion of construction works on the transmission system. Vide subsequent letter dated 4th August, 2017, RRVPNL informed the Appellant that one ICT of capacity 500 MVA has been commissioned and the 2nd ICT of 500 MVA may be commissioned by 31st August, 2017.

36. When we read the content of these letters of RRVPNL in conjunction with the two undertakings dated 31st May, 2017 and 11th June, 2017 extracted by it from the Appellant to the effect that even after receiving connectivity, the Appellant shall not inject power into the grid without prior approval of RRVPNL authorities and would be liable for the losses caused to RRVPNL for such unauthorized injection of power into the grid, it becomes evident that the Appellant could not

have, in any case, commenced supply of power to NTPC on the SCOD of the project i.e. 1st June, 2017. It is not the case where the power projects were still under construction and had not been completed when the connectivity was made available by the RRVPNL. The Appellant has commissioned the power projects, even though in parts, but much before the connectivity was made available by Respondent No. 5 RRVPNL for evacuation of power from commissioned parts. Taking note of such aspect of the matter, we are of the opinion that delay in commissioning of the projects on the part of the Appellant was not deliberate or contumacious but occasioned only on account of non-availability of the proper transmission evacuation system which was to be provided by RRVPNL.

37. Further, as per Article 4.1.1. of the PPAs, the obligation of solar power developer i.e. the Appellant was to commence supply of power upto the contracted capacity to NTPC not later than the scheduled commissioning date and to continue the supply of power through out the term of the agreement. Article 4.6.1 of the PPAs specifies the circumstances under which solar power developer i.e. the Appellant would become liable to pay liquidated damages to the NTPC. We find it apposite to quote the said article hereunder :-

“4.6.1 If the SPD is unable to commence supply of power to NTPC by the Scheduled Commissioning Date other than for the reasons

specified in Article 4.5.1, the SPD shall pay to NTPC, Liquidated Damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date”

38. Thus, in view of Article 4.6.1, the Appellant was liable to pay liquidated damages to NTPC only if it was unable to commence supply of power to NTPC by the scheduled commissioning date for the reasons other than those specified in Article 4.5.1. We have already extracted Article 4.5.1 in paragraph No. 20 herein above. As per Clause (a) of the said Article, if the Appellant was prevented from performing its obligations under Article 4.1.1. (i.e. commencement of supply of power to NTPC) by the scheduled commissioning date due to any delay from RSDCL/SPIA in giving possession of land and connectivity with STU/CTU system, scheduled commission date was to be deferred for the period as specified thereunder.

39. In the instant case, even if the Appellant would have commissioned the two power projects on or before the scheduled commissioning date i.e. 1st June, 2017, it could not have commenced supply of power to NTPC for the reason that by that time, the proper evacuation transmission system had not been made available for its power projects by Respondent No. 5 – RRVPNL. Further, the

Appellant was inhibited from injecting power from its power projects into the grid even after receiving connectivity by virtue of the two undertakings dated 31st May, 2017 and 11th June, 2017 extracted from it by RVVPNL, enjoining upon it to seek approval of RRVPNL before injection of power into the grid failing which it was liable to compensate RRVPNL for the losses, if any. Undisputedly, the Appellant had already commissioned various parts of the projects well before the connectivity was made available to it by RRVPNL and it was permitted to inject power into the grid. It was by way of communication dated 19th May, 2017 i.e. much before the SCOD that Respondent No. 5 – RRVPNL had informed the Appellant that there was no power evacuation capacity margin available at 220 KV GSS Bhadla and that the 400 KV line from Bhadla to Bikaner would be ready by 15th June, 2017. Accordingly, the Appellant informed NTPC on 22nd May, 2017 that necessary and adequate evacuation system would not be available by 1st June, 2017. Thus, everybody including NTPC knew that power supply cannot be commenced by the Appellant on 1st June, 2017. The Appellant was allowed connectivity for the first time on 26th July, 2017 and that too for only 40 MW capacity of Project-1 which was soon increased to 60 MW on 2nd August, 2017 but again reduced to 40 MW

on 6th August, 2017. Thereafter, the Appellant was permitted to enhance the injection into the grid to 70 MW on 19th August, 2017. Permission to inject entire capacity of 140 MW was granted to the Appellant on 25th August, 2017. Thus, the Appellant was ready and capable of injecting power into the Grid every time when permission/connectivity was granted to it which clearly indicates that supply of power was not inhibited by anything attributable to Appellant and the Appellant was unable to commence supply of power to NTPC due to non-availability of evacuation transmission facility, which was the responsibility of 5th Respondent – RRVPNL, and therefore, is protected by Clause (a) of Article 4.5.1 of the PPA entitling it for waiver of liquidated damages as provided in the PPAs for delay in supply of power to NTPC.

40. The facts and circumstances of the case, as discussed herein above, clearly reveal that delay in supply of power by Appellant to NTPC beyond the Scheduled Commercial Operation Date cannot be attributed to the Appellant but has occasioned on account of inability on the part of 5th Respondent-RRVPNL (STU in the State of Rajasthan) to make available the evacuation transmission system for the

Appellant's power project on or before the SCOD. We are of the firm opinion that when the delay on the part of the solar power developer to supply power is to mainly due to external factors i.e. either in the absence of or delay in establishment of evacuation transmission system, it would not be justified to hold the power developer liable for liquidated damages. In this regard, our views are fortified by previous judgement of this Tribunal in Appeal No. 67 of 2021 entitled Solitaire BTN Solar Pvt. Ltd. Vs. Tamil Nadu Electricity Regulatory Commission & Ors. decided on 5th July, 2021.

41. In the light of the above discussion, we find that the Central Commission has erred in refusing to extend the SCOD of the Appellant's power projects and in holding the Appellant liable to pay liquidated damages to NTPC for delay in supply of power.

42. Accordingly, we are unable to sustain the impugned order of the Commission. The same is hereby set aside. The appeal stands allowed. Hence, the SCOD of the Appellant's power project stands extended till 11th August, 2017 as sought by the Appellant. Further, we hold the Appellant not liable to pay any liquidated damages to

NTPC and, therefore, the NTPC shall refund to the Appellant within one month the entire amount, if any, received from the Appellant on account of liquidated damages.

Pronounced in the open court on this 10th day of February, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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REPORTABLE / NON REPORTABLE

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