

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

**PRESENT:**

**Thiru M.Chandrasekar**

**.... Chairman**

**and**

**Thiru K.Venkatasamy**

**.... Member (Legal)**

**D.R.P. No.9of 2020**

M/s.Tirunelveli Solar Project Private Limited  
29, Hare Krisham Regency  
Rampura Road, Sukhiya  
Sanganer, Jaipur  
Rajasthan – 302 011.

... Petitioner  
(Thiru Rahul Balaji  
Advocate for the Petitioner)

Vs

1. Tamil Nadu Generation and  
Distribution Corporation Limited  
Represented by its Chairman  
144, Anna Salai  
Chennai – 600 002.
  
2. The Chief Engineer  
NCES – TANGEDCO  
No. 144, Anna Salai  
Chennai – 600 002.

....Respondents  
(Thiru M.Gopinathan  
Standing Counsel for the Respondents)

**Dates of hearing** : 02-06-2020; 14-07-2020; 04-08-2020;  
25-08-2020; 15-09-2020; 23-10-2020;  
12-11-2020; 17-11-2020; 20-11-2020;  
01-12-2020; 15-12-2020; 06-01-2021;  
19-01-2021; 17-02-2021; 16-03-2021;  
30-03-2021; 15-04-2021; 27-07-2021;  
24-08-2021; 28-09-2021; 26-10-2021;  
16-11-2021; 30-11-2021; 15-12-2021;  
04-01-2022; 01-02-2022; 15-02-2022;  
and 22-02-2022;

**Date of order** : 05-05-2022

The D.R.P.No.9 of 2020 came up for final hearing before the Commission on 22-02-2022 and the Commission upon perusing the petition and connected records and after hearing the submissions of both sides passes the following:-

**ORDER**

**1. Prayer in D.R.P. No. 9of 2020:-**

The prayer of the petitioner in this D.R.P.No.9of 2020 is to grant the petitioner an extension of the commercial operation date from 26-09-2017 till 30-01-2019 in as much as the actual commissioning of the petitioner's solar power plant was delayed due to justifiable reasons and commissioned on 29-01-2020 and consequently direct the respondents not to take precipitative action including not enforcing any security for the delay in CoD.

**2. Facts of the Case:-**

This petition has been filed to grant the petitioner an extension of time for commissioning its 100 MW Solar Power Plant at Kollankinar, Onamakulam, Sankaraperi, Kuppanapuram, Kudhirakulam, Thennampatti and Parivallikottam villages, Tuticorin District since there has been a change in law in respect of the

Power Purchase Agreement dated 28-09-2017 and consequently direct TANGEDCO to not invoke the bank guarantee.

**3. Contentions of the Petitioner:-**

3.1. Vide notification being Notification No. TNERC/RPO/l9/1 dated 07.12.2010, the Tamil Nadu Electricity Regulatory Commission, in purported exercise of powers conferred by Section 181, read with Section 61,66 and 86 (1) (e) of the Electricity Act, 2003 notified the Tamil Nadu Electricity Regulatory Commission (Renewable Energy Purchase Obligation) Regulations, 2010 (RPO Regulations) on 07.12.2010 with a view to defining the scope of RPO's within the State of Tamil Nadu.

3.2. It is incumbent upon Respondent TANGEDCO to purchase power from renewable sources of energy including solar power generators to meet its purchase obligation under the 2010 RPO Regulations. Further, the Commission has the bounden duty to protect and promote generation of electricity from non-renewable sources of energy in order to be compliant with the Electricity Act, 2003 and also the various international conventions such as the UNFCCC and the Kyoto Protocol.

3.3. M/s. Rays Power Infra (P) Limited participated in the tender specification CE/NCES/OT.No.1/2017-2018 and was one of the most successful bidders in the same. Pursuant to the same, the said company was awarded the Letter of Intent by the 2<sup>nd</sup> respondent bearing reference number LOI.Ref.No.CE/NCES/SE/SOLAR/EE/SCB/AEE3/F.M/s.Rays Power Infra/D.No. 78117 dated 29.08.2017.

3.4. Thereafter, the said Rays Power Infra (P) Limited signed the Power Purchase Agreement on 28.09.2017. An Addendum to the said power purchase agreement dated 28.09.2017 was entered into between the Petitioner and the Respondent. The said Addendum Agreement stated that the subject 100 MW solar power plant will be erected and commissioned by the Petitioner company, which is a Special Purpose Vehicle (SPV) of the company Rays Power Infra (P) Limited, which is the signatory to the PPA dated 28.09.2017. Further, said Addendum Agreement also states that there is a change in the location of the solar power plant pursuant to a letter dated 23.09.2017 issued by the Petitioner, i.e. the power plant will be erected at Kollankinar, Parivillikottai and Tennampatti Villages, Ottapidaram Taluk, Tuticorin District instead of Marandhai Village, Alankulam Taluk, Tirunelveli District.

3.5. Thereafter, the said PPA dated 28.09.2017 stood assigned in favour of the Petitioner herein vide letter dated 21.04.2018 bearing Lr.No.CE/NCES/SE/Solar/EE/AEE3/F.M/s Rays Power Infra/D.32018 issued by the Respondent Chief Engineer.

3.6. As per clause 11 of the said PPA, the PPA is valid for a period of 25 years subject to the COD and the expiry date.

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

*“14. Commissioning:*

*(a) Part Commissioning:*

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

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

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

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

*Delay beyond 29 months: In case the commissioning of project is further delayed beyond 29 months and up to 34 months, the SPG shall in addition to 100% encashment of performance bank guarantee shall pay a liquidated damages to the distribution licensee a sum of Rs.10,000/- per MWac on a per day basis in the form of BG to the extent of capacity not commissioned.*

*Prior to expiry of 29 months from the date of signing of PPA the SPG shall furnish an additional performance bank guarantee calculated at Rs.10,000/- per MWac for 5 months to the distribution licensee to the extent of capacity not commissioned. In case of non-furnishing of additional performance bank guarantee the PPA shall stand terminated automatically without any notice or order.*

*The maximum time period allowed for commissioning of the full project capacity with encashment of performance bank guarantee and payment of liquidated damages shall be 34 months from the date of signing of the PPA. The amount of liquidated damages shall be recovered by TANGEDCO from the payments due of project developer on account of sale of solar power to TANGEDCO. In case the commissioning of the project is delayed beyond 34 months from the date of signing of PPA the PPA capacity shall stand reduced or amended to the extent of project capacity commissioned when the PPA for the balance capacity not commissioned will stand terminated and shall be reduced from the selected project capacity. In case the project is not commissioned within the said 34 months, the PPA will stand terminated automatically without any notice or order and the distribution licensee will encash the performance guarantee furnished towards liquidated damages.*

*15. Commercial Operation Date:*

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

*16. Force Majeure:*

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

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

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

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

3.9. In the instant case, the Petitioner ought to have commissioned its solar power plant by 27<sup>th</sup>September,2019 i.e. 24 months from the date of signing of the PPA.

3.10. The Petitioner herein, being a special purpose vehicle incorporated for the purpose of erecting and commissioning the subject 100MW solar power plant, entered into a Module Supply Agreement with M/s.Rays Power Infra Private Limited on 15-05-2018.

3.11. It is important to understand how a solar power plant is constructed and commissioned. The Petitioner's solar power plant is fitted with solar photovoltaic modules (PV Module) imported from China. (Poly Crystalline Module) This PV module is the primary source (Transducer) of solar PV Project. PV modules are made up of many solar cells and cells are made up of silicon like semiconductors, they are constructed with a positive layer and a negative layer which together create an electric field. PV solar panels generate Direct Current (DC Electricity) which in turn converted into Alternating current (AC Electricity) using suitable Inverters. Hence, PV module is the primary functional equipment without which the Petitioner cannot construct this 100 MW project.

3.12. However, vide Notification No.01/2018-Customs (SG) dated 30<sup>th</sup>July, 2018, the Ministry of Finance have imposed a 'Safeguard Duty (Hereinafter. 'SGD') on the above mentioned modules and solar cells from all developed countries and China

PR and Malaysia. The said notification imposed a safeguard duty of 25% (which was subsequently reduced to 20% on 30th July, 2019) on the ad valorem value of the modules, thus increasing the price of modules by 20%. This has resulted in an increase of the overall project cost by 8%. Consequently, this translates into an increase in the fixed costs incurred by the Petitioner herein thereby affecting the entire project viability of the petitioner.

3.13. In light of the sudden change in law, the Petitioner entered into an amendment to the said Module Supply Agreement dated 19.06.2019 to recognise the increase in the cost of the solar PV modules. Thereafter, the Petitioner was embroiled in litigation before the Hon'ble Madras High Court since the Petitioner's solar PV modules were not allowed for clearance by the port authorities at the Chennai port and the Tuticorin port.

3.14. The Petitioner filed W.P.No. 22387 of 2019 before the Hon 'ble Madras High Court seeking to quash the order passed by the Directorate General of Trade Remedies ("DGTR") upholding the levy of SGD on solar PV modules and also sought for an interim injunction restraining the customs authorities from levying SGD. On 31-07-2019, the Hon'ble Madras High Court passed an interim direction for the release of the solar PV modules imported on the condition that the petitioner pay 50% of the duty levied through a bank guarantee and the remaining 50% was to be paid by executing a bond valid for a period of two years, which is to be subsequently renewed.

3.15. The said order directing the port authorities to release the imported solar PV modules was communicated to the Deputy Commissioner of Customs, Tuticorin Customs House by M/s.Rays Power Infra P Ltd, vide letter dated 06.08.2019. However, the Deputy Commissioner of Customs, Tuticorin Customs informed that they have not been arrayed as a party in the said W.P.No.22387 of 2019 and therefore, are not bound by the said order dated 31.07.2019.

3.16. Consequently, the Petitioner filed a petition W.M.P.No.21720 of 2019 to implead the Commissioner of Customs, Tuticorin as a Respondent in W.P.No.22387 of 2019. The said petition was ordered as prayed for on 27.09.2019.

3.17. Even though the Commissioner of Customs, Tuticorin was impleaded as a Respondent and was bound to implement the order dated 31.07.2019, the authorities refused to release the solar PV modules stating that the importer of the solar PV modules is M/s.Rays Power Infra Private Limited while the Petitioner in W.P.No. 22387 of 2019 is Tirunelveli Solar Project Private Limited and that only M/s. Rays Power Infra Private Limited will be allowed to take delivery of the modules. The Customs authorities refused to pay heed to the various agreements entered into between M/s. Rays Power Infra Private Limited and Tirunelveli Solar Project Private Limited and also failed to acknowledge that Tirunelveli Solar Project Private Limited is a special purpose vehicle of M/s.Rays Power Infra Private Limited for the purpose of erection of the subject 100MW solar power plant.

3.18. Aggrieved by the same, M/s. Rays Power Infra Private Limited filed W.P.Nos. 29358, 29502 and 29504 of 2019 and on 05.10.2019, Hon'ble Madras High Court passed an interim direction for the release of the solar PV modules imported on the condition that the Petitioner pay 50% of the duty levied through a bank guarantee and the remaining 50% was to be paid by executing a bond valid for a period of two years, which is to be subsequently renewed.

3.19. However, once again the port authorities refused to release the imported solar PV modules on the ground that the importer is M/s. Rays Power Infra Private Limited wherein the Petitioner in W.P.Nos. 29358, 29502 and 29504 of 2019 is M/s. Rays Solar Infra Private Limited. Therefore, the Petitioner was constrained to file a petition to amend the cause title which came to be allowed by the Hon'ble Madras High Court on 08-11-2019.

3.20. Thereafter, the port authorities allowed for the release of the imported solar PV modules which culminated on 20th December, 2019.

3.21. From the above, it is clear that the Petitioner was unable to take delivery of the solar PV modules, which is the core of every solar power plant for over 4 months, due to which the Petitioner was unable to achieve the scheduled CoD of 24 months, i.e. 27<sup>th</sup> September, 2019. The Petitioner faced difficulties due to the levy of SGD and the consequent challenge of the same before the Hon'ble Madras High Court in W.P.No. 22387 of 2019. The Petitioner detailed these roadblocks in letters dated 23.09.2019 and 24.09.2019.

3.22. The petitioner also brought to the notice of the Respondents that there was disruption in the construction activities by the villagers who claimed that the heavy movement of vehicles on the road leading to the project site was damaging the village roads. The villagers also damaged the culvert leading vehicles to the project site in demonstration of their opposition to the entire project itself. In the said letter, that pursuant to the meeting held on 11<sup>th</sup> August, 2019 in the presence of various stakeholders, the Petitioner company assured that it would remedy any damage done to the roads pursuant to the construction of the project. The Petitioner also agreed to deposit a sum of Rs.10,00,000/- to the CSR account of the Collector, Thoothukudi to ensure that if the roads are damaged, they will be duly rectified. In the said letters, the Petitioner also states that the work was moving in a very slow pace despite the Petitioner's assurances.

3.23. Apart from the above, the Petitioner also faced delay due to the Lok Sabha Elections held in March, 2019 and the by-elections held at Ottapidaran in May, 2019. The Petitioner's land acquisition process was significantly delayed because the officers in charge or scrutinizing the Petitioner's land acquisition applications were sent on election duty. The petitioner received no response from the TANGEDCO for any of the above letters.

3.24. In spite of all the above stated challenges faced by the Petitioner, the Petitioner's solar power plant has been duly commissioned on 29.01.2020. The Petitioner is filing the letter issued by the TANTRANSCO for evacuation power. The Petitioner was also granted an HTSC No. 405 for evacuation of power vide the

same letter issued by TANTRANSCO. Therefore, the Petitioner is filing the instant petition for the purpose of formally extending the commissioning date (CoD) to 30<sup>th</sup> January, 2020 without the invocation of any bank guarantee.

3.25. Aggrieved by the Respondent TANGEOCO's failure to extend the COO for the Petitioner by 6 months, the Petitioner is filing the instant petition on the following among other grounds.

3.26. When the tariff payable is determined through a transparent bidding process, the Commission adopts the said tariff under section 63 of the Electricity Act, 2003. Therefore, the Commission has the power to review its decision to adopt the said tariff based on the terms and conditions based on which the said tariff is adopted under section 86(1)(a) of the Act. Hence, the instant petition is maintainable in law and in facts.

3.27. The Commission has powers to extend the CoD for the petitioner on a project specific basis to meet the ends of justice. Clause 48 (1) of TNERC (Conduct of Business) Regulations, 2004 provides that "Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission." In the instant case, despite all efforts put in by the Petitioner to complete construction of its project well before September 25<sup>th</sup> 2019, and having demonstrably being ready to generate and supply power by investing as follows:-

- (i) Turnkey EPC Contract has been awarded to M/s. Rays Power Infra Pvt Ltd construction and erection of the SPG.
- (ii) Procurement of Solar Modules issued with 3.57 % Advance
- (iii) Lands of approximately 400 acres already registered in the company.
- (iv) Ground works like Land Levelling & Fencing is completed
- (v) Term Loan for the project is already sanctioned by L&T.

3.28. The petitioner could not supply 100% of the power as agreed to in the PPA for reasons that are beyond its control, even the Ministry of New and Renewable Energy Resources has issued a notification bearing number 23/43/2018-R&R dated 27.08.2018 by Ministry of Power to CERC setting out that solar power generators can be duly compensated for the sudden levy of SGD as the same amounts to a change in law situation. In furtherance of the same, several state Distribution Licensees have allowed generators to claim for an extension of the COD as being a change in law situation. The sudden levy of SGD was not contemplated by either of the two parties i.e. the Petitioner and the TANGEDCO, when the said PPA was signed.

3.29. Several crores has been invested in the Petitioner's project towards commissioning. The Petitioner has made arrangements for additional funds to meet out the increased project costs due to the unexpected levy of SGD. In such a scenario, it will be grossly unjust to penalise the Petitioner for the delay in commissioning of the solar power plant when the reasons for the same cannot be controlled by the Petitioner. By doing so, the TANGEDCO will be unjustly enriched

at the cost of the Petitioner. Indeed Regulatory Commissions in the past have invoked such inherent powers vested in them and granted project specific extension of the COD to project developers whose project commissioning had been delayed for no fault of theirs. The Hon'ble Central Electricity Regulatory Commission has allowed for an extension of the CoD in the case of MEIL Green Power Lid v NTPC Vidyut Vyapar Nigam Limited and Ors16/MP/2014 on the ground that the sudden reduction in DNI levels, the Petitioner therein was forced to redesign the entire project, which was the cause of the delay.

3.30. The Solar Energy Corporation of India (SECI) is a CPSU directly under the administrative control of the MNRE. SECI was established dedicated to the solar energy sector was principally tasked with the implementation of the JNNSM and the targets thereon. However, SECI now has enjoys enhanced purview over the entire renewable energy sector. The SECI is tasked with the implementation of a number of schemes of the MNRE seen as solar park scheme and grid-connected solar rooftop scheme along with a host of other specialised schemes such as defence scheme. canal-top scheme, Indo-Pak border scheme etc. The SECI recognized various scenarios causing delay in commissioning of solar projects, which are completely outside the control of the developer and recognized that such scenarios warrant an extension of milestones for solar energy projects in its letter dated 22.10.2019. In the said letter the SECI has set out the manner in which extension of the CoD will be granted in situations where there has been a delay in sanctioning of land by the respective State Governments or when there is a delay in obtaining the NOC from the MoD. Therefore, it is not uncommon for CoD to be extended for

power projects, given the various aspects outside the developer's control. In the instant case, the levy of SGD amounts to a change in law, affecting the viability of the project and it is thus a fit case for seeking revision of milestones.

3.31. There has been a substantial change in law which falls within the scope of Force Majeure as contemplated under clause 16 of the PPA. When the Petitioner participated in the tender floated by TANGEDCO, there was no concept of SGD on the solar modules proposed to be imported by the Petitioner for the purpose of setting up the SPG. Therefore, the Petitioner agreed for the PPA tariff of Rs.3.47 per KWH and became the successful tenderer. An analysis of the Petitioner's tender will demonstrate that either parties never contemplated such a cost while the Petitioner has indeed considered other escalations before quoting its price. The Petitioner is setting forth a brief calculation table setting out how the entire project cost currently stands enlarged due to the levy of SGD.

3.32. As per the projected project cost of Rs.3.40 PerMWp of which about 50% (excluding CST) constitute the cost for PV module suffered by 20% SGD thereby the Project Cost increased by Rs.30 crores increasing the overall project cost and the required equity investment by the Petitioner.

Particulars	Unit	Value with SGD	Value without SGD
Project Cost			
Land Cost for the Project	Rs.Crores	18.55	18.55
Modules Cost	Rs.Crores	172.52	143.58

BOS Cost (Incl Evac & Transport)	Rs.Crores	167.61	167.61
Pre-Ops & Finance Costs	Rs.Crores	31.78	32.01
<b>Total</b>	Rs.Crores	<b>390.45</b>	<b>361.74</b>
Means of Financing			
Equity	Rs.Crores	107.45	78.74
Debt	Rs.Crores	283.00	283.00
<b>Total</b>	<b>Rs.Crores</b>	<b>390.45</b>	<b>361.74</b>
<b>Project IRR</b>	%	<b>11.77%</b>	<b>13.05%</b>
<b>Equity IRR</b>	%	<b>11.59%</b>	<b>15.06%</b>

3.33 It is now clear that the change in law is causing a surge of 8% in the expected project cost. The petitioner ought to be granted an extension of time of 6 Months from Scheduled COD date 26-09-2019 to make suitable arrangements for funds to meet the surge.

3.34. The following establishes that the Petitioner is ready and willing to perform its obligations under the PPA and the same cannot be questioned:-.

- (i) Turnkey EPC Contract has been awarded to Rays Power Infra Pvt Ltd construction and erection of the SPG
- (ii) Procurement of Solar Modules issued with 3.57% Advance
- (iii) Lands of approximately 400 Acres already registered in the company.
- (iv) Ground works like Land Levelling & Fencing is completed
- (v) Term Loan for the project is already sanctioned by L&T.

3.35. The petitioner was further disrupted from completing its project in time due to the disruption in the construction activities by the villagers who claimed that the heavy movement of vehicles on the road leading to the project site was damaging the village roads. The villagers also damaged the culvert leading vehicles to the

project site in demonstration of their opposition to the entire project itself. This disruption was completely beyond the control of the petitioner.

3.36. TANGEDCO's actions have the potential to seriously and detrimentally affect the Petitioner's project viability. The petitioner is facing immense opposition from banks and other financial institutions due to the abysmal financial position of the respondent TANGEDCO. Even the Petitioner's investors have pulled out their funds since TANGEDCO has been repeatedly failing to honour its commitments under the PPA. Consequently, the Petitioner is now being forced to provide 6 months bill payments as bank guarantee, which is very arduous for the Petitioner, given that several crores has already been invested in the proposed subject SPG.

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

3.38. TANGEDCO will not suffer any loss if the Petitioner's COD is extended by 6 months as prayed for. The Respondent TANGEDCO will not suffer in any manner if the Petitioner's request for extension of time is granted. In fact, the PPA entered into by the Petitioner and TANGEDCO benefits TANGEDCO two fold, i.e. TANGEDCO is assured of 100 MW of power from the Petitioner's solar power

plant and TANGEDCO will be complying with its RPO. Therefore, the commissioning of the Petitioner's solar power plant is more beneficial to TANGEDCO than to the Petitioner itself. Further, TANGEDCO has not invested any sums so far in respect of the Petitioner's solar power plant and therefore will not be suffering any losses.

3.39. The Petitioner's request for extension of COD will ensure compliance of UNFCCC and the Kyoto Protocol. It is universally acknowledged that conventional source of energy, in particular coal and hydrocarbon, result in significant environmental degradation and adverse impact. The last few decades have seen a global recognition of the adverse environmental impact (externality) of conventional energy (particularly coal and hydrocarbons) and the need to promote gradual but steady development of renewable energy sources to substitute conventional power. These stated legislative and policy objectives of environment protection and sustainable development are now well established in our jurisprudence in context of Articles 48-A, 51, 51-A (g) and 21 of the Constitution of India. India is a party to the global move on climate change-committed to sustainable development. The United Nation's Framework Convention on Climate Change ("UNFCCC") signed by India on 10.06.1992 and ratified on 01.11.1993. Adoption of Protocol to the UNFCCC adopted in Kyoto, Japan on 11.12.1997 ("Kyoto Protocol") acceded to by India on 26.08.2002. The Electricity Act, 2003, the National Electricity Policy and Tariff Policy mandate encouragement to be provided to non-conventional energy sources. The consequence of TANGEDCO's default would have a direct effect of

negating such mandate and therefore on this ground also, the Petitioner's project is entitled to the relief sought for.

#### **4. Contentions of the Respondent:-**

4.1. The petitioner has filed Dispute Resolution Petition to grant the petitioner an extension of the Commercial Operation Date (COD) from 26.09.2017 till 30.01.2019 in as much as the actual commissioning of the petitioner's solar power plant was delayed due to justifiable reasons and commissioned on 29.01.2020 and consequently direct the Respondents not to take precipitative action including not enforcing any security for delay in COD

4.2. Before going into the main prayer of the petitioner, it is to be stated that the Government of India with a vision of promoting renewable energy has fixed an ambitious target of 100 GW of Renewable energy by 2022 out of which 60 GW is to be from Solar power. In order to achieve this target, the Ministry of Power has fixed Solar RPO target as 9398 MW for the State of Tamil Nadu by 2022.

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

4.4. While the second phase was lodged by TANGEDCO, another tender (Phase III) against Specification CE/NCES/OT.No.1/2017-18 for the procurement of 1500 MW of solar power from the developers for establishing solar power plants in Tamil Nadu under reverse bidding process (e-tender), with an upper ceiling limit of Rs.4.00 per unit, with due date of opening as 15.06.2017. Before floating the tender, TANGEDCO has filed Miscellaneous Petition in MP.No.8 of 2017 before the Commission seeking approval for the "Procurement quantum" and for the draft Tender Specification, prepared in line with the draft guidelines issued by the Ministry of Power, Government of India for grid connected Solar PV power plants. As there was no bidding guideline at that time, TANGEDCO has followed draft guidelines issued by Ministry of Power for the preparation of Tender Specification. The Commission in its daily order dated 25.04.2017 has directed TANGEDCO to proceed with the tendering process.

4.5. The Board of TANGEDCO has accorded approval in its 70<sup>th</sup> meeting held on 10.05.2017 for floating tender for the procurement of 1500 MW of solar power from the developers establishing solar power plants in the State of Tamil Nadu under reverse bidding process (e-tender).

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

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

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

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

4.9. 39 bidders had participated in the tender for establishment of solar power plants of combined capacity of 3932.5 MW in various districts of Tamil Nadu. The tender documents of all the bidders were scrutinized and based on the approval of

the Board of TANGEDCO, price bids of eligible 25 bidders of combined capacity of 2673 MW were opened on 30.06.2017. M/s. Raasi Green Earth Energy (P) Limited, Bangalore, who quoted a tariff of Rs.3.47 per unit in respect of their proposed 100 MW solar power plant at Ramnad district was the L1 bidder.

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

Sl. No.	Name of the Bidder	Capacity in MW	Negotiated Rate
1	M/s. Raasi Green Earth Energy Pvt. Ltd.	100	3.47 (L1)
2	M/s. Sai Jyothi Infra structure Ventures (P) Limited	54	3.47
3	M/s. Solitaire BTN Solar Private Limited	100	3.47
4	M/s. NarbheramVishram	100	3.47
5	M/s. Rays Power Infra (P) Limited	100	3.47
6	M/s. NVR Energy Private Limited	100	3.47
7	M/s. Dynamize Solar (P) Limited	5	3.47
8	M/s. ReNew Solar Energy (Rajasthan) Private Limited	100	3.47
9	M/s.Sunlight (Udayasooriyan)	1	3.47
10	M/s. Talettutayi Solar Project Two (P) Limited	50	3.47
11	M/s. Dev International	1	3.47
12	M/s. G.R.Thanga Maligai (Firm)	10	3.47
13	M/s. G.R. Thangamaligai & Sons	10	3.47
14	M/s.G.R.T. Silverwares	10	3.47
15	M/s.Shapoorji Pallonji Infrastructure Capital Company (P) Ltd.	50	3.47
16	M/s. NLC India Limited	709	3.47
	<b>Total</b>	<b>1500</b>	

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

4.12. TANGEDCO has filed Power Procurement Approval Petition (PPAP.No.5 of 2017) before the Commission seeking approval for the procurement of 1500 MW of solar power from the developers mentioned in para 9 above at the rate of Rs.3.47 per unit on long term basis.

4.13. The Commission in its order, dated 29.08.2017 in PPAP.No.5 of 2017 has accorded approval to TANGEDCO for the procurement of 1500 MW of solar power from the developers mentioned in para 9 above at the rate of Rs.3,47 per unit on long term basis. The Commission has also directed TANGEDCO to execute PPA with the successful bidders within 1 month from the date of order in PPAP.No.5 Of 2017.

4.14. Consequent on the approval of the Commission in PPAP.No.5 of 2017, TANGEDCO have issued Letter of Intent to all the 16 successful bidders including the petitioner company for the procurement of solar power at the rate of Rs.3,47 per unit from their proposed solar power plants of combined capacity of 1500 MW.

4.15. 14 out of 16 successful bidders have executed PPA with TANGEDCO within the stipulated time (from 26.09.2017 to 28.09.2017). As M/s. Sai Jyothi Infrastructure Ventures (P) Limited (54 MW) and M/s. Talettutayi Solar Project Two (P) Limited (50 MW) have not come forward to execute PPA with TANGEDCO, the

EMD furnished by them have been forfeited as per tender norms. Due to non-execution of PPA by above said two bidders, the quantum left out was 104 MW, out of the bidden quantum of 1500 MW.

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

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

4.17. The Board of TANGEDCO has also accorded approval for the issuance of Letter of Intent and subsequent signing of PPA with 4 developers mentioned in para 15 above for a combined capacity of 104 MW for purchasing solar power at the rate of Rs.3.47 per unit to achieve the targeted capacity of 1500 MW.

4.18. Certain main terms of the "Letter of Intent" dated 29.08.2017 are as follows:-

- (i) The tariff of Rs.3.47 per unit is "FIRM and FIXED" for the entire agreement period.

- (ii) Performance Bank Guarantee of Rs.20 crores has to be furnished at the time of signing of PPA and it should be valid for a period of 36 months.
- (iii) Copy of land documents, plant layout, detailed project report to be furnished within 3 months from the date of PPA or else the PPA can be terminated by TANGEDCO.
- (iv) SPG shall report Project Financing Arrangements within 180 days from the date of signing of PPA and in case of delay TANGEDCO shall encash Performance Bank Guarantee and shall remove the project from the list of selected projects.
- (v) Part commissioning is applicable for this project.
- (vi) Plant has to be commissioned within 24 months from the date of signing of PPA and in case of failure to do so, Performance Bank Guarantee shall be encashed on per day basis with 100% encashment for 5 months delay and for delay beyond 5 months in addition to the above, the SPG has to pay a sum of Rs.10,000/- per MW per day of delay in the form of BG calculated for a period of 5 months. In case of non-furnishing of PBG, the PPA will stand terminated automatically without any notice/order. ,

4.18. Accordingly, TANGEDCO has issued Letter of Intent to M/s. Rays Power Infra (P) Limited for the establishment of 100 MW solar power plant at Marandhai Village, Alankulam Taluk, Tirunelveli District for supplying solar power to TANGEDCO at the rate of Rs.3.47 per unit on long term basis, on 29.08.2017.

4.19. Based on the request of the company vide letter dated 23.09.2017, the company was permitted to change the location of proposed 100 MW solar power plant from Marandhai Village, Alankulam Taluk, Tirunelveli District to Kallankinar, Parivillikottai and Thennampatti villages, Ottapidaram taluk, Tuticorin district.

4.20. M/s.Rays Power Infra (P) Limited had executed Power Purchase Agreement (PPA) with TANGEDCO for supplying solar power at the rate of Rs.3.47 per unit on 28.09.2017.

4.21. Load flow study was conducted and it had been proposed to connect the 100 MW solar power plant of M/s. Rays Power Infra (P) limited at on-going Thennampatty 400/230-110 KV SS at 110 KV level. The load flow study result had also been communicated to the company on 07.11.2017.

4.22. Based on the request of M/s. Rays Power Infra (P) Limited vide letter dated 29.01.2018, an Addendum for the PPA dated 28.09.2017 was issued for the formation of Special Purpose Vehicle (SPV) in the name of M/s. Tirunveli Solar Project Private Limited in respect of the proposed 100 MW solar power plant at Kollankinar, Parivillikottai and Thennampatti villages, Ottapidaram taluk, Tuticorin district, on 27.04.2018.

4.23. As per the terms and conditions of tender and as per the terms and conditions of Letter of Intent, the successful bidders shall furnish Performance Bank

Guarantee at the rate of Rs.20 Lakhs per MW in the form of BG obtained from any Nationalized/Scheduled bank. At the time of signing PPA, M/s. Rays Power Infra (P) Limited has furnished Performance Bank Guarantee (PBG) in form of BG bearing No.3188317BG0000544 dated 27.09.2017 for a value of Rs.20 crores issued by State Bank of India, SME Jaipur South Branch with validity upto 30-09-2020 for 100 MW.

4.24. As per the terms and conditions of tender, Letter of Intent dated 29.08.2017 and Clause 14 of PPA dated 28.09.2017, the Scheduled Date of Commissioning the proposed 100 MW solar power plant of M/s. Tirunelveli Solar Project Private Limited shall be on or before 27.09.2019. But the petitioner has not commissioned their project within Scheduled Date of Commissioning. However, as per the conditions governing tender, Letter of Intent and PPA, there is a provision to allow bidders to commission their project beyond 10 months from the Scheduled Date of Commissioning with penalty viz. forfeiture of Performance Bank Guarantee in proportionate of capacity not commissioned for the first 5 months delay from the due date and liquidated Damages at the rate of Rs. 10,000/- per MW per day for the delay beyond first 5 months delay.

4.25. As per the terms and conditions of tender, the due date of commissioning the proposed 100 MW solar power plant of M/s. Tirunveli Solar Project Private Limited with forfeiture of Performance Bank Guarantee (PBG) shall be on or before 27.02.2020. M/s. Tirunveli Solar Project Private Limited has commissioned their solar power plant on 29.01.2020, i.e. with a delay of 123 days beyond scheduled

date of commissioning from 27.09.2019. Hence, as per tender norms, the Performance bank Guarantee has to be forfeited in proportionate of delay period, which works out to be Rs.16,07,84,370/-.

4.26. As the petitioner has not commissioned their proposed 100 MW solar power plant on or before scheduled date of commissioning TANGEDCO vide CE/NCES letter dated 24.02.2020 has addressed to State Bank of India, SME Jaipur South Branch requesting to invoke Rs.16,07,84,370/- from the BG value of Rs.20 crores, as per the contractual obligations.

4.27. In the meantime, the petitioner company has filed Writ Petition in WP.No.5874 of 2020 and WMP.No.8709 of 2020 in WP.No.5874 of 2020 before Hon'ble Madras High Court with the following prayer.

*" ..... this Hon'ble High Court may pleased to issue a Writ, Order or Direction in the nature of WRIT OF MANDAMUS forbearing the Respondents 1&2 in any way encashing the Bank Guarantee in BG.No.3188317BG0000544 dated 27-09-2017 executed by the petitioner in State Bank of India, Jaipur Branch pending hearing of the petition in S.R. No.23 of 2020 filed by the petitioner before the 3<sup>rd</sup> respondent and pass such further or other orders as this Hon'ble Court may deem fit and proper to pass in the facts and circumstances of the case and thus render justice".*

4.28. During the hearing on 30.03.2020, the Hon'ble Madras High Court has directed TANGEDCO not to invoke the Bank Guarantee till 30.04.2020. As directed by the Hon'ble Madras High Court, TANGEDCO has intimated the concerned bank not to invoke the BG until further confirmation. The Writ Petition in WP.No.5874 of 2020 and WMP.No.8709 of 2020 in WP.No.5874 of 2020 came up for hearing before Hon'ble Madras High Court on 30.04.2020. During the hearing, the Hon'ble

Madras High Court has directed TANGEDCO not to invoke the BG till 30.06.2020. As directed by the Hon'ble Madras High Court, TANGEDCO has intimated the concerned bank on 08.05.2020 not to invoke the BG until further confirmation. Now the petitioner company has moved to the Commission and filed this Dispute Resolution Petition.

4.29. The petitioner in para 23 of its petition has stated that the imposition of "Safeguard duty" on solar panels by Central Government affected the entire project commercial viability, due to increase in solar module cost. Under this scheme, TANGEDCO has executed PPA with 18 developers for the procurement of solar power of combined capacity of 1500 MW at the rate of Rs.3.47 per unit. Out of the above, 13 developers of combined capacity of 1294 MW have commissioned their projects within scheduled date of commissioning without raising this "Safeguard duty" issue, excluding the petitioner's project. Since, two developers, viz. Thiru. Uthayasooryan and M/s. Dynamize Solar Private Limited have not commissioned their project of combined capacity of 6 MW within the stipulated time, their PPAs were terminated. One developer, viz. M/s. Solitaire BTN Solar Private Limited has commissioned 50 MW partially out of the proposed 100 MW and moved to the Commission in DRP.No.5 of 2020. Another developer, viz. M/s.VSR Solar Private limited having project capacity of 50 MW has not commissioned its project within scheduled date of commissioning and hence the Bank Guarantee for a value of Rs.10 crores was forfeited by TANGEDCO and the developer has also filed Dispute Resolution Petition in DRP.No.7 of 2020 before the Commission. Hence, the alleged increase in "Safeguard duty issue" for not commissioning the 100 MW SPV

plant within scheduled date of commissioning is not acceptable and justifiable. In fact, the said reason is an afterthought.

4.30. The petitioner has elaborately discussed the Renewable Purchase Obligation (RPO) in para 10,11,12 & 13 of the petition. As per the RPO target fixed by the Central Government to the State, the Distribution licensee (TANGEDCO) is an 'obligated entity' to meet the RPO targets. Achieving the RPO targets shall be under the purview of Distribution Licensee and the petitioner is no way connected to this issue.

4.31. With reference to various grounds in the Dispute Resolution Petition, the following are stated:-

- (i) As already stated in para 28 of this affidavit, 18 developers including the petitioner company have executed PPA with TANGEDCO. Out of 18 developers, 13 developers have commissioned their projects without raising the issue with regard to imposition of "Safeguard duty" on solarpanels issued by the Central Government and proceeded on PPA terms. The petitioner alone raised this issue and requesting time extension without penalty, violating the PPA terms, which is unacceptable. There is no provision of "Change in law" in the tender. The tender specification has already been approved by the Commission in MP.No.8 of 2017 and the petitioner knows it very well. Hence, the intention of the petitioner claiming time extension beyond scheduled date of commissioning without any penalty on the alleged

"Change in law" situation in violation of PPA terms is also not acceptable, as it is an afterthought, moreso, when having agreed to come under uniform tender/PPA conditions, the petitioner is estopped in law to change its plea to project specific basis, as it was not applied and obtained contract by filing petition claiming time extension beyond scheduled date of commissioning without any penalty for its plant separately. Hence, the decision relied on has no application to the case on hand.

- (ii) The PPAs executed with two developers, viz. Thiru.Uthayasooriyan and M/s.Dynamize Solar Private Limited under this scheme were terminated for not commissioning within the due date, and their bank guarantees were also forfeited. The Bank Guarantee value of Rs.10 crores of another developer, viz. M/s. VSR Solar Private Limited, petitioner in DRP.No.7 of 2020 has already been forfeited by TANGEDCO for not commissioning within the scheduled date of commissioning. Hence, granting of any time extension to the petitioner beyond scheduled date of commissioning without any penalty is not acceptable and not justifiable. Otherwise, it will unsettle the settled position paving way for those three developers to claim parity and refund. Hence, the Dispute Resolution Petition filed by the petitioner company is not maintainable and liable to be dismissed.
- (iii) The petitioner company has elaborately discussed in para 25 to 34 of its petition with regard to the difficulties faced by them for clearance of

Solar PV modules in Chennai Port and Tuticorin Port. These issues are under the purview of the petitioner's company and TANGEDCO is nothing to do with such litigations. These allegations of the petitioner are not related to the core subject of the petition. Therefore, it is evident that the petitioner, with an intention to cover up its failures has made bald and irrelevant allegations against the respondents. In any case, the petitioner is estopped to seek any relief by making allegations against the persons/department not before the Commission and as such these are to be summarily rejected as a self-serving statement only. The petitioner company ought to have abided by the PPA contractual obligations and should have commissioned its project on or before scheduled date of commissioning to avoid penalties.

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

## **5. Rejoinder Statement on behalf of the Petitioner:-**

5.1. The instant petition has been filed by the Petitioner seeking for the principal relief of extension of the Commercial Date of Operation ('CoD') in respect of the

Petitioner's 100MW solar PV power plant located at Kollankinar, Onamakulm, Sunkaraperi, Kuppanapurarn, Kudhirakulam, Thennampatti and Parivallikottum villages. Tuticorin District since there have been incidental and unforeseeable events which significantly altered the petitioner's solar power project viability. Further, the petitioner company has been subjected to delays caused due to the various actions and inactions on the part of the TANGEDCO and other Government authorities

5.2. TANGEDCO's case is premised only on one ground that two other solar power developers, namely, Thiru Uthayasooriyan and M/s. Dynamize Solar Power Private Limited have had their bank guarantees ('BGs') forfeited already since they did not adhere to the scheduled date of commissioning and that if the Petitioner's prayer in the instant petition is allowed, the above named companies will also agitate before the Commission for a similar relief thereby distressing the Respondent TANGEDCO.

5.3. Such reliance is wholly misleading and lacking in any foundation in as much as the facts and circumstances of every case is different and that the Petitioner has indeed demonstrated its readiness and willingness to perform its obligations under the Power Purchase Agreement ('PPA') dated 28.09.2017 as also clearly demonstrating that the delay in achieving CoD was not due to any default on the part of the petitioner thereby entitling the Petitioner to a case specific extension of the CoD in law as also the terms of the contract between parties. Further, the Petitioner has commissioned its power plant on 29.01.2020 after the extraneous

delays stood remedied by the respective parties, clearly demonstrating that its project suffered no delays due to the petitioner.

5.4. The Petitioner's case is one that is also enjoying the benefit of an interim injunction granted by the Hon'ble Madras High Court in W.P. No. 5874 of 2020, which has directed the Respondent TANGEDCO to not take any precipitative action against the Petitioner. Therefore, it is wholly erroneous to juxtapose the Petitioner's case with that of other developers and contend that the Petitioner's prayer ought to be dismissed.

5.5. Before delving into a paragraph wise response to the averments raised in the Counter, the Petitioner is setting out the context in which the instant dispute arose:

I. Delay in route & profile approval and Railway crossing approval by the TANGEDCO and other Government authorities:

- (i) The Petitioner company submitted its route and profile for approval from the TANGEDCO/TANTRANSCO as early as 23.05.2019. During the inspection conducted by the TANGEDCO / TANTRANSCO, they found that the Petitioner's 110 KV line can be linked to the existing 400/230-110 kv sub-station at Thennampatty by stringing the petitioner's line to the existing free arm of the 230 kv SC line on the DC tower constructed by NLC India Ltd., which also owns and operates a 100 MW solar power plant adjacent to the petitioner's power plant.

- (ii) Necessary "No Objection Certificate" was sought from NLC India Ltd. by the TANTRANSCO on 19.06.2019 and the same was granted by NLC India Ltd on 09.07.2019.
- (iii) Thereafter, the Superintending Engineer, General Construction set out the route map and sent it for its internal approval from TANGEDCO and TANTRANSCO on 31.08.2019 and the same was approved only on 25.09.2019 and 26.09.2019, respectively. Only after such approval could the construction of the said 110 kv line could commence.
- (iv) However, due to a the introduction of additional rail track, a request was raised by the Railway authorities for the correction of the work transmission line location numbers. Therefore, the Superintending Engineer/GCC/Madurai issued a revised route and profile approval dated 23.10.2019, updated to the Executive Engineer/ TLC/ Tirunelveli vide letter dated 29.10.2019.
- (v) This approval was itself obtained very belatedly as the date of commissioning of the Petitioner's plant was 25.09.2019. Therefore, for no fault of the Petitioner company, the Petitioner was unable to commission its power plant since route and profile approval for an already existing tower and sub-station was delayed by the TANGEDCO and the TANTRANSCO.
- (vi) The entire process of obtaining route plan approval falls within the domain of the TANGEDCO and TANTRANSCO only and the Petitioner cannot hasten the process in any manner.

II. Delay in obtaining Railway crossing approval for railway line:

- (i) While obtaining the route and profile approval, it was noticed by TANTRANSCO that a necessary Railway crossing approval is required to be obtained since the Petitioner's 110 kv line, when erected, crosses railway lines. Such approval squarely falls within the domain of the TANGEDCO / TANTRANSCO and not the petitioner. This is especially so since the Railways never act upon or even accept requests from private parties and only the licensee can apply, process and obtain the consents.
- (ii) To the Petitioner's utter shock and dismay, the Railway crossing approval was made to the office of the Southern Railways only on 30.10.2019 by the Superintending Engineer, General Construction (an official for TANGEDCO/TANTRANSCO) i.e. more than one month after the Petitioner's scheduled date of commissioning.
- (iii). The Southern Railways returned the TANTRANSCO's application on 09.12.2019 stating certain shortcomings in the said application. Thereafter, the Southern Railways accorded their approval for railway crossing only on 27.12.2019 subject to certain conditions set out in their approval letter itself as per which a circuit for stings connection was to be constructed by the Petitioner, only in the presence of the Railways authorities and TANGEDCO/TANTRANSCO's authorities. That the Petitioner was dependent on the abovementioned authorities for the remaining construction, which was conducted as per the requirements and Railways gave its Safety approval finally on 10.01.2020.
- (iv) It is only after the said Railway crossing approval and route & profile approval, could the Petitioner even begin the remaining construction

activities. Therefore, it is abundantly clear that the Petitioner was made to wait for several months post its scheduled date of commissioning due to the delay caused by TANGEDCO/ TANTRANSCO and Railway authorities.

- (v). In spite of such delays, the Petitioner was always ready and willing to commission its power plant. The Petitioner's power plant was fully commissioned on 29.01.2020 and the Petitioner has been generating electricity and supplying the same to the TANGEDCO ever since. A copy of the Petitioner's generation details since January 2020 is being filed along with this rejoinder.
- (vi) It is now settled law that a generator cannot be held liable for delays caused on the part of the licensees or third parties and would be entitled to an extension.

### III Levy of Safe Guard Duty by the Ministry of Finance:

- (i) The sudden levy of Safe Guard Duty ('SGD') on solar photovoltaic modules (PV) imported from all developing countries and China by the Ministry of Finance vide Notification No.01/2018- Customs (SG) dated 30.07.2018 was not foreseeable by either of the parties at the time of execution of the PPA and has a significant effect on the Petitioner's solar power project. The SGD was set at 20% of the ad valorem value of the import, thereby enhancing the Petitioner's project cost by 8% over all amounting to increase of Rs.29/- Cr. (Twenty-Nine Crores Only). That due to this increase in cost which is a result of an unforeseeable event i.e. sudden levy of SGD, Rays had to change the financial terms with the lenders and had to arrange an additional equity capital which took some time.

- (ii) The contents of the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects, 2017 dated 03.08.2017 issued by the Ministry of Power which serves as a guiding principle in the determination of tariff through competitive bidding. Clause 5.4.2 specifically states that actions of Governmental authority having material adverse effect shall fall within the scope of Non-Natural Force Majeure Event, governing the instant issue. The said clause also states that any delay or refusal in obtaining the requisite permits to carry out the activities of the PPA shall amount to a Non-Natural Force Majeure Event, provided such delay is not attributable to the Petitioner. As in this case, where there was a sudden levy of SGD which was an unforeseeable event, hence, amounting to a Force Majeure event.
- (iii) In fact, the unusual increase in project cost faced by developers due to the sudden levy of SGD was taken into consideration by the Ministry of New and Renewable Energy Resources (' MNRE ') in its notification bearing 23/43/2018-- R&R dated 27-08-2018 wherein the MNRE has, *inter alia* stated that the levy of SGD amounts to a change in law situation. The same stance has been further buttressed by the Solar Energy Corporation of India ('SECI') in its letter dated 22.10.2019. The Respondent has failed to advert to any of the above in its counter affidavit.
- (iv) Further, it is apposite to note that the Petitioner had, in fact, challenged the levy of SGD itself before the Hon'ble Madras High Court in W.P. Nos. 22387/2019.

- (v) The economic impact on generators after the sudden levy of SGD came to be considered by the Hon'ble Central Electricity Regulatory Commission ('CERC') in 342/MP/2018 ACME Rewa Solar Energy Private Limited v SECI and Others in which the CERC has held that the levy of SGD prima facie amounts to change in law and therefore generators are entitled to an extension of CoD due to sudden operational expenditure incurred by them.
- (vi) Pursuant to the said judgement of the CERC, even the MNRE has issued a notification dated 23.03.2020 in which the MNRE has directed compensation to be paid to generators affected by the levy of SGD, thereby recognizing that the levy of SGD indeed amounts to change in law.

5.6. The facts and narration of events which culminated in the Petitioner signing the PPA dated 28.09.2017, including the entire tender bidding process undertaken by the TANGEDCO, thereby not meriting any specific response of the Petitioner. However, the Petitioner puts the Respondent to strict proof of the same.

5.7. The facts, dates and events that are pertinent to the Petitioner company and merit no specific response from the Petitioner.

5.8. The Petitioner refutes in as much as the Petitioner company was unable to achieve the CoD due to a multitude of reasons including but not limited to the sudden levy of SGD on solar PV cells which was challenged by the petitioner in W.P. No. 22387 of 2019 and other grounds which have already been set forth and for reasons of brevity are not being repeated. Therefore, it is incorrect to state that

the petitioner has not commissioned its power plant, which even otherwise is factually incorrect.

5.9. The instant petition was filed by the Petitioner on 05.02.2020. However, the same was listed for admission before the Commission only on 02.06.2020 on which date the instant petition stood admitted. In the meantime, as admitted by the TANGEDCO, a letter was sent by the TANGEDCO on 24.02.2020 to the State Bank of India, SME Jaipur South Branch requesting to invoke Rs.16,07,84,370/- from the BG value of Rs.20 crores. Left with no other alternative efficacious remedy, the Petitioner was constrained to move the Hon'ble Madras High Court for urgent injunctive relief forbearing the TANGEDCO from taking any precipitative action against the Petitioner, which was granted on 30.03.2020, based on the strength of the Petitioner's prime facie case, balance of convenience and the irreparable loss that the Petitioner would incur.

5.10. As stated earlier, it is incorrect to compare the case of the Petitioner with that of other developers who participated in the same tender as the Petitioner. The sudden levy of SGD on solar PV cells, which form the core of the Petitioner's power plant is bona fide and has been acknowledged by the SECI and the MNRE. Further, to state that other developers have not faced an issue with achieving CoD even with the levy of SGD is based on an assumption that all such developers are also importing their solar PV cells from developing countries and China. (the countries from which import of solar PV cells are subject to levy of 20% SGD). The strength of contentions and the final prayer in a petition are to be tested on whether

they are bona fide and legally tenable. The pleadings in a petition cannot be subject to an arbitrary yardstick of the performance of a competitor. Such an approach will severely prejudice the case of the Petitioner and will result in a gross miscarriage of justice.

5.11. By way of a clarification, the RPO mechanism was discussed in the principal petition only to establish that if the Petitioner is granted a project specific extension of CoD, the same would benefit the TANGEDCO immensely.

5.12. The Petitioner is not seeking any revision of its tariff or a refund even though the Petitioner is currently facing an unprecedented 8% / Rs. 29/- Cr. (Twenty-Nine Crores Only) hike in project cost. Given that the Petitioner is already facing a difficult financial situation, invocation of BG or imposition of any penalty for reasons wholly beyond the Petitioner's control would cripple the Petitioner's project. Further, it is in the interest of the Petitioner as well as the Respondent TANGEDCO that the Petitioner's solar power plant is treated as commissioned within the same control period.

5.13. Further, as reiterated earlier, it is wholly erroneous to compare the Petitioner's case with that of other developers in as much as the Petitioner has achieved CoD on 29.01.2020 and has also begun generating electricity and injecting the same into the TANTRANSCO grid. A statement of energy injection statement from January to June 2020 is attached along with this Rejoinder. This

establishes that the Petitioner was always ready and willing to perform its obligations under the PPA.

5.14. In conclusion, the Petitioner seeks to set out the various submissions which have gone unrefuted by the Respondent TANGEDCO in their counter affidavit:

- (a) That the levy of SGD on import of solar PV cells from developing countries and China by the Ministry of Finance is a development of the law was not reasonably foreseeable by either of the parties, having a significant impact on the Petitioner's obligations under the PPA dated 29.08.2017, thereby falling within the teeth of the Force Majeure clause contained in clause 16 of the PPA.
- (b) That the levy of SGD has a detrimental impact on solar power developers has been acknowledged by the MNRE and the SECI vide their Notification dated 27.08.2019 and letter dated 22.10.2019 respectively.
- (c) That the Petitioner suffers an overall increase in project cost by 8% / Rs.29/- Cr. (Twenty Nine Crores only) thereby threatening the Petitioner's project viability.
- (d) That the Petitioner has always been ready and willing to perform its obligations under the PPA dated 29-08-2017.
- (e). That the project specific extension of CoD will not affect the TANGEDCO in any manner whatsoever.
- (f) That the project specific extension of the Petitioner's power plant will benefit the TANGEDCO immensely since the TANGEDCO being an obligated entity has to purchase power from renewable sources.

## **6. Additional Affidavit on behalf of the Petitioner:-**

6.1. The instant petition has been filed by the Petitioner seeking for the principal relief of extension of the Commercial Date of Operation ('COD') in respect of the Petitioner's 100MW solar PV power plant located at Kollankinar, Onamakulam, Sankaraperi, Kuppanapuram, Kudhirakulam, Thennampatti and Parivallikottam villages, Tuticorin District since there has been a change in law which significantly altered the Petitioner's solar power project viability. Further, the Petitioner company has been subjected to delays caused due to the various actions and inactions on the part of the TANGEDCO and other Government authorities.

6.2. The petitioner states that while so, the petitioner was surprised to receive a copy of the letter of the 2<sup>nd</sup> Respondent invoking the Bank Guarantees furnished by the petitioner vide Letter No.CE/NCES/SE/SOLAR/EE/SCB/AEE3/FM/s.Rays Power/D780/20, dated 24.9.2020. The said communications was issued without reference to the interim order issued by the Hon'ble Madras High Court, the orders extending interim orders by the Hon'ble Madras High Court as well as the orders of the Commission and the Respondent has incorrectly stated that there is no specific order of the Commission and therefore the Bank Guarantee is being invoked. This is entirely incorrect. The invocation had been done, in violation of the express orders of the Hon'ble High Court of Madras dated 30.03.2020 passed in writ petition W.P No. 5874 of 2020, filed by our Client. The said order was a modification of the earlier order passed and issued in view of the lockdown being imposed. While disposing of the writ petition, the Hon'ble High Court of Madras, had directed the

petitioner to approach the Commission, in respect of the disputes that had arisen out of the PPA. However, in order to protect the interests of the petitioner, more specifically from any arbitrary encashment of BankGuarantee by TANGEDCO, the Hon'ble Court granted an interim injunction vide the said order, directing TANGEDCO to maintain status quo with respect to the subject Bank Guarantee submitted in connection with the PPA. The said order reads as follows:

*"In view of the present nation-wide lockdown situation and by considering the above stated facts and circumstances, this Court is inclined to dispose of this miscellaneous petition by directing the TANGEDCO to maintain status quo as on today in respect of the subject matter bank guarantee till 30.04.2020. The petitioner is also directed to keep the bank guarantee alive till the disposal of the matter before the third respondent. This miscellaneous petition is disposed of accordingly."*

6.3. The aforesaid interim order was further extended till 01.06.2020, in view of the order passed by the Hon'ble Division Bench of the Madras High Court, in suo motu writ petition W.P No. 7413 of 2020 dated 25.04.2020 extending the duration of interim orders passed in various judicial proceedings, owing to the COVID pandemic restrictions. By virtue of the said order and subsequent extension orders, the interim order dated 30.03.2020, continues to subsist and is binding on TANGEDCO since the lockdown continues to operate and there is thus an automatic extension of all interim orders already granted by the High Court. By virtue of such order the Bank Guarantee cannot be invoked as the direction to maintain status quo continues.

6.4. In addition thereto, when this petition in DRP NO.9 of 2020 before the Commission came up for hearing on 02.06.2020, the Commission was pleased to

direct status quo to be maintained till 14-07-2020. The order dated 02-06-2020 (under reference (iii)), read as follows:-

*“Thiru Rahul Balaji, Advocate appeared for petitioner and drew the attention of the Commission to para 6 of the order of the High Court and prayed to direct TANGEOCO not to encash the Bank Guarantee. The petition is admitted. The case is adjourned to 14-07-2020 for filing counter, till then Status-Quo to be maintained.”*

6.5. Thereafter, the Petition was listed on 14.07.2020 and on the said date, the Commission posted the matter on 04.08.2020, for filing of rejoinder and arguments. TANGEDCO, through its counsel also represented that matters would not be precipitated during the pendency of the proceedings and on this basis it was agreed that the matter would be heard and disposed of expeditiously. Thereafter, the matter was listed on 25.08.2020, on which date the Petitioner filed its Rejoinder and since the pleadings were complete, the Petition was posted for arguments on 15.09.2020. On 15.09.2020, the Petitioner commenced submissions and the matter was posted on 07.10.2020 on a specific date for final hearing. It would be evident from the daily orders passed on the aforementioned dates that the proceedings before the Commission are on the brink of conclusion.

6.6. The petitioner thereafter issued a communication through its counsel bringing to the attention of the Respondent the above developments and also confirmed that its commitment of keeping the Bank Guarantee extended till conclusion is also complied with and the Bank would be separately processing the same and was forwarding the extended Bank Guarantee as a matter of course. It now appears that the Respondent is not further processing the invocation. However, it would be in the interest of justice that the original order granted be

formally re-stated to apply till final orders in order that the petitioner provide the same to its bankers.

6.7. In addition thereto, the petitioner is also not being paid the Tariff Invoices, citing the pendency of the present proceedings. The present proceedings are only for the purpose of extension of the COD and if the same is granted, the question of any further charges or payments would not arise. In the event the Commission decides against the petitioner, even in such case the interests of the Respondent are fully secured by securities. While so, the denial of payment of regular invoices citing the pendency of the case is inexplicable. The non-payment right from the date of commissioning is causing enormous prejudice to the petitioner and is affecting its ability to pay its financial institutions and there is real risk of the petitioner's project is declared to be a defaulter.

6.8. The petitioner successfully commissioned its project on 29-01-2020 and has been raising Invoices. The status of the same is set forth in the following tabulated statement with the total amount due under the Invoices being 20.98 Crores

S. No.	Month	Invoice No.	Date	Amount
1	January 2020 – February 2020	TSPPL/02/Feb 2020	18-06-2020	10,061,548.00
2	March 2020	TSPPL/03/Mar 2020	18-06-2020	32,409,007.00
3	April 2020	TSPPL/04/Apr 2020	18-06-2020	29,570,587.00
4	May 2020	TSPPL/05/May 2020	18-06-2020	30,757,222.00
5	June 2020	TSPPL/06/Jun 2020	03-07-2020	35,564,353.00
6	July 2020	TSPPL/07/Jul 2020	03-08-2020	36,071,224.00
7	August 2020	TSPPL/08/Aug 2020	04-09-2020	35,339,758.00
<b>Total</b>				<b>209,773,699.00</b>
				<b>20.98</b>

6.9. In addition thereto, interest has also accrued on the above dues. There is no basis for withholding Invoice payments citing the pendency of the present petition

which is causing enormous prejudice. The petitioner has invested large capital in the State encouraged by its policies and has established the project despite the enormous challenges. It ought to be ensured that the Invoices are not arbitrarily withheld in order that the attractiveness of the state as an investment destination continues to be high.

6.10. In addition thereto there is substantial curtailment that is being effected which is further affecting the viability. The details of the same are set out in the table below and requires Regulatory intervention in terms of the orders already passed with respect to the Must-run status for solar power plants issued by the Commission:-

Tirunelveli Solar Project Pvt. Ltd. 100 MW	
Month	Load Curtailment in Hours
April	11.15
May	10.21
June	24.47
August	91.41
September	160.11
<b>Total hours of load curtailment</b>	<b>297.35</b>

Thus, the total load curtailment is as high as 298 hours or equivalent of an entire month's normal generation in just over a 5 month period.

6.11. The petitioner is filing the present affidavit only to place on record the additional facts and the challenges being faced by the petitioner's project even after the substantial investment it has made in the fond hope that it would be considered an important partner in the solar initiative in the State.

6.12. The Commission may formally record the extension of the interim orders with regard to the Bank Guarantees pending the final adjudication and direct the Respondent TANGEDCO not to cite the pendency of the present proceedings to withhold payments.

**7. Additional Affidavit filed on behalf of the Petitioner:-**

7.1. The instant petition has been filed by the Petitioner seeking for the principal relief of extension of the Commercial Date of Operation ('COD') in respect of the Petitioner's 100MW solar PV power plant located at Kollankinar, Onamakulam, Sankaraperi, Kuppanapuram, Kudhirakulam, Thennampatti and Parivallikottam villages, Tuticorin District since there has been a change in law which significantly altered the Petitioner's solar power project viability. Further, the Petitioner company has been subjected to delays caused due to the various actions and inactions on the part of the TANGEDCO and other Government authorities.

7.2. The petitioner is filing the instant affidavit pursuant to the order of the Commission dated 30-03-2021. On the said date, the Respondent TANGEDCO's counsel submitted that the Petitioner's Bank Guarantee expired on 30-11-2020. Based on the said submission, the Commission directed the petitioner to renew it bank guarantee within two weeks.

7.3. The petitioner has duly renewed the Bank Guarantee dated 27-09-2017 and the same is extended till 31-05-2021 and the date of claim is extended till 31-05-2022. The same has been communicated to the Respondent TANGEDCO

vide its letter and e-mail dated 08-04-2021. The said letter was duly acknowledged by the TANGEDCO. The Bank Guarantee and a copy of the said letter as acknowledged by TANGEDCO and email are filed along with this affidavit.

**8. Written Submissions filed on behalf of the Respondents:-**

8.1. The Respondents had entered into Power Purchase Agreement with Rays Power Infra (P) Ltd. on 28.09.2017. The said Agreement is filed in Page No. 17 of the Typed Set of Documents, annexed to the Petition, filed by the Petitioner. It is submitted that TANGEDCO has issued Letter of Intent to Rays Power Infra (P) Ltd. for the establishment of 100 MW Solar Power Plant for supplying solar power to TANGEDCO on 29.08.2017. The said Letter of Intent is filed by the Petitioner in the petition. Based on the request of M/s. Rays Power Infra (P) Ltd. vide letter dated 29.01.2018, an addendum for the PPA dated 28.09.2017 was issued for the formation of Special Purpose Vehicle (SPV) in the name of the Petitioner Tirunveli Solar Project Private Limited, in respect of the proposed 100 MW Solar Power Plant at Kollankinar, Pariuvillikottai and Thennampatti villages, Ottapidaram Taluk, Tuticorin District, on 27.04.2018.

8.2. As per the terms and conditions of tender and as per the terms and conditions of the Letter of Intent, the successful bidders shall furnish Performance Bank Guarantee at the rate of Rupees 20 Lakhs per MW in the form of Bank Guarantee obtained from any nationalized or Scheduled Bank. At the time of signing PPA, M/s. Rays Power Infra (P) Ltd. has furnished Performance Bank Guarantee (PBG) in form of Bank Guarantee, bearing No. 3188317BG0000544

dated 27.09.2017, for a value of Rupees 20 Crore issued by State Bank of India, SME Jaipur South Branch with validity up to 30.09.2020 for 100 MW.

8.3. As per the terms and conditions of tender, Letter of Intent dated 29.08.2017, filed by the Petitioner in the petition, and Clause 14 of the Power Purchase Agreement filed in the petition, the Scheduled Date of Commissioning of the proposed 100 MW Solar Power plant of M/s. Tirunelveli Solar Project Private Limited shall be on or before 27.09.2019. However, the Petitioner did not commission their project within the Scheduled date of Commissioning.

8.4. As per the conditions governing the tender, Letter of Intent to the Petition filed by the Petitioner and Power Purchase Agreement filed by the petitioner, there is a provision which enables the bidders to commission their project beyond 10 months from the Scheduled Date of Commissioning with penalty viz. forfeiture of Performance Bank Guarantee in proportionate to the capacity not commissioned for the first 5 months delay from the due date and Liquidated Damages at the rate of Rupees 10,000/- per MW per day for the delay beyond first 5 months of delay.

8.5. As per the terms and conditions of tender, the due date of commissioning the proposed 100 MW Solar Power Plant of the Petitioner with forfeiture of Performance Bank Guarantee shall be on or before 27.02.2020. The Petitioner has commissioned their 100 MW Solar Power Plant only on 29.01.2020 i.e. with a delay of 123 beyond scheduled date of commissioning from 27.09.2019. Hence, as per

tender, the Performance Bank Guarantee has to be forfeited in proportion to the period of delay, which is Rupees 16,07,84,370/-

8. 6. It is evident that the Petitioner has not commenced and commissioned their 100 MW Solar Power Plant, on or before the Scheduled date of commissioning. Hence, TANGEDCO vide its letter dated: 24.02.2020 addressed to State Bank of India, SME Jaipur South Branch, invoked the Bank Guarantee.

8.7. The Petitioner has invoked the jurisdiction of the Commission by preferring a Petition under Sections 63 and 86 (1) (a) of the Electricity Act, 2003 read with Rule 16 of the Conduct of Business Regulations, 2004.

8.8. Section 63 of the Electricity Act, 2003 reads as follows:-

*“Section 63. (Determination of tariff by bidding process): Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government”.*

8.9. The Respondent is unable to understand as to why this provision was invoked, since tariff is never in issue in the present Petition. The so called explanation given by the Petitioner in Paragraph 38 of the Petition does not explain the same. The same prays for a revisionary relief from this Commission. But the present case is not in the nature of a Revision but a Dispute Resolution Petition.

8.9. Section 86 (1) (a) reads as follows:-

*Section 86. (Functions of State Commission): ---*

*(1) The State Commission shall discharge the following functions, namely:-*

*a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State: Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;”*

The invocation of this Section also raises a question as to whether tariff is in issue in the present Petition.

8.10. Regulation 16 of the Conduct of Business Regulations, 2004 Reads as follows:

- “(1) The Commission may initiate any proceedings suo motu or on a petition filed by any affected or interested person. Initiation of proceedings*
- (2) When the Commission initiates the proceedings, it shall be by a due notice issued by the Commission. The Commission may give such orders and directions as may be deemed necessary, for serving of notices to the affected parties; for the filing of replies and rejoinders against or in support of the petition in such form as the Commission may direct. The Commission may, if it considers appropriate, issue orders for publication of the petition inviting comments from the public or any class of persons on the issue involved in the proceedings in such form as the Commission may direct;*
- (3) While issuing the notice of inquiry the Commission may, in suo-motu proceedings and other appropriate cases, designate an officer of the Commission or any other person whom the Commission considers appropriate to present the matter in the capacity of a petitioner in the case.”*

It is to be noted that there is no Rule 16 in Conduct of Business Regulations, 2004. (There are only Regulations) It is not clear under which provision of law, the Petitioner is trying to invoke the present Dispute Resolution Petition.

8.11. The Petitioner has filed the present D.R.P. No. 9 of 2020 before the Commission praying to grant the Petitioner an extension of the Commercial Operation Date (COD) from 26-09-2017 till 30-01-2019 in as much as the actual of the Petitioner's Solar Power Plant was delayed due to justifiable reasons and commissioned on 29.01.2020 and consequently direct the Respondents not to take precipitative action including not enforcing any security for delay in COD. There is an incorrect invocation of the provisions of the Electricity Act, 2003, it is not clear what is the relief that the Petitioner Claims.

8.12. The Relief claimed by the Petitioner is to grant the Petitioner an extension of the Commercial Operation Date (COD) from 26.09.2017 till 30.01.2019, the Petitioner should have invoked the "Settlement of Disputes" Clause, under Clause 13 of the Power Purchase Agreement for Solar Power Plants, Covered Under Tender Specification in CE/NCES/OT No.1/2017-2018. Clause 13 Reads as follows:

*"If any dispute or difference of any kind whatsoever arises between the parties relating to this agreement, it shall, in the first instance, be settled amicably, by the parties, failing which either party may approach the Commission for the adjudication of such dispute under Section 86 (1) (f) of the Electricity Act, 2003 in accordance with the Conduct of Business Regulations, 2004 and Fees and Fines Regulations, 2004 of the Commission. This Agreement shall be governed by the Laws of India and the Courts at Chennai alone shall have jurisdiction."*

Thus, without prejudice to the Respondent's rights and contentions, it is evident that there is a pre-dispute settlement mechanism provided, which, the

Petitioner has not clearly followed. Instead, the Petitioner has preferred the present Petition. The Respondent has not waived this provision of the Contract.

8.13. The Petitioner has also invoked Clause 48 (1) of the Conduct of Business Regulations, 2004. But, there is no abuse of process by the Respondent TANGEDCO hence there is no reason to invoke the said provision.

8.14. Without prejudice to our rights and contentions, the Correct provision for invocation of the jurisdiction of this Court to settle the dispute arising out of this Contract should have been Section 86 (1) (f) going by the terms of contract. Hence, the Petition is not maintainable in law and on facts:

8.15. Clause 16 of the Power Purchase Agreement filed by the Petitioner reads as follows:-

*" ..... 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."*

Thus, it is clear, that on a plain reading of the Force Majeure Clause is contained in the Agreement, entered into between the parties, even that assuming without admitting that, the Force Majeure conditions existed, the petitioner has not informed the Respondent, within 15 days of occurrence of each of the so called force majeure events.

8.16. The safeguard duty imposition, was brought to the notice of the Respondent, only on 23.09.2019, which is not within the period of 15 days as provided under Clause 16 of the Power Purchase Agreement filed by the Petitioner.

8.17. The Petitioner has stated in paragraph 35 of its Petition as follows:

*"Apart from the above, the Petitioner also faced delay due to the Lok Sabha Elections held in March, 2019 and the by-elections held at Ottapidaran in May, 2019. The Petitioner's land acquisition process was significantly delayed because the officers in charge of scrutinizing the Petitioner's land acquisition applications were sent on election duty"*

For this alleged force majeure event also, no notice was brought to the Respondent within a period of 15 days, as stipulated in the agreement. This alleged force majeure event was brought to the notice of the Respondent, only on 23.09.2019, which is not within the period of 15 days, as provided under Clause 16 of the Power Purchase Agreement.

8.18. The Petitioner has stated in Paragraph 35 of its Petition as follows:

*"35. In the said letters, Petitioner also brought to the notice of the Respondents that there was disruption in the construction activities by the villagers who claimed that the heavy movement of vehicles on the road leading to the project site was damaging the village roads. The villagers also damaged the culvert leading vehicles to the project site in demonstration of their opposition to the entire project itself. The Petitioner states in the said letter, that pursuant to the meeting held on 11 August 2019 in the presence of various stakeholders, the Petitioner company assured that it would remedy any damage done to the roads pursuant to the construction of the project. The Petitioner also agreed to deposit a sum of Rs.10,00,000/- to the CSR account of the Collector, Thoothukudi to ensure that if the roads are damaged, they will be duly rectified. A copy of the Minutes of the Meeting held on 11<sup>th</sup> August, 2019 is being filed herewith. In the said letters, the Petitioner also states that the work was moving in a very slow pace despite the Petitioner's assurances. "*

For the said alleged force majeure event, no such notice bring the same to the knowledge of the Respondent within a period of 15 days as stipulated in the agreement. This alleged force majeure event was brought to the notice of the Respondent only on 23.09.2019 which is not within the period of 15 days as provided under Clause 16 of the Power Purchase Agreement filed by the Petitioner.

8.19. Notice is a pre-condition to the Affected Party's entitlement to claim relief, under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed by the Petitioner.

8.20. Reliance is placed, on the maxims "le contrat fait la loi" which means that the contract makes the law and "legem contractui" meaning, the agreement of the parties makes the law of the contract and "pactio pro lege valet" which means that agreement takes the place of the law. Thus, the stipulations of parties constitute the law of the contract; agreements give contracts, the force of law. Clause 16 of the Power Purchase Agreement filed by the Petitioner reads as follows:

*" 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"*

As such notice was sent to the Respondent, within a period of 15 days of the so called alleged three Force Majeure events, as stipulated in the agreement. The alleged Force Majeure events were brought to the notice of the Respondent, only on 23.09.2019, which is not within the period of 15 days, as provided under Clause

16 of the Power Purchase Agreement filed by the Petitioner.

8.21. The word "Shall" used in the Clause 16 of the Power Purchase Agreement filed to the Petition by the Petitioner indicates that this provision of Contract is intended by both the parties to be mandatorily complied.

8.22. The Petitioner had not complied with the conditions for invoking the force majeure clause provided under Clause 16 of the Power Purchase Agreement filed to the Petition by the Petitioner, and has thus violated the principle of *pacta sunt servanda* which means that, agreements are meant to be kept. Thus, agreements must be honoured. Agreements and stipulation of a party to a contract must be observed.

8.24. The Petitioner was aware, of the force majeure clause provided under Clause 16 of the Power Purchase Agreement! filed to the Petition filed by the Petitioner. The Petitioner by agreeing to the Contract has agreed to the Force Majeure Clause provided in Clause 16 of the Power Purchase Agreement filed to the Petition by the Petitioner too. This argument of the Respondent is expressed by the *maxims qui cum alio contrahit, vel est, vel esse debet non ignarus conditione sui*, - "he who contracts with another either is or ought not to be ignorant of his condition" and *quia sit iniuria*- "one who wills a thing to be or to be done cannot complain of that thing as an injury"

8.25. Section 37 of the Indian Contract Act, 1872 reads as follows:-

*“Section 37 – Obligation of parties to contracts- The parties to a contract must either perform or offer to perform their respective promise.”*

There is a promise on the part of the Petitioner to abide by clause 16 of the Power Purchase Agreement filed by the petitioner.

8.26. The basic rule of contract law is that, the promisor must perform exactly, what he/it has undertaken to do. The obligation to perform is absolute, as held in the case of *Magnum Films v. Golcha Properties Pvt. Ltd.* reported in AIR 1984 Del 162. It is the obligation of each, party to perform its respective promise as agreed, unless the promise has dispensed with the performance, or it is excused by this Act or any other law.

8.27. In accordance with the well-known legal maxim *contractus ab initio voluntatis est, ex post facto necessitates*, it is stated that, at the outset, a contract is a matter of freewill, but when it has been made, it becomes a matter of compulsion. Hence, the Petitioner is bound to comply with the clause 16 of the Power Purchase Agreement, filed by the Petitioner, to comply with the Force Majeure Conditions.

8.28. The Petitioner is bound by the clause 16 of the Power Purchase Agreement filed by the Petitioner to comply with the Force Majeure Conditions, in accordance with the legal principle *consensus facit legem*-i.e. consent makes the law. This maxim deals with the centrality of consent in validating a contract. A contract is law between the parties agreeing to be bound by it, agreements give the law to the contract. Thus, if two persons make an agreement in good faith and with full

knowledge, the law will insist on its being carried out since the joint agreement gives it the force of law. A contract is a law between the parties, which can acquire force only by consent. The terms of a contract, lawful in its purpose, constitute the law as between the parties.

8.29. For the reasons adumbrated above, the invocation of the so called force majeure clause, in this petition is only an afterthought realising that the Petitioner has not complied with the requirement at the relevant time as prescribed under the Agreement.

8.30. The contentions placed in the forthcoming paragraphs are without prejudice to the contentions placed, regarding invocation of Force Majeure Clause and Maintainability of this Petition.

8.31. There is no specific "change in law" clause in the agreement. The Force majeure is not engaged merely by additional cost. Unless the clause expressly or impliedly covers increased cost, the general law is that, force majeure does not apply to financial hardship. Moreover, increase in cost is not covered under any of the events enumerated under the headings.

8.32. There is no definition of 'change in law' in the Power Purchase Agreement filed by the Petitioner. This should distinctly highlight the scope of the applicable law, what constitutes change in law, authorities which can authorise the change in law, and the date after which a change in law event, should have occurred.

8.33. In the absence of any expressly stated price escalation or cost fluctuation provisions, it would seem difficult to make such claim valid and admissible. A party can be excused from their contractual performance when due to an unexpected event; the performance has become impossible, and not becoming uneconomical.

8.34. "Law" is not defined anywhere in Power Purchase Agreement filed by the Petitioner.

8.35. The Petitioner has set out in Paragraph 23 of its Petition as follows:

*“However, vide Notification No.01/2018 - Customs (SG) dated 30<sup>th</sup> July, 2018 the Ministry of Finance have imposed a 'Safeguard Duty'(Hereinafter 'SGD') on the above mentioned modules and solar, cells from all developed countries and China PR and Malaysia. The said notification imposed a safeguard duty of 25% (which was subsequently reduced to 20% on 30<sup>th</sup> July 2019) on the ad valorem value of the modules, thus increasing the price of modules by 20%. this will result in an increase of the overall project cost by 8%. Consequently, this translates into an increase in the fixed costs incurred by the petitioner herein thereby affecting the entire project viability”.*

8.36. The Petitioner in in Para 23 of its Petition alleges that there is a cost escalation. It is a well settled principle of contract law, that commercial impossibility, extreme cost or difficulty of performance is not a ground for excuse of obligations, assumed under the contract. This proposition of law that, commercial impossibility, extreme cost or difficulty of performance is not a ground for excuse of obligations assumed under the contract has been reiterated in the cases of Keshavlal Brothers & Co. v. Diwan Chand & Co., reported in AIR 1923 PC 105., Karl Ettlinger and Co. V. Chagandas & Co. reported in AIR 1915 Bom 232.

8.37. The contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk of such an increase. If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Petitioner, cannot be said to be possible one, as it would completely defeat the explicit wordings and purpose of the contract. There is no gainsaying that, there will be price: fluctuations which a prudent contractor would have taken into margin, while bidding in the tender. Such price fluctuations cannot be brought under Clause 16 of the Power Purchase Agreement filed by the Petitioner unless specific language points to the inclusion. Reliance is placed on the case of South East Asia Marine Engg. & Constructions Ltd. (SEAMEC LTD.) v. Oil India Ltd., reported in (2020) 5 SCC 164.

8.38. The Petitioner has set out in Paragraph 24 of its Petition as follows:

*"In light of the sudden change in law, the petitioner entered into an amendment to the said Module Supply Agreement dated 19-06-2019 to recognise the increase in the cost of the solar PV modules."*

The Respondent is not a party to such Agreement and is in no way a signatory of this Agreement.

8.39. The Petitioner has set out in Paragraph 25 and 26 of its Petition as follows:

*"25. Thereafter, the Petitioner was embroiled in litigation before the Hon'ble Madras High Court since the Petitioner's solar PV modules were not allowed for clearance by the port authorities at the Chennai port and the Tuticorin port. The Petitioner seeks to set out a gist of the litigation involved in securing the solar PV modules hereinbelow:*

26. *The Petitioner filed W.P.No.22387 of 2019 before the Hon'ble Madras High Court seeking to quash the order passed by the Directorate General of Trade Remedies ("DGTR,") upholding the levy ofSGD on solar PV modules and also sought foran interim injunction restraining the customs authorities from levying SGD. On 31.07.2019, the Hon'ble Madras High Court passed an interim direction for the releaseh of the solar PV modules imported on the condition that the Petitioner pay 50% of the duty levied through a bank guarantee and the remaining 50% was to be paid byexecuting a bond valid for a period of two years, which is to be subsequently renewed. "*

Without admitting our liability, the Respondent states that the Petitioner should have raised a issue regarding the cost escalation due to safeguard duty imposition to the Respondent, instead of embroiling themselves in litigation. The Petitioner should have taken steps to complete the project in time.

8.40. The Petitioner has set out in Paragraph 27 of its Petition as follows:- !

*"27. The said order directing the port authorities to release the imported solar PV modules was communicated to the Deputy Commissioner of Customs, Tuticorin Customs House by the Rays Power Infra P. Ltd. vide letter dated 06-08-2019. However, the Deputy Commissioner of Customs, Tuticorin Customs informed that they have not been arrayed as a party in the said W.P. No. 22387 of 2019 and therefore, are not bound by the said order dated 31-07-2019."*

This shows that the Petitioner has not pursued the litigation with due diligence and prudence. Reliance is placed on the maxim *Nullus Commodum Capere Protect De Injuria Sua Propria*. No man can take advantage of his own, wrong. The same has been observed in the case of Eureka Forbes Limited vs. Allahabad Bank and Ors. ((2010) 6 SCC 193) as follows:-

*66. "Maxim Nullus commodum capere potest de injuria sua propria has a clear mandate of law that, a person who by manipulation of a process frustrates the legal rights of others, should not be permitted to take advantage of his wrong or manipulations. In the present case Respondent Nos. 2 & 3 and the appellant have acted together while disposing off the hypothecated goods, and now, they cannot be permitted to turn back to argue, that since the*

*goods have been sold, liability cannot be fastened upon respondent Nos. 2 & 3 and in any case on the appellant."*

Thus, this act of Petitioner in not pursuing the litigation with due diligence does not constitute Force Majeure.

8.41. The Petitioner has set out in paragraph 31 of its Petition as follows:-

*"31. However, once again the port authorities refused to release the imported solar PV modules on the ground that the importer is Rays Power Infra Private Limited whereas the Petitioner in W.P.Nos.29358, 29502 and 29504 of 2019 is Rays Solar Infra Private Limited. Therefore, the Petitioner was constrained to file a petition to amend the cause title, which came to be allowed by the Hon'ble Madras High Court on 08.11.2019."*

This shows that, the Petitioner has not pursued the litigation too with due diligence. This act of Petitioner does not constitute Force Majeure even assuming without admitting it is so.

8.42. Force Majeure includes an element of non-foreseeability. Lok Sabha election was scheduled to be held in 2019. It is a pre-planned event every 5 years. Hence, such elections could not constitute a Force Majeure event.

8.43 Adverse inference can be drawn from the fact that, the Petitioner has not informed of the Force Majeure Conditions, at the time when, they prevailed within 15 days of its occurrence.

8.44. Safeguard Duties have been imposed many times due to products dumped from China. Such a change of rate cannot be deemed to be a sudden act of Government which cannot be foreseen. Without prejudice, the Petitioner has no

remedy but to claim compensation for the escalated amount. But such remedy was not invoked. Instead the Petitioner chose to file cases before the Hon'ble High Court of Madras vide W.P. Nos. 22387 of 2019, 29358, 29502, 29504 of 2019 respectively. There were many defects in the Writ Petition filed as evident in Para 31 of the Petition by the Petitioner. Hence the delay due to defective litigation process was definitely due to the act of the Petitioner and hence is not an unforeseeable event.

**9. Written Submission on behalf of the Petitioner:-**

9.1. The Petitioner was one of the many willing investors who, in response to the Tender floated by the Respondent TANGEDCO invested huge sums of money to set up a 100MW solar PV power plant in Tamil Nadu. Per the approval granted by the Commission, TANGEDCO invited 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.

9.2. After obtaining the requisite letters of intent, Petitioner took all steps in right earnest to commission its 100MW solar PV power plant. However, on 30.07.2018, the Union Government hiked the SGD payable on the import of solar PV modules by 25%, which significantly affected the Petitioner's project viability.

9.3. In addition to tiding over the above sudden increase in project costs, Petitioner was also deeply aggrieved by the continuous inaction on the part of Respondent TANGEDCO in granting the necessary approval for energising the Petitioner's solar PV power plant with the grid and commence supply of power to Respondent TANGEDCO, who is the sole purchaser of the power generated by Petitioner's 100MW solar power plant.

9.4. In response to the petition filed by the Petitioner, Respondent TANGEDCO has taken the sole ground of defense that two other solar power developers, namely, Thiru Uthayasooryan and M/s Dynamize Solar Power Private Limited have had their bank guarantees ('BGs') forfeited already since they did not adhere to the scheduled date of commissioning and that if the Petitioner's prayer in the instant petition is allowed, the above named companies will also agitate before the Commission for a similar relief thereby distressing the Respondent TANGEDCO.

9.5. As stated earlier, it is incorrect to compare the case of the Petitioner with that of other developers who participated in the same tender as the Petitioner. The sudden levy of SGD on solar PV cells, which form the core of the Petitioner's power plant is bona fide and has been acknowledged by the SECI and the MNRE. Further, to state that other developers have not faced an issue with achieving COD even with the levy of SGD is based on an assumption that all such developers are also importing their solar PV cells from developing countries and China (the countries from which import of solar PV cells are subject to levy of 20% SGD). It is submitted that the strength of contentions and the final prayer in a petition are to be

tested on whether they are bona fide and legally tenable. The pleadings in a petition cannot be subject to an arbitrary yardstick of the performance of a competitor. Such an approach will severely prejudice the case of the Petitioner and will result in a gross miscarriage of justice.

9.6. Therefore, in spirit, Respondent TANGEDCO has not refuted the case of the Petitioner on merits but has sought to juxtapose the case of the Petitioner with other developers with the intention of depriving the Petitioner of the preferential tariff in order to tide over its own shortcomings.

9.7. As per the terms of the PPA dated 28.09.2017, Respondent TANGEDCO is the sole purchaser of the power generated at Petitioner's solar power plant. Therefore, Petitioner will be severely disadvantaged if Petitioner is not entitled to the tariff rate as arrived at in the tender.

9.8. Furthermore, as evidenced in the additional typed set of papers filed on 10.10.2020, Petitioner has fully commissioned its solar power plant on 29.01.2020 and has been injecting energy into the grid from January 2020 onwards. In this regard, Petitioner has also sent multiple letters seeking payment from TANGEDCO, however, no payments have been made for energy injected into the grid since June, 2021.

9.9. The Petitioner now seeks to set forth its arguments in seriatim, as follows:-

A. The Commission has Inherent Powers to Extend the COD for the Petitioner on a project-specific basis –

- i. The Commission has inherent powers, under Regulation 48 (1) of the TNERC (Conduct of Business) Regulations, 2004, to extend the COD of the Project to the meet the ends of justice. The said provision has been extracted herein below:  
  
“Nothing in these Regulations shall be deemed to limit of otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission.”
- ii. The Ministry of New and Renewable Energy Resources issued a notification dated 27.08.2018 to Central Electricity Regulatory Commission (“CERC”) stating that solar power generators can be duly compensated for the sudden levy of Safe Guard Duty (“SGD”) as the same amounts to a change in law situation. The same stance has been once again reiterated by the MNRE in its notification dated 22.10.2019.
- iii. Further, in the case of ACME Rewa Solar Energy Private Limited v SECI and Ors. in Petition No. 342/MP/2018, the CERC has held that the levy of SGD prima facie amounts to change in law and therefore generators are entitled to an extension of COD due to sudden operational expenditure incurred by them.
- iv. Therefore, the Commission indeed has the power to extend the COD in respect of power projects where tender was adopted by the Commission after bidding process was resorted to in light of Section 63 of the Electricity Act, 2003 in view of the notifications issued by the MNRE and the CERC

which recognize that the sudden levy of SGD amounts to a change in law situation which threatens the project viability of projects.

- v. Therefore, the Commission has the power to pass suitable orders in the interest of justice.
- B. Levy of SGD constituted a substantial change in law which falls within the scope of the provision of Force Majeure under the PPA -
- i. There was no concept of SGD on solar modules, at the time of floating of the tender. Therefore, the Petitioner did not contemplate the said cost while making bids when the tender was floated. In fact, the tender conditions would show that neither party contemplated such a cost. Further, it was in these circumstances that the Petitioner entered into a Module Supply Agreement with Rays Power Infra P Ltd.
  - ii. Due to the unprecedented change in law which translated into increased project costs faced by solar power developers across India, the MNRE issued two notifications allowing for project specific extension of COD in certain situations. In light of the sudden change in law, the Petitioner entered into an amendment to the ModuleSupply Agreement dated 19.06.2019 to recognise the increase in the cost of the solar PV modules. Thereafter the Petitioner was embroiled in litigation before the Hon'ble Madras High Court since the Petitioner's solar PV modules were not allowed for clearance by the port authorities at the Chennai port and the Tuticorin port. The gist of the litigation was delved into in the petition filed and the same is not reiterated herein for the sake of brevity. After the litigation, the port authorities allowed for the release of the imported solar PV modules only on 20.12.2019.

- iii. From the above, it is clear that the Petitioner was unable to take delivery of the solar PV modules in time due to the levy of SGD constituted a substantial change in law due to which the Petitioner was unable to achieve COD within the scheduled 24 months. In this regard the Petitioner sent letters dated 23.09.2019 and 24.09.2019.
- C. Further roadblocks faced by the Petitioner which falls within the scope of the provision of Force Majeure under the PPA -
- iv. In the letters dated 23.09.2019 and 24.09.2019, the Petitioner further put the Respondents on notice that there was disruption in the construction activities by the villagers who claimed that the heavy movement of vehicles on the road leading to the project site was damaging the village roads. The villagers also damaged the culvert leading vehicles to the project site in demonstration of their opposition to the entire project itself. The Petitioner held a meeting on 11.08.2019 in the presence of various stakeholders, and assured that it would remedy any damage done to the roads pursuant to the construction of the project and agreed to depositing a sum of Rs.10 lakhs to the CSR account of the Collector, Thoothukudi to show its bonafides.
- v. Furthermore, the Petitioner's land acquisition process was significantly delayed due to the officers in charge to scrutinise the application being sent on election duty for LS elections held during March, 2019 and By-elections during May, 2019.
- vi. The Petitioner is only seeking 6 months' project specific extension in as much as the Petitioner has successfully commissioned its power plant on 29.01.2020 and has been supplying power to the TANGEDCO and raising

invoices for the same. Therefore, extension of COD in certain specific circumstances is not unknown and can certainly be permitted if the reasons are bone fide.

- D. TANGEDCO's precarious financial position has detrimentally affected the Petitioner's project viability -
  - i. The Petitioner faced stiff resistance from its lenders and financial consultants during the course of the project completion due to the poor financial status of the TANGEDCO and its defaults in payments to generators, especially RE generators, which was given wide publicity in various media as well as announcements and websites of the Central Government's power ministries.
  - ii. With great difficulty, the Petitioner was able to obtain the necessary funds and has even successfully commissioned its power plant. While the Petitioner is supplying electricity since January, 2020, it has received no payment from the TANGEDCO thus far.
  - iii. Such an act of the TANGEDCO is threatening the viability of the Petitioner since the Petitioner is unable to finance its debts and is risking being declared as an NPA with every day's delay of TANGEDCO in clearing the Petitioner's invoices.
- E. The TANGEDCO's lackadaisical approach in obtaining necessary permissions and approvals has contributed to the delay:
  - i. The TANGEDCO and TANTRANSCO have acted in a lackadaisical manner with respect to obtaining permissions and approvals that are solely within their purview. It is submitted that the Petitioner was unable to energise its

solar power plant as the Respondents did not obtain the necessary permissions on time, thereby prejudicing the case of the Petitioner.

- ii. Specifically, TANGEDCO has delayed the obtaining railway approval for line crossing as well as route approval.
- iii. Delay in route approval and railway lines approval by the TANGEDCO and other Government authorities:

\* The Petitioner company applied for its route approval from the TANTRANSCO as early as 15.06.2019. During the inspection conducted by the TANTRANSCO, it was found that the Petitioner's 110KV line can be linked to the existing 400/230-110 kv sub station at Thennampatty by stringing the Petitioner's line to the existing free arm of the 230kv SC line on the DC tower constructed by NLC Power Corporation Ltd, which also owns and operates a 100MW solar power plant adjacent to the Petitioner's power plant.

\* Necessary 'No Objection Certificate' was sought from NLC Power Corporation by the TANTRANSCO on 19.06.2019 and the same was granted by NLC Power Corporation on 09.07.2019.

\* Thereafter, the Superintending Engineer, General Construction set out its route map and sent it for the approval of the TANGEDCO and the TANTRANSCO on 31.08.2019 and the same was approved only on 25.09.2019 and 26.09.2019 respectively. Only after such approval could the construction of the said 110kv line commence.

\* This approval was itself obtained very belatedly as the date of commissioning of the Petitioner's plant was 25.09.2019. Therefore,

for no fault of the Petitioner company, the Petitioner was unable to commission its power plant since route approval for an existing tower and sub station was delayed by the TANTRANSCO.

\* It is pertinent to note that the entire process of obtaining route plan approval falls with the domain of the TANTRANSCO only and the Petitioner cannot hasten the process in any manner.

\* This shows that the TANTRANSCO's lackadaisical approach has affected the case of the Petitioner prejudicially, i.e. Petitioner was unable to commission its plant by 25.09.2019 as the route approval was obtained by TANTRANSCO only on 25.09.2019 and 26.09.2019, thereby forcing the Petitioner to approach the Commission, for not fault of theirs.

iv. Delay in obtaining railway approval for line crossing:

\* While obtaining the route approval, it was noticed by the TANTRANSCO that necessary railway line crossing approval must also be obtained since the Petitioner's 110kv line, when erected, crosses railway lines. Obtaining such approvals squarely falls within the domain of the TANTRANSCO and not the Petitioner.

\* To the Petitioner's utter shock and dismay, the railway line crossing approval was made to the office of the Southern Railways only on 30.10.2019 by the Superintending Engineer, General Construction i.e., more than one month after the Petitioner's scheduled date of commissioning.

- \* The Southern Railways returned the TANTRANSCO's application on 09.12.2019. Thereafter, the Southern Railways accorded their approval for railway crossing only on 27.12.2019 subject to certain conditions set out in their approval letter itself (more than 3 months after the scheduled date of commissioning).
- \* It is only after the said railway crossing approval and route approval, could the TANTRANSCO even begin their construction activities and erection of lines. Therefore, it is abundantly clear that the Petitioner was made to wait for several months post its scheduled date of commissioning due to the delay caused by the TANTRANSCO.
- \* It is pertinent to note that, in spite of such delays, the Petitioner was always ready and willing to commission its power plant. The Petitioner's power plant was fully commissioned on 29.01.2020 and the Petitioner has been generating electricity and supplying the same to the TANGEDCO ever since. A copy of the Petitioner's generation details since January, 2020 has been filed along in its additional typed set of papers dated 10.10.2020. In fact, Petitioner has not been paid its dues for the power injected into the grid in spite of several letters issued seeking payment.
- \* It is now settled law that a generator cannot be held liable for delays caused on the part of the TANGEDCO/TANTRANSCO. The same has been upheld by the Hon'ble Maharashtra Electricity Regulatory Commission in Case No. 286 of 2019 Clean Wind Power Bhavnagar P Ltd v MSEDCL.

v. The above position of law has been reiterated by the Hon'ble Appellate Tribunal for Electricity in Appeal No.67 of 2021 dated 29.06.2021 M/s Solitaire BTN Solar Private Limited v TNERC & Ors ("BTN Solitaire"). The Appellant in Appeal No. 57 of 2021 is an entity similarly situated as the Petitioner herein. While considering the delays caused by Respondent TANGEDCO and the TANTRANSCO in effecting proper connectivity for transmission of power, thereby preventing the Petitioner from commissioning within the stipulated time period, the APTEL held as follows:

"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 fulfil 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.”

- vi. It is an undisputed fact and a settled position in law that the onus to provide connectivity to Petitioner’s solar power plant for evacuation of power falls on the Respondent TANGEDCO and the 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.
- F. Delays caused by Respondent TANGEDCO and the outbreak of COVID 19 entitle the Petitioner to an extension of COD:
  - i. At the outset, Petitioner submits that it has fully commissioned its solar power plant on 29.01.2020 and has been injecting power into the grid from that date. Petitioner has also raised invoices for the sale of such power and has received no payment from TANGEDCO as on date.
  - ii. It is pertinent to note that in the case of BTN Solitaire Supra, the Hon’ble APTEL has held that for delays caused by the Respondent TANGEDCO/TANTRANSCO in respect of obligations mandated as per

the terms of the Letter of Intent and the Electricity Act, 2003 a project specific extension can be granted. The relevant extract is reproduced hereunder:

“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.

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.”

- iii. In view of the above judgement of APTEL, this Commission passed an order dated 28.09.2021 giving effect to the above judgement and directing the Respondent TANGEDCO to return the bank guarantees.
  - iv. In the instant case, Respondent TANGEDCO and TANTRANSCO obtained route approval and railway line crossing approval only on 25.09.2019 and 27.12.2019, exceeding the scheduled date of commissioning as set out in the PPA.
  - v. In spite of the above delays, Petitioner has successfully commissioned its power plant on 29.01.2020 and has been injecting power into the grid as on date.
- G. Issuance of notice invoking force majeure within time to the TANGEDCO is not an absolute term of the PPA in as much as the TANGEDCO was part of all the correspondences
- i. It is relevant to state herein that the Respondent, during the arguments conceded that the force majeure event may have occurred, however, raised a technical argument that the force majeure clause was not invoked in time and that no notice was given to TANGEDCO within the period mentioned in the PPA. In this regard, the force majeure clause may be reproduced for ready reference:

“16. Force Majeure

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

“Force Majeure” events mean 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 affects the performance by either party such as but not limited to:

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

- ii. The Respondents have sought to rely on such technicality by submitting that this part of the force majeure clause is an absolute term of the PPA. However, the same is denied and it is submitted that the aforesaid clause does not state that no claims are available to parties if notice is not issued within 15 days’ time as stipulated in the PPA. Further, it must be pointed out

that the TANGEDCO has till date not made any contention to state that the prejudice was caused to them due to the Petitioner not issuing issue within 15 days. The TANGEDCO was well aware of the issue faced by the Petitioner in respect of the change in law, local elections which was communicated vide letters dated 23.09.2019 and 24.09.2019, as well as all the correspondences with respect to the railway approvals that were sent to TANGEDCO. As stated above, the Petitioner had in fact, put TANGEDCO on notice of the issues faced by it and it is not as though TANGEDCO was completely unaware of these.

- iii. The notice to TANGEDCO invoking force majeure clause within time is only mandatory if the TANGEDCO was unaware of such force majeure events. However, as explained hereinabove, it is evident that the TANGEDCO was well aware of the circumstances faced by the Petitioner during the contemporaneous point in time and TANGEDCO was in fact marked on all the correspondence in respect of the same.
- iv. The Commission has inherent powers under Clause 48(1) of the TNERC (Conduct of Business) Regulations, 2014 which provides that “Nothing in these Regulations shall be deemed to limit or affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission.” and as such the Commission is not restrained by lack or delay in issuing notice, from issuing appropriate orders in the interest of justice, especially since the Petitioner has successfully commissioned its power plant on 29.01.2020 and has been supplying electricity since January, 2020. It is however, unfortunate that the

Petitioner has received no payment from the TANGEDCO thus far for the electricity supplied by it.

- H. No losses would be caused to TANGEDCO if the Petitioner's prayer for extension is allowed -
  - i. As per the terms of the PPA, the Respondent TANGEDCO is the sole purchaser of power of the Petitioner.
  - ii. If the Petitioner is granted a project specific extension, no prejudice or hardship will be caused to TANGEDCO in as much as TANGEDCO will be given the benefit of continuous power supply from the Petitioner's solar power plant.
  - iii. Furthermore, by purchasing power from the Petitioner, TANGEDCO will remain compliant with the extant RPO regulations which mandate obligated entities such as the Respondent to purchase power from renewable energy generators such as the Petitioner.

#### **10. Findings of the Commission:-**

10.1. We have heard the parties at length and perused the material records adduced as evidences before us.

10.2 The prayer of the petitioner in this D.R.P.No.9 of 2020 is to grant the petitioner an extension of the commercial operation date from 26-09-2017 till 30-01-2019 in as much as the actual commissioning of the petitioner's solar power plant was delayed due to justifiable reasons and commissioned on 29-01-2020 and consequently direct the respondents not to take precipitative action including not enforcing any security for the delay in CoD.

10.3. It is seen from the petition that the petitioner relies upon two grounds for the relief namely (a) the change in law arising out of levy of Safe Guard Duty and (b) delay attributable to TANTRANSCO & TANGEDCO in energising the Plant and delay in seeking approved from other authorities such as Railways. We are not inclined to entertain the plea for ordering the relief sought for on account of “Change in Law” arising out of levy of Safe Guard Duty as there is a failure to issue notice to the opposite side as required under the PPA. However, the question as to whether delay on the part of the licensee in energising a generating plant resulting in disabling the licensee from encashing the Bank Guarantee and levy of Liquidated Damages is no longer *res integra* and has been well settled by the Hon’ble APTEL in Appeal No. 67 of 2021 which will be discussed in the later part of this order.

10.4. In order to first to ensure whether there is any delay attributable to the respondent in energising the plant, it is necessary to reproduce the averments made by the petitioner in the written submissions. The following portions of the written submissions of the petitioner clearly reveals the fact that there is a delay in energising the plant of the petition which falls within the PPA Period.

*Delay in route approval and railway lines approval by the TANGEDCO and other Government authorities:*

\* *The Petitioner company applied for its route approval from the TANTRANSCO as early as 15.06.2019. During the inspection conducted by the TANTRANSCO, it was found that the Petitioner’s 110KV line can be linked to the existing 400/230-110 kv sub station at*

*Thennampatty by stringing the Petitioner's line to the existing free arm of the 230kv SC line on the DC tower constructed by NLC Power Corporation Ltd, which also owns and operates a 100MW solar power plant adjacent to the Petitioner's power plant.*

- \* Necessary 'No Objection Certificate' was sought from NLC Power Corporation by the TANTRANSCO on 19.06.2019 and the same was granted by NLC Power Corporation on 09.07.2019.*
- \* Thereafter, the Superintending Engineer, General Construction set out the route map and sent it for the approval of the TANGEDCO and the TANTRANSCO on 31.08.2019 and the same was approved only on 25.09.2019 and 26.09.2019 respectively. Only after such approval could the construction of the said 110kv line commence.*
- \* This approval was itself obtained very belatedly as the date of commissioning of the Petitioner's plant was 25.09.2019. Therefore, for no fault of the Petitioner company, the Petitioner was unable to commission its power plant since route approval for an existing tower and sub station was delayed by the TANTRANSCO.*
- \* It is pertinent to note that the entire process of obtaining route plan approval falls within the domain of the TANTRANSCO only and the Petitioner cannot hasten the process in any manner.*
- \* This shows that the TANTRANSCO's lackadaisical approach has affected the case of the Petitioner prejudicially, i.e. Petitioner was unable to commission its plant by 25.09.2019 as the route approval was obtained by TANTRANSCO only on 25.09.2019 and 26.09.2019,*

*thereby forcing the Petitioner to approach the Commission, for not fault of theirs.*

*iv. Delay in obtaining railway approval for line crossing:*

- \* While obtaining the route approval, it was noticed by the TANTRANSCO that necessary railway line crossing approval must also be obtained since the Petitioner's 110kv line, when erected, crosses railway lines. Obtaining such approvals squarely falls within the domain of the TANTRANSCO and not the Petitioner.*
- \* To the Petitioner's utter shock and dismay, the railway line crossing approval was made to the office of the Southern Railways only on 30.10.2019 by the Superintending Engineer, General Construction i.e., more than one month after the Petitioner's scheduled date of commissioning.*
- \* The Southern Railways returned the TANTRANSCO's application on 09.12.2019. Thereafter, the Southern Railways accorded their approval for railway crossing only on 27.12.2019 subject to certain conditions set out in their approval letter itself (more than 3 months after the scheduled date of commissioning).*
- \* It is only after the said railway crossing approval and route approval, could the TANTRANSCO even begin their construction activities and erection of lines. Therefore, is abundantly clear that the Petitioner was made to wait for several months post its scheduled date of commissioning due to the delay caused by the TANTRANSCO.*

- \* *It is pertinent to note that, in spite of such delays, the Petitioner was always ready and willing to commission its power plant. The Petitioner's power plant was fully commissioned on 29.01.2020 and the Petitioner has been generating electricity and supplying the same to the TANGEDCO ever since. A copy of the Petitioner's generation details since January,2020 has been filed along in its additional typed set of papers dated 10.10.2020. In fact, Petitioner has not been paid its dues for the power injected into the grid in spite of several letters issued seeking payment.*
  - \* *It is now settled law that a generator cannot be held liable for delays caused on the part of the TANGEDCO/TANTRANSCO. The same has been upheld by the Hon'ble Maharashtra Electricity Regulatory Commission in Case No. 286 of 2019 Clean Wind Power Bhavnagar P Ltd v MSEDCL.*
- v. *The above position of law has been reiterated by the Hon'ble Appellate Tribunal for Electricity in Appeal No.67 of 2019 dated 29.06.2021 M/s Solitaire BTN Solar Private Limited v TNERC & Ors ("BTN Solitaire"). The Appellant in Appeal No. 57 of 2021 is an entity similarly situated as the Petitioner herein. While considering the delays caused by Respondent TANGEDCO and the TANTRANSCO in effecting proper connectivity for transmission of power, thereby preventing the Petitioner from commissioning within the stipulated time period, the APTEL held as follows:*

*"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 Theni – 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 fulfil its obligation in terms of RfS, LoI, 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.”*

- vi. It is an undisputed fact and a settled position in law that the onus to provide connectivity to Petitioner’s solar power plant for evacuation of power falls on the Respondent TANGEDCO and the 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.*

10.5. The Hon'ble APTEL in its judgement 05.07.2021 in Appeal No.67 of 2021 has held as follows.

*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 theready 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.*

10.6. In this connection, we are to observe that there are two principal contentions advanced for relief for extension of time namely, a) the difficulties experienced by the petitioner on various counts and b) the delay caused by the respondent. While the former is not acceptable, the latter is acceptable in view of the ratio laid down in Appeal No. 67 of 2021. This is all the more important in view of the fact that no minimal defence much less solid defence has been put up by the respondent to explain the delay even while there was all round attack on the petitioner on the merits of the claim. This main issue, namely, the delay in energising the plant, it is seen, has been left totally undefended by the respondent and hence in the absence of any defence on the part of the respondent, we are constrained to decide the issue against the respondent. In view of the same, we find that the petitioner has a

case for relief in view of the inexplicable delay in energising the plant of the petitioner. The following discussions would clearly establish the same.

10.7. It is seen that the crucial date for commissioning of the plant as contemplated in the PPA is 25-09-2019 i.e. 24 months from the date of signing of the PPA in the normal circumstances. However, there is a provision for extension of the time limit for commissioning of plant upto 34 months in the PPA. It is seen that the petitioner applied for its route approval from TANTRANSCO on 15-06-2019 itself. However, there was delay in getting the No Objection Certificate from the M/s.NLC Power Corporation Ltd. and further there was delay in obtaining the Railway's approval for line crossing. It is the case of the petitioner that application for route approval was submitted in time and but for the delay on the part of the licensee in obtaining the necessary approvals from the other authorities such as M/s. NLC Power Corporation Ltd. and Railways, the plant would have been commissioned well within the time limit of 24 months. Ongoing through the written submission, it is seen there has been delay on the part of TANGEDCO and TANTRANSCO in getting the necessary approval and hence we are of the considered view the petitioner cannot be faulted for delay in commissioning of the plant beyond the normal period of 24 months and the licensees have a share of blame on delay in commissioning the plants.

10.8. In view of the same, it is observed that the petitioner cannot be penalized with invocation of Bank Guarantee and levy of Liquidated Damages for the delay in commissioning of the plant beyond 24 months.

In the result, the petition is allowed.

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

(Sd.....)  
(M.Chandrasekar)  
Chairman  
/True Copy /

**Secretary**  
**Tamil Nadu Electricity**  
**Regulatory Commission**