

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APL No. 67 OF 2021 &
IA No. 150 OF 2021 & IA No. 1703 OF 2020 & IA No. 159 OF 2021 &
IA No. 382 OF 2021 & IA No. 434 OF 2021 & IA No. 524 OF 2021 & IA
No. 583 OF 2021**

Dated: 5th July, 2021

**Present: Hon`ble Mrs. Justice Manjula Chellur, Chairperson
Hon`ble Mr. Ravindra Kumar Verma, Technical Member**

In the matter of:

**M/s Solitaire BTN Solar Private Limited
Through : Authorised Signatory
239, Okhla Industrial Estate, Phase-II, New
Delhi -110020**

.... Appellant(s)

Versus

**1. Tamil Nadu Electricity Regulatory Commission
Through : Secretary
4thFloor, SIDCO Corporate Office Building
Thiru VI KA Industrial Estate, Guindy,
Chennai - 600 032**

.... Respondent No.1

**2. Tamil Nadu Generation & Distribution
Corporation Limited (TANGEDCO)
Through: Chairperson / MD
144, Anna Salai,
Chennai - 02, Tamil Nadu**

.... Respondent No.2

**3. Tamil Nadu Transmission Corporation
Limited (TANTRANSCO)
Through: Chairperson / MD
144, Anna Salai,
Chennai - 02, Tamil Nadu**

.... Respondent No.3

**4. Non-Conventional Energy Sources (NCES)
Through : Chief Engineer
2ndFloor, Eastern Wing, NPKRR Maligai**

144, Anna Salai,
Chennai - 02, Tamil Nadu

.... Respondent No.4

Counsel for the Appellant (s) : Mr. Basawa Prabhu S. Patil, Sr. Adv.
Mr. Hemant Sahai
Mr. Apoorva Misra
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Ms. Puja Priyadarshini
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Mr. B. Vinodh Kanna
Mr. Aishwary Choudhary
Mr. Prateek Jyotisman for R2,
R-3 & R-4

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

1. This Appeal has been filed by M/s Solitaire BTN Solar Pvt. Ltd., (hereinafter referred to as the "*Appellant/Generator*") against the Impugned Order dated 24.11.2020 passed by the Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as "*Respondent No. 1 or TNERC or State Commission*") in DRP No. 05 of 2020.

2. The Appellant is a generating company engaged in the business of generation and sale of electricity.
3. Respondent No. 1 is Tamil Nadu Electricity Regulatory Commission, for the State of Tamil Nadu, exercising powers and discharging functions under the provisions of the Electricity Act, 2003.
4. Respondent No. 2 is Tamil Nadu Generation & Distribution Company (hereinafter referred to as "*Respondent No. 2 or TANGEDCO/ DISCOM*"). It is a generation & distribution company and was formed on 1 November 2010 under section 131 of the Electricity Act of 2003, and is the successor to the erstwhile Tamil Nadu Electricity Board.
5. The third Respondent is the Tamil Nadu Transmission Corporation Limited (hereinafter referred to as "*Respondent No. 3 or TANTRANSCO*") and discharging functions under the provisions of the Electricity Act, 2003.
6. The fourth Respondent is the Chief Engineer, Non-Conventional Energy Sources (NCES), (hereinafter referred to as the *Respondent No.4*) and is the authorised representative of the Respondent No. 2.

7. **Prayer of the Appellant**

- (a) Allow the present Appeal;
- (b) Issue appropriate Direction(s) / Order(s) to allow the present appeal and set aside the Impugned Order dated 24.11.2020 to

the extent the same is pleaded in the grounds mentioned in the Appeal;

- (c) Issue appropriate Direction(s) / Order(s) to the Respondents to return the Performance Bank Guarantee of Rs. 20 Crores and Additional Performance Bank Guarantees of Rs. 7.6 Crores immediately to the Appellant without any delay along with the cost of renewing such bank guarantees.

- 8. Let's have a look at the chronology of events which led to filing of this Appeal by the Appellant.

- 9. On 25.04.2017, the TNERC granted approval to TANGEDCO to invite bids to establish, maintain and operate solar power plants of minimum of 1 MW capacity and maximum 500 MW capacity in a single location for a single Solar Power Generator or a Company in State of Tamil Nadu for a total capacity of 1500 MW and to supply the generated solar power to TANGEDCO under long term Power Purchase Agreement at a rate to be finalised through reverse bidding considering the tariff of Rs. 4.00 per unit as upper limit.

- 10. On 15.05.2017, TANGEDCO issued Request for Submission (RfS) for procurement of Solar Power from Developers establishing Solar Power Plants in the State of Tamil Nadu through a reverse bidding process. As per the RfS, both TANGEDCO and TANTRANSCO were made obligated to provide transmission system to facilitate evacuation of power from the Project. Further, the Appellant had to pay application fee for connectivity to STU

system in terms of Regulation 5 of TNERC's Intra-state Open Access Regulations, 2014 and STU was required to carry out necessary system studies for determining connectivity lines. The relevant extracts from the RfS read as under:

“22.0) Role of STU/TANGEDCO:

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

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

28.0) Transmission Feasibility:

The SPG has to pay application fee to TANGEDCO as per Hon'ble TNERC's Intra State Open Access Regulations, 2014. The SPG has to establish power evacuation facility based on load flow study results i.e. the SPG has to erect the power evacuation line from their proposed solar power plant to the STU/TANGEDCO substation at their cost as per section 10(1) of the Electricity Act 2003.... ”

11. On 15.06.2017, the Appellant herein submitted its bid to build and establish solar power plants and sell the generated electricity from therein to TANGEDCO from the three locations set out below, jointly having a total capacity of 150 MW:

S.NO.	LOCATION	CAPACITY
1	Thulukankulam village, Kariapatti taluk, Virudhnagar District.	50 MW
2	Melakumilankulam village, Kariapatti taluk, Virudhnagar District.	50 MW
3	Esali village, Kariapatti taluk, Virudhnagar District.	50 MW

The aforesaid locations were selected by the Appellant on the basis of the available evacuation feasibility for various sub-stations provided under the RfS.

12. On 06.07.2017, the Appellant participated in the meeting held at TANGEDCO office and accepted the negotiated tariff at the rate of Rs. 3.47 per unit which was L1 discovered during the bidding process for supplying power from 100 MW (instead of 150 MW as originally proposed).

Letter of Intent (Lol) dated 29.08.2017

13. On 29.08.2017, TANGEDCO, vide its letter of same date, issued Letter of Intent (Lol) in favour of the Appellant, on terms and conditions stipulated in Tender Specification along with its amendments.

14. The Lol, reiterated that the obligation to provide connectivity to the Project will be with TANGEDCO and TANTRANSCO. It is relevant to point out that under the Lol, the location for the Project was considered as 50 MW each at Thulukkankulam Village, Karaiapatti Taluk, Virudhunagar District and Melakumilankulam Village, Kariapatti Taluk, Virudhunagar District respectively. Relevant extracts from the Lol dated 29.08.2017 read as under:

“11.0)Role of STU/TANGEDCO:

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

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

Power Purchase Agreement dated 28.09.2017

15. On 04.09.2017, the Appellant herein communicated its acceptance to Lol dated 29.08.2017 and subsequently on 28.09.2017, the Appellant herein executed a Power Purchase Agreement (PPA) with TANGEDCO for supply of 100 MW of power from the Project.

16. Under the PPA, the project was required to be set up at Kariapatti Taluk and the power from such project was required to be injected at nearest substation owned by TANGEDCO/TANTRANSCO. As per the terms of the PPA, the Project was embedded in the distribution utilities network with the delivery point being at the substation owned and operated by TANGEDCO/TANTRANSCO to be indicated by STU based on load flow studies to be carried out by them upon submission of application along with applicable fee as per Regulation 5 of TNERC's Intra State Open Access Regulations, 2014. Interface point was not identified in the PPA for the reasons that STU was required to carry-out load flow studies upon submission of fees by the Appellant.
17. As per the agreed terms of the PPA, the Appellant was made responsible for obtaining Transmission Connectivity and Access to the transmission system owned by the TANGEDCO/TANTRANSCO. The relevant extracts from the PPA dated 28.09.2017 is set out below:

“2. Interfacing and Evacuation Facilities:

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

Notably, the terms and conditions agreed in the PPA are an extension to those agreed between the Appellant with TANGEDCO as per the Lol.

Request for change in Project location and load flow studies

18. On 24.10.2017, considering the difficulty being faced in acquiring the land at Kariapatti Taluk, a request for change in project location was made by Appellant for shift of location site from Kariapatti Taluk to Ganguvarpatti, Theni District. This new location of the Project was north – east of Madurai and about 30 km from nearest 220 kV substation at Sembatti. The Appellant did not make any request with TANGEDCO / TANTRANSCO for seeking open access / connectivity from the original locations at Kariapatti Taluk.
19. The Appellant requested for change in location concurrently with a request to STU to undertake the load flow study. Such request letter requesting change in location and seeking open access/connectivity in terms of the TNERC Open Access Regulations, was submitted along with requisite demand drafts for load flow study to be conducted by TANGEDCO for the first time.
20. On 07.11.2017, TANGEDCO conducted primary study to evaluate the option of connecting the Appellant's Project to 110 kV Batlagundu S/s. It was informed that injecting additional load of 100 MW to 110 kV Batlagundu S/s would require certain augmentation works, upon completion of which connectivity may be allowed.
21. On 10.11.2017, the Appellant issued Notice Inviting Tender (NIT) for engaging EPC for Supply Contract, Module Supply and Accessories Contract, Contract for erections, testing,

commissioning, and civil works and Contract for Transmission Line Works and concluded the tender on 20.11.2017.

22. On 18.12.2017, the Appellant acquired 379.30 acres of land through registered lease deed for the purpose of construction of the 100 MW Project. A Balance 29.07 acre of land was also identified.
23. On 05.01.2018, TANGEDCO conducted the Load Flow and Solar Study with respect to the Project of the Appellant and finalised its findings for allowing principal evacuation approval to the Project but subject to certain pre-connectivity works being undertaken by TANGEDCO.

TANGEDCO's letter dated 06.01.2018 – Results of load flow studies

24. On 06.01.2018, NCES vide its letter of same date communicated that a load flow study has been conducted in respect of the proposed Solar Project being developed by the Appellant. NCES informed that the load flow study was undertaken considering the network conditions in FY 2018-19 and accordingly finalised the following transmission scheme for the Appellant:

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

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

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

Schedule Date of Commissioning (SCOD)

- 25. As per PPA, the Appellant was under obligation to commission the entire capacity of the Project on or before 24 months from the date of signing of the PPA i.e., **by 27.09.2019**. Such obligation to achieve SCOD, as per the stipulated timelines, in the scheme of the PPA, pre-requisites that the reciprocal obligation of TANGEDCO to provide the evacuation system (with certainty) has been undertaken.
- 26. On 08.01.2018, the Appellant approached REC Limited (Lenders) for request of sanction of loan for its Project. As per the pre-requisite, the Appellant informed that majority of the land has been acquired through registered lease deeds, the promoters' equity as required has been infused, and EPC Contract has been executed.

27. On 13.02.2018, the Appellant furnished the desired demand draft to REC Limited for the purpose of sanctioning of the loan amount. Subsequently, on 21.03.2018, REC Limited confirmed the receipt of the application made by the Appellant seeking sanction of loan and intimated that the same is under process.
28. On 07.05.2018, the Appellant having completed its initial obligations such as acquisition of 100 per cent land, Design and Engineering of AC & DC electrical packages done, Soil testing of the Project site etc., vide its letter of same date informed TANGEDCO that the Appellant has already acquired the land for the Project and is planning to commission the Project by March 2019. It was therefore, requested that the connectivity works that are undertaken by TANGEDCO be expedited.
29. On 24.05.2018, REC Limited (Lenders) issued a letter communicating that the loan application made by Appellant has been cleared by the appropriate committee.

REC sanctioned the loan on 09.07.2018

30. The Appellant did not receive any response from NCES or TANGEDCO and therefore, was forced to write multiple letters/reminders to both the entities for their expeditious actions. Meanwhile, on 09.07.2018, REC sanctioned the loan in favour of the Appellant.
31. On 26.07.2018, Appellant issued a letter to TANGEDCO, whereby TANGEDCO confirmed that all required documents as per the terms

and conditions of tender specification in respect to the Solar Project were furnished. Further, Respondents agreed to assign the Company's rights under the PPA in favour of the lender (REC).

32. On 21.08.2018, the officials at NCES and TANGEDCO met the Appellant to discuss the progress of the connectivity lines and augmentation of the transmission system. After passage of almost seven (7) months from the date of providing Conditional Evacuation Approval, it was discussed that as per the Conditional Evacuation Approval the Point No. 1 i.e. *Conversion of 110 kV Theni – Sembatti Feeder I and II by Wolf equivalent HTLS (High Temperature Low Sag) conductor* **will not be possible due to certain commercial constraints.** It was therefore, requested by the Appellant that the said condition be removed from the Conditional Evacuation Approval and directions may be given to TANTRANSCO to expedite the completion of the remaining pre-connectivity works to evacuate power supply from the Project.
33. The Appellant has submitted that despite passage of time and continuous follow ups and letters for early completion of all pre-connectivity points to enable 100% evacuation from plant, no formal response or status was received from either NCES or TANGEDCO. Therefore, the Appellant vide its letter dated 11.09.2018, wrote to TANTRANSCO explaining its difficulty in obtaining necessary disbursements from its lenders who had subjected the disbursement to the completion of the pre-connectivity works. It was once again requested that the works be expedited since the same is affecting the project timelines and commissioning schedule. Pertinently, the difficulty in getting disbursements from the lenders goes to the root

of the matter impacting the financial viability of the project. Similar letters were written to NCES and TANGEDCO on 26.09.2018 however no response was received by the Appellant.

34. On 09.11.2018, TANTRANSCO approved the single line drawing of the Appellant for establishment of 2 x 50 MW Solar Project plant at Ganguvarpatty village, subject to certain conditions including requirements regarding equipment, SSE work, protection/metering authorities, etc., amongst others. TANTRANSCO had also shared a single line diagram along with this letter, which was the single line diagram of the Appellant with the modifications required.
35. On 10.11.2018, the Appellant again issued the Notice Inviting Tender (NIT) for engaging EPC for Module Supply and Accessories Contract, Contract for erections, testing, commissioning, and civil works and Contract for Transmission Line Works. On 27.11.2018, these contracts were concluded.
36. On 27.11.2018, Supply Contract was executed with EPC – Hindustan EPC Co. Private Limited. Module Supply and Accessories Contract was executed with Hindustan Power Project Private Limited and Contract for erections, testing, commissioning, and civil works was executed with Peridot Power Ventures Limited. Contract for Transmission Line Works executed with Peridot Power Ventures Limited.
37. The Appellant further wrote multiple reminders on 14.12.2018, 31.12.2018, 09.01.2019, 05.03.2019, 01.04.2019, 15.04.2019, 20.04.2019 and 25.04.2019 requesting intervention of the office of

CMD – TANGEDCO and CE – NCES for expeditious completion of pre-connectivity works. Despite writing on several occasions to NCES, TANGEDCO and TANTRANSCO, the Appellant neither received its acknowledgement to its multiple requests for intervention in expediting the pre connectivity points nor did it receive any certainty on timelines for completion or status thereof.

38. On 16.01.2019, the Appellant issued “Notice to Proceed” to its EPC for the Civil Works to be carried out at the Project site. Thereafter, in March – April 2019, the Appellant issued a similar notice to its EPC for undertaking works related to the 110 kV inter-connecting transmission line (about 6-7 Km long) from the Project site till 110 kV Batlagundu S/s.
39. On 02.05.2019, the Appellant being aggrieved by arbitrary, illegal and irresponsible conduct of the NCES, TANGEDCO and TANTRANSCO, once again wrote a letter explaining the difficulties being faced by the Appellant’s Project and how the same shall also affect the Project timelines and commissioning schedule.

New 230/110 kV substation at Ganguvarpatty Village

40. On 15.05.2019 (after passage of one (1) year and four (4) months from the date of Conditional Evacuation Approval), the Chairman Cum Managing Director – TANGEDCO afforded opportunity to the Appellant and heard the difficulties being faced by it in implementation of project. It was only subsequently that on 29.05.2019, that the Appellant was informed by (Director Generation) - TANGEDCO that a new 230/110 KV sub-station is

being planned and to be constructed near to the location of the Project and after completion of this substation, 100% power evacuation will take place from Solar plant. It is important to note that said communication dated 29.5.2019 was issued to the Appellant just four (4) months prior to SCOD 27.09.2019 of the Project.

41. On 24.05.2019, Superintending Engineer (Operation), TANTRANSCO, Madurai wrote a letter to Director (Operation), Chennai regarding feasibility of connecting the Solar Project with 110 KV Theni – Sembatty feeder, wherein the Respondents themselves have opined that evacuation of 100 MW capacity from the Solar Project is possible only after completion of pre-connectivity/improvement works mentioned at serial no. (a), (c) and (d) of the letter dated 06.01.2018. The letter further categorically records that out of the above, none of the work stated in serial no. (a), (c) and (d) of letter dated 06.01.2018 has even commenced and the works could not be completed before the commissioning of the Solar Project. Additionally, with regard to the representation made by the Appellant before the Chairman TANGEDCO requesting for completion of pre-connectivity work by September 2019 to enable power evacuation from Solar Project, a report was submitted by the Superintending Engineer, wherein among others, the following were also noted:

- The existing conductor in 110 KV Theni – Sembatty I and II feeders is Wolf with current carrying capacity of 343 Amps. The existing conductor and its accessories have served 60 years of life as against its full life of 35 years.

- The peak reached in 110 KV Theni – Sembatty II feeder is 77 MVA (Exp), 370 Amps, 25.05.2018/17 Hrs at Theni End, over and above the current carrying capacity of wolf conductor now itself.
- Similarly for 110 KV Theni – Sembatty I feeder, the feeder is already loaded upto 69 MVA (Exp), 320 Amps, 28.05.2018/16 Hrs. The margin available is very low.
- Moreover, in case of transferring existing 110 KV Batlagundu SS to 110 KV Theni – Sembatty I feeder, 110 KV Theni – Sembatty I, feeder will get overloaded when the feeder trips or breakdown occurs. Hence, there is no possibility of transferring existing 110 KV Batlagundu SS from Theni-Sembatty feeder II to Theni-Sembatty feeder I.
- Under the said circumstances, there is no possibility to inject the power from the Solar Project when the feeder is in tied condition.
- **As a temporary measure, if the Solar Project is introduced in 110 KV Theni Sembatty I feeder, both the feeders 110 KV Theni - Sembatty I & II have to be kept radial from Theni end even during non-wind season, that too with generation from Solar Project limited in range of 30 to 40 MW due to conductor constraints.**
- After completion of serial no. (a), (c) and (d) of letter dated 06.01.2018 (pre-connectivity work) full generation from Solar Project can be achieved.

Further, after analysing the feeder loads and future load growth, it has been stated in by the Superintending Engineer that **construction of new 230/110 KV Ganguvarpatty SS is the only permanent solution.**

42. On 29.05.2019, Appellant after having discussion with TANGEDCO in relation to the quantum of power that can be accommodated from the existing 110 KV Batlagundu SS (without pre-connectivity works) was informed that construction of new 230/110 KV Ganguvarpatty SS only can be a permanent solution for evacuation of 100 MW power from the Solar Project.
43. On 31.05.2019, TANGEDCO wrote a letter to Solitaire informing that **“it shall extend all support for evacuating the power”** from the project at Ganguvarpatti.
44. On 04.06.2019, a joint meeting was held for discussion on:
- (i) establishment of early connectivity to the already commissioned Thappakundu 400KV SS and effective loading of the substation; and
 - (ii) the existing condition of the Thappakundu substation and the proposed connectivity.

A perusal of the said minutes shows that Respondents once again reiterated the necessity of construction of new 230/110 KV Ganguvarpatty SS to provide permanent solution for evacuation of 100 MW power.

45. On 10.06.2019, TANGEDCO/TANTRANSCO while giving permission to Appellant to inject 30-40 MW from its Solar Project **on temporary basis** from the Batlagundu S/s, also informed the Appellant regarding the constraints of TANGEDCO/TANTRANSCO

in providing the infrastructure for evacuation for the complete 100 MW and confirmed that construction of new 230/110 KV Ganguvarpatty SS is the permanent solution for 100 MW evacuation of power from the Solar Project. Accordingly, an offer of land for the alternate sub-station at Ganguvarpatty for construction of new SS at the cost of Appellant was accepted.

46. Subsequently, on 04.06.2019 a meeting was held between the Appellant and officials of NCES and TANGEDCO. It was only during this meeting, the Appellant was informed that two of the pre-connectivity works identified under the Conditional Evacuation Approval dated 06.01.2018 for the Project, could not be completed in a time bound manner to effectuate power supply from 25.09.2019 as agreed under the terms of the Power Purchase Agreement dated 28.09.2017.

Since the power from the Project cannot be supplied due to delay of the pre-connectivity works as identified under Conditional Evacuation Approval ought to be undertaken by TANGEDCO/TANTRANSCO, hence, to expedite evacuation and supply from the Project and to provide a permanent solution, it was suggested by TANGEDCO and TANTRANSCO in the meetings to establish a new 230/110 kV substation at Ganguvarpatty Village, Theni District at nearby premises of the Project. The Project can be interfaced at this 230/110 kV substation level at Ganguvarpatty Village by erecting 110 kV SC line from the Project after completion of new 230/110 kV substation.

47. In this regard, a site inspection was carried out by the GCC Wing, Madurai and Operation Wing, Madurai of TANGEDCO/TANTRANSCO, where after it was reported that the private land identified in SF No. 2619/1B & 2 in Ganguvarpatty -I Village in Periyakulum Taluk of Theni District is found suitable for the establishment of new 230/110 kV substation as proposed. Accordingly, it was advised that for the purpose of evacuation of 100 percent of power from the Project, necessary land be procured (a minimum of 10 acres) by the Appellant at its own cost.
48. As per original evacuation approval plan, Appellant was undertaking implementation of approximately 6 Kms Transmission Line interconnecting the project with the Batlagundu substation with an estimated capex of approximately Rs. 7 Crores at its own cost and expense. This connectivity line was due for completion on 20.09.2019 to connect the project for the intervening period i.e. prior to operationalization of the new 230/110 kV sub-station.

However, as informed by SE-Operations, Madurai vide its letter dated 10.06.2019, the 110 kV Batlagundu substation could only accommodate **partial evacuation to the extent of maximum of 30-40 MW out of 100 MW** due to evacuation constraints.

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

Director (Generation) it emerged that there is discussion for setting up of new sub-station near the Project site with which the Appellant's Project be connected for successful evacuation of 100 per cent of the Project capacity. However, the government would at least take 8-9 months to acquire land and thereafter similar time to construct the sub-station. Therefore, it was suggested if the Appellant could purchase 10 acres of land for the new sub-station at its own cost. The Appellant had accordingly shortlisted parcels of land, which were shown to the officials of TANGEDCO/TANTRANSCO for their approval.

50. Further, it was requested by Appellant that as an interim arrangement to ensure maximum evacuation from project, shifting of balance WEG feeders from Theni S/S to Thappakundu 400 kV S/S should be prioritized with work completion by September 2019.
51. TANGEDCO was also requested to review and reconfirm the maximum quantum of power evacuation allowed from the project since 30 -40 MW of power evacuation confirmation will make the project completely unviable. The minimum capacity allowed under the PPA is 50% of the contracted capacity. Hence, commissioning of any capacity lower than 50 MW is not allowed as per the PPA.
52. Meanwhile, on 20.07.2019, the Project site was affected due to certain law and order situation and a police complaint was also filed.
53. In furtherance of its commitment to complete the project within the prescribed timelines, the Appellant who was already lagging with the project completion timelines for reasons solely attributable to the

Respondents, promptly acquired the necessary land (10 acres) and the same was handed over to SE Operations, Madurai on 01.10.2019.

54. On 22.07.2019, the Appellant once again wrote to NCES and TANGEDCO / TANTRANSCO seeking information to confirm the maximum quantum of power that can be evacuated through the existing Batlagundu sub-station and time extension should be granted for the balance capacity. The Appellant also requested TANGEDCO that due to evacuation constraint, the Appellant do not want to be in a situation that Appellant incur huge generation loss on one side and pay huge interest cost on disbursed loan for idle capacity.
55. The Appellant submitted that although the authorities indicated that around 30-40 MW of power may be evacuated through existing sub-station there was no assurance of the same which allowed any certainty. Needless to mention that the Solar Modules cannot be allowed to be mounted on merely assurance of the authorities that 30-40 MW of power may be allowed to be evacuated through the existing sub-station, since any variation in the assurance will result in rendering the Project capacity idle.
56. **On 27.08.2019**, TANTRANSCO vide its letter addressed to Chief Engineer, System Operations, informed the Appellant that after considering the system study, **60 MW of power may be injected at Batlagundu S/s.** However, this maximum limit of 60 MW may increase or decrease depending upon the actual flow of generation after commissioning of the Appellant's Project and will be allowed

accordingly. It was confirmed that the 100 per cent Project capacity would only be evacuated once the new sub-station is commissioned.

57. On 29.08.2019, the Appellant, after receipt of the “Conditional Approval of 60 MW”, proceeded to write to its EPC for expediting the works at the Project and supplying of material / modules for the construction of the Project.
58. On 05.09.2019, TANGEDCO informed REC Limited that the commissioning of the entire Project Capacity i.e. 100 MW can be done by 27.07.2020 (34 months from the Effective Date) however the same shall be subjected to levy of penalty. No clarity on the evacuation was provided by TANGEDCO. A new 220 kV substation would take minimum of 2-3 years for commissioning. Thus, assurance given by TANGEDCO to REC that 100% evacuation can be done by 27.7.2020 (10 months from SCOD) reveal that 100 % power could be evacuated from 110 kV Batlagundu substation itself and intentions of the Respondents were to delay the projects and get unduly enriched through penalties.

Request for extension of SCD on 17/09/2019

59. It is submitted that the Appellant brought to the notice of the Respondents that due to evacuation constraints on account of non-completion of pre-connectivity works is being financially and commercially prejudiced and Appellant’s lenders have also withheld further disbursement of funds. Vide letter dated 17.09.2019, the Appellant requested TANGEDCO for extension in SCOD citing

inordinate delay in grant of part evacuation approval of 60 MW on, as late as 27.08.2019 just a month before the SCOD of 27.09.2019.

Petition filed on 25/09/2019

60. It is important to point out that having consistently following up with NCES, TANGEDCO and TANTRANSCO seeking status update on evacuation and confirmation of the capacity that may be evacuated through the existing sub-station, it was only at the belated stage i.e. 27.08.2019 that the Appellant was informed about the possible evacuation limit of 60 MW from the existing sub-station. Compelled by such reasons, the Appellant herein was constrained to approach the TNERC with the Petition (DRP No. 05 of 2020) on 25.09.2019 seeking *inter alia* for extension of time in achieving commissioning of the Project.
61. While the petition was pending adjudication before the TNERC and was yet to be taken up for admission, on 27.09.2019 i.e. within two days of filing of the Petition before TNERC, TANGEDCO informed Appellant that it shall extend all support to evacuate power on completion of 100 MW. However, any delay in commissioning beyond SCOD will be subjected to penalties. It is evident from the letters dated 27.09.2019, TANGEDCO was silent on the Appellant's request for extension in SCOD.
62. On 01.10.2019, the Appellant handed over 10 acres of land to TANGEDCO (without any consideration) for the purpose of construction of Ganguvarpatty S/s. The Appellant continued to work towards achieving the commissioning of the 50 MW of the Project,

since TANGEDCO vide its letter dated 27.08.2019 only assured evacuation to the extent of 60 MW with a condition that this 60 MW could vary based on the actual loading conditions.

63. On 10.12.2019, the Appellant informed TANGEDCO that it is ready for commissioning of the 50 MW capacity and requested TANGEDCO to inspect the site and grant grid tie-up approval. Shortly thereafter, on 14.12.2019, the Appellant requested CEIG to inspect the Project Site and accord certification for the 50 MW capacity.
64. Without considering the repeated pleadings of the Appellant to allow extension of SCOD primarily due to the delay in providing evacuation approval by TANGEDCO, on 20.12.2019, TANGEDCO emphasised that the entire capacity requires to be commissioned by 27.07.2020 (34 months from the Effective Date) and requested the Appellant to submit documents for inspection of site.
65. On 29.12.2019 and 31.12.2019, the CEIG and NCES inspected the Project site respectively. On 06.01.2020, the Appellant informed that 50 MW capacity is ready for commissioning and requested TANTRASCO to provide grid connectivity approval. Similar letter also written to TANGEDCO whereby clarity was also sought as to when the entire capacity will be evacuated.
66. On 08.01.2020, the CEIG issued certificate to the extent of 50 MW capacity.

67. **On 20.01.2020, TANGEDCO discussed with the Appellant that 100 MW power can be injected at Batlagundu S/s, subject to restriction of load, if any, to avoid overloading and replacement of wolf conductor in both of the feeder- I and II into HTLS conductor, to avoid breakdown of the line. Thereafter on 24.01.2020, TANGEDCO informed Appellant that grid connectivity approval for 50 MW has been issued and that 100 MW capacity (entire project capacity) can be evacuated through the existing Batlagundu S/s.**
68. Meanwhile, on 15.01.2020 and 28.01.2020, certain module suppliers started invoking *force majeure* clause in view of the outbreak of Covid – 19 in China and India. Multiple instances affected the progress made by Project, which included the suppliers, vendors, sub-contractors and contractors, citing *force majeure* clauses / outbreak of Covid -19 as an event affecting their performance under their respective agreements.

50 MW capacity commissioned on 20.02.2020

69. Despite facing various unfavourable conditions, the Appellant herein commissioned 50 MW out of total of 100 MW capacity on 20.02.2020.
70. On 25.02.2020, the TNERC while hearing the Petition (DRP No. 05 of 2020) on admission and the Interim Application filed by the Appellant seeking stay on the encashment of Performance Bank Guarantee (PBG) of Rs. 20 Crores, passed directions staying the encashment of PBG and subsequently on 10.03.2020, vide its Order

of same dated recorded the statement of TANGEDCO that the PPA is alive and subsisting.

71. On 25.02.2020, the Project site once again was impacted due to local law and order situation which compelled the Appellant to file a Police Complaint regarding the same.

Force Majeure Notices issued by Appellant

72. On 21.03.2020, 31.03.2020, 26.05.2020 and 02.07.2020, the Appellant issued *force majeure* notices and intimation to TANGEDCO citing impact of Covid -19 as a material event impairing the ability of the Appellant to proceed with its obligation to commission the balance 50 MW capacity of the PPA.
73. On 10.07.2020, the Appellant herein achieved readiness in relation to the additional 16 MW capacity and requested TANGEDCO to allow evacuation of the same and accord necessary synchronisation approval for the same.
74. On 14.07.2020, NCES inspected the Project site and found that around 16 MW was ready, and balance 4 MW was also ready but for want of a transformer, which was to be received at the Project site.

MNRE's OM granting blanket extension due to Covid 19

75. MNRE in furtherance to its office memorandum dated 17.04.2020 and 30.06.2020, *vide* its 13.08.2020, granted a blanket extension of

5 months to all renewable generators including the Appellant for achieving various timelines under the PPA. Such consideration was made by MNRE after understanding the plight of various renewable projects, where the progress has been affected due to outbreak of Covid -19 in India and abroad and resultant directions of lockdown and restrictions imposed by the Central Government and State Government.

76. On 12.08.2020, the Appellant herein approached TANGEDCO to allow grid-tie-up approval (synchronisation and injection approval) for the additional 25 MW capacity (51 MW to 75 MW).
77. On 18.08.2020, the CEIG accorded its certification for the additional 25 MW capacity.
78. On 26.08.2020, the Appellant vide its Interim Application No. 03 of 2020 seeking *inter alia* direction against TANGEDCO to allow synchronisation and commissioning of the additional 25 MW capacity pending the adjudication of the Petition. While such application was being heard by the TNERC it was pointed out by TANGEDCO that the prayers in the petition do not include any relief that is being prayed by the Appellant in relation to delay caused due to Covid -19. It was explained that since the Petition was filed in September 2019, such issue could not be incorporated at such time. However, the TNERC allowed the Appellant to file an application seeking amendment of the grounds and prayers to add the submissions in relation to impact on the progress of the project due to Covid -19. On 07.09.2020, the Appellant filed such application.

79. The Appellant vide its Additional Affidavit dated 28.09.2020 provided the status of the Project.
80. The Appellant submitted Performance Bank Guarantee of Rs 20 Crores (as provided under the LOI) and subsequently Additional Performance Guarantees of Rs. 7.6 Crores in favour of TANGEDCO.
81. On 29.10.2020, the Appellant achieved readiness for the balance 25 MW capacity and on 19.11.2020, the CEIG accorded its certification. However, apart from first 50 MW capacity the balance capacity of 50 MW was yet to be synchronised and commissioned.
82. On 24.11.2020, the TNERC pronounced the Impugned Order. The TNERC while allowing the delayed commissioning in reference to the first 50 MW of the contracted capacity, has truncated the balance 50 MW capacity. The balance 50 MW for which the Appellant achieved readiness beyond the SCOD, has not been allowed and the parties have been directed to negotiate the tariff for supply of power for the balance 50 MW.
83. Aggrieved by the order dated 24.11.20 passed by TNERC, the Appellant has filed the present Appeal.

Submission made by the Appellant

84. It is the case of the Appellant that the TANGEDCO / TANTRANSCO failed to provide any assurance or visibility regarding possibility of evacuation to the extent of 100 per cent of the Project capacity of

100 MW which led to the delay in implementation of the Project by the Appellant.

85. Below is the table capturing the dates of readiness/ commissioning of the part capacity of the project which was delayed on account of:-

(a) Non-availability of transmission system for evacuation of power from the Project and

(b) Outbreak of Covid – 19 in China and India and consequent announcement of lockdown by the Central and State Government:

S.No.	Capacity (MW)	Date of Readiness	Delay from SCOD	Readiness from Evacuation Approval	Date of Inspection of CEIG / Approval
1.	50	10.12.2019	74 days	105 days	29.12.19/08.01.20
2.	16	10.07.2020	287 days	168 days	14.08.20/18.08.20
3.	09	14.08.2020	322 days	203 days	14.08.20/18.08.20
4.	25	29.10.2020	398 days	279 days	10.11.20/19.11.20

Note: The first capacity of 50 MW was commissioned on 20.02.2020.

86. Notably, the aforesaid delays have occurred on account of reasons not attributable to Appellant and are beyond its reasonable control. The period of delay corresponding to the each of the events of delay is also set out below:

S.No.	Capacity (MW)	Delay in granting Evacuation Approval	No. of Days	Delay due to Covid -19	No. of Days
1.	50	From 06.01.2018 to 27.08.2019	598	--	

S.No.	Capacity (MW)	Delay in granting Evacuation Approval	No. of Days	Delay due to Covid -19	No. of Days
2.	16	From 06.01.2018 to 24.01.2020	748	From 15.01.2020 to 10.07.2020	177
3.	09	From 06.01.2018 to 24.01.2020	748	From 15.01.2020 to 14.08.2020	212
4.	25	From 06.01.2018 to 24.01.2020	748	From 15.01.2020 to 29.10.2020	288

87. The commissioning timelines have been provided under Article 14 (b) of the PPA, which reads as under:

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

months, the Distribution Licensee will encash the entire (100%) Performance Bank Guarantee.

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

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

The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be 34 months from the date of signing of PPA. The amount of Liquidated Damages shall be recovered by TANGEDCO from the payments due of the Project Developer on account of Sale of Solar Power to TANGEDCO.

*In case, the Commissioning of the Project is **delayed beyond 34 months** from the date of signing of PPA, the PPA capacity*

*shall stand reduced/ amended to the extent of Project Capacity Commissioned and the PPA for the balance Capacity not commissioned will stand terminated and shall be reduced from the selected Project Capacity. **In case, the project is not commissioned, within such 34 months, the PPA will stand terminated** automatically without any notice or Order and the Distribution Licensee will encash the Additional Performance Bank Guarantee furnished towards Liquidated Damages.*

88. Further, the Force Majeure Event has been defined under Article 16 of the PPA and the same reads as under:

“16. Force Majeure:

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

“Force Majeure” events means any event which is beyond the control of the parties involved which they could not foresee or with a reasonable amount of diligence could not have been foreseen or which could not be prevented and which

substantially affect the performance by either party such as but not limited to:-

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

A combined reading of the aforesaid two provisions of the PPA, it emerges that while the general rule is that the Project timelines are required to be mandatorily performed and non-performance of a material obligation i.e. completion of the Project as per the prescribed timelines (SCOD) will attract either penalties / liquidated damages, exception has been made where the parties to the contract will not be made liable for any loss or damage whatsoever arising out of failure to achieve SCOD, if the same has been restricted due to occurrence of Force Majeure Event.

89. It is clear that the delay in providing transmission system for evacuation of 100 per cent power from the Project is solely attributable to TANGEDCO. It is settled principle of law that no one can take advantage of its own wrong. Accordingly, in view of the fact that the delay prior to outbreak of Covid – 19, caused in achieving SCOD was solely for the reasons attributable to TANGEDCO, TANGEDCO is restricted in law to exercise its option

of terminating the PPA as a consequence of the entire capacity not being commissioned within the stipulated timeline.

90. The delay caused in the implementation of the Project due to unavailability of the transmission system is for reasons beyond the control of Appellant and accordingly, Appellant is contractually and legally entitled to receive extension corresponding to the period affected by such delay.

The period of delay from 06.01.2018 till 27.08.2019 (598 days for 60 MW) and from 06.01.2018 till 24.01.2020 (748 days for 40 MW) is directly attributable to TANGEDCO / TANTRANSCO and consequently, the same will have to be considered while extending the SCOD under the PPA.

91. Further, the event of outbreak of Covid -19 in China and India, consequently, impacting the solar module supplier of Appellant, its logistical partners, EPC and sub-contractors, qualifies to be a Force Majeure Event in terms of Article 16 of the PPA.
92. The outbreak of Covid – 19 in China and India and the subsequent decisions of the Central Government to recognize the same as an “epidemic” resulting in locking down of various commercial activities, inter and intra state movement of men and material etc., squarely qualifies to be an event of Force Majeure under the PPA. Even otherwise, MNRE has recognised the same as an event of Force Majeure. From 15.01.2020 onwards, Appellant’s ability to execute the balance 50 MW was affected since various module suppliers / vendors etc. communicated their difficulty to operate

and perform under their respective agreements due to Covid – 19. Such difficulty in receiving men and material on the project site and implementing the project as per the desired efficiency was impacted severely.

93. Accordingly, Appellant **issued Force Majeure Notices** to TANGEDCO on 21.03.2020, 31.03.2020, 26.05.2020 and 02.07.2020. Such notices remained un-responded by TANGEDCO.
94. Meanwhile, MNRE *vide* its Office Memorandum dated 17.04.2020, 30.06.2020 and 13.08.2020, has directed its implementing agencies to consider the outbreak of Covid -19 as an event of Force Majeure and consequently, allow a blanket extension of 5 months to the renewable power projects.
95. Notably, even beyond the allowed MNRE period, the project suffered to face the continued impact of Covid – 19, since the State Government extended the Lockdown in the State till 31.08.2020. Therefore, the period of Lockdown to be considered for Appellant will be from 25.03.2020 till 31.08.2020. However, subsequent to 31.08.2020, Appellant continued to face difficulties in operating at its desired efficiency, and the same impacted the progress of balance 25 MW of the Project. In this regard, it needs to be clarified that the 16 MW+09 MW (25 MW) out of the balance 50 MW capacity, achieved readiness within the MNRE timeline. This capacity awaited synchronization approval from TANGEDCO, which was not given. The fact that the ready capacity of 16 MW + 09 MW was not given synchronization and commissioning

approval, Appellant faced difficulty in draw – down of funds for completing the last 25 MW capacity.

96. In view of the above Office Order of MNRE on as is situation, the maximum time period allowed under the PPA i.e. 34 months from the Effective Date shall be stand extended from 27.07.2020 by 5 months i.e. 27.12.2020 (subject to LDs). The period under *force majeure* due to continuance of lockdown by the State Government further continued till 31.08.2020. However, Appellant cannot be subjected to any LDs / financial prejudice, since the delay in commissioning of the 100 MW capacity of the Project has been for justifiable reasons and cannot be attributed to Appellant. The period of delay from 15.01.2020 till 19.11.2020 (309 days) will have to be considered while extending the SCOD under the PPA.
97. Pertinently, the Regulatory Commissions and APTEL in catena of its orders and judgements have allowed extension of SCOD where the delay has been due to reasons not attributable to the Generator.
98. It is the specific case of the Appellant that even on demurrer, the facts of the case clearly demonstrate that the Appellant was entitled to extension of SCD till the time the Respondents fulfilled their contractual and legal obligations of ensuring evacuation of the entire Contracted Capacity of 100 MW through its transmission system, and at the very least such extension has to be given upto 27.12.2020. The Appellant had completed the entire project of 100MW prior to this date of 27.12.2020. Therefore, there can be no question of termination of the PPA or any part thereof, prior to this

date. It is further submitted that since this extension to SCD is precipitated entirely due to reasons attributable to the Respondents' failure to ensure evacuation of the entire 100MW Contract Capacity, and also in addition, on account of the MNRE OM dated 13.08.2021 allowing a blanket extension for completion to all renewable energy developers due to the advent of the COVID 19 virus, both these grounds fall within the express provisions of force majeure within Clause 16 of the PPA. Accordingly, the Appellant is entitled to this extension of SCD without any liability to pay any Liquidated Damages ('LDs') or other penalty. Further, such extension of SCD is within the scope of and in accordance with the provisions of the PPA. Thus, the Appellant is entitled to this extension of the SCD without any liabilities, and the PPA continues to remain valid and binding for the entire Contracted Capacity of 100 MW, upon the same terms and conditions, including tariff, as specified in the PPA.

99. The relevant dates pertaining to the immediate controversy are reproduced below:

S. No.	PARTICULARS	DATES
1.	Power Purchase Agreement (100 MW) – Effective Date	28.09.2017
2.	Application for Evacuation Approval	24.10.2017
3.	Evacuation Approval (Conditional – Pre connectivity works to be undertaken by TANGEDCO)	06.01.2018

4.	Evacuation Approval (Max. 60 MW subject to actual flow of generation) – received one month prior to SCD	27.08.2019
5.	Scheduled Commissioning Date (SCD) – 24 months from Effective Date	27.09.2019
6.	Achieved Readiness for 50 MW (qua 1st 50 MWs)	10.12.2019
7.	CEIG received qua 1st 50 MW (Inspection done on 28.12.2019)	08.01.2020
8.	Evacuation Approval (100 MW)	24.01.2020
9.	First 50 MW commissioning achieved	20.02.2020
10.	Additional Performance Bank Guarantee of Rs. 4 Crores submitted by Solitaire out of abundant caution.	27.02.2020
11.	Additional Performance Bank Guarantee of Rs. 3.6 Crores submitted by Solitaire out of abundant caution.	28.02.2020
10.	Lockdown Period [MNRE Office Memo – 5 months’ blanket extension]	25.03.2020 To 24.08.2020
11.	Readiness Achieved for 16 MW	10.07.2020
12.	Max. permissible timelines (34 months from Effective Date)	27.07.2020
13.	Readiness Achieved for 09 MW	12.08.2020
14.	CEIG received for 25 MW (16 MW + 09 MW) (Inspection done by CEIG on 13.08.2020)	18.08.2020
15.	Readiness Achieved for balance 25 MW	29.10.2020

16.	CEIG received for balance 25 MW (Inspection done on 10.11.2020)	19.11.2020
17.	Balance 50 MW commissioning achieved (in compliance with this Tribunal's Order dated 23.12.2020)	08.02.2021

100. The Appellant is entitled to extension of SCD beyond the 24 months specified in the PPA, without any liability for payment of LDs or any other penalty, till such time the conditions required for ensuring evacuation of the entire 100 MW Contracted Capacity, are completed by Respondent. These conditions admittedly have not been completed by the Respondents, notably the condition (a) (specified in approval dated 06.01.2018) which requires replacement of the Theni -Sempatti Feeder 1 from the existing Wolf Conductor with an equivalent HTLS conductor capable of evacuating the entire 100 MW of Contracted Capacity of the Appellant's project or till the Appellant's project is connected to a new 230/110 KV Sub-station at Ganguvarpatty Village ('*Ganguvarpatty SS*') as the permanent solution.

101. Without prejudice to the aforesaid contention, therefore, in any event at a bare minimum, the Appellant is entitled to an extension of SCD without any LDs or other penalty till 34 months i.e., till 27.07.2020 as specified in the PPA, and thereafter, it is entitled to another 5 months under the blanket extension under the MNRE OM dated 13.08.2020. With these bare minimum extensions, the SCOD gets extended upto 27.12.2020. The entire capacity of 100 MW achieved readiness on 29.10.2020 and received CEIG Certificate

for the same on 19.11.2020. Thus, the same would be deemed to have been commissioned on 29.10.2020/19.11.2020 though it could not be synchronised with the Grid due to arbitrary actions and/or administrative delays on part of the Respondents.

102. It is submitted that the extension of SCOD is strictly as per the terms of the PPA read with settled law in terms of *Chenamangathihalli Solar Power Projects LLP & Anr. vs BESCO & Anr.*, Appeal No. 351 of 2018 that has been upheld by the Hon'ble Supreme Court. Accordingly, this extension to the SCOD is to be granted without any LDs or any other penalty. Further, the PPA for the entire Contracted Capacity of 100 MWs remains valid and binding upon the same terms and conditions, including tariff as contained in the PPA.

103. It is submitted that despite the fact that the Appellant is entitled to the extension of the SCD till such time the Respondents complete all the conditions specified in approval dated 06.01.2018, specifically condition (a) requiring replacement of Theni - Sempatti Feeder - 1 from existing Wolf Conductor with an equivalent HTLS conductor capable of evacuating the entire 100 MW Contracted Capacity of the Solar Project, or till the Solar Project is connected to a new Ganguvarpatty S/S as the permanent solution, however, the Appellant completed and commissioned the balance capacity at its own risk and cost without there being any assurance from Respondents on the evacuation of the entire contracted capacity. The Appellant reserves its right to seek remedial actions for this risk and cost in appropriate proceedings at appropriate stage.

104. With the aforesaid extensions, including the blanket extension of 5 months granted by way of MNRE OM dated 13.08.2020 is applied in the facts and circumstances of the present case, the project timelines within which the entire 100 MW was to be commissioned as per the PPA stand extended till 27.12.2020. Admittedly, the Appellant has received Chief Electrical Inspector of Government ('CEIG') for 25 MW (16 MW + 09 MW) on 18.08.2020 and the final 25 MW capacity on 19.11.2020. Therefore, the direction of the Ld. TNERC directing termination of the PPA qua remaining 50 MW plant capacity is erroneous, arbitrary and illegal. The Appellant is not liable to pay any liquidated damages for the delay in commissioning insofar as the delay occurred for reasons beyond the control of the Appellant i.e. non-availability of requisite evacuation infrastructure to ensure evacuation of entire contracted capacity of 100 MW amounting to a Force Majeure Event as per Clause 16 of the PPA read along with law laid down by this Tribunal vide its judgment dated 14.09.2020, passed in the case of *Chenamangathihalli Solar Power Projects LLP & Anr. vs BESCO & Anr.*, Appeal No. 351 of 2018.

105. It is the specific case of the Appellant that evacuation infrastructure in place where the Appellant's power plant is connected as on date, is still not sufficient for ensuring evacuation of entire contacted capacity of 100 MW. Therefore, the delay in providing evacuation infrastructure for evacuation of entire 100 MW capacity, is still continuing.

Submission of TANGEDCO/Respondent No.2

106. The Appellant had finished work for 50 MW just two months before SCOD. The Appellant *vide* letter dated 16.07.2019 informed that 50% work i.e., 50 MW power had been generated from the solar power plant. The same goes on to show that the Appellant had not planned/strategized the running of the solar power plant in a way which would ensure achievement of SCOD, as an additional 50 MW of power could not have been generated in 2 months.
107. The primary aim of the Appellant was to achieve SCOD and the reasons given by the Appellant for not achieving the same did not stop the Appellant from doing its own job. The evacuation approval and country-wide lockdown, two of the most argued contentions of the Appellant fail to explain how the Appellant had been affected from committing to its own work. Without prejudice to the case of the Respondent, even if it were to be assumed that TANGEDCO/TANTRANSCO did not provide evacuation facility, as required, it does not have any bearing on the Appellant in generating 100 MW power. Similar to the analogy in the law related to specific relief, the Appellant cannot claim any benefit, when its conduct shows that it was unwilling, ill-prepared and not ready to commit to its own.
108. The Appellant has admitted in its pleadings that the outbreak of Covid-19 in China and India impacted the supply chain of materials from the solar module supplier, logistical partners, EPC and sub-contractors. Since it is undisputed that that Covid-19 pandemic could not have impacted operations commenced and running before 27.09.2019 (SCOD), the Appellant ought not to be given any leeway on account of being affected by the Covid-19 pandemic.

109. The field report received from SE/NCES/Udumalpet stated that the Appellant failed to initiate any erection activities in respect of the balance proposed 50 MW solar power plant before SCOD.
110. The Appellant failed to achieve Financial Closure within 180 days of signing of the PPA as necessitated by the Letter of Intent dated 29.08.2017.
111. It approached M/s. Rural Electrification Corporation of India only after 2 years from the date of signing of the PPA, evidencing the callous approach of the Appellant towards arranging a regular cash inflow, the backbone of any such project.
112. In order to upgrade the system, the pre-connectivity works were recommended by the Planning Wing taking into account the load growth and these works were initiated during 2014-15 itself for strengthening the existing infrastructure of TANGEDCO/TANTRANSCO. Hence, the pre-connectivity works mentioned in load flow study result were already under consideration/ implementation, but not specific to this 100 MW load flow study for evacuating the proposed 100 MW solar power plant of the Appellant.
113. TANGEDCO had promised full support on all instances and the same had been communicated to Appellant through letters dated 31.05.2019, 05.09.2019 and 27.09.2019.

114. The Appellant during the hearing on 22.03.2021, before this Tribunal had relied upon the TANTRANSCO's inter-correspondence letter dated 24.05.2019 addressed by SE/Operation/Madurai to the Director / Operation / Chennai, letter dated 10.6.2019 addressed to CE/NCES and letter dated 10.6.2019 addressed to the Appellant and claimed that there exist evacuation constraints for their proposed 100MW SPV Power Plant.

115. The allegation of the Appellant, based on the above letters, is totally false. All the above three letters had been addressed with the presumption that none of the pre-connectivity works would be completed on or before SCOD i.e., on or before 27.09.2019. In the SE/Operation/ Madurai letter dated 24.05.2019 Paragraph (3) states that:

“Out of the above none of the works stated in (a), (c), (d) have commences and the works could not be completed before the commissioning of the solar plants.”

Hence, the entire report of SE/O/Madurai has been based on the presumption/assumption that none of the pre-connectivity works would be completed, and the network condition when the 100 MW SPV plant of the Appellant is accommodated if the works are not completed has been stated.

116. SE/O/Madurai has further stated that while addressing the letters from TANTRANSCO to Higher ups dated 13.05.2019 and 24.05.2019, there was no wind generation in Regen Kamatchipuram and it was not isolated and as there was also no appreciable load

transferred to Thappagundu 400 KV Substation. Moreover, Batlagundu 110 KV Substation was also not transferred from 110 KV Theni – Sembatti II feeder to 110 KV Theni – Sembatti I feeder. Due to the above reasons, these letters erroneously presumed that full generation from M/S Solitaire BTN Solar Pvt Ltd could not be evacuated through Batlagundu 110 KV Substation and the same was reflected in the letters from TANTRANSCO to Higher ups dated 13.05.2019 and 24.05.2019.

117. Consequent to the transfer of 170MVA of loads to Thappagundu 400 KV S/S and by transferring of Batlagundu 110 KV Substation from 110 KV Theni – Sembatti II feeder to I feeder on 20.02.2020, more power can be evacuated than the power addressed in the letters dated 13.05.2019 and 24.05.2019.

118. With regard to the letter dated 10.6.2019 addressed from SE/O/Madurai to the Appellant, regarding the land for 230 KV Substation, as per the revised Master plan XII, approval was accorded for proposing a 230 KV Substation in and around Batlagundu 110 KV S/S or Nilakottai 110 KV S/S as per Lr No: SE/PLG/EMP/A3/F. Revised Master Plan/D.134/14 DT 28.03.2014. Land identification for the same and the corresponding works were being carried by TANTRANSCO and TANGEDCO. During the above process, as the Appellant had expressed his willingness (as per MOM dated 04.06.2019) land had been identified at Ganguvarpatty Village for establishment of a 230 KV Substation near Batlagundu. It is evident that the above 230 KV Substation was being planned since long back and not for the power evacuation of the project by M/s Solitaire BTN Solar Pvt. Ltd.

119. In the above contest only, the establishment of 230 KV Substation at Ganguvarpatty was drafted, suggested in the letters from Superintending Engineer/ Operation/ TANTRANSCO/ Madurai and submitted to the Higher Officials in the letters dated 13.05.2019 and 24.05.2019 stating the importance of establishment of Ganguvarpatty 230 KV Substation. These letters are only internal correspondences within the TANTRANSCO/ TANGEDCO and not communicated to the company. It is respectfully submitted neither the Board of TANGEDCO nor the Board of TANTRANSCO had issued any approved proceedings in this regard and the Appellant weighing upon an internal correspondence to his advantage to seal down his inefficiency in completing the project is totally not acceptable and objectionable.
120. In the letters dated 13.05.2019 and 24.05.2019 also, it has been stated as considering the load growth, upcoming solar plants, transferring of solar plants connected at Eluvanampatty 110 KV SS to Ganguvarpatty SS, the establishment of 230 KV Ganguvarpatty SS is essential. Hence, Ganguvarpatty 230 KV S/S is only an improvement proposal and not specifically for M/s. Solitaire BTN Solar Pvt Ltd.
121. In the letter dated 10.06.2019, Lr. No. SE/O/MDU/EA/AE/F.Solitaire Dkt/D.No.882/19 from the Superintending Engineer, TANTRANSCO to M/s. Solitaire BTN Pvt. Ltd., it was clearly mentioned that on analyzing the feeder loads and future load growth for the upcoming solar projects for **establishment of 230/110 KV SS at Ganguvarpatty village, Theni district at the nearby**

premises of solar promoter is the only permanent solution. It

also mentions that an inspection was carried out by the GCC wing and Operation Wing and it was reported by the GCC wing that the private land identified in SF.No.:2619/1B & 2 in Ganguvarpatty-I village in Periyakulam taluk of Theni district is found suitable for the establishment of 230 KV substation. It further mentioned that necessary arrangements may be made for procurement of the private land identified for a minimum of 10 acres land in SF.No.:2619/1B & 2 in Ganguvarpatty-I Bit village in Periyakulam taluk of Theni district for establishment of a 230/110 KV substation so as to evacuate the quantum of 100MW of power through TANTRANSCO Grid.

122. In letter dated 19.08.2019 Lr.No.EE/ Operation/ 230KV SS Theni/ F.Solar/ D. No. 19, which is an internal correspondence between the Officials of TANTRANSCO, the system/flow details when the 100MW solar power of M/s Solitaire BTN Pvt Ltd is connected with Batlagundu SS at 110KV level has been analysed in detail. Further, EE/O/Theni has stated that due to transfer of certain WEG loads to 400KV Thappagundu S/S, overloading of Theni SS due to additional flow of generation from solar power of M/s Solitaire BTN Solar Pvt Ltd does not arise. Further EE/Operation/Theni has remarked that during the period from Jan to May the solar power generator will help to meet the power crisis expected.

123. As on date, the 100 MW Solar power plant of M/s. Solitaire BTN Solar Pvt. Ltd. is being evacuated through 110 KV Batlagundu S/S as committed in its load flow results communicated during 06.01.2018 itself.

124. Three years later to the issue of load flow results, due to load growth in Dindigul district, in Theni-Sembatti I feeder, Intermediate Sub stations (110KV Vaigai SS, 110KV Madhurapuri SS, 110KV Batlagundu SS and 110KV Ayyambalayam SS) loads have increased by 10 to 12% facilitating the Power generated by M/s Solitaire BTN Solar Pvt Ltd. be consumed by the Substations.
125. M/s. Solitaire BTN Solar Pvt. Ltd. have reached maximum peak generation of 85.2MW on 18.03.2021 at 12.00 hrs which was evacuated without any restriction and based on this record alone the entire prayer of the Appellant may be dismissed.
126. Even during high wind and maximum hydro generation in Periyar & Suruliar Power houses, TANTRANSOCO was always capable of making arrangements such that the Theni-Sembatti I feeder tie can be opened at Sembatti end without reducing the Solar Generation.
127. The Appellant had attempted to mislead the court by the terms - "curtailment" and "constraints". It is respectfully submitted that "curtailment of solar power" is not only pertaining to the Appellant but also to other generators, is done based on Indian Electricity Grid Code to maintain grid discipline and as per the provisions in the PPA thereof. Curtailment of power due to grid safety and grid discipline **has been carried out not only for M/s. Solitaire BTN Solar Pvt. Ltd.** but for all the generators throughout the Tamil Nadu State as per the instruction of Load Dispatch center. **So far Curtailment of Solar Power has not been done due to feeder overloading.**

128. While the status of TANGEDCO/TANTRANSCO has been proved beyond doubt that it is ready for evacuating the 100 MW power. It is submitted that the Respondents had called for a meeting on 04.06.2019 with the Appellant, in order to ascertain the issues for extending connectivity to the proposed 100 MW solar power plant. The Appellant had finished only 35% of the work by 01.06.2019. The Appellant had also sought the permission of the Respondent to commence the physical work at Batlagundu at the same time, which signifies the ill-preparedness of the Appellant.
129. REC, the funding agent of the project, requested *vide* letter dated 04.03.2020 for the Respondent to commit to not terminate the PPA, admitting there in that the project is still under construction.
130. The Evacuation Approval dated 06.01.2018 was an unconditional approval and not contingent upon any pre-connectivity works to be undertaken by Respondent No. 2.
131. The commissioning of 100 MW, in both phases, has taken place from Batlagundu substation, signifying that the Batlagundu substation was ready for commissioning the whole capacity as on SCOD.
132. Pursuant to the orders dated 01.02.2021 and 05.02.2021 of APTEL, the partial commissioning of 50 MW has been done from Batlagundu substation. If there were to be any pre-connectivity related issues for power evacuation, the entire contracted capacity could not have been evacuated through Batlagundu substation. Hence, the Appellant's primary reason for not achieving SCOD is proven false.

In Arguendo, as per Clause the Respondent would not be responsible for delay in commissioning due to improvement works carried out by it even if it were to be assumed that the erection of the Ganguvarpatti substation was specific to the purposes of the Appellant Company's project, it was improvement work being carried out by Respondent No. 2 or 3. Any delay in commissioning, if caused due to improvement works being carried out by Respondent No. 2 or 3, would not be attributable to Respondent No. 2 or 3, as per Clause 2(h) of the PPA.

133. It is evident from the Revised Master Plan/D.134/14 dt. 28.03.2014 that the approval was accorded to build a 230 KV Substation in and around Batlagundu. Further, if the establishment of the Substation at Ganguvarpatti is primarily for the power evacuation of the power generated by the Appellant, then the entire cost of the establishment of the substation Rs. 18,772/- Lakhs (approx.) would have had to be borne by the Appellant, as per rules and regulations for the Deposit Contribution Works in the Respondent Company. Similar commitments have not been made or fulfilled by the Appellant. Thus, the conduct of the Appellant by not bearing any cost for the establishment of the Substation at Ganguvarpatti, proves beyond doubt that the purpose of establishing the said Ganguvarpatti SS was only for the sake of network improvement and not for the power evacuation by the Appellant's solar power plant.

134. The Appellant had wrongly accused the Respondent for non-completion of pre-connectivity jobs. The following is the status of

pre-connectivity jobs, proving wrong every accusation levelled by the Appellant.

Conditions	Status as of date																		
<p>Conversion of 110 KV Theni-Sembatti Feeder I and II by Wolf equivalent HTLS conductor.</p>	<p>Strengthening of existing 110 KV DC Theni- Sembatti I and II feeder with WOLF conductor by HTLS conductor was administratively vide (Per) CH TANTRANSCO Proceedings No: 5 dated 06.01.2015 for an amount of Rs. 2903.28 Lakhs. The current carrying capacity of HTLS (Wolf equivalent) conductor is 1.5 times of the capacity of the conventional WOLF conductor. For the above works, in principle approval accorded for availing grant from PSDF vide (Per) CH TANTRANSCO Proceedings No; 122 dated 09.08.2018 for an amount of Rs. 3841.23Lakhs for reconductoring of 110 KV Theni – Sembatti I and II feeders with Carbon composite core conductor. <u>But not accepted for PSDF grant. Revised proposal is to be sent up for sanction.</u></p> <p>With regard to the above pre-connectivity work even the petitioner in one of his letters has agreed that the existing Theni-Sempatti I Feeder which is of WOLF conductor having a current carrying capacity of nearly 330 Amps is suffice for the present loading conditions as only the surplus generation of M/s Solitaire BTN Pvt. Ltd. after local consumptions is to be exported into it.</p>																		
<p>Transferring of Batlagundu 110 KV SS from Theni-Sembatty feeder II to Theni-Sembatty feeder I.</p>	<p>Switching over operation done on 20.02.2020</p> <p>This is just a switching operation and Batlagundu 110 KV Substation has been transferred from 110 KV Theni – Sembatti II feeder to I feeder on 20.02.2020 i.e., on the date on which 50MW of solar power plant of M/s Solitaire BTN Pvt Ltd was part commissioned.</p> <p>Consequent to transfer of Batlagundu 110KV SS to 110 KV Theni – Sembatti-I, the net loads/generation incident on the above feeder are as follows:</p> <table border="1" data-bbox="570 1444 1292 1738"> <thead> <tr> <th></th> <th>Load in MW</th> <th>Generation in MW</th> </tr> </thead> <tbody> <tr> <td>Ayyampalayam SS 2 X 16MVA</td> <td>32</td> <td></td> </tr> <tr> <td>Batlagundu SS 2 X 10 MVA</td> <td>20</td> <td>100 (Solitaire)</td> </tr> <tr> <td>Vaigai Dam SS 1 X 16 MVA</td> <td>16</td> <td>15 (WEG)</td> </tr> <tr> <td>Madurapuri SS 2 X 10 MVA</td> <td>20</td> <td></td> </tr> <tr> <td>Total (Feeder-I)</td> <td>78</td> <td>115</td> </tr> </tbody> </table> <p>The network conditions when 110 Batlagundu SS is transferred to Theni-Sempatti feeder-I from Theni- Sempatti feeder-II has not been taken into account in any of the letters addressed from SE/O/Madurai.</p>		Load in MW	Generation in MW	Ayyampalayam SS 2 X 16MVA	32		Batlagundu SS 2 X 10 MVA	20	100 (Solitaire)	Vaigai Dam SS 1 X 16 MVA	16	15 (WEG)	Madurapuri SS 2 X 10 MVA	20		Total (Feeder-I)	78	115
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<p>Erection of Sembatty-Checkanurani 230 KV second circuit</p>	<p>Strengthening of existing Kundah conductor in 230KV Sembatty-Checkanurani feeder with Zebra conductor was administratively approved (Per) CH TANTRANSCO Proceedings No: 178 dated 21.10.2016 for an amount of Rs 2394.95 Lakhs Gross. Revised estimate has been submitted for getting revised administrative approval. Dependent on the previous work erection of an additional 230 KV line between Sembatti 230 KV SS and Checkanurani 230 KV Switching station was administratively approved (Per) CH TANTRANSCO Proceedings No: 39 dated 14.02.17 for an amount of Rs. 948.48Lakhs.</p>
<p>Transferring of the WEG connected substations of both 10(1) and TANGEDCO viz, Kamatchipuram, Kadamalaikundu, Rasingapuram, Srirangapuram and Kandamanur substations from Theni-Periyar feeder I, II & III and Theni-Pasumalai feeder to Thappakundu 400 KV SS.</p>	<p>Regarding the transfer of Loads to Thappagundu <u>400 KV SS, Thappagundu 400 KV Substation came into commercial operation on 21.03.2019</u> with 110 KV Theni- Rasingapuram I and II feeders (70 MVA) and 110 KV Regen Kamatchipuram wind farm Substation (100 MVA). But soon after the commissioning of the substation on 21.03.2019, due to high voltage problem, 110 KV Theni-Rasingapuram I and II feeders were isolated on the very next day itself. Hence due to this teething issue in transfer of loads, <u>the SE/O/Madurai has not taken into account the transfer of loads of about 170 MW in his letters dt 23.5.2019 and 10.6.2019.</u> However the above loads ie., 110 KV Theni- Rasingapuram I and II feeders (70 MVA) and 110 KV Regen Kamatchipuram wind farm Substation (100 MVA) <u>were put back into on 21.06.2019.</u> Hence a total load of 170MW has been transferred to 400KV Thappagundu SS thereby giving considerable relief at 230KV Theni S/S. With this relief, the net export incident on the 110 KV Theni -Sembatti feeder -I is easily manageable at 230 KV Theni SS end.</p>

135. The Appellant Company contends that “...*the event of outbreak of Covid-19 in China and India, consequently the solar module supplier of Solitaire, its logistical partners, EPC and sub-contractors, qualifies to be a Force Majeure event in terms of Article 16 of the PPA*”. The same proves beyond doubt that the raw materials have been sourced only in the latter half of 2019 (beyond the due date of 27.09.2019) while the PPA had been executed in 2017. It goes on to show that the Appellant had not strategized in a manner which would lead it to commit to the prescribed SCOD in the PPA.

136. Without prejudice, if the raw materials for the balance 50 MW, for which grid tie-up was issued based on the directions of this Tribunal, had been sourced only during November/December 2019, the applicability of tariff of Rs. 3.47/-, which was fixed in the tender during 2017 based on the market conditions prevailing at that time, remains questionable when the solar tariff rate is declining worldwide.
137. As per the terms and conditions of the Letter of Intent dated 29.08.2017 the SPG shall report Project Financing Arrangements within 180 days from the date of signing of PPA and in case of delay, TANGEDCO shall encash performance bank guarantee and shall remove the project from the list of selected projects. While such was the responsibility on the Appellant, the Appellant *vide* letter dated 06.01.2020 stated that “.....we have further approached our lenders (REC Limited) to release further fund for commissioning of balance capacity of 48 MW within this quarter.....”. As per the terms and conditions of Letter of Intent, the Appellant Company has not furnished Financial Closure within 180 days from the date of PPA for the contracted project capacity of 100 MW. As per their letter dated 06.01.2020, they have approached M/s. Rural Electrification Corporation of India only after 2 years from the date of PPA for financing the balance capacity out of 100 MW.
138. It is submitted that as per the field report received from SE/NCES/Udumalpet, the Appellant/developer has not initiated any erection activities in respect of the balance proposed 50 MW solar power plant till the due date of 27.09.2019 and also till the first penalty period of 5 months i.e., prior to 27.02.2020. While the

Appellant had not taken initiative for funding or for purchase of raw materials such as solar panels, inverters etc., for the 50 MW SPV capacity, the Appellant's claim for seeking extension of time and stating that they are not liable to bear any liquidated damages and/or contractual penalty for not commissioning its project as per the Scheduled Commercial Operation Date as prescribed under the PPA dated 28.09.2017 since the delay is for reasons beyond the control of the Appellant, is not acceptable on any ground. The Appellant, in order to cover-up its failures has made allegations against the Respondents. In the absence of compliance on its part and lack of readiness and preparedness, the Appellant is not entitled to point fingers to any other party.

139. The Appellant in its affidavit dated 28.09.2020 stated that for the last balance of 25 MW capacity of project, the Appellant had been able to install additional 15.5 MW and installation of 2.5 MW would be achieved by 08.10.2020. The Appellant in this affidavit committed that it would have installed an additional 18 MW by 08.10.2020. Further, the Appellant mentioned that *"BOS, inverters, inverter-duty transformer etc., has been procured and received on site for the entire balance capacity i.e. 76 MW to 100 MW. The balance can only be undertaken, once RES Ltd. (lenders) disburse the amounts, which can be utilized to procure balance modules and undertake consequential installation works. It has already been submitted that, once the 25 MW capacity (51 MW – 75 MW) is allowed, synchronization and commissioning, REC Ltd. will be able to disburse the remaining loan and enable the petitioner to complete the commissioning of its entire project expeditiously without any further delay"*. The submissions of the Appellant before the

Commission show that the Appellant was neither nearing financial closure, nor was ready with raw material to achieve SCOD. The same has been duly noted by the Commission in the Impugned Order. The Appellant cannot take the defense of Covid-19 induced lockdown, as the scheduled date for commissioning was 27.09.2019

140. While the LOI and PPA were issued during 2017 and the scheduled date of commissioning for the 100 MW solar power plant of M/s. Solitaire BTN solar (P) Limited was on 27.09.2020, the pandemic situation arose only during March 2020 end. It is not acceptable that for a PPA executed in 2017, the reason for not achieving the SCOD was Covid-19 lockdown, when the Appellant was well aware of the fact that the due date for commissioning is during September 2019. It is clear that the defense of Covid-19 lockdown as a Force Majeure event is an afterthought. The same cannot be granted in the DRP.

141. The same becomes evident from the fact that before the TNERC the Appellant had altered its prayer citing Covid-19 pandemic, thereby attributing the delay to it, given that it had been proven beyond doubt that there had not been any connectivity issues by TANGEDCO. The Appellant only sought to take advantage of the pandemic to drag the issue, by mentioning the lockdown period due to Covid-19 and MNRE office memorandum and seeking COD extension. Accordingly, there is no question of applicability of Force Majeure owing to Covid-19 for the present issue.

142. It is the case of the Respondents that they were always ready to evacuate the solar power with the existing infrastructure and more

importantly the Respondents on 08.02.2021 have also synchronised the balance 50 MW to TANTRANSCO grid through Batlagundu 110 kV SS only. It is further submitted that the Appellant Company did not diligently work on the solar power generation and the Appellant Company failed to commission 100 MW of Solar Power before the Schedule Commissioning Operational Date i.e., 27.09.2019, therefore, the Force majeure clause cannot be invoked by the Appellant Company post SCOD in the present matter. At the first instance, the Appellant Company failed in sourcing the raw material before SCOD i.e., 27.09.2019 and this is evident from the pleadings of Appellant before this Tribunal that the outbreak of Covid-19 in China and India impacted the supply chain of materials at the of materials, which undisputedly commenced post 27.09.2019 (SCOD). Moreover, the imprudent approach of the Appellant towards completing the project before the due date is also evident from the field report received from SE/NCES/Udumalpet stating that the Appellant failed to initiate any erection activities in respect of the balance proposed 50 MW solar power plant before SCOD. Further, the Appellant Company has considerably failed to achieve Financial Closure within 180 days of signing of the PPA as necessitated by the Letter of Intent dated 29.08.2017 and has approached M/s. Rural Electrification Corporation of India only after 2 years from the date of signing of the PPA.

Thus, in view of the above, the legal maxim "*Nullus Commodum Capere Potest De Injuria Sua Propria*" i.e., one cannot take advantage of its own wrong, is relevant. Therefore, the Appellant Company in the present case cannot invoke the Force majeure

clause for the delay caused in commissioning of the project due to its own wrong.

143. As per Article 14(b) of the PPA, “in case of non-commissioning within 29 months, the Distribution Licensee i.e., the respondent in the present case shall be entitled to encash the entire (100%) Performance Bank Guarantee”.

Moreover, Article 14(b) further stipulates that“ prior to expiry of 29 months the appellant shall furnish additional Performance Bank Guarantee calculated @Rs. 10,000/- per MWac for five months to the extent of capacity not commissioned and in case of non-furnishing the Additional Performance Bank Guarantee, the PPA stands terminated automatically without any notice/order to the SPG”, i.e., the Appellant in the present case.

144. The severity of the non-achievement of SCOD and levy of penalty, if the Appellant is permitted to commission the proposed 100 MW on or before 27.07.2020, had been communicated to REC Limited also, *vide* letter dated 05.09.2019.

145. In the present matter, the Appellant has only commissioned the solar project partially i.e., 50 MW capacity on 20.02.2020 with a delay period of 145 days. Therefore, the Respondent is entitled to forfeit the PBG proportionate to the capacity not commissioned as well as the capacity commissioned with a delay period 145 days. Hence, an approximate amount of Rs. 19.6 Crores is to be forfeited. In addition to the PBG, the Appellant is obligated to furnish an

additional Bank Guarantee calculated @Rs. 10,000/- per MW from 5 months of the date of the signing of the PPA i.e., prior to 27.02.2020. However, the Appellant furnished a BG worth Rs. 4 crores on 27.02.2020 and another BG of Rs. 3.6 crores on 28.02.2020. Thus, on account of failure to furnish BG prior to expiry of 29 months, the contract automatically stood terminated as on 27.02.2020, severing parties from each other under the PPA and any obligations thereunder.

146. The Commission, in orders dated 25.02.2020 and 10.03.2020, had also noted that the Appellant had not furnished the additional bank guarantees.

147. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. This principle has been upheld by the Hon'ble Supreme Court in a catena of cases, including:

Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd & Anr., (1996) 5 SCC 450

“4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

5. It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power

cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief. The question, therefore, is whether the petitioner had made out any case of irreparable injury by proof of special equity or fraud so as to invoke the jurisdiction of the Court by way of injunction to restrain the first respondent from encashing the bank guarantee. The High Court held that the petitioner has not made out either. We have carefully scanned the reasons given by the High Court as well as the contentions raised by the parties. On the facts, we do not find that any case of fraud has been made out. The contention is that after promise to extend time for constructing the buildings and allotment of extra houses and the term of bank guarantees was extended, the contract was terminated. It is not a case of fraud but one of acting in terms of contract. It is next contended by Shri G. Nageshwara Rao, the learned counsel for the petitioner, that unless the amount due and payable is determined by a competent court or tribunal by mere invocation of bank guarantee or letter of credit pleading that the amount is due and payable by the petitioner, which was disputed, cannot be held to be due and payable in a case. The Court has yet to go into the question and until a finding after trial, or decision is given by a court or tribunal that amount is due and payable by the petitioner, it cannot be held to be due and payable. Therefore, the High Court committed

manifest error of law in refusing to grant injunction as the petitioner has made out a prima facie strong case. We find no force in the contention. All the clauses of the contract of the bank guarantee are to be read together. Bank guarantee/letters of credit is an independent contract between the bank and the beneficiary. It does not depend on the result of the dispute between the person on whose behalf the bank guarantee was given by the bank and the beneficiary. Though the question was not elaborately discussed, it was in sum answered by this Court in Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. [(1995) 6 SCC 76] (SCC at p. 79). This Court had held in para 6 that the entire dispute was pending before the arbitrator. Whether, and if so, what is the amount due to the appellant was to be adjudicated in the arbitration proceedings. The order of the learned Single Judge proceeds on the basis that the amounts claimed were not and cannot be said to be due and the bank has violated the understanding between the respondent and the bank in giving unconditional guarantee to the appellant. The learned Judge held that the bank had issued a guarantee in a standard form, covering a wider spectrum than agreed to between the respondent and the bank and it cannot be a reason to hold that the appellant is in any way fettered in invoking the conditional bank guarantee. Similarly, the reasoning of the learned Single Judge that before invoking the performance guarantee the appellant should assess the quantum of loss and damages and mention the ascertained figure, cannot be put forward to restrain the appellant from invoking the unconditional guarantee. This

reasoning would clearly indicate that the final adjudication is not a precondition to invoke the bank guarantee and that is not a ground to issue injunction restraining the beneficiary to enforce the bank guarantee. In Hindustan Steelworks Construction Ltd. v. Tarapore & Co. [(1996) 5 SCC 34 : JT (1996) 6 SC 295] , it was contended that a contractor had a counter-claim against the appellant; that disputes had been referred to the arbitrator and no amount was said to be due and payable by the contractor to the appellant till the arbitrator declared the award. It was contended therein that those were exceptional circumstances justifying interference by restraining the appellant from enforcing the bank guarantee. The High Court had issued interim injunction from enforcing the bank guarantee. Interfering with and reversing the order of the High Court, this Court has held in para 23 that a bank must honour its commitment free from interference by the courts. The special circumstances or special equity pleaded in the case that there was a serious dispute on the question as to who has committed the breach of the contract and that whether the amount is due and payable by the contractor to the appellant till the arbitrator declares the award, was not sufficient to make the case an exceptional one justifying interference by restraining the appellant from enforcing the bank guarantee. The order of injunction, therefore, was reserved with certain directions with which we are not concerned in this case.”

U. P. State Sugar Corporation v. Sumac International Ltd., (1997) 1 SCC 568

“12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.”

Mahatma Gandhi Sahakara Sakkare Karkhane v. National Heavy Engineering Cooperative Limited & Anr., (2007) 6 SCC 470;

“22. In our considered opinion if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

28. The learned counsel in support of his submission relied upon the decision of this Court in Hindustan Construction Co. Ltd. v. State of Bihar [(1999) 8 SCC 436] . This Court in Hindustan Construction Co. [(1999) 8 SCC 436] having referred to the terms of Clause (9) of principal contract between the parties therein came to the conclusion that the bank guarantee specifically refers to the original contract and postulates that if the obligations expressed in the contract, are not fulfilled by HCCL, the right to claim recovery of the whole or part of the “advance mobilisation” then alone the bank was liable to pay the amount due under the guarantee to the Executive Engineer. The Court found that the bank guarantee specifically refers to Clause (9) of the principal

agreement and it is under those circumstances it came to the conclusion that the amount covered by the bank guarantee becomes payable and the same could be invoked only in the circumstances referred to in Clause (9) of the principal agreement. The bank guarantee executed by the bank in the instant case in favour of the appellant herein does not contain any such clause. Mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one. In the very said judgment this Court observed that: (SCC p. 442, para 9).

“9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad.”

(emphasis supplied)

What is relevant, therefore, is the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee, we find the guarantee

to be an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee.”

Vinitec Electronic Private Limited v. HCL Infosystem Ltd., (2008) 1 SCC 544

“11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes.

...

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence.

...

22. In the present case the amended clause does not refer to any of the clauses specifically as such but on the other hand the Bank had undertaken responsibility to pay any sum or sums within the guaranteed limit upon receipt of written demand from the Company. The operative portion of the bank

guarantee furnished by the Bank does not refer to any of the conditions for payment under the bank guarantee. It is true that the bank guarantee furnished makes a reference to the principal agreement between the parties in its preamble. Mere fact that the bank guarantee refers to the principal agreement in the preamble of the deed of guarantee does not make the guarantee furnished by the Bank to be a conditional one unless any particular clause of the agreement has been made part of the deed of guarantee.

23. The recitals in the preamble in the deed of guarantee do not control the operative part of the deed. After careful analysis of the terms of the guarantee we find the guarantee to be an unconditional one. The appellant, therefore, cannot be allowed to raise any dispute and prevent the respondent from encashing the bank guarantee.

24. The next question that falls for our consideration is as to whether the present case falls under any of or both the exceptions, namely, whether there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit and another exception whether there are any “special equities” in favour of granting injunction.

25. This Court in more than one decision took the view that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. We have meticulously examined the pleadings in the present case in which no factual foundation is laid in support of the allegation of fraud. There is not even a proper allegation of any fraud as such and in fact the whole case of the appellant centres around the allegation with regard

to the alleged breach of contract by the respondent. The plea of fraud in the appellant's own words is to the following effect: "That despite the respondent HCL being in default of not making payment as stipulated in the bank guarantee, in perpetration of abject dishonesty and fraud, the respondent HCL fraudulently invoked the bank guarantee furnished by the applicant and sought remittance of the sums under the conditional bank guarantee from Oriental Bank of Commerce vide letter of invocation dated 16-12-2003."

148. In order dated 23.12.2020, this Tribunal directed Respondent Nos. 2, 3 and 4 to constitute a Commissioning Committee and allow synchronisation of the remaining non-commissioned 50 MW, regardless of the PPA not being in effect. Accordingly, the Tribunal has written a new contract between the parties, which had not been agreed to by the Respondent. Such directions by any court of law have been condemned and deemed impermissible by the Supreme Court in *Shree Ambica Medical Stores v. Surat People's Coop. Bank Ltd.*, (2020) 13 SCC 564. The relevant excerpt from the Ambica judgment is produced hereinbelow.

"23. The above provision states that no risk can be assumed by the insurer unless the premium payable is received in advance. Sub-section (3) of Section 64-VB provides for refund of the premium amount to the insured in case of cancellation or alteration of the terms and conditions of the policy. In the present case, the premium of Rs 992 to cover STFI perils was refunded by the insurer to the Bank and the amount was deposited in the insured's account. The proposal does not

conclude the contract. A contract postulates an agreement between the parties. In the present case, the insurer while issuing the new policy at a fresh location specifically excluded STFI perils and refunded the premium. The insured at the time when the loss occurred was covered by a policy that excluded STFI perils. Therefore, the insurer cannot be held to be liable. To hold to the contrary would be rewriting the agreement between the parties and creating a fresh contract to which the parties had not agreed.”

149. In *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.*, (2006) 2 SCC 628, the Hon’ble Supreme Court held that a court of law has to read the agreement between the parties as it is and cannot rewrite nor create a new one. The relevant excerpt from Shin judgment is produced hereinbelow.

“15. It is no doubt true that a court of law will read the agreement as it is and cannot rewrite nor create a new one. It is also true that the contract must be read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if otherwise it is not permissible. But it is well settled that if the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable.”

150. In *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, (1997) 1 SCC 579, the Hon’ble Supreme Court observed that Court has neither the expertise nor the jurisdiction to delve deep into the commercial

wisdom, with which the parties had entered into the contract. Hence, the Court should not interfere in such matters. The same principle is to be followed by Tribunals as well, hence, this Tribunal too in the present case, as held in *LIC of India v. S. Sindhu*, (2006) 5 SCC 258. The relevant excerpt from LIC judgment is produced herein below.

“8. At the outset, what should be noticed, is that the amount that is paid by LIC in regard to a lapsed policy, is not “refund of the premiums paid on various dates”, but a reduced lump sum (calculated as per condition 4 of the policy) instead of the assured sum. When what is paid by LIC is not refund of premiums, the question of treating the amount paid by LIC as refund of premiums paid and then directing payment of interest thereon from the respective dates of payment of premium does not arise. That would amount to treating the premiums paid in respect of a policy which lapsed by default, as fixed deposits repayable with a hefty rate of interest. Surely, the intention is not to reward defaulting policy-holders. Moreover, the courts and tribunals cannot rewrite contracts and direct payment contrary to the terms of the contract, that too to the defaulting party. Be that as it may.”

151. Subsequent to the termination of the PPA on 27.02.2020, it becomes imperative to renegotiate the tariff rate for the remainder 50 MW power generated because there is a huge discrepancy in the prevalent tariff rate, considering the downfall in the solar power tariff rate in the country and the tariff rate in the terminated PPA (Rs. 3.47/- per unit). It is pertinent to note that SECI in reverse bid auction

during November, 2020, for 1070 MW has recorded a record low tariff of Rs. 2/- per unit. So, if the Respondent were to commission and synchronise the remainder 50 MW power at the tariff rate in the terminated PPA, the Respondent would have to incur losses to the tune of Rs. 6,11,66,70,000/- over many years, which would ultimately have to be borne by the end customer.

152. It becomes clear that the Respondent would face severe financial impact if the tariff rates are not re-negotiated as per the prevailing solar power tariff rates in the country. This Tribunal also needs to consider that the payment of such high tariffs to the Appellant would have a trickling down effect on the end consumers, i.e., the masses of the country. The effect of such high pricing would be faced by multitude of people, which can be easily mitigated if the rates were to re-negotiated by the parties herein as per the current market trend.

153. The TNERC was of the view that the blanket immunity of MNRE cannot be granted to the Appellant as the pandemic situation did not arise prior to SCOD. In the Impugned Order, the Commission has dealt with the communication of Government of India in F. No. 283/18/2020-GRID SOLAR, dated 17.04.2020, to the implementing agency i.e., Respondent No. 1 herein. In the said communication, Respondent No. 1, being the implementing agency, had been directed to consider the extension of time limit for the project affected by Covid-19. The Commission noted that Respondent No. 1 had declined to extend the commissioning date. The Commission concurred with the decision of Respondent No. 1 on the ground that the actual date of commissioning period contemplated in the PPA

did not fall within the pandemic period. The Commission also noted that the communication of the Government of India was issued much after the expiry of the scheduled date of commissioning of the project and hence the said communication cannot be relied upon by the Appellant for sustaining its case.

154. The Commission extended the same logic to the argument of Covid-19 pandemic being taken as a defence under the Force Majeure clause. The Commission was correct to observe that any relief could have been granted to the Appellant on the ground of Covid-19 pandemic being a force majeure event, only if the pandemic occurred within the period of the PPA.

155. The Respondent had fulfilled its obligation regarding pre-connectivity to the extent of 60 MW before SCOD and remaining 40 MW post SCOD. Thus, entitled to encashment of Performance Bank Guarantee and Additional Bank Guarantee.

156. The Commission has noted that from the records, it becomes clear that the original place where the project was contemplated was three different locations, namely, Thulukankulam village, Melankumilankulam village and Esali village in Virudunagar district in Tamil Nadu. The connectivity as contemplated in the Letter of Intent dated 29.08.2017 was meant for these three locations. The PPA was entered only for the purpose of generation of power from these locations. The Commission correctly noted that the PPA provided that the responsibility of getting transmission connectivity and access to the transmission owned and operated by the Distribution Licensee/Respondent No. 1 herein, shall be with the

solar power generator/Appellant herein, that too at the cost of the Appellant.

157. The Respondents had performed their due of the PPA by issuing evacuation approval on 06.01.2018, which contemplated interfacing the Appellant's project with Batlagundu substation 100 KV level by conversion of 110 KV Theni-Sempatti Feeder II and transfer of WEGs connected substation of TANGEDCO from various places.
158. It is clear from the evacuation approval dated 06.01.2018, as had been noticed by the Commission, that there was no whisper about the 230 KV substation at Ganguvarpatti at any point. It is submitted that the contemplation of Ganguvarpatti substation as a possible substation for the Appellant's project was undertaken only on 04.06.2019. It ought to be noted here that Ganguvarpatti substation was discussed between the two parties only by June 2019, which is only 3 months from the SCOD. The Appellant should have been preparing to its fullest to achieve the SCOD as per the PPA. If it had been working towards achieving the SCOD, it would not have generated merely 50 MW of power in the given time. This exemplifies the fact that the Appellant was merely hunting for reasons to pin the delay in commissioning on the Respondents.
159. The Commission also reached the same conclusion basis the fact that the Appellant had been advised to procure land after the meeting held on 04.06.2019. During the pendency of the same, Respondent No. 3 communicated on 27.08.2019 that 60 MW of power may be injected at Batlagundu. This communication of Respondent No. 3 had been misconstrued by the Appellant to mean

that the Batlagundu substation was only ready to commission 60 MW of the total capacity. However, the Commission observed correctly, and the same ought to be taken note of by this Tribunal, that the original proposal for interfacing was not dropped and the change of location as to the interfacing at Ganguvarpatti was not agreed to as the only option. Thus, the Batlagundu substation had not been outrightly removed from the scheme of things. Thus, the Commission had appropriately noted that the proposal for interfacing at Ganguvarpatti was only an alternative proposal to accommodate the Appellant. It becomes clear that Ganguvarpatti substation was not looked at as a replacement to Batlagundu, but only as an alternative to it, to supplement the need of the project.

160. The Commissioning of 25 MW does not fall within the scope of Part Commissioning and thus, 25 MW does not qualify to be treated as part commissioning.
161. The Appellant was not ready to commission the remaining 25 MW capacity of the project within the period of PPA.
162. The termination of the PPA was due to the shortcomings on behalf of the Appellant before the SCOD, which led to the Appellant not achieving SCOD. The purpose of the office memoranda of MNRE was to aide entities which had actually been affected by the Covid-19 pandemic. The Appellant, on the other hand, is merely trying to take advantage of the protection being granted by MNRE. As mentioned earlier, no one should be able to take advantage of their own wrong doing, and hence, in the present case as well, the

Appellant does not deserve to be given the benefit for having breached on its part of the PPA and the obligations thereunder.

163. In conclusion, the only question of importance that is left unanswered is the applicable tariff rate for the remainder 50 MW power generated. The same stands commissioned and synchronized as of date. This Tribunal ought to decide this matter, keeping in mind the multitudinous effect of tariff rate on the people i.e., the end consumers.

Finding and analysis

164. After hearing the Appellant, Respondents, having gone through the Appeal filed by the Appellant, written submissions made by the Appellants and Respondents and the material placed before us, we are of the opinion that in this Appeal following issues arise for our consideration:

Issue No. 1: Did the Respondent no. 3 (TANTRANSCO) grant conditional connectivity approval to the Appellant to interface its Solar P V plant at Batlagundu S/S at 110 kV level?

165. It is an undisputed fact that both Respondent No. 2 (*TANGEDCO*) and Respondent no. 3 (*TANTRANSCO*) have been obligated to provide connectivity to the project of the Appellant and also to provide transmission system to facilitate evacuation of power from the Project.

166. Under the PPA, the project was required to be set up at Kariapatti Taluk and the power from such project was required to be injected at nearest substation owned by TANGEDCO/TANTRANSCO. As per the terms of the PPA, the Project was embedded in the distribution utilities network with the delivery point being at the substation owned and operated by TANGEDCO/TANTRANSCO to be indicated by STU based on load flow studies to be carried out by them upon submission of application along with applicable fee as per Regulation 5 of TNERC's Intra State Open Access Regulations, 2014. Interface point was not identified in the PPA for the reasons that STU was required to carry-out load flow studies upon submission of fees by the Appellant.
167. Considering the difficulty being faced in acquiring the land at Kariapatti Taluk, the Appellant applied for change of project location to Ganguvarpatty, Dindigul District, and also requested Respondents to undertake a load flow study for the above location to be connected at the existing 110 kV Batlangundu SS. Such request letter requesting change in location and seeking open access/connectivity in terms of the TNERC Open Access Regulations, was submitted along with requisite demand drafts for load flow study to be conducted by TANGEDCO for the first time.
168. In response to the aforesaid application, TANGEDCO issued a letter dated 06.01.2018 to the Appellant, confirming that it had conducted the load flow study and that the Appellant's plant can be interfaced at existing 110 KV Batlagundu SS. This letter elaborated and confirmed that the load flow study had been conducted considering the then current network condition i.e. as on "2018-19", to determine

the adequacy of the transmission system as it existed to enable connectivity as well as evacuation of the power from the Appellant's proposed 2x50 MW project at the Ganguvarpatty village. The said letter also finalised the transmission scheme and specified that the said connectivity and evacuation of the entire 2x50MW capacity could be interfaced at the said existing 110 KV Batlagundu SS. The letter also states that said interface can happen only **after completion of the 4 pre-connectivity works listed therein**. It is the case of the Appellant that the evacuation of 100 MW power from the Solar Project was therefore conditional and contingent upon completion of the said listed works. The relevant extracts are set out below:

*"Your proposed 2x50 MW Solar PV Power Plant can be interfaced at Batlagundu S/s at 110 KV level by erecting 110 KV DC line from the plant **after completion of the following works**:*

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

and II and Theni Pasumalai feeder to Thappakundu 400 KV SS.”

169. The Respondent TANGEDCO has submitted that it had provided full support to achieve SCOD in the PPA. TANGEDCO's on-going work for improving pre-connectivity was never an impediment. In order to upgrade the system, the pre-connectivity works were recommended by the Planning Wing taking into account the load growth and these works were initiated during 2014-15 itself for strengthening the existing infrastructure of TANGEDCO/ TANTRANSCO. Hence, the pre-connectivity works mentioned in load flow study result were already under consideration/ implementation, but not specific to this 100 MW load flow study for evacuating the proposed 100 MW solar power plant of the Appellant. The evacuation approval was always an unconditional approval and was not contingent on any pre-connectivity works

170. Our observation on this issue are as under:

- (i) The letter dated 06.01.2018 was written by Respondent TANTRANSCO to Appellant communicating the results of the load flow studies carried out by TANTRANSCO.
- (ii) TANGEDCO vide its letter dated 06.01.2018 addressed to the Appellant, confirmed that the load flow study had been conducted considering the then current network condition i.e. as on “2018-19”, to determine the adequacy of the transmission system as it existed to enable connectivity as well as evacuation of the power

from the Appellant's proposed 2x50 MW project at the Ganguvarpatty village.

- (iii) Respondent TANTRANSCO vide its letter dated 06.01.2018 communicated to Appellant that the transmission scheme for evacuation of the power generated from the solar plant of the Appellant has been finalised. It specified that the said connectivity and evacuation of the entire 2x50MW capacity could be interfaced at the said existing 110 KV Batlagundu SS.
- (iv) The letter also states that said interface can happen only ***after completion of the 4 pre-connectivity works listed therein.***

171. As such, it is abundantly clear that it was a conditional approval, success of which lied on successful completion of identified works. The message from this communication sent by the Respondent to the Appellant is that the project cannot be interfaced with the existing transmission system but can be interfaced only after completion of works identified the letter.

In view of this finding we cannot agree with the submission of the Respondents that the evacuation approval was never conditional and accordingly the submissions made by the Respondents are rejected forthwith. Accordingly, we therefore decide that the Respondent TANTRANSCO vide its letter dated 06.01.2018 granted conditional connectivity approval to the plant of the Appellant and the same was contingent on successful completion of the works identified in the letter.

Issue No. 2: Have the Respondents completed the works, identified in the letter dated 06.01.2018 giving the conditional approval, to provide transmission system to facilitate evacuation of the entire 100 MW of power from the projects of the Appellant?

172. In view of the finding that the evacuation approval given the Respondent TANTRANSCO vide its communication dated 06.01.2018 was a conditional approval, the next issue which arise for our consideration is: When did the Respondents complete the works identified in the its communication dated 06.01.2018?

173. Respondent TANTRANSCO has submitted the status of the works identified in the conditional approval dated 06.01.2018 as under:.

Works	Status
Conversion of 110 KV Theni-Sembatti Feeder I and II by Wolf equivalent HTLS conductor.	Not done.
Transferring of Batlagundu 110 KV SS from Theni-Sembatty feeder II to Theni-Sembatty feeder I.	Completed
Erection of Sembatty-Checkanurani 230 KV second circuit	Not done
Transferring of the WEG connected substations of both 10(1) and TANGEDCO viz, Kamatchipuram, Kadamalaikundu, Rasingapuram, Srirangapuram and Kandamanur substations from Theni-Periyar	Completed.

feeder I, II & III and Theni-Pasumalai feeder to Thappakundu 400 KV SS.	
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174. From the status furnished by the Respondents it is clear beyond doubt that all the works identified in the letter dated 06.01.2018 issued by the Respondent TANTRANSCO to the Appellant giving the conditional approval had not been completed till March, 2021.

175. It is the case of the Appellant that pre-connectivity work mentioned at serial no. 1 i.e. Conversion of 110 KV Theni – Sembatti – I and II by Wolf equivalent HTLS conductor has not been completed. The Respondents continued to emphasize on the importance of pre-connectivity work mentioned at serial no. 1 and insisted that undertaking the said work is necessary to allow connectivity and ensure evacuation of 100 MW capacity from Appellant's Solar Project. In this context following facts have been pointed:

- (i) Conversion of existing wolf conductor with equivalent (means same diameter and weight) High Tension Low Sag ('HTLS') conductor needs to be undertaken.
- (ii) The existing wolf conductor is ACSR conductor i.e. Aluminium Conductor Steel Reinforced. The existing wolf conductor is admittedly 60 years old and has served its full life of 35 years.
- (iii) The same is designed for 65 degrees Celsius final temperature, the current carrying rating is restricted to 343 Amps as conductor has outlived its useful life. Therefore, this conductor can carry maximum 65 MW of load in winters and whereas in summers, the current

capacity will reduce significantly (maximum 55-60 MW) due to rise in ambient temperature.

(iv) HTLS conductor are usually designed for 150 degree Celsius to 175 degree Celsius and the current carrying rating is 550 Amp – 761 Amp, which means that conductor can carry 105 MW – 145 MW. The cost of HTLS is almost twice as wolf conductor.

176. Since, the aforesaid pre connectivity has not been undertaken by the Respondents, till date, therefore, it is apparent that the existing evacuation infrastructure at which the Appellant's Solar Project is connected i.e. 110 KV Batalagundu SS is incapable of evacuating the entire contracted capacity of 100 MW.

177. The Appellant has further submitted that the Respondents vide its letter dated 27.08.2019 (One month prior to SCD) informed to the Appellant that the evacuation of power from existing 110 KV Batlagundu SS can only be at a maximum limit of 60 MW which will also be dependent upon actual flow of generation after commissioning of the Project and once again reiterated that the entire 100 MW capacity can be evacuated from the Solar Project after establishment of new 230/110 KV Ganguvarpatty SS. The relevant extract is set out below:

“Normally the power flows from Theni to Sembatty since Sembatty is the load centre feeding many industries in Dindigul district. Hence, if the solar generation of 60 MW is injected at the Batlagundu 110 KV SS, after consumption of the Batlagundu SS loads

approximately 12MW, only 48 MW of power will flow towards Sembatty direction which is within the allowable limit of Wolf conductor. The above 50 MW can be injected at Batlagundu 110 KV SS in all the season like wind, solar and hydel.

Maximum limit of 60 MW may increase or increase depending on the actual flow of generation after commissioning of the solar plant by M/ Solitaire BTN Solar Private Ltd. and will be allowed accordingly.

After establishment of 230/110 KV SS at Ganguvarpatty village, maximum power of 100 MW can be evacuated.”

178. It is the case of the Appellant that as on 27.08.2019 (i.e. one month prior to SCD), the existing Theni-Sembatty Feeder I connected to the 110 KV Batlagundu SS i.e. the existing transmission infrastructure was not capable of evacuating 100 MW power from the Solar Project and it was in the clear understanding of the Respondents too, that the 100 MW power can be evacuated after establishment of new 230/110 KV Ganguvarpatty SS at Ganguvarpatty village as the permanent solution.

179. The Appellant has submitted that there are clear admissions and acknowledgements on part of the Respondents that the existing transmission infrastructure is incapable of evacuating the entire contracted capacity of 100MW. These are:

- On 06.01.2018, Appellant was informed that its proposed Solar Project can be interfaced at Batlagundu SS only after completion of the 4 pre-connectivity works.
- On 24.05.2019, Respondents in their internal letter comes to categorical conclusions that – *(i) full generation of 100 MW can be achieved only after completion of pre-connectivity works mentioned at serial no. (a) and (c) and transfer of 110 KV connectivity of wind promoters to Thappagundu in serial no. (d) and; (ii) establishment of new 230/110 KV Ganguvarpatty SS is the only permanent solution.*
- On 10.06.2019, Appellant was informed that as a temporary measure generation from Solar Project can be allowed in the range of 30-40 MW of power due to conductor constrains and that permanent solution for evacuation of 100 MW is establishment of new 230/110 Ganguvarpatty SS.
- On 27.08.2019, Respondents informed Appellant that maximum limit of 60 MW can be injected at existing 110 KV Batlagundu SS which may increase or decrease depending upon actual flow of generation and, maximum power of 100 MW can be evacuated only after establishment of new 230/110 Ganguvarpatty SS.

180. It is the case of the Appellant that assuming that all other generation from other sources are removed from the Theni-Sembatty Feeder – I and only the Appellant's 100MW is connected to this Feeder – I, even then, on the showing of the Respondents themselves, the said Feeder – I could have evacuated a maximum of 63 MW as admitted by the Respondents in their letter dated 27.08.2019.

181. The Appellant has submitted that all the arguments before this Tribunal subsequently are an after-thought, a blatant attempt to mislead, a clumsy approach at trying to improve its position repeatedly by filing false and misleading affidavits, just to attempt to argue that “as on the SCD date” i.e. 27.09.2019, the respondents were in a position to evacuate the entire 100MW Contracted Capacity. These assertions are not only false to the knowledge of the persons that have deposed the affidavits, these assertions are not sustainable upon a simple reading of the diverse letters and internal reports that clearly conclude that it is not possible to evacuate the entire 100 MW Contracted Capacity, even as of today. The proof of this lies in the very fact that the Respondents have themselves filed numerous backing down instructions for the period from 10.02.2021 to 07.03.2021 showing significant curtailment of the Appellant’s generation. The Respondent seeks to argue that these curtailment instructions are due to grid stability issues, which is a false and frivolous contention, to the knowledge of the Respondents. These curtailment instructions demonstrate a clear capacity constraint in the transmission system that directly affects the Appellant’s project.

182. Per contra Respondent TANGEDCO has submitted that it had promised full support on all instances and the same had been communicated to Appellant through letters dated 31.05.2019, 05.09.2019 and 27.09.2019.

183. Respondent TANTRANSCO has submitted that in letter dated 19.08.2019 Lr.No.EE/ Operation/ 230KV SS Theni/ F.Solar/ D. No. 19, which is an internal correspondence between the Officials of

TANTRANSCO, the system/flow details when the 100 MW solar power of M/s Solitaire BTN Pvt Ltd is connected with Batlagundu SS at 110KV level has been analysed in detail. Further, EE/O/Theni has stated that due to transfer of certain WEG loads to 400KV Thappagundu S/S, overloading of Theni SS due to additional flow of generation from solar power of M/s Solitaire BTN Solar Pvt Ltd does not arise. Further EE/Operation/Theni has remarked that during the period from Jan to May the solar power generator will help to meet the power crisis expected.

184. Respondents have also submitted that as on date, the 100 MW Solar power plant of M/s. Solitaire BTN Solar Pvt. Ltd. is being evacuated through 110 KV Batlagundu S/S as committed in its load flow results communicated during 06.01.2018 itself.

185. Three years later to the issue of load flow results, due to load growth in Dindigul district, in Theni-Sembatti I feeder, Intermediate Sub stations (110KV Vaigai SS, 110KV Madhurapuri SS, 110KV Batlagundu SS and 110KV Ayyambalayam SS) loads have increased by 10 to 12% facilitating the Power generated by M/s Solitaire BTN Solar Pvt Ltd. be consumed by the Substations.

186. M/s. Solitaire BTN Solar Pvt. Ltd. have reached maximum peak generation of 85.2MW on 18.03.2021 at 12.00 hrs which was evacuated without any restriction and based on this record alone the entire prayer of the Appellant may be dismissed.

187. Even during high wind and maximum hydro generation in Periyar & Suruliar Power houses, TANTRANSCO was always capable of

making arrangements such that the Theni-Sembatti I feeder tie can be opened at Sembatti end without reducing the Solar Generation.

188. Respondent TANGEDCO has submitted that the Appellant had attempted to mislead the court by the terms - "curtailment" and "constraints". It is respectfully submitted that "curtailment of solar power" is not only pertaining to the Appellant but also to other generators, is done based on Indian Electricity Grid Code to maintain grid discipline and as per the provisions in the PPA thereof. Curtailment of power due to grid safety and grid discipline has been carried out not only for M/s. Solitaire BTN Solar Pvt. Ltd. but for all the generators throughout the Tamil Nadu State as per the instruction of Load Dispatch center. So far Curtailment of Solar Power has not been done due to feeder overloading.

189. The commissioning of 100 MW, in both phases, has taken place from Batlagundu substation, signifying that the Batlagundu substation was ready for commissioning the whole capacity as on SCOD.

190. We have noted that the Respondent TANTRANSCO vide its letter dated 06.01.2018 addressed to Appellant made it clear that the 2 x 50 MW solar PV Plant of the Appellant can be interfaced at Batlagundu SS at 110 kV level only after completion of certain works. Through this letter the Respondent TANTRANSCO informed the Appellant that load flow study was carried out considering the network conditions in FY 2018-19 and accordingly finalized the transmission scheme for the evacuation of the power from the solar PV plant of the Appellant. This simply means that the natural load growth for FY 2018-19 has already been considered in the study. As

per the load flow study the evacuation of the entire output from the plant was possible only after the completion of the works identified in the study. As two works out of total four works have not been completed the system is inadequate to evacuate the entire 100 MW power generation from the solar PV plant of the Appellant.

191. Existing Wolf Conductor on 110 kV Theni - Sembatti I & II is 60 year old and has served its full life of 35 years. The same is designed for 65 degrees Celsius final temperature, the current carrying rating is restricted to 343 Amps as conductor had served his entire life. Therefore, this conductor can carry maximum 65 MW of load in winters and whereas in summers, the current capacity will reduce significantly (maximum 55-60 MW) due to rise in ambient temperature. HTLS conductor are usually designed for 150 degree Celsius to 175 degree Celsius and the current carrying rating is 550 Amp – 761 Amp, which means that conductor can carry 105 MW – 145 MW. The cost of HTLS is almost twice as wolf conductor. Respondent TANTRANSCO has submitted that Conversion of 110 kV Theni-Sembatti Feeder I and II by Wolf equivalent HTLS conductor has not been done. As such the system continues to be constrained for evacuation of the entire output from the solar PV plant of the Appellant.

192. The flow of current through the 110 kV Theni-Sembatti Feeder I is dependent on the quantum of instant load being supplied by the sub stations connected to the feeder and also the instant power generated by the WEG and solar plant connected to the feeder. The load and generation figures are all varying quantities and are different from instant to instant thus making different permutations and

combinations of load and generation balance. It is in this context that under high generation (at full rated capacity of 100 MW of the generating plant) and low load conditions, the system would be subjected to high flow of current through the feeder. As the conductor is having limitation of 55-60 MW, on flow of current, the generation will have to be monitored and restricted accordingly. It is for this precise reason the Respondent TANTRANSCO gave a conditional approval and made themselves incumbent to complete certain identified works to facilitate the evacuation of the entire generation from the plant of Appellant.

193. We note from the submissions made by the parties that the matter regarding the adequacy of the system to evacuate the 100 MW power from the solar plant of the Appellant was discussed at length subsequently and it was consistently observed by the Respondent TANTRANSCO that without completing all the works identified in the conditional approval granted by Respondent TANTRANSCO vide their letter dated 06.01.2018, it would not be possible to evacuate the entire 100 MW power from the solar plant of the Appellant and if the connectivity is allowed then the generation of the solar plant would have to be restricted.

194. We also note that the Respondents vide its letter dated 27.08.2019 **(One month prior to SCD)** informed to the Appellant that the **evacuation** of power from existing 110 KV Batlagundu SS can only be at a maximum limit of **60 MW** which will also be dependent upon actual flow of generation after commissioning of the Project and once again reiterated that the entire 100 MW capacity can be evacuated

from the Solar Project after establishment of new 230/110 KV Ganguvarpatty SS. The relevant extract is set out below:

“Normally the power flows from Theni to Sembatty since Sembatty is the load centre feeding many industries in Dindigul district. Hence, if the solar generation of 60 MW is injected at the Batlagundu 110 KV SS, after consumption of the Batlagundu SS loads approximately 12MW, only 48 MW of power will flow towards Sembatty direction which is within the allowable limit of Wolf conductor. The above 50 MW can be injected at Batlagundu 110 KV SS in all the season like wind, solar and hydel.

Maximum limit of 60 MW may increase or increase depending on the actual flow of generation after commissioning of the solar plant by M/ Solitaire BTN Solar Private Ltd. and will be allowed accordingly.

After establishment of 230/110 KV SS at Ganguvarpatty village, maximum power of 100 MW can be evacuated.”

195. We note from the above letter that existing system is constrained and under scenario of solar generation at full load rated capacity of 100 MW and minimum load of less than 12 MW say 8-10 MW at Batlagundu SS, the flow of current through the 110 kV Theini – Sembatti – I feeder would be much higher than the maximum current carrying capacity of the old Wolf conductor. Under these conditions

the generation of solar plants would have to be reduced/ restricted. Though the Respondents have denied that the curtailments/ restrictions are not on account of inadequacy of the transmission system but this submission has not been proved / substantiated by them.

196. In view of the above we are not impressed by the submissions made by the Respondents TANGEDCO and TANTRANSCO that the existing system without completing all the works identified in the letter dated 06.01.2018 is adequate.

197. In view of the above we are of the considered opinion that the Respondents have not completed all the works identified in the conditional connectivity approval communicated by the Respondent TANGEDCO vide their letter dated 06.01.2018. The Respondent has failed to fulfill its obligation in terms of RfS, Lol, PPA and the Electricity Act, 2003, to provide adequate transmission system to Appellant to evacuate the entire output of its 100 MW of the solar PV plant of the Appellant.

Issue No. 3: Whether the Appellant can be granted extension of time for commissioning of its solar plant invoking the provisions of Force Majeure under PPA?

198. State Commission has decided that any relief, invoking the provisions of Force Majeure under PPA, on account of Covid-19 being an epidemic, can be considered only when such an event occurred within the period of PPA. The relief was denied as the

pandemic period was posterior to the schedule date of commissioning.

199. Let's have a look at the commissioning timelines which have been provided under Article 14 (b) of the PPA, and reads as under:

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

Delay beyond 29 months: *In case the commissioning of project is further delayed beyond 29 months and upto 34 months, the SPG shall in addition to 100% encashment of Performance Bank Guarantee, shall pay a Liquidated Damages to the Distribution Licensee a sum of Rs. 10,000/-*

per MWac per day basis in the form of BG, to the extent of Capacity not commissioned.

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

The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be 34 months from the date of signing of PPA. The amount of Liquidated Damages shall be recovered by TANGEDCO from the payments due of the Project Developer on account of Sale of Solar Power to TANGEDCO.

*In case, the Commissioning of the Project is **delayed beyond 34 months** from the date of signing of PPA, the PPA capacity shall stand reduced/ amended to the extent of Project Capacity Commissioned and the PPA for the balance Capacity not commissioned will stand terminated and shall be reduced from the selected Project Capacity.**In case, the project is not commissioned, within such 34 months, the PPA will stand terminated** automatically without any notice or Order and the Distribution Licensee will encash the Additional*

Performance Bank Guarantee furnished towards Liquidated Damages.

200. From the reading of the above provision of the PPA it is clear that the maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be 34 months from the date of signing of PPA and in case, the project is not commissioned, within such 34 months, the PPA will stand terminated automatically without any notice or Order and the Distribution Licensee will encash the Additional Performance Bank Guarantee furnished towards Liquidated Damages.

201. The PPA was signed on 28.9.2017 and the maximum permissible time of 34 months ended on 27.07.2020. The blanket exemption of 5 months granted by MNRE is for the lockdown period from 25.03.2019 – 24.08.2020 and this period fall in the PPA period. Therefore the decision of the State Commission not to allow relief to the Appellant on the ground that the Covid 19 pandemic occurred outside the period of PPA is wrong and set aside.

202. The Force Majeure Event has been defined under Article 16 of the PPA and the same reads as under:

“16. Force Majeure:

Both the parties shall ensure compliance of the terms of this agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry

out the terms of this agreement to the extent that such failure is due to force majeure events as defined here under. Any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event(s) by giving notice to the other party in writing within 15 days from the occurrence of such Force majeure.

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

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

203. A combined reading of the aforesaid two provisions of the PPA, it emerges that while the general rule is that the Project timelines are required to be mandatorily performed and non-performance of a material obligation i.e. completion of the Project as per the prescribed timelines (SCOD) will attract either penalties / liquidated damages, exception has been made where the parties to the

contract will not be made liable for any loss or damage whatsoever arising out of failure to achieve SCOD, if the same has been restricted due to occurrence of Force Majeure Event.

204. In terms of Rfs, Lol, PPA and Electricity Act, 2003, the Respondents TANTRANSCO/ TANGEDCO were obligated to provide evacuation of entire output of 100 MW (full rated capacity) of the solar PV plant of the Appellant but the Respondents have not fulfilled the obligation. We have noted that the Appellant regularly followed up the matter regarding the completion of works identified in the conditional evacuation granted by the Respondent TANTRANSCO vide its letter dated 06.01.2018 but the works have still not been completed. The Appellant apprised the Respondents repeatedly that unconditional evacuation approval is a prerequisite for disbursement of fund by the financier (REC). We are of the opinion that the delay caused in the implementation of the Project due to unavailability of the transmission system is for reasons beyond the control of Appellant. In terms of the provisions 16 – “Force Majeure” of the PPA, the event of delay in granting the connectivity approval by the Respondents TANGEDCO/TANTRANSCO to the Appellant is a Force Majeure event and the Appellant is entitled for the extension of Scheduled Commission Date in terms of provision of PPA.

205. We have also noted the submission of the Appellant that even beyond the allowed MNRE period, the project suffered to face the continued impact of Covid – 19, since the State Government extended the Lockdown in the State till 31.08.2020. Therefore, the period of Lockdown to be considered for Appellant will be from

25.03.2020 till 31.08.2020. However, subsequent to 31.08.2020, Appellant continued to face difficulties in operating at its desired efficiency, and the same impacted the progress of balance 25 MW of the Project. It has been clarified that the 16 MW+09 MW (25 MW) out of the balance 50 MW capacity, achieved readiness within the MNRE timeline. This capacity awaited synchronization approval from TANGEDCO, which was not given. The fact that the ready capacity of 16 MW + 09 MW was not given synchronization and commissioning approval, Appellant faced difficulty in draw – down of funds for completing the last 25 MW capacity.

206. In view of the above we are of the considered opinion that Appellant can be allowed extension of ten months' time on account of Force Majeure event of unavailability of transmission system and further five months extension of time on account of Force Majeure event of lockdown due to corona pandemic.

207 Accordingly the scheduled commissioning date is hereby extended from 27.09.2019 to 27.12.2020 without the encashment of Performance Bank Guarantee and payment of Liquidated Damages.

208 We also note that the entire capacity of 100 MW achieved readiness on 29.10.2020 and received CEIG certificate for the same on 19.11.2020 but was not synchronised with the grid for reasons beyond the control of the Appellant. The fact that the balance capacity of 50 MW was declared ready for commissioning on 29.10.2020/19.11.2020, we are of the opinion that as per PPA, the Appellant made available the entire capacity of 100 MW of the

solar PV plant by the extended Scheduled Commissioning Date of 27.12.2020. In view of this the Respondent TANGEDCO cannot encash the Performance Bank Guarantee or ask the Appellant for payment of Liquidated Damages.

209 We hereby order the Respondent TANGEDCO to forthwith return the Performance Bank Guarantee of Rs. 20 Crores and Additional Performance Bank Guarantee of Rs. 7.6 Crores to the Appellant without any delay along with the cost of renewing such bank Guarantee.

210 We also direct that the Appellant be paid full tariff of Rs. 3.47 per unit for the balance 50 MW w.e.f. 08.02.2021 onward i.e. the date on which this capacity was synchronised with the grid and Respondent TANGEDCO to pay the Appellant the differential tariff withheld along with carrying cost calculated as per the late payment surcharge as provided for in the PPA/TNERC Regulations/ CERC Regulations.

211 We also direct the Respondents to take necessary steps to expedite the completion of pending works to provide permanent and adequate transmission system to facilitate evacuation of entire output of the solar PV plant of the Appellant.

212 In view of the above the Impugned order dated 24.11.2020 passed by the Respondent State Commission is hereby set aside and remitted back to the State Commission for consideration afresh. The State Commission is directed to pass orders, keeping in view the opinion expressed in this judgement, in accordance with law.

213 The Appeal and the IAs are disposed of in above terms. No order as to costs.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 5th DAY OF JULY, 2021.**

**(Ravindra Kumar Verma)
Technical Member**

**(Justice Smt. Manjula Chellur)
Chairperson**

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REPORTABLE/NON-REPORTABLE
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