



नई दिल्ली  
NEW DELHI

याचिका संख्या /Petition No.: 180/MP/2018

कोरम/Coram:

श्री पी. के. पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson  
डॉ. एम. के. अय्यर, सदस्य/ Dr. M.K. Iyer, Member  
श्री आई. एस. झा, सदस्य/ Sh. I.S. Jha, Member

आदेश दिनांक /Date of Order: 18<sup>th</sup> of December, 2019

**IN THE MATTER OF:**

Petition under Section 79 (1) (f) and other applicable provisions of the Electricity Act, 2003, by the Petitioners against NTPC Ltd., which has levied penalty/liquidated damages and illegally threatened to invoke the Performance Bank Guarantees on account of delay in commissioning of the Projects.

**AND IN THE MATTER OF:**

1. Suzlon Energy Ltd.
2. Aalok Solarfarms Ltd.
3. Abha Solarfarms Ltd.
4. Heramba Renewables Ltd.
5. Shreyas Solarfarms Ltd.

All maintaining Office at  
'Suzlon', 5, Shrimali Society  
Near Shri Krishna Compelx  
Navrangpura,

**VERSUS**

1. National Thermal Power Corporation Ltd.  
Represented by its Chairperson  
Core-7, SCOPE Complex, 7,  
Institutional Area, Lodi Road,  
New Delhi – 110003
2. The Ministry of New and Renewable Energy  
Represented by its Secretary,  
Block-14, CGO Complex,  
Lodhi Road, New Delhi-110003
3. Jaipur Vidyut Vitran Nigam Limited  
Vidyut Bhawan, Jyoti Nagar,  
Jaipur-302005
4. Ajmer Vidyut Vitran Nigam Limited  
Vidyut Bhawan, Panchsheel Nagar,  
Makarwall Road,  
Ajmer-305004
5. Jodhpur Vidyut Vitran Nigam Limited  
New Power House, Industrial Area,  
Jodhpur-342003

**Parties Present:** Shri Amit Kapur, Advocate, SEL  
Ms. Abiha Zaidi, Advocate, SEL  
Shri N.K. Deo, SEL  
Shri M.G. Ramachandran, Sr. Advocate, NTPC  
Ms. Poorva Saigal, Advocate, NTPC  
Ms. Tanya Sareen, Advocate, NTPC  
Shri I.Vppal, Advocate, NTPC

**आदेश/ ORDER**

The Petitioner No. 1, Suzlon Energy Ltd. is one of the leading renewable energy solutions providers and engaged in generation and sale of electricity in the State of Rajasthan. The Petitioner has filed the present Petition under Section 79 (1) (f) and other applicable

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provisions of the Electricity Act, 2003 against the impugned action of NTPC by which it has threatened to invoke the Performance Bank Guarantees (hereinafter referred to as 'PBGs') of the 6 x 10 MW Solar Power Projects on account of delay in commissioning of the Projects.

2. The Petitioner No. 2, Aalok Solarfarms Ltd., Petitioner No. 3, Abha Solarfarms Ltd., Petitioner No. 4, Heramba Renewables Ltd. (I & II), Petitioner No. 5, Shreyas Solarfarms Ltd. (I & II) are special purpose vehicles of Petitioner No.1 and are engaged in the business of solar power generation and sale. They have set up a Solar Power Plant of 10 MW each. The Petitioners No. 2 to 5 are hereinafter collectively referred to as 'Solar power Developers or 'SPDs'.
3. The Respondent No. 1, M/s NTPC Ltd. (hereinafter referred to as 'NTPC') is a Central Public Sector Undertaking and is engaged in the business of generation of electricity and allied activities and has been identified by the Government of India as the Implementation Agency for setting up of Grid – connected Solar PV Power Projects under State Specific Bundling Scheme and for facilitating purchase and sale of 33 kV or above Grid-connected Solar PV Power under the National Solar Mission of Government of India.
4. The Respondent No. 2, Ministry of New and Renewable Energy (hereinafter referred to as 'MNRE'), is the nodal Ministry of the Government of India for all matters relating to new and renewable energy. MNRE issued guidelines for implementation of Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranch-I for "State Specific Bundling Scheme" under which NTPC was designated as the implementation agency.
5. The Respondent No. 3, Jaipur Vidyut Vitran Nigam Ltd., the Respondent No.4, Ajmer Vidyut Vitran Nigam Ltd., and the Respondent No. 5, Jodhpur Vidyut Vitran Nigam Ltd. are the Discoms operating in the State of Rajasthan.
6. The Petitioners have made following prayers:
  - a) *Declare that the Petitioners are entitled to an extension of the Scheduled Commissioning Date;*

- b) *Direct the Respondent No. 1 to not impose any liquidated damages and/or encashment of the Bank Guarantees for delay in achieving Scheduled Commissioning Date, since the same is on account of Force Majeure Events;*
- c) *Pending proceedings in the Petition, grant interim relief and direct Respondent No. 1 not to take any coercive action against the Petitioners as prayed for in the Petition; and*
- d) *Any other or further relief(s) as may deem fit may please be granted.*

**Brief facts of the case**

- 7. On 10.03.2015, the Government of India introduced National Solar Mission Phase-II Guidelines for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I - State Specific Bundling Scheme.
- 8. On 03.07.2015, NTPC issued the Request for Selection (RfS) document for setting up Grid Connected Solar-PV Power Projects of cumulative capacity of 100 MW (10 MW x 10 Projects) in the State of Rajasthan.
- 9. On 13.05.2016, NTPC issued a Letter of Intent to the SPDs.
- 10. On 02.08.2016 NTPC entered into six Power Purchase Agreements (hereinafter referred to as 'PPAs') with the Petitioners for setting up of 60 MW for supply of power at a tariff of Rs. 5.07/kWh on long term basis i.e. 25 years. The allotted capacity of 60 MW was split by Suzlon into six (6) parts of 10 MW each for development of Solar Power Projects, for generation and sale of solar power under National Solar Mission by the respective SPDs being (i) Abha Solarframs Ltd. (ii) Aalok Solarfarms Ltd. (iii) Heramba Renewables Ltd. (I & II) and (iv) Shreyas Solarframs Ltd. (I & II).
- 11. On 23.12.2016, M/s Mohangarh Engineers & Construction (Contractor) informed the Petitioner No.1 that the Mining Department has informed that a New Mining Policy is being framed as such the permit for 'Murram cannot be granted till New Mining Policy is notified.
- 12. On 27.12.2016, the Revenue Department allotted land to Petitioner No.1 for the Power projects.

13. On 31.01.2017, the Petitioners executed Transmission Agreements with Rajasthan Rajya Vidyut Prasaran Nigam Ltd. (hereinafter referred to as 'RRVPNL') for providing one number 33kV bay allocation in 220kV substation at 220/132 kV GSS, Badisid, District Jodhpur for evacuation of power from the Projects.
14. On 01.03.2017, the New Mining Policy was notified by the Government of Rajasthan.
15. On 22.03.2017, the Petitioner wrote to Rajasthan Renewable Energy Corporation Ltd. (hereinafter referred to as 'RREC') to recommend grant of short term permit/approval of required quantity of '*Murram*'.
16. On 31.03.2017, RREC requested Mining Department, Jodhpur for short term permit/approval of required quantity of '*Murram*' for the SPDs.
17. On 26.05.2017, SPDs were granted required/conditional permit for '*Murram*' by the Mining Department, Jodhpur.
18. On 12.07.2017, the SPDs were mandated to achieve the Schedule date of Commissioning (hereinafter referred to as '*SCoD*') of the projects as per PPAs.
19. On 20.07.2017, the Petitioners requested RRVPNL to expedite completion of 33kV bay work in terms of the Transmission Agreements in order to enable SPDs to achieve SCoD of the projects.
20. On 25.08.2017, the Petitioners sought extension of time for commissioning of the Projects on account of implementation of GST, interconnection Transmission Facilities from RRVPNL etc.
21. On 01.09.2017, the Petitioners wrote to RREC requesting to advise RRVPNL to complete the pending work of the 33kV bay.
22. On 07.09.2017, RREC requested RRVPNL to complete the power evacuation system work at the earliest in terms of the Transmission Agreement.
23. On 12.09.2017, NTPC rejected the request of the Petitioners for extension of time for commissioning of the Projects.

24. On 27.09.2017, RRVPNL notified the Petitioners regarding the completion of Bay construction work.
25. On 13.10.2017, the Petitioners requested RREC to recommend NTPC to waive off the Liquidated damages levied on SPDs since there was delay of 104 days by RRVPNL in construction of 33kV bay work.
26. On 26.10.2017, RREC wrote to RRVPNL to confirm the date of completion of bay work at the projects.
27. On 03.11.2017, SPDs requested MNRE to issue suitable directions to NTPC for extension of SCoD without imposition of any liquidated damages.
28. On 06.11.2017, RRVPNL certified that the 33kV allotted to the SPDs was completed on 27.09.2017 and charged on 28.10.2017.
29. On 30.11.2017, the Mining department gave the permit for use of 'Murram' to M/s Heramba.
30. The Petitioners commissioned 6 x 10 MW Solar Photo Voltaic Power Generation Projects on various dates in October, 2017 and November, 2017.
31. On 05.12.2017, 29.01.2018 & 01.05.2018, the Petitioners again requested NTPC for extension of the SCoD because of delay caused due to unforeseen, unavoidable and uncontrollable reasons not attributable to the Petitioners and hence are the covered as Force Majeure events.
32. On 30.05.2018, NTPC informed the SPDs stating that in terms of Article 4.6 of the PPA, they are liable to pay liquidated damages to NTPC for the delay in the SCoD and also stated that if the SPDs do not pay the stipulated amount towards liquidated damages by 06.06.2018, it is entitled to invoke the PBGs.
33. The Petitioners filled the Petition on 04.06.2019 seeking extension of the SCoD without the levy liquidated damages.

### **Submissions of the Petitioner in the pleadings**

34. The Petitioners have submitted that it has developed 6 x 10 MW Solar Photo Voltaic Power Generation Projects under Batch-II Tranche-II of National Solar Mission Phase-II State Specific Bundling Scheme (Non Solar Park-DCR Category) in Rajasthan through four SPVs viz. Petitioners 2 to 5 and have executed six identical PPAs dated 02.08.2016.
35. The Petitioners have submitted that as per the PPAs, the SCoD of the projects was 12.07.2017. However, the projects were commissioned by the Petitioners as under:

<b>S. No.</b>	<b>Solar Power Developer</b>	<b>SCoD</b>	<b>Actual CoD</b>	<b>Delay (days)</b>
(i)	Abha Solarfarms Ltd.	12.07.2017	13.11.2017	124
(ii)	Aalok Solarfarms Ltd.	12.07.2017	17.10.2017	97
(iii)	Heramba Renewables Ltd. (“ <i>Heramba-I</i> ”)	12.07.2017	17.10.2017	97
(iv)	Heramba Renewables Ltd. (“ <i>Heramba-II</i> ”)	12.07.2017	28.10.2017	108
(v)	Shreyas Solarfarms Ltd. (“ <i>Shreyas -I</i> ”)	12.07.2017	17.11.2017	128
(vi)	Shreyas Solarfarms Ltd. (“ <i>Shreyas -II</i> ”)	12.07.2017	17.11.2017	128

36. The Petitioners have submitted that relevant provisions of the PPAs stipulates as under:-
- As per Article 2.1 of the PPAs, the ‘Effective date’ of the PPAs was 13.06.2016.
  - As per Article 1.1 of the PPAs, SCoD was defined to mean 12.07.2017 i.e. *thirteen (13) months from the Effective Date.*
  - As per Article 3.2.4 of the PPAs, “*In case of inability of the SPD to fulfil any one or more of the conditions specified in Article 3.1 due to any Force Majeure event, the time period for fulfilment of the Conditions Subsequent as mentioned in Article 3.1, shall be extended for the period of such Force Majeure event.*”
  - As per Article 3.2.5 of the PPAs “*Provided that due to the provisions of this Article 3.2.4, any increase in the time period for completion of conditions subsequent mentioned under Article 3.1, shall also lead to an equal extension in the Scheduled Commissioning Date*”.
  - As per Article 3.2.6 of the PPAs, “*In case of delay in achieving conditions specified in Article 3.1 as may be applicable, NTPC shall encash Performance Bank Guarantee and*

*shall remove the project from the list of the selected projects, unless the delay is on account of Force Majeure.”*

- f. As per Article 3.3.4 of the PPAs, subject to the Force Majeure conditions mentioned in Article 4.5, *“If the SPD fails to commence supply of power from the SCoD specified in this Agreement NTPC shall have the right to encash the Performance Bank without prejudice to other rights of NTPC under this Agreement.”*
  - g. Article 4 of the PPAs provides for obligations of the SPDs with respect to construction and development of the project. This article requires the Solar Power Developer to obtain all consents, clearances and permits for the purposes of, inter alia, designing, constructing, erecting, commissioning, completing and testing the power project. In addition, the Solar Power Developer was responsible for getting Connectivity with the STU/CTU System for evacuation of power by the SCoD.
  - h. Article 4.5.1 of the PPAs provides that in the event the SPD is prevented from performing its obligations under Article 4.1 by the Scheduled Commissioning Date due to Force Majeure events affecting the Solar Power Developer, the Scheduled Commissioning Date shall be deferred for a reasonable period to permit the Solar Power Developer to overcome the effects of Force Majeure events.
37. The Petitioners have submitted that the Revenue Department allotted land to Petitioner No.1 for development of the Projects on 27.12.2016. In compliance with the Article 3.1(c) of the PPAs, to get Connectivity with the CTU/STU System for confirming the evacuation of power by the SCoD, SPDs entered into respective Transmission Agreements with ‘RRVPL’ on 31.01.2017 for providing one number 33kV bay allocation in 220kV substation at 220/132 kV GSS, Badisid, District Jodhpur for evacuation of power from the Projects. On November 15, 2016, SPDs also deposited the applicable connectivity charges of Rs. 20 lakhs (@ Rs. 2 Lakh per MW) as stipulated in the Rajasthan Solar Energy Policy 2014/RERC Regulations.
38. The Petitioners have submitted that the primary requirement to commence project work was the construction of project roads. In order to commence road construction, contractors of Petitioner No.1 approached the Mining Department for short term permits for collecting and transporting the ‘Murrum’ required for construction of the Project Roads. However, the Mining Department did not entertain the said applications for permits stating that a new mining policy is being framed and it cannot grant any permits till the new policy is notified.



39. The Petitioners have submitted that the SPDs are entitled to an extension of SCoD on account of the following factors that were beyond the reasonable control of the SPDs and which are squarely covered under various provisions of the PPAs and MNRE Guidelines entitling the SPDs to a legitimate extension.

***I. Delays in achieving the SCoD were due to impediments beyond control of the SPDs***

40. The Petitioners have submitted that Clause 3.4 of the MNRE Guidelines provides that SPDs are entitled to extension of SCoD if there is delay on account of connectivity. The relevant extract of the said Clause is as under: -

*“3.4 ...The developers will be given extra time if there is any delay in giving possession of land and connectivity equivalent to the delay. There will however be no compensation or LD or deemed generation for any delay...If extension is required to be given beyond 3 months due to delay in park development or evacuation, NVVN will approach MNRE, who will be authorized to decide on further extension with the approval of the Secretary, MNRE.”*

41. Clause 3.11 of the MNRE Guidelines stipulates that in case the delay in commissioning is on account of delay in connectivity, NTPC shall not encash the Bank Guarantees and can extend the date of commissioning without any financial implications on the Solar Power Developer and further in case of an extension beyond 3 months, NTPC can do so with the approval of MNRE. The relevant extract is quoted as under:-

*“3.11 Financial Closure  
In case of delay in achieving above condition as may be applicable, NVVN shall encash Performance Bank Guarantees and shall remove the project from the list of the selected projects, unless the delay is on account of delay in allotment of land in Solar Park or by Government or delay in transmission line or Force Majeure. An extension can however be considered, on the sole request of SPD on payment of a penalty of Rs. 25,000/- per day per MW. This amount will go into the Payment Security Fund. This extension will not have any impact on the Scheduled Commercial Operation Date.  
NVVN can extend the time for financial closure and commissioning date by upto 3 months, without any financial implications on the SPD, if there are delays in land allotment or connectivity and in States where solar park is not likely to be ready for a particular bid, NVVN may allow all bidders to choose their site on their own anywhere in the State. For any extension beyond 3 months, NVVN will approach MNRE, who will be authorized to decide on further extension with the approval of Secretary, MNRE...”*

42. The Petitioners have submitted that in terms of Clause 3.4 and Clause 3.11 of the MNRE Guidelines, NTPC can encash the Bank Guarantees in case of delay in achieving SCoD,

unless the delay is on account of delay in Transmission Line. The Clause further stipulates that in case the delay in commissioning is on account of delay in connectivity, NTPC can extend the date of commissioning without any financial implications on the SPDs and further in case of an extension beyond 3 months, NTPC can do so with the approval of MNRE.

43. The Petitioners have submitted that in replication of such enabling powers under the MNRE Guidelines, the PPAs allow deferring the SCOD if delay is *inter alia* due to force majeure events affecting the SPDs. In this regard, reliance is placed on Article 4.5.1 of the PPAs, extracted as under:-

“4.5. Extension of Time:

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

*(a) any NTPC event of default; or*

*(b) Force Majeure Events affecting NTPC, or*

*(c) Force Majeure Events affecting the SPD,*

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

44. The Petitioners have submitted that it is a settled position of law that in case of statutory contracts, terms of the contract must be read in consonance with the law and policy. In this regard, reliance is placed on *All India Power Engineers’ Federation vs. CERC & Ors. (2016) 1 SCC*; *Energy Watchdog vs. CERC & Ors. (2017) 14 SCC 80*.

45. The Petitioners have submitted that Recital No. 4 to the RfS dated 03.07.2015, issued by NTPC provides that RFS must be read in conjunction with the MNRE Guidelines. Further, LoI dated 13.05.2016, in para 3 also provides that the documents including the RfS and the MNRE Guidelines form an integral part of the PPAs.

46. The Petitioners have submitted that in view of above, Article 4.5.1 of the PPAs must be read conjointly with Clause 3.4 and 3.11 of the MNRE Guidelines to give full effect to the terms of the PPAs. A conjoint reading of these provisions entitles the SPDs for an extension of the SCoD if the delay in achieving the SCoD is on account of delay in interconnection facilities being made available to the SPDs or on account of force majeure events.

## ***II. RRVPNL failed to provide inter-connection facilities in time.***

47. The Petitioners have submitted that it was obligation of RRVPNL to provide inter-connection facilities in time and delay in providing the same to SPDs rendered it impossible for the SPDs to achieve timely completion of the projects.
48. The Petitioners have submitted that:
- a. Clause 4.2 of the MNRE Guidelines provide that the transmission system shall be provided by the STU to facilitate evacuation of power from the projects, which *inter alia* includes providing connectivity to the grid.
  - b. Clause 3.5.C (vi) of the MNRE Guidelines and Section 3.9.2 (iv) of the RfS provides that the STU shall endeavour to match the commissioning of the transmission system with the commissioning of the solar power projects.
  - c. SPDs entered into Transmission Agreements dated 31.01.2017 with RRVPNL, wherein RRVPNL was tasked with providing the interconnection facilities to the SPDs by 13.06.2017, i.e., one month prior to the SCoD.
49. The Petitioners have submitted that they regularly pursued with RRVPNL regarding timely availability of the interconnection facilities. SPDs have sent letters dated 20.07.2017; 01.09.2017; 07.09.2017 to RREC/RRVPNL highlighting the slow progress of work relating to inter-connection facilities. However, there was a delay in the successful completion and subsequent charging of the interconnection facilities by RRVPNL. RRVPNL completed the erection and construction of the interconnection facilities on 27.09.2017. Once the inter-connection facilities were completed, SPDs immediately completed other related work and commissioned the Projects within one month of the completion of interconnection facilities by RRVPNL and achieved COD on 13.11.2017 (Abha), 17.10.2017 (Aalok), 17.10.2017 (Heramba I), 28.10.2017 (Heramba II), 17.11.2017 (Shreyas I), 17.11.2017 (Shreyas II).
50. The Petitioners have submitted that SPDs' obligations under Article 4.1 of the PPAs to ensure commencement of power supply within SCoD must be read along with their obligations under Article 3.1.(g) of the PPAs which envisages that SPDs shall make adequate arrangements to connect the power project switchyard with the inter-connection facilities at inter-connection/ metering / delivery point.

51. The Petitioners have submitted that delay on account of non-availability of interconnection facilities being an impediment beyond control of the SPDs, qualifies as a force majeure event in terms of the following: -
- a) Article 11.3.1(d) of the PPAs provide that an event of Force Majeure identified under NTPC Discom PSA will qualify as a Force Majeure event.
  - b) Article 7.3.1 of PSA dated 11.05.2016 between NPTC and RUVNL recognizes that an event affecting the STU thereby affecting evacuation of power from the 'Delivery Points' by RUVNL will qualify as a Force Majeure event.
  - c) Delivery Points are defined to mean SPD's Delivery Point and NTPC's Delivery Point.

Therefore, delay in completion of inter-connection facility on account of STU is a Force Majeure event.

52. The Petitioners have submitted that the delay in interconnection facilities is recognized as a Force Majeure event. The Petitioners have placed there reliance on the APTEL judgment in *Chamundeswari Electricity Supply Co. Ltd. vs. Saisudhir Energy (Chitradurga) Pvt. Ltd. & Anr. Appeal No. 176 of 2015 and IA Nos. 364 and 368 of 2015, dated 21.03.2018, reported as 2018 SCC Online APTEL 65; the Commission Order dated 24.01.2019, in Kudgi Transmission Limited vs. Bangalore Electricity Supply Company Limited in Petition No. 248/MP/2016.*
53. The Petitioners have submitted that MNRE Guidelines squarely apply to projects in non-solar park as well.
- a. The 'scope of the Guidelines' applies to all solar power projects under the State Specific Bundling Scheme, without any discrimination between projects located in solar parks and non-solar parks.
  - b. RfS has been issued specifically for Non-Solar Park Category. The RFS clearly mentions that the MNRE Guidelines are applicable to NSM Phase II Batch II Projects. Clause 2.1 of the MNRE Guidelines envisage the following 3 situations where the provisions of the Guidelines would be applicable: -
    - i) Entire tendered quantity located in the Solar Parks in the State.
    - ii) Part of tendered quantity located in the Solar Park and part outside Solar Park.

iii) Entire tendered quantity located outside the Solar Park.

**III. Delay on account of non-availability of Murram was beyond the control of SPDs.**

54. The Petitioners have submitted that the primary requirement to commence project work was the construction of access roads. Thus, access roads are considered as an activity on the 'critical path' of the Projects. The doctrine of 'critical path' was recognized by the APTEL in its judgment dated 28.11.2018 in *Damodar Valley Corporation vs. Delhi Transco Ltd. & Ors.* Appeal No. 256 of 2015, reported as 2018 SCC Online APTEL 130.
55. The Petitioners have submitted that Suzlon appointed Mohangarh Engineers & Construction Company (hereinafter referred to as 'Contractor') to construct the access roads. On 23.12.2016, the contractor informed Suzlon that:
- i) There is delay in getting permit of *Murram* on account of proposed changes to the Rajasthan Minor Mineral Concession Rules 1986. In view of the pendency of the new law, the Mining department was not entertaining any requests for short term permits from private firms while this amendment was underway. Hence, the Contractor had requested for extension of time for construction of roads.
  - ii) On 01.03.2017, the Rajasthan Minor Mineral Concession Rules, 2017 were notified.
  - iii) On 22.03.2017, the SPDs wrote to RREC to recommend grant of short-term permits of the required quantities of *Murram*, to Assistant Mining Engineer and also requested them to expedite such approval. It was clarified that the projects were being developed for the Central Government under the NSM. On 31.03.2017, RREC wrote to Assistant Mining Engineer, Mining Department requesting the latter to grant short-term permits of the required quantities of *Murram*.
56. The details of the permission/short-term permits for excavation and use of murrum granted by the Mining Department have been tabulated herein-under:-

SPD	Date of grant of permission/short-term permit	Quantity Tonnes	Timeline of grant
Abha	Option C approval granted on 26.05.2017	9000	46 days prior to SCoD
Shreyas	Option C approval granted on 26.05.2017	34000	46 days prior to SCoD
Aalok	Option B approval granted on 30.11.2017	9000	143 days after SCoD
Heramba	Option B approval granted on 30.11.2017	18000	143 days after SCoD

57. The Petitioners have submitted that on 01.03.2017, New Mining policy was unveiled and on 22.03.2017, SPDs required to construct WBM (Water Bound Macadam) road for which they need to obtain the Short term permit/approval from the concerned Mining department for about 9000 tonnes of Murram. However, as per rule no. 63 of the Mineral Concession Rules 1986, Short term permit could be granted for Murram only up to 500 tonnes, except in case of contract of works department of State Government/ Central Government/ Autonomous bodies/ Government undertaking, where Short term permit can be granted for the required quantities (without any upper limit) on recommendation of the concerned department. SPDs therefore requested RREC for recommendation as it was developing the project under the NSM. SPDs adopted prudent utility practices in obtaining short-term permits for *Murram*.
58. The Petitioners have submitted that considering the slow progress of getting the approval, the SPDs in the meanwhile, explored other options to ensure completion of construction of roads within time. Abha and Shreyas approached the Mining Department and obtained Option C approval for Murram (*i.e. to purchase Murram from third parties who already have the license to excavate and use Murram*). From the afore-said table, it is clear that the permission to the SPDs to use Murram (Option –B approval) was granted only on 30.11.2017 (for 3 projects i.e. 2 projects of Heramba and 1 project of Abha).
59. The Petitioners have submitted that the Commission in its Order dated 31.10.2016 in *NTPC vs. Madhya Pradesh Power Management Co. Ltd. Petition No. 212/MP/2016 reported as 2016 SCC Online CERC 549*, has recognized ‘non-availability of Murram’ as one of the factors that ‘*hinders*’ civil works in a project.
60. The Petitioners have submitted that Short-term permits for excavation and use of Murram constitute a statutory approval under the Rajasthan Minor Mineral Concession Rules, 2017. It is a settled position of law that delay in statutory approvals or any other delay on behalf of government instrumentalities that hindered the works in a project is a Force Majeure event

and hence SCoD ought to be extended. The Petitioner has placed its reliance on the following judgments: *Gujarat Urja Vikas Nigam Ltd. & Anr. vs. M/s. Cargo Solar Power Gujarat Pvt. Ltd.* Appeal No. 123 of 2012 reported as 2014 SCC Online APTEL 23; *North Karanpura Transmission Co. Ltd. vs. CERC* Appeal No. 139 of 2013 dated 02.12.2013; *Omega Infraengineers Pvt. Ltd. vs. PSERC & Ors.* Appeal No. 328 of 2017, dated 21.02.2019, reported as 2019 SCC Online APTEL 8; *Taxus Infrastructure & Power Projects Pvt. Ltd. vs. GERC* Appeal No. 114 of 2015 and Appeal No. 131 of 2015 2018, dated 04.11.2018, reported as SCC Online APTEL 86; *M/s. Lanco Kondapalli Power Ltd. vs. Andhra Pradesh Electricity Regulatory Commission*, Appeal No. 154 of 2013 dated 12.01.2015, reported as 2015 SCC Online APTEL 140; *North Eastern Electric Power Corporation Limited vs. Assam State Electricity Board*, Appeal Nos. 159, 162 and 167 of 2005, dated 31.10.2007 reported as 2007 SCC Online APTEL 120; Order dated 29.03.2019 in *Darbhanga Motihari Transmission Co. Ltd. vs. Bihar State Power Transmission Co. Ltd.* Petition No. 237/MP/2017 reported as 2019 SCC Online CERC 21; Order dated 29.03.2019 in *NRSS XXXI (B) Transmission Ltd. vs. UP Power Corporation Ltd.*, Petition No. 195/MP/2017 reported as 2019 SCC Online CERC 22.

#### ***IV. SCoD should be revised on account of force majeure events***

61. The Petitioners have submitted that Article 11.7.1 (a) of the PPAs provide that a party is not in breach of its obligations under the PPAs if the performance of the said obligations was *inter alia* ‘hindered’ due to a force majeure event. The Hon’ble Supreme Court in *Energy Watchdog & Ors. vs. CERC & Ors.* (2017) 14 SCC 80 held that a party can be said to have been hindered if there is something which partly prevents the performance of the obligation under the PPAs. The relevant extract is reproduced herein-under:-

“45. ...Given the fact that the PPA must be read as a whole, and that Clauses 12.3 and 12.7(a) are a part of the same scheme of force majeure under the contract, it is clear that the expression “hindered” in Clause 12.7(a) really goes with the expression “partly prevents” in Clause 12.3. Force majeure clauses are to be narrowly construed, and obviously the expression “prevents” in Clause 12.3 is spoken of also in Clause 12.7(a). When “prevent” is preceded by the expression “wholly or partly”, it is reasonable to assume that the expression “prevented” in Clause 12.7(a) goes with the expression “wholly” in Clause 12.3 and the expression “hindered” in Clause 12.7(a) goes with the expression “partly”. This being so, it is clear that there must be something which partly prevents the performance of the obligation under the agreement....”

62. The Petitioners have submitted that the obligations under the PPAs were contingent on the availability of the interconnection facilities and Murram and non-availability thereof resulted in an impediment beyond the control of the SPDs. In this regard, the Hon'ble Supreme Court in *Industrial Finance Corporation of India vs. Cannanore Spinning & Weaving Mills Ltd.* (2002) 5 SCC 54 held as under:-

“40. It may be noticed here that the statute itself has recognised the doctrine of frustration and encompassed within its ambit an exhaustive arena of force majeure under which non-performance stands excused by reason of an impediment beyond its control which could neither be foreseen at the time of entering into the contract nor can the effect of the supervening event be avoided or overcome.”

**V. Compliance to the requirement of Force Majeure notice.**

63. The Petitioners have submitted that the Commission, in its Order dated 03.04.2018, in *Purulia & Kharagpur Transmission Co. Ltd. vs. PGCIL, Petition No. 110/MP/2016 2018 SCC Online CERC 11*, while interpreting a similar force majeure clause held that provisions of the contract with respect to force majeure notice are complete as long as the aggrieved party intimates the other before approaching the Commission. Therefore, since the SPDs notified NTPC about the force majeure events on 25.08.2017, the same should constitute a compliance to the procedural mandate of notifying the other party about force majeure events. Further, the Hon'ble Supreme Court in *Union of India vs. Madras Bar Assn.*, (2010) 11 SCC 1 recognizes that the Tribunals are not inhibited by procedural technicalities.

**VI. The Commission can grant extension of SCoD beyond the maximum stipulated extension under the PPA.**

64. The Petitioners have submitted that the Commission is empowered to grant extension of SCoD beyond the maximum stipulated extension period under the PPAs. In this regard, reliance is placed on the Order of this Commission dated 16.10.2015, in *Jabalpur Transmission Co. vs. Adhunik Power & Natural Resources Ltd.* in Petition No. 73/MP/2014 in 2015 SCC Online CERC 114 wherein it was held as under: -

“48. Though Article 4.4.2 provides for extension of SCOD upto a maximum period of six months, the Commission after considering the circumstances for delay in grant of forest clearance and Section 164 authorization and the efforts made by the petitioner to



*mitigate the force majeure events, we allow extension of SCOD from 31.3.2014 till the respective dates of commercial operation of the transmission lines.”*

**VII. Wrongful levy of Liquidated Damages by NTPC.**

65. The Petitioners have submitted that NTPC has wrongly contended that it is entitled to levy liquidated damages without proving any actual loss. The said contention is untenable and is against the settled law on liquidated damages that justice requires nothing more than compensation measured by the amount of harm suffered. In this regard, the Petitioners have placed the reliance on the judgment of the Hon’ble Supreme Court in the Constitution Bench decision of *Fateh Chand vs. Balkrishan Dass* AIR 1963 SC 1405 in which it was held that if there is no legal injury, no compensation is payable. The said judgment also emphasized that the Courts shall adopt an *ex-post estimation of damages* instead of an *ex-ante* approach. The Hon’ble Supreme Court in the case of *Maula Baux vs. Union of India*, 1969 (2) SCC 554, held that since the Government of India *failed to prove the amount of reasonable damages* that could be awarded and *did not produce any evidence, no compensation was liable to be awarded*. Further, in *Kailash Nath Associates vs. DDA* (2015) 4 SCC 136, the Division Bench of the Hon’ble Supreme Court *inter alia* held *if damage or loss is not suffered, the law does not provide for a windfall*. Therefore, the interpretation of the Courts is that legal injury is a must, and that Section 74 of the Contract Act did not contemplate the payment of the agreed amount or any amount, even if there was no legal injury.
66. The Petitioners have submitted that merely because the PPAs and the RfS contain a clause for liquidated damages, it cannot be imposed without ascertaining any actual loss suffered by NTPC. Since NTPC has not demonstrated any actual loss, an adverse inference ought to be drawn against NTPC. In light of the afore-said submissions, the Commission may grant relief as prayed for in the Petitions.

**Submissions of Respondent No. 1 (NTPC) in the pleadings**

67. The Respondent No.1 has made the following submissions:

***I. Petitioners to obtain all clearances in respect of the land and associated infrastructure and for connectivity to the STU system***

68. The Respondent No.1 has submitted that in terms of Article 3.1 and Article 4.1 of the PPAs and Clause 3.9.2 of the RfS, it is the sole and absolute responsibility and obligation of the Petitioners to obtain all clearances in respect of the land and associated infrastructure and also for connectivity to the STU system and make arrangements for the same. Therefore, any delay on account of the construction of the road due to unavailability of 'Murram' and/or the interconnection facilities is to the account of the Petitioner. NTPC has placed its reliance on the judgment of the Hon'ble Supreme Court in the case of *Naihati Jute Mills Ltd. v. Khyaliram Jagannath AIR 1968 SC and M/s Alopi Parshad & Sons Ltd. –v- Union of India (AIR 1960 SC 588)*, in which it was held that the non-availability of 'Murram' has made the performance of the contract onerous cannot be a ground for claiming relief or redressal under force majeure.
69. The Respondent No.1 has submitted that the Petitioners had entered into PPAs on 02.08.2016 with the clear knowledge that the Project had to be commissioned within thirteen (13) months. The projects being developed under the non-solar park category, it was left to the Petitioners to decide on the location of the Project including making arrangements for connectivity and the land and associated infrastructure.
70. The Respondent No.1 has submitted that the terms of PPAs for a non- solar park category Projects are different than the solar park projects wherein the obligation of providing the connectivity and the land and associated infrastructure lies with the Solar Park Implementation Agency. The solar park PPAs Article 4.5 specifically recognizes the delay in grant of connectivity and handing over of land as a ground for extension of time. The present PPAs, related to non-solar park development, do not have a similar clause. The delay on account of land and connectivity are not applicable to the present case and cannot be a ground for extension. In fact, the contrast in the two set of PPAs clearly brings about the obligations and responsibility of the developer to obtain all consents and ensure connectivity in a non-solar park plot.
71. The Respondent No.1 has submitted that in terms of the Guidelines notified by MNRE read with Clause 3.6 of the RfS issued by NTPC, it was left to the discretion of the bidder i.e. the
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Petitioner to identify the location of the Project. Further, Clause 3.9.2 of the RfS expressly stipulates that, the Project developer has to submit a letter from the STU confirming the technical feasibility of connectivity of the Plant and that the responsibility of Transmission Connectivity and Access to the STU will lie with the Project Developer.

***Re: MNRE guidelines are not binding on NTPC is baseless and misplaced***

72. The Respondent No.1 has submitted that there are certain provisions of the Guidelines inter-alia provisions related to ‘Extension of Time on account of connectivity and land’ is not applicable to a SPDs setting up Project outside a Solar Park, namely, at a location of its choice. Clauses 3.4 and 3.11 of the MNRE Guidelines are applicable only to a developer setting up Project in a Solar Park and not to a Non- Solar Park Category developer. It is a settled principle that different words/provisions have to be given different meanings. Accordingly, the absence of the said Article 4.5.1(a) in the case of a Non-Solar Park Category Developer has to be given due meaning and effect. NTPC has placed its reliance on the judgment of the Hon’ble Supreme Court in the case of *All India Power Engineers Federation –v-Sasan Power Limited and Ors. (2016) 1 SCC 487*; and *Energy Watchdog –v- Central Electricity Regulatory Commission (2017) 14 SCC 80* to state that the terms of the Contract have to be read with the Policy. In the present case, however, the Guidelines itself limit the applicability of Clause 3.4 and 3.11 to Solar Park category Developer and the same intent is further captured in the express wording of the PPAs finally entered into.

***Re: No timely action by the Petitioners in respect of interconnection facilities***

73. The Respondent No. 1 has submitted that Article 4.2 of the PPAs stipulates that “*the Petitioners to obtain all information from the concern authorities with regard to interconnection facilities as is reasonable necessary to enable it to design, install and operate all system equipment and apparatus on the SPD’s side of interconnection point*”. Despite the above, the Petitioners have not shown any instance on record, prior to 20.07.2017 i.e. before the SCoD of 12.07.2017 that they had approached RVPN/NTPC/RREC with regard to the delay in providing the Bay connectivity.

***Re: Non-availability of interconnection facility is not a force majeure event***

74. The Respondent No. 1 has submitted that the non-availability of Connectivity/ Interconnection Facility does not amount to a Force Majeure Event within the meaning of the PPAs. The Petitioners have relied on Article 11.3.1(d) of the PPAs to state that a Force Majeure Event under the PSA is a Force Majeure Event under the PPAs. Article 7.3.1 (f) of the PSA specifically recognizes only '*an event of force majeure affecting the concerned STU/CTU as the case may be, thereby affecting the evacuation of power from the Delivery Point by the RUVNL*'.
75. The Respondent No. 1 has submitted that the key provision being that it relates to any Force Majeure event relating to 'evacuation' of power. The case of the Petitioners relates to connectivity and not evacuation of power. These two aspects are different. Further, Article 3.1 and 4.1 of the PPAs cast an absolute obligation upon the Petitioners to obtain connectivity before the SCoD.

***II. Petitioners were not prevented from performing on account of Non-Availability of 'Murram' and/or the delay in providing the Bay by RRVPN***

76. The Respondent No. 1 has submitted that the issue of interconnection facilities and unavailability of Murram were raised belatedly because the Petitioners were themselves not in a position to commission the Power Projects by 12.07.2017. Vide Letter dated 25.08.2017 the Petitioners had sought for an extension of time on account of implementation of GST Laws, amongst other issues. After the OM No. 283/131/2017-GRID SOLAR dated 20.06.2018 issued by MNRE pertaining to Extension in SCoD of Solar Power Plants, on account of GST related issues, the Petitioners had again, by letters dated 11.07.2018 requested NTPC to take into account the impact of implementation of GST on achieving the SCoD and allow extension accordingly. As per the PPAs, the SCoD was 12.07.2017. Accordingly, irrespective of the availability of the Interconnection Transmission Facilities by RRVPN, the Petitioners had not fully undertaken activities of procurement of all equipment, construction and completion of the Project and are raising the issue of interconnection facilities belatedly. The interconnection facilities are only required when the project is to be synchronized with the Grid for evacuation of power from the project and not before.

77. The Respondent No. 1 has submitted that in view of the above, the Petitioner could not be said to have been ‘prevented from performing its obligations under Article 4.1 by the Scheduled Commissioning Date’, on account of the delay (if any) on the part of RVPN in constructing the Bay at its substation, so as to entitle the Petitioner to an extension of time, within the meaning of Article 4.5.1 of the PPA. The Petitioner should in the ordinary course have procured and bought into the site the equipment well before 01.07.2017. The availability of the interconnection facilities does not have any bearing on such procurement of the equipment at the Project Site.
78. The Respondent No. 1 has submitted that even though the Interconnection Facilities were ready in all respects by 27.09.2017, the Projects were actually commissioned 17.10.2017 (20 MW), 28.10.2017 (10 MW), 13.11.2017 (10 MW) and 17.11.2017 (20 MW). This shows that the Petitioners itself were not in a position to commission the Projects even when the interconnection facilities/bay were provided. Further, even assuming that the Petitioner required one (1) month after the connectivity to carry out certain activities, as envisaged in the Transmission Service Agreement dated 31.01.2017, there is no explanation as to why 30 MW were commissioned on 13.11.2017 and 17.11.2017.

### ***III. Force majeure events – unavailability of Murram***

79. The Respondent No. 1 has submitted that the delay on account of unavailability of ‘Murram’ due to delayed grant of consent by the Mining Department cannot be considered as a Force Majeure Event and consequently, a ground for extension of time under the PPAs. There is no explanation/justification as to why the Petitioners did not construct the road for the period from the issue of Letter of Intent/ signing of the PPA (May/August, 2016) till December, 2016 even though the proposed location had been identified in May/August, 2016. The reliance sought to be placed by the Petitioners on the decision dated 31.10.2016 of the Commission in *Petition No. 212/MP/2016 in NTPC Limited v Madhya Pradesh Power Management Company Limited and Ors.*, to state that the non-availability of Murram has been recognized as a factor which ‘hinders’ civil works, is misplaced. The said decision was passed by the Commission in the context of the Petition filed by NTPC requesting an extension of time for injection of infirm power on account of testing of its Mouda Generating Station before commercial operation and there has been no finding to the effect of whether such non-availability amounts to a force majeure event or not.
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#### ***IV. Notice of Force Majeure – not given***

80. The Respondent No. 1 has submitted that without prejudice to the above contentions, that unavailability of 'Murram' does not constitute a force majeure event, even assuming that it was a force majeure event, the Petitioner failed to comply with the provisions of Article 11 of the PPAs regarding relief in respect of Force Majeure Event. In terms of Article 11.5.1 of the PPAs, it is mandatory for the Affected Party to give notice to the other party regarding the alleged Force Majeure event within a period of 7 days from the date on which such party knew of the commencement of Force Majeure Event. Such notice of Force Majeure event has been recognized under the PPAs to be a mandatory pre-condition for being entitled to a relief under Article 11.
81. The Respondent No. 1 has submitted that if the PPAs require a notice to be issued then in terms of *Section 50 of the Indian Contract Act, 1872*, the notice has to be issued within 7 days of the knowledge of the Force Majeure Event. This principle has been upheld by the APTEL in *Talwandi Sabo Power Limited v Punjab State Power Corporation Limited case in Appeal No. 97 of 2016 dated 03.06.2016*. NTPC has placed the reliance on the decision dated 07.11.2017 in *Appeal No. 212 of 2016 of the Hon'ble Tribunal in the case of Maruti Clean Coal and Power Limited -v- Power Grid Corporation of India Limited and Ors.*, wherein while dealing with a similar provision under the BPTA/TSA, the Tribunal has held that the requirement of a notice as prescribed cannot be done away with.

#### ***Re: Proof of actual loss***

82. The Respondent No. 1 has submitted that the PPAs broadly contain two distinct and independent provisions for the monetary compensation to NTPC to be paid by the Petitioner. These are:-
- a. Liquidated Damages to be paid to NTPC for the delay in the commissioning of the power project as provided in Article 4.6 of the PPAs. The Liquidated Damages provided in Article 4.6.1 of the PPAs is a specific ascertained sum of money; and
  - b. After the commissioning of the power project and during the operation period, the compensation for the shortfall in the generation to be paid to buying utilities as provided in Article 4.4 of the PPAs.

83. The Respondent No. 1 has submitted that in the instant case, there were delays on the part of the Petitioners in fulfilling the obligations with respect to construction and development of the project as provided in Article 4 of the PPAs; as well as in achieving the SCoD, which as per the PPAs is 12.07.2017. On account of the non-achievement of commissioning by the SCoD, the Petitioners became liable to pay liquidated Damages as specified in the PPAs.
84. The Respondent No. 1 has submitted that as per settled law, a stipulation of Liquidated Damages could either be a genuine pre-estimate of damages or by way of penalty depending on the nature of the provision. If it is a genuine pre-estimate of damages, there is no requirement to prove damages or loss. NTPC has placed its reliance on the principle of law laid down by the Hon'ble Courts with respect to the Section 74 of the Indian Contract Act, 1872 which deals with liquidated damages, as interpreted by the Constitution Bench decision in *Fateh Chand case (1964) 1 SCR 515* in two (2) categories, namely, (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty.
85. The Respondent No. 1 has submitted that if the sum named as liquidated damages is not by way of penalty, there is no necessity to enquire into actual loss and the agreement reached between the parties stipulating the sum is binding and is payable. In other words, no actual loss or damages need to be established. NTPC has placed its reliance on following cases in this regard: *Fateh Chand case (1964) 1 SCR 515*; *Maula Bux (1969) 2 SCC 554*; *Surjit Kaur –v- Naurata Singh (200) 7 SCC 379*; *ONGC –v- Saw Pipe Limited (2003) 5 SCC 705*; *Construction Design case AIR 2015 SCC 1282*; *Kailash Nath –v- Delhi Development Authority (2015) 4 SCC*; *BSNL case (2011) 1 SCC 394*; *Ultratech Cement v Sunfiled Resources, decision dated 21.12.2016 passed by Hon'ble High Court of Bombay in Appeal No.881 of 2005 in Arbitration Petition No. 35 of 2004*; *Mahadeoprasad –v- Siemens (India) Limited 1933 ILR Vol. LX Cal. 1379*.
86. The Respondent No. 1 has submitted that the onus of proving that no loss whatsoever was suffered by the non-defaulting party as a result of the breach is on the defaulting party. It is for the defaulting party who wishes to avoid payment of liquidated damages to assume the burden of establishing no loss whatsoever. It is not for the non-defaulting party to prove that it had incurred a loss. This has been interpreted in *ONGC –v- Saw Pipe Limited (2003) 5 SCC*

705; *Construction Design case AIR 2015 SCC 1282*; *The decision of Bombay High Court in Ultratech Cement case dated 21.12.2016*.

87. The Respondent No. 1 has submitted that the claim for liquidated damages is in the field of regulatory regime such as Electricity Sector, the actual loss caused in monetary terms cannot be assessed and therefore it falls within the exception provided in *Maula Bux case (1969) 2 SCC 554*, *Kailash Nath –v- Delhi Development Authority (2015) 4 SCC 136*. Reference may also be made to: *BSNL case (2011) 1 SCC 394*; *PTC case 2014 ELR (APTEL) 1243*; *Lanco case 2015 ELR (APTEL) 755*.
88. The Respondent No. 1 has submitted that the APTEL has already examined the issue of the liability to pay liquidated damages. The Tribunal has considered the difficulty in calculating the actual loss and held that since the compensation payable has been pre-estimated and is not penal in nature, there is no need to provide evidence that actual loss incurred. NTPC has placed its reliance on following cases: *PTC India Limited -v- Gujarat Electricity Regulatory Commission and Anr 2014 ELR (APTEL) 1243*; *Lanco Kondapalli Power Limited -v- Andhra Pradesh Electricity Regulatory Commission 2015 ELR (APTEL) 755*.
89. The Respondent No. 1 has submitted that the Hon'ble High Court of Delhi has also recognized that liquidated damages as specified in the PPAs should be awarded. In *Dalmia Solar Power Ltd. –v- NTPC Vidyut Vyapar Nigam Ltd vide Order dated 14.03.2017 in OMP (COMM) 120/2017* it has been held that the Liquidated Damages provided in the Agreement are payable unless the Court finds the specified compensation amount as liquidated damages in the Agreement to be unreasonable.
90. The Respondent No. 1 has submitted that the settled law is that if the sum named as liquidated damages is not by way of penalty but is genuine pre-estimate of the loss that will be suffered, then there is no necessity to enquire into actual loss and the agreement reached between the parties stipulating the sum is binding and is payable. The agreement between the parties estimating the damage would itself be evidence. Unless the Liquidated Damages provision results in payment of an exorbitant and un-conscionable amount, the same cannot be treated a *terrorem* or a penalty, particularly, in the context of the parties are free to agree to the terms and conditions of the contract and adequacy of consideration not being a relevant



issue. Further, the issue of proof of loss was not raised by the Petitioners in the pleadings filed and is being raised as an afterthought. The Petitioners are liable to pay the liquidated damages. The stay in the encashment of the bank guarantee is required to be vacated.

### **Analysis and Decision**

91. The Petition was admitted on 05.06.2018 and came up of hearing on 31.01.2019 and was reserved for Orders on 29.08.2019. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records. The brief facts of the case are as under:
92. The Petitioners have developed 6 x 10 MW Solar Photo Voltaic Power Generation Projects under Batch-II Tranche-II of National Solar Mission Phase-II State Specific Bundling Scheme (Non Solar Park-DCR Category) in Rajasthan through four SPVs viz. Petitioners 2 to 5 and have executed six identical PPAs dated 02.08.2016. The SCoD of the projects was 12.07.2017. However, the projects were commissioned as under:

<b>S. No.</b>	<b>Solar Power Developer</b>	<b>SCoD</b>	<b>Actual CoD</b>	<b>Delay (days)</b>
(i)	Abha Solarfarms Ltd.	12.07.2017	13.11.2017	124
(ii)	Aalok Solarfarms Ltd.	12.07.2017	17.10.2017	97
(iii)	Heramba Renewables Ltd. (“ <i>Heramba-I</i> ”)	12.07.2017	17.10.2017	97
(iv)	Heramba Renewables Ltd. (“ <i>Heramba-II</i> ”)	12.07.2017	28.10.2017	108
(v)	Shreyas Solarfarms Ltd. (“ <i>Shreyas -I</i> ”)	12.07.2017	17.11.2017	128
(vi)	Shreyas Solarfarms Ltd. (“ <i>Shreyas -II</i> ”)	12.07.2017	17.11.2017	128

93. The Petitioners have submitted that there was delay in commissioning of Projects due to non-availability of inter-connection facilities viz. construction of 33kV bay allocated in 220kV substation at 220/132 kV GSS, Badisid, District Jodhpur for evacuation of power from the Projects and delay in grant of short-term permit regarding use of ‘*Murram*’ (used for construction of access roads) by SPDs on account of framing and notification of New Mining Policy by Government of Rajasthan. The Petitioners have prayed that the SCoD of the projects may be extended without levy of liquidated Damages or encashment of Bank Guarantees. **Per Contra**, the Respondent No.1 has submitted that in terms of Article 3.1 and

Article 4.1 of the PPAs and Clause 3.9.2 of the RfS, it is the sole and absolute responsibility and obligation of the Petitioners to obtain all clearances in respect of the land and associated infrastructure and also for connectivity to the STU system and make arrangements for the same. Therefore, any delay on account of the construction of the road due to unavailability of Murram and/or the interconnection facilities is to the account of the Petitioner.

94. From the submissions of the parties, the following issues arise before this Commission:

*Issue No. 1: Whether the Petitioners are entitled to an extension of the Scheduled Commissioning Date on account of non-availability of inter-connection facilities and delay in grant of short-term permit regarding use of 'Murram' on account of framing and notification of New Mining Policy by Government of Rajasthan?*

*Issue No. 2: Whether the Respondent No. 1 should be directed to not impose any liquidated damages and/or encashment of the Bank Guarantees for delay in achieving Scheduled Commissioning Date, since the same is on account of Force Majeure Events?*

95. No other issue was pressed or claimed.

96. We now discuss the issues one by one:

*Issue No. 1: Whether the Petitioners are entitled to an extension of the Scheduled Commissioning Date on account of non-availability of inter-connection facilities and delay in grant of short-term permit regarding use of 'Murram' on account of framing and notification of New Mining Policy by Government of Rajasthan?*

97. The Petitioners have submitted that the SPDs are entitled to an extension of SCoD on account of the following factors:

- a. Delay on account of non-availability of inter-connection facilities
- b. Delay on account of non-availability of Murram

*a. Delay on account of non-availability of inter-connection facilities*

98. The Petitioners have submitted that in terms of Clause 3.4 and Clause 3.11 of the MNRE Guidelines, NTPC cannot encash the Bank Guarantees in case of delay in achieving SCoD if delay is on account of delay in Transmission Line. Rather, NTPC can extend the date of

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commissioning without any financial implications on the SPDs and further in case of an extension beyond 3 months, NTPC can do so with the approval of MNRE. The Recital No. 4 to the RfS dated 03.07.2015, issued by NTPC provides that RfS must be read in conjunction with the MNRE Guidelines. In view of above, Article 4.5.1 of the PPAs read conjointly with Clause 3.4 and 3.11 of the MNRE Guidelines entitles the SPDs for an extension of the SCoD if the delay in achieving the SCoD is on account of delay in interconnection facilities being made available to the SPDs or on account of force majeure events.

99. The Petitioners have submitted that Clause 4.2 of the MNRE Guidelines provides that the transmission system shall be provided by the STU to facilitate evacuation of power from the projects, which inter alia includes providing connectivity to the grid. Clause 3.5.C (vi) of the MNRE Guidelines and Section 3.9.2 (iv) of the RfS provides that the STU shall endeavour to match the commissioning of the transmission system with the commissioning of the solar power projects. Article 4.1 of the PPAs read along with their obligations under Article 3.1(g) of the PPAs envisages that SPDs shall make adequate arrangements to connect the power project switchyard with the inter-connection facilities at inter-connection/ metering / delivery point.
100. The Petitioners have submitted that SPDs entered Transmission Agreements dated 31.01.2017 with RRVPNL, wherein RRVPNL was tasked with providing the interconnection facilities to the SPDs by 13.06.2017, i.e., one month prior to the SCoD. SPDs have sent letters dated 20.07.2017; 01.09.2017; 07.09.2017 to RREC/RRVPNL highlighting the slow progress of work relating to inter-connection facilities. However, RRVPNL completed the erection and construction of the interconnection facilities on 27.09.2017. Once the inter-connection facilities were completed, SPDs immediately completed other related work and commissioned the Projects within one month of the completion of interconnection facilities by RRVPNL and achieved the commissioning.
101. The Petitioners have submitted that delay on account of non-availability of interconnection facilities being an impediment beyond control of the SPDs, qualifies as a force majeure event in terms of Article 11.3.1(d) of the PPAs and Article 7.3.1 of PSA dated 11.05.2016. Therefore, delay in completion of inter-connection facility on account of STU is a Force Majeure event. The Petitioners have submitted that the delay in interconnection facilities is recognized as a Force Majeure event. The Petitioners have placed their reliance on the

APTEL judgment in *Chamundeswari Electricity Supply Co. Ltd. vs. Saisudhir Energy (Chitradurga) Pvt. Ltd. & Anr. Appeal No. 176 of 2015 and IA Nos. 364 and 368 of 2015, dated 21.03.2018, reported as 2018 SCC Online APTEL 65; the Commission Order dated 24.01.2019, in Kudgi Transmission Limited vs. Bangalore Electricity Supply Company Limited in Petition No. 248/MP/2016.*

102. The Petitioners have submitted that Clause 2.1 of the MNRE Guidelines applies to all solar power projects under the State Specific Bundling Scheme, without any discrimination between projects located in solar parks and non-solar parks.
103. The Respondent No.1 has submitted that the terms of PPAs for a non- solar park category Projects are different than the solar park projects wherein the obligation of providing the connectivity and the land and associated infrastructure lies with the Solar Park Implementation Agency. The solar park PPA's Article 4.5 specifically recognizes the delay in grant of connectivity and handing over of land as a ground for extension of time. The present PPAs, related to non-solar park development, do not have a similar clause. Article 4.2 of the PPAs stipulates that *"the Petitioners to obtain all information from the concern authorities with regard to interconnection facilities as is reasonable necessary to enable it to design, install and operate all system equipment and apparatus on the SPD's side of interconnection point"*. Despite the above, the Petitioners have not shown that any instance on record, prior to 20.07.2017 i.e. before the SCoD of 12.07.2017 that they had approached RVPN/NTPC/RREC in regard to the delay in providing the Bay connectivity. Further, the non-availability of Connectivity/ Interconnection Facility does not amount to a Force Majeure Event within the meaning of Article 11 of the PPAs.
104. The Commission observes that relevant Clauses of the MNRE Guidelines dated 10.03.2015 stipulate as under:

*"1.3.2 Phase-II, Batch-II: State Specific Bundling Scheme*

*These guidelines are for 3000 MW. MNRE will indicate the total quantity for various States based on response received from the States. NVVN may then procure that quantity through one or more State specific tenders.*

*Scope of the Guidelines*

*The scope of these guidelines is limited to providing the necessary policy and operational framework for development of projects under the above mentioned "State Specific Bundling Scheme". These guidelines are independent and will have no bearing*

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*on the projects already selected under earlier schemes of NSM Phase-I & Phase-II, Batch -1.”*

*“2.1 NSM Phase-II Batch-II State Specific Bundling Scheme for 3000 MW Solar PV Projects*

*.... The proposed 3000 MW Solar PV Projects to be selected under Batch-II of NSM Phase-II, will be implemented by NVVN on Solar Parks to be developed through association of Central and State Agencies / Land provided by State Governments or Land identified and arranged by Solar Power Developers in the respective States.*

*MNRE is facilitating development of 25 Solar Parks to accelerate the Solar Capacity Addition in various States. The bidder will approach the Solar Park Implementation Agency (SPIA) for allotment of land and connectivity. The SPIA shall provide the details of land and the timelines for availability, allotment, possession and connectivity for the projects before submission of bids. The SPIA will provide the Cost of Land, Annual Charges, and Connectivity Charges etc. which the developer would take into consideration in their bid.*

*There could be three (3) situations:*

*(A)Entire tendered quantity can be located in the Solar Parks in the State;*

*(B)Part of tendered quantity can be located in Solar Park and part outside Solar Park;  
and*

*(C)Entire tendered quantity can be located outside the Solar Park.”*

*“3.4 ...The developers will be given extra time if there is any delay in giving possession of land and connectivity equivalent to the delay. There will however be no compensation or LD or deemed generation for any delay...If extension is required to be given beyond 3 months due to delay in park development or evacuation, NVVN will approach MNRE, who will be authorized to decide on further extension with the approval of the Secretary, MNRE.”*

*“3.11 Financial Closure*

*In case of delay in achieving above condition as may be applicable, NVVN shall encash Performance Bank Guarantees and shall remove the project from the list of the selected projects, unless the delay is on account of delay in allotment of land in Solar Park or by Government or delay in transmission line or Force Majeure. An extension can however be considered, on the sole request of SPD on payment of a penalty of Rs. 25,000/- per day per MW. This amount will go into the Payment Security Fund. This extension will not have any impact on the Scheduled Commercial Operation Date.*

*NVVN can extend the time for financial closure and commissioning date by upto 3 months, without any financial implications on the SPD, if there are delays in land allotment or connectivity and in States where solar park is not likely to be ready for a particular bid, NVVN may allow all bidders to choose their site on their own anywhere in the State. For any extension beyond 3 months, NVVN will approach MNRE, who will be authorized to decide on further extension with the approval of Secretary, MNRE...”*

105. The Commission observes that relevant Articles of PPAs stipulate as under:

*“Guidelines”*

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shall mean “Guidelines for Selection of Grid Connected Solar PV Projects under “State Specific Bundling Scheme” under Batch-II Tranche 1 of NSM Phase-11 issued by MNRE, Gol;

“Delivery Point”/“Interconnection Point”/ “Metering point” shall mean the point at 33 kV or above at the STU Sub Station where the power from the Solar Power Project is injected into the STU System. The SPD shall abide by the relevant CERC Regulations, Grid Code and Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006 as applicable, amended and revised from time to time.”

“Scheduled Commissioning Date” shall mean 12.07.2017 i.e. thirteen (13) months from the Effective date”

### “3.1 Satisfaction of conditions subsequent by the SPD

The SPD agrees and undertakes to duly perform and complete all of the following activities including Financial Closure at the SPD’s own cost and risk within 210 days from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by NTPC:

a) The SPD shall obtain all Consents, Clearances and Permits required for supply of power to NTPC as per the terms of this Agreement. NTPC has no obligation to recommend to any department/agency or the Govt, for the grant/permission for the Solar Power project. The Solar Power Developer shall on its own obtain permissions /sanctions from Govt, authorities, if any required for establishing the project;

c)The SPD shall be solely responsible and make arrangements for Land & associated infrastructure for development of the Project and for Connectivity with the STU/CTU System for confirming the evacuation of power by the Scheduled Commissioning date;

e)The SPD shall fulfill the technical requirements according to criteria mentioned under Clause 3.5 (B) of NSM Guidelines for Selection of Grid-connected Solar-PV Power Projects under “State Specific Bundling Scheme” of Batch-II, Tranche-I of NSM Phase- II and produce the documentary evidence of the same.

g)The SPD shall make adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at Interconnection I Metering / Delivery Point.”

## “ARTICLE 4: CONSTRUCTION & DEVELOPMENT OF THE PROJECT

### “4.1 SPD’s Obligations

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

a) Land & associated infrastructure for development of the Project, Connectivity with the STL/ CTU System and all clearances related thereto;...”

### “4.2 Information regarding Interconnection Facilities

4.2.1 The SPD shall be required to obtain all information from concern authorities with regard to the Interconnection Facilities as is reasonably necessary to enable it to design, install and operate all system equipments and apparatus on the SPD’s side of the

*Interconnection point /Delivery Point /Metering point to enable delivery of electricity*

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

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

*“4.5. Extension of Time:*

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

*(a) any NTPC event of default; or*

*(b) Force Majeure Events affecting NTPC, or*

*(c) Force Majeure Events affecting the SPD,*

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

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

*4.5.2.1 In case extension is required to be given beyond 3 months due to delay for reasons specified in Article 4.5.1, NTPC will approach MNRE, who will be authorized to decide on further extension.*

*....*

*....*

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

*“11. ARTICLE 11: FORCE MAJEURE*

*11.1 Definitions*

*11.1.1 In this Article, the following terms shall have the following meanings:*

## *11.2 Affected Party*

*11.2.1 An affected Party means NTPC or the SPD whose performance has been affected by an event of Force Majeure.*

## *11.3 Force Majeure*

*11.3.1 A 'Force Majeure' means any event or circumstance or combination of events those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:*

- a) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado if and only if it is declared/ notified by the competent state/ central authority/ agency (as applicable);*
- b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action if and only if it is declared/ notified by the competent state/ central authority/ agency (as applicable); or*
- c) radioactive contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party.*
- d) An event of Force Majeure identified under NTPC-Discom PSA, thereby affecting delivery of power from SPD to Discom.”*

## *“16.3 Dispute Resolution*

### *16.3.1 Dispute Resolution by the Appropriate Commission*

#### *i Where any Dispute*

*(a) arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, or*

*(b) relates to any matter agreed to be referred to the Appropriate Commission, such Dispute shall be submitted to adjudication by the Central Commission.*

*ii NTPC shall be entitled to co-opt the Discoms as a supporting party in such proceedings before the Central Commission.”*

106. The Commission observes that Article 7.3 of PSA dated 11.05.2016 stipulates as under:



### *“7.3 Force Majeure*

*7.3.1 A ‘Force Majeure’ means any event or circumstance or combination of events and circumstances as stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care in performing its obligations:*

- a) Act of God, including, but not limited to lightning, drought, fire and explosion, earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, resulting in evacuation of power being disrupted from the Delivery Points; or*
- b) Explosion, accident or breakage of transmission facilities to deliver power from the Delivery Points to the receiving substation(s); or*
- c) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action making the performance of obligations as specified herein as impossible; or*
- d) radio active contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party.*
- e) An event of force majeure identified under NTPC -SPD PPA thereby affecting supply of power by SPD and/or NTPC.*
- f) An event of force majeure affecting the concerned STU/CTU, as the case may be, thereby affecting the evacuation of power from the Delivery Points by the “RUVNL”*

107. From the above, the Commission observes that the Guidelines for Selection of Grid Connected Solar PV Projects under “State Specific Bundling Scheme” under Batch-II Tranche 1 of NSM Phase-11 issued by MNRE are applicable to the Petition. The SCoD for the project was 12.07.2017. As per the PPAs dated 02.08.2016, the SPDs were to obtain all Consents, Clearances and Permits required for supply of power to NTPC as per the terms of this Agreement. It is stipulated in the PPAs that the SPDs were to make arrangements for Land & associated infrastructure for development of the Project and for Connectivity with the STU/CTU System for confirming the evacuation of power by the SCoD. The SPDs were to make adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at Interconnection/ Metering / Delivery Point. In the PPAs the Delivery Point/Interconnection Point/Metering point has been defined as the point at 33 kV

or above at the STU Sub Station where power from the Solar Power Project is injected into the STU System. The SPDs have undertaken the responsibility at their own cost and risk, for Connectivity with the STL/ CTU System and all clearances related thereto. The SPDs were required to obtain all information from the concerned authorities with regard to the Interconnection Facilities as is reasonably necessary to enable it to design, install and operate all system equipments and apparatus on the SPD's side of the Interconnection point /Delivery Point /Metering point to enable delivery of electricity. Further, the SPDs had to bear entire cost of Transmission from the project up to the interconnection point including cost of construction of line, losses etc. The Commission further observes that as per Article 4.5 of the PPAs, extension of time for SCoD is available only in case of Force Majeure events affecting the SPD. As per Article 7.3.1 of the PSA an event affecting the concerned STU thereby affecting the evacuation of power from the Delivery Points by the RUVNL is considered to be Force Majeure. Further as per Article 4.5.2 of the PPAs SCoD can be extended by NTPC only upto three months. In case extension is required to be given beyond 3 months, NTPC has to approach MNRE. Further, as per Article 4.5.7 of the PPAs the SCoD cannot be extended beyond twenty five months from the date of signing of PPA.

108. The Commission further observes that the Transmission Agreements dated 31.01.2017 was executed between RRVPNL or STU and SPDs which interalia stipulated as under:

“ ...

*Whereas, SPD shall make arrangements to connect the Power Project Switchyard with the interconnection facilities at Delivery Point. The SPD shall construct the 33 kV transmission line at its own cost.*

*Whereas, RRVPNL agree to complete the bay work 1 (one) month before the schedule commissioning date of the power plant and shall provide open access as per Central and State's Rules and Regulations for full supply of the power from the Solar Power Plant for the entire duration of the Power Purchase Agreement signed by SPD with NTPC Ltd...”*

109. The Commission observes that following certificates dated 06.11.2017 issued by RRVPNL (STU):

*M/s. Heramba Renewables Ltd*

*“It is certified that the work related to 2 (two) no of 33kV bay (#3 & #4) allotted to M/s. Heramba Renewables Ltd, at RVPN 220kV Kanasar GSS for the connection of 2x10 MW Solar PV power project has been completed on date- 27.09.2017 in all aspect.*

*The above 33kV bay has been charged on date-13.10.2017 successfully and has been in operation since then. The performance of the all equipment employed in subject 33kV bay has been satisfactory”*

*M/s. Abha Solarfarm Ltd*

*“It is certified that the work related to 1 (one) no of 33kV bay (#9) allotted to M/s. Abha Solarfarm Ltd, at RVPN 220kV Badisid GSS for the connection of 1x10 MW Solar PV power project has been completed on date- 27.09.2017 in all aspect.*

*The above 33kV bay has been charged on date-13.10.2017 successfully and has been in operation since then. The performance of the all equipment employed in subject 33kV bay has been satisfactory”*

*M/s. Aalok Solarfarm Ltd*

*“It is certified that the work related to 1 (one) no of 33kV bay (#10) allotted to M/s. Aalok Solarfarm Ltd, at RVPN 220kV Badisid GSS for the connection of 1x10 MW Solar PV power project has been completed on date- 27.09.2017 in all aspect.*

*The above 33kV bay has been charged on date-28.10.2017 successfully and has been in operation since then. The performance of the all equipment employed in subject 33kV bay has been satisfactory”*

*M/s. Shreyas Solarfarms Ltd*

*“It is certified that the work related to 2 (two) no of 33kV bay (#13 & #15) allotted to M/s. Shreyas Solarfarms Ltd, at RVPN 132kV Khetusar GSS for the connection of 2x10 MW Solar PV power project has been completed on date- 27.09.2017 in all aspect.*

*The above 33kV are yet to be charged as on date.”*

110. From the above, the Commission observes that the SPDs have executed Transmission Agreements with RRVPNL (STU) on 31.01.2017. As per Transmission Agreement, RRVPNL was to provide the interconnection facilities to the SPDs by 13.06.2017, i.e., one month prior to the SCoD. SPDs have sent letters dated 20.07.2017; 01.09.2017; 07.09.2017 to RREC/RRVPNL highlighting the slow progress of work relating to inter-connection facilities. As per certificate dated 06.11.2017 issued by RRVPNL, the 33kV bay work was completed on 27.09.2017 and the 33kV bays have been charged at different dates in the month of October, 2017 and September, 2017 as mentioned below:

<b>S. No.</b>	<b>Petitioners</b>	<b>SCoD</b>	<b>33kV Bay work completed on</b>	<b>33kV charging date</b>	<b>One Month time as per Trans. Agreement</b>	<b>Reference date</b>	<b>Actual CoD</b>
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	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F=D or E whichever is later</b>	<b>G</b>
(i)	Aalok Solarfarms	12.07.2017	27.09.2017	28.10.2017	27.10.2017	28.10.2017	17.10.2017
(ii)	Abha Solarfarms	12.07.2017	27.09.2017	13.10.2017	27.10.2017	27.10.2017	13.11.2017
(iii)	Heramba-I	12.07.2017	27.09.2017	13.10.2017	27.10.2017	27.10.2017	17.10.2017
(iv)	Heramba-II	12.07.2017	27.09.2017	13.10.2017	27.10.2017	27.10.2017	28.10.2017
(v)	Shreyas –I	12.07.2017	27.09.2017	Not provided	27.10.2017		17.11.2017
(vi)	Shreyas –II	12.07.2017	27.09.2017	Not provided	27.10.2017		17.11.2017

111. The Commission observes that as per PPAs dated 02.08.2016 the SCoD for the Projects was 12.07.2017. As per Transmission Agreement dated 31.01.2017 the RRVPNL(STU) agreed to complete the bay work one (1) month before the SCoD of the projects. Meaning thereby that RRVPNL has to complete the Bay work in all respect by 12.06.2017. The Commission is of the view that the time period of one month i.e. from 12.06.2017 to 12.07.2017 (SCoD) was provided to the contracting parties for charging of bay by RRVPNL and simultaneously, for commissioning of projects by the scheduled commissioning date by SPDs. However, RRVPNL completed the bay work on 27.09.2017 i.e. after three months of scheduled commissioning date. It is observed that delay in completion of bay affected the evacuation of power from the Delivery Points by the RUVNL and is a Force Majeure as per Article 11.3.1 of the PPAs read with Article 7.3.1 of the PSA. As stipulated in Article 4.5.2.1, NTPC was obliged to approach MNRE for approval of extending SCoD beyond three months. However, there is nothing on record that NTPC approached MNRE for any extension. As per Article 16.3.1 the contracting parties can approach the appropriate commission for dispute resolution. The Commission observes that since the SCoD of the projects was 12.07.2017 but the bay work was completed by RRVPNL on 27.09.2017, therefore as per Transmission Agreement one (1) month time i.e. upto 27.10.2017 is available to RRVPNL for charging of bay and similar time is available to SPDs for commissioning of the projects. In view of above, the Commission holds that time period of the SCoD shall be extended to ‘Reference date’ shown as ‘F’ in the table above [i.e. 27.10.2017 (one month time after the completion of bay by RRVPNL) or the date of charging of bay by RRVPNL whichever is later].

***b. Delay on account of non-availability of Murram***

112. The Petitioners have submitted that there was delay in granting short-term permits to use ‘Murram’ for constructing the access roads. The delay was caused by the Department of Mines and Geology, Government of Rajasthan on account of impending changes to government policies. The primary requirement to commence project work was the construction of access roads. Thus, access roads are considered as an activity on the ‘critical path’ of the Projects. The doctrine of ‘critical path’ was recognized by APTEL in its judgment dated 28.11.2018 in *Damodar Valley Corporation vs. Delhi Transco Ltd. & Ors.* Appeal No. 256 of 2015, reported as 2018 SCC Online APTEL 130.
113. The Petitioners have submitted that on 01.03.2017, New Mining policy was unveiled and on 22.03.2017, as per rule no. 63 of the Mineral Concession Rules 1986, Short term permit could be granted for Murram only up to 500 tonnes, except in case of contract of works department of State Government/ Central Government/ Autonomous bodies/ Government undertaking, where Short term permit can be granted for the required quantities (without any upper limit) on recommendation of the concerned department. SPDs adopted prudent utility practices in obtaining short-term permits for *Murram*. Considering the slow progress of getting the approval, the SPDs explored other options to ensure completion of construction of roads within time. Petitioner No. 3 (Abha Solarfarms Ltd.) and Petitioner No. 5 (Shreyas Solarfarms Ltd.) approached the Mining Department and obtained Option ‘C’ approval for Murram i.e. to purchase Murram from third parties who already have the license to excavate and use Murram. Further, the permission to the SPDs to use Murram under Option ‘C’ was granted only on 30.11.2017 for two (2) projects of Petitioner No. 4 (Heramba Renewable Ltd.) and one (1) project of Petitioner No. 2 (Aalok Solarfarms Ltd.). The details of the permission/short-term permits for excavation and use of Murram granted by the Mining Department is as under:-

<b>SPD</b>	<b>Option under which permission given by Department of Mines</b>	<b>Approved quantity of Murram (Tonnes)</b>	<b>SCoD</b>	<b>Date of grant of permission/ short-term permit</b>	<b>Timeline of grant</b>
Abha	C	9000	12.07.2017	26.05.2017	48 days prior to SCoD

Shreyas	C	34000	12.07.2017	26.05.2017	48 days prior to SCoD
Aalok	B	9000	12.07.2017	30.11.2017	142 days after SCoD
Heramba	B	18000	12.07.2017	30.11.2017	142 days after SCoD

114. The Petitioners have submitted that the Commission in its Order dated 31.10.2016 in Petition No. 212/MP/2016 in case titled *NTPC vs. Madhya Pradesh Power Management Co. Ltd. reported as 2016 SCC Online CERC 549*, has recognized ‘non-availability of Murram’ as one of the factors that ‘*hinders*’ civil works in a project. It is a settled position of law that delay in statutory approvals or any other delay on behalf of government instrumentalities that hindered the works in a project is a force majeure event and hence SCoD ought to be extended. Therefore, the delay in granting short-term permits to use ‘*Murram*’ for constructing the access roads by the Department of Mines and Geology, Government of Rajasthan, constitutes as Force Majeure. Hence, SPDs are entitled to revision of the SCoD, in terms of Article 4.5.1 (c) of the PPAs, for the period during which performance of its obligations under the PPAs were ‘hindered’ pursuant to the afore-said delay.
115. The Petitioners have submitted that they represented before the MNRE on 03.11.2017 and 29.01.2018. However, MNRE did not respond till date. The SPDs have also written letters on 25.08.2017, 01.05.2018 and 16.01.2019 to NTPC for extension of the SCoD without levy of any penalty/liquidated damages. However, on 12.09.2017, NTPC rejected the request of the SPDs regarding extension of SCoD stating that the same is untenable.
116. **Per Contra**, the Respondent No.1 has submitted that the issue of unavailability of Murram was raised belatedly because the Petitioners were themselves not in a position to commission the Power Projects by 12.07.2017. There is no explanation/justification as to why the Petitioners did not construct the road for the period from the issue of Letter of Intent/ signing of the PPAs (May/August, 2016) till December, 2016 even though the proposed location had been identified in May/August, 2016. Even assuming that it was a force majeure event, the Petitioner failed to comply with the provisions of Article 11 of the PPAs regarding relief in respect of Force Majeure Event. In terms of Article 11.5.1 of the PPAs, it is mandatory for the Affected Party to give notice to the other party regarding the alleged Force Majeure event

within a period of 7 days from the date on which such party knew of the commencement of Force Majeure Event.

117. The Commission observes that relevant Articles of PPAs stipulates as under:

*“3.1 Satisfaction of conditions subsequent by the SPD*

*The SPD agrees and undertakes to duly perform and complete all of the following activities including Financial Closure at the SPD’s own cost and risk within 210 days from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by NTPC:*

*c)The SPD shall be solely responsible and make arrangements for Land & associated infrastructure for development of the Project and for Connectivity with the STU/CTU System for confirming the evacuation of power by the Scheduled Commissioning date;*

*“ARTICLE 4: CONSTRUCTION & DEVELOPMENT OF THE PROJECT*

*“4.1 SPD’s Obligations*

*The SPD undertakes to be responsible, at SPD’s own cost and risk, for:*

*a) Land & associated infrastructure for development of the Project, Connectivity with the STL/ CTU System and all clearances related thereto; ... ”*

*“4.5. Extension of Time:*

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

*(a) any NTPC event of default; or*

*(b) Force Majeure Events affecting NTPC, or*

*(c) Force Majeure Events affecting the SPD,*

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

From the above, the Commission observes that it was the sole responsibility of the SPDs to make arrangements for Land & associated infrastructure for development of the Project for confirming the evacuation of power by the Scheduled Commissioning date. The SPDs have undertaken to be responsible, at its own cost and risk, for development of Land & associated infrastructure of the Project, Connectivity and all clearances related thereto. The Commission observes that the approval of the Murram under Option ‘C’ was granted to the Petitioner No. 3 and Petitioner No. 5 and conditional approval of the Murram under Option ‘B’ was granted to the Petitioner No. 2 and Petitioner No. 4 on 26.05.2017 whereas the SCoD of the SPDs was on 12.07.2017. It is observed that the final approval of the Murram under Option ‘B’ was

granted to the Petitioner No. 2 and Petitioner No.4 on 30.11.2017, whereas the Petitioner No. 2 achieved commissioning of its project on 17.10.2017 and the Petitioner No. 4 achieved commissioning of its project on 17.11.2017 i.e. before the date of final approval of Murram on 30.11.2017. Therefore, the Commission notes that some of the projects were commissioned before the actual date of approval/ short term permit for Murram. However, the issue in question is whether non-availability of Murram is an event under Force Majeure. From the plain reading of Article 11 of the PPAs the Commission finds that un-availability of Murram is not an event covered as Force Majeure under Article 11 of the PPAs.

118. To summarize there was a delay due to late providing of ‘infrastructure for transmission and evacuation of power’ for unavoidable and uncontrollable reasons not attributable to the Petitioners and hence are covered under Force Majeure events in terms of Article 11.3.1 (d) of the PPAs read with 7.3.1 (f) of the PSA. Therefore, the Petitioners are eligible for extension of SCoD as per Article 4.5.1 of the PPAs as detailed below:

S. No.	Petitioners	SCoD	Reference date *	Actual CoD	Delay (days)
(i)	Aalok Solarfarms	12.07.2017	28.10.2017	17.10.2017	Nil
(ii)	Abha Solarfarms	12.07.2017	27.10.2017	13.11.2017	17
(iii)	Heramba-I	12.07.2017	27.10.2017	17.10.2017	Nil
(iv)	Heramba-II	12.07.2017	27.10.2017	28.10.2017	1
(v)	Shreyas –I	12.07.2017	Not provided	17.11.2017	
(vi)	Shreyas –II	12.07.2017	Not provided	17.11.2017	

*\*Reference paras 110 and 111*

From the above, the Actual date of Commissioning for the Petitioner No. 2 (Aalok Solarfarms) and project 1 (Heramba-I) of Petitioner No. 4 was 17.10.2017 which is before the time provided in Transmission Agreement (date of completion of 33kV bay work plus one month in order to achieve commissioning) as such there is no delay attributable to them. Whereas there is only one day delay in actual commissioning by Petitioner No. 4 for its project 2 (Heramba-II). The Actual date of Commissioning for the Petitioner No. 3 (Abha Solarfarms) was 13.11.2017 which is 17 days after the time provided in Transmission Agreement as such there is 17 days delay attributable to the Petitioner No. 3. Further, RRVPNL has certified that 33kV bay was not charged as on 06.11.2017. Therefore the Commission is not in the position to ascertain the number of days delay in achieving the commission for Petition No. 5 for its two projects (Shreyas –I & Shreyas –II). The Commission directs the contracting parties to ascertain the date of charging of 33kV bay qua



Petitioner No. 5 and calculate the delay (if any) in achieving the actual commissioning as per principles laid down in para 111. The issue is decided accordingly.

***Issue No. 2: Whether the Respondent No. 1 should be directed to not impose any liquidated damages and/or encashment of the Bank Guarantees for delay in achieving Scheduled Commissioning Date, since the same is on account of Force Majeure Events?***

119. The Commission observes that Article 4.6 of the PPAs stipulates as under:

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

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

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

*4.6.1.2 Delay beyond five month: In case the commissioning of Project is delayed beyond 5 months, the SPD shall, in addition to encashment of Bank Guarantee by NTPC, additionally pay to NTPC the Liquidated Damages @ Rs. 1,00,000 per MW per day of delay for the delay in such remaining Capacity which is not commissioned.*

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

120. In the light of discussion held in Issue No. 1 the Commission holds that Liquidated Damages shall be levied for the period of delay as indicated in para no. 118 above, strictly as per Article 4.6 of the PPAs.

121. Accordingly, the Petition No. 180/MP/2018 is disposed of in terms of the above.

Sd/-

**आई. एस. झा**  
**सदस्य**

Sd/-

**डॉ एम. के. अय्यर**  
**सदस्य**

Sd/-

**पी. के. पुजारी**  
**अध्यक्ष**