



केन्द्रीय विद्युत विनियामक आयोग
CENTRAL ELECTRICITY REGULATORY COMMISSION



नई दिल्ली
NEW DELHI

याचिका संख्या /Petition No.: 100/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: 10th of January, 2020

IN THE MATTER OF:

Petition filed under Section 79(1)(f) read with Section 79(1)(k) of the Electricity Act, 2003 along with Regulation 68 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking indulgence of the Hon'ble Central Electricity Regulatory Commission to direct NTPC Vidyut Vyapar Nigam Limited to comply with the Order dated 11.10.2017 in Petition No. 16/MP/2014 by computing the delay suffered by the Generation Project due to force majeure eventualities and revise the Schedule Commercial Operation Date for the Generation Project.

AND IN THE MATTER OF:

M/S Megha Engineering & Infrastructures Limited
S2- Technocrat Industrial Estate
Balanagar, Hyderabad
Telangana-500037

...Petitioner

VERSUS

1. NTPC VIDYUT VYAPAR NIGAM LIMITED
THROUGH: THE CHAIRPERSON
NTPC BHAWAN, CORE 7, SCOPE COMPLEX
7 INSTITUTIONAL AREA, LODHI ROAD
NEW DELHI-110003
 2. PUNJAB STATE POWER CORPORATION LIMITED
THROUGH: CHAIRMAN & MANAGING DIRECTOR
SLDC BUILDING, 220KV GRID SUB-STATION,
PSPCL, ABLOWAL, PATIALA – 147001
 3. CENTRAL POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LTD.
THROUGH: CHAIRMAN
MINT COMPOUND,
HYDERABAD-500063
 4. EASTERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH
THROUGH: CHAIRMAN
CORPORATE OFFICE, P&T COLONY,
SEETHAMMADHARA, VISHAKHAPATNAM-530013
 5. NORTHERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LTD.
THROUGH: CHAIRMAN
H.NO.1-1-478, 503 &504 OPPOSITE NIT PETROL BUNK,
CHAITNAYAPURI, KAZIPET, WARRANGAL-506004
 6. CHATTISGARH STATE POWER DISTRIBUTION COMPANY LTD.
THROUGH: CHAIRMAN
FOURTH FLOOR, VIDYUT SEVA BHAWAN,
DANGANIA, RAIPUR(CHATTISGARH)- 492013
 7. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD.
THROUGH: CHAIRMAN
5TH FLOOR, ANANT KNEKAR MARG,
BANDRA (EAST), MUMBAI-400051.
 8. AJMER VIDYUT VITRAN NIGAM LTD.
THROUGH: CHAIRMAN
OLD POWER, HATHI BHATA,
AJMER – 305001
 9. JAIPUR VIDYUT VITRAN NIGAM LIMITED
THROUGH: CHAIRMAN
JAIPUR-302005.
 10. JODHPUR VIDYUT VITRAN NIGAM LIMITED
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THROUGH: CHAIRMAN
NEW POWER HOUSE, INDUSTRIAL AREA,
JODHPUR-342003.

11. U.P. POWER CORPORATION LTD.
THROUGH: CHAIRMAN
14THFLOOR, SHAKTI BHAWAN,
EXT.14, ASHOK MARG, LUCKNOW-226001.
12. ASSAM POWER DISTRIBUTION COMPANY LTD.
THROUGH: CHAIRMAN
BIJULEE BHAWAN, PALTANBAZAR,
GUWAHATI-781001.
13. BANGALORE ELECTRICITY SUPPLY CORPORATION POWERPURCHASE
THROUGH: CHAIRMAN
K.R. CIRCLE, BANGALORE-560001.
14. DAMODAR VALLEY CORPORATION
THROUGH: CHAIRMAN
DVC TOWERS, VIP ROAD,
KOLKATA-700054.
15. GRIDCO LTD.
THROUGH: CHAIRMAN
JANPATH, BHULUTESWAR-751022
16. TAMIL NADU GENERATION AND DISTRIBUTION COMPANY LTD.
THROUGH: CHAIRMAN
144, ANNA SALAI, CHENNAI-600002
17. WEST BENGAL STATE ELECTRICITY DISTRIBUTION COMPANY LTD.
THROUGH: CHAIRMAN
VIDYUT BHAWAN, 7TH FLOOR,
BLOCK-DJ, SECTOR-II, BIDHANNAGAR,
KOLKATA-700091.

...Respondents

Parties Present: Shri Anand Kumar Srivastava, Advocate, MEIL
Shri Nishant Talwar, Advocate, MEIL
Shri T. Ashok Reddy, MEIL
Shri Venugopal, MEIL
Ms. Anushree Bardhan, Advocate, NVVNL and PSPCL
Ms. Tanya Sareen, Advocate, NVVNL and PSPCL
Shri Nishant Gupta, NVVNL
Shri Anil Chawla, NVVNL

आदेश/ ORDER

The Petitioner, M/s Megha Engineering & Infrastructures Limited is a Generating Company and has established a 50 MW solar thermal power project near Nagalapuram, Peddavaduguru Mandal in the Anantapur district, Andhra Pradesh (hereinafter referred to as 'Generation Project').

2. The Respondent, NTPC Vidyut Vyapar Nigam Limited (hereinafter referred to as 'NVTN') is an inter-State trading licensee. NVTN is the nodal agency vested with the power to execute agreements for sale and purchase of power under Jawaharlal Nehru National Solar Mission (hereinafter referred to as 'JNNSM'). NVTN purchases power from the Petitioner as an intermediary and sells power to the Distribution licensees after bundling it with the unallocated power procured from the Central unallocated quota of coal based power projects of NTPC
3. The Petitioner has filed the petition under Section 79(1)(f) read with Section 79(1)(k) of the Electricity Act, 2003 along with Regulation 68 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking indulgence of the Commission to direct NTPC Vidyut Vyapar Nigam Limited to comply with the Order dated 11.10.2017 in Petition No. 16/MP/2014 by computing the delay suffered by the Generation Project due to force majeure eventualities and revise the Schedule Commercial Operation Date for the Generation Project.
4. The Petitioner has made the following prayers:
 - a) *Direct NTPC Vidyut Vyapar Nigam Limited to stay from taking any coercive measures pursuant to the terms of the Power Purchase Agreement dated 10.01.2011 and supplementary agreements executed subsequently till the period of force majeure is finalized pursuant to this Commission's Order dated 11.10.2017 in Petition No. 16/MP/2014 read with Petitioner's letter dated 17.10.2017, 28.11.2017 and 22.12.2017;*

- b) Direct NTPC Vidyut Vyapar Nigam Limited to place before this Commission the extension of SCoD to be allowed for Petitioner's Project pursuant to this Commission's Order dated 11.10.2017 in Petition No. 16/MP/2014 and as per the drought GOs issued by the State of Andhra Pradesh dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014 and consequently extend the SCoD;*
- c) Pass such other Order/(s) as deem fit in the interest of justice and equity by this Commission.*

Background

5. On 10.01.2011, the Petitioner executed Power Purchase Agreement (hereinafter referred to as 'PPA') with NVVN for its 50 MW solar thermal power project near Nagalapuram, Peddavaduguru Mandal in the Anantapur district, Andhra Pradesh.
 6. On 23.01.2012, 30.10.2013 & 27.09.2016, PPA was amended for supply of power from 50 MW solar thermal power project.
 7. The Scheduled Commercial Operation Date (hereinafter referred to as 'SCoD') as per PPA was 09.05.2013.
 8. The SCoD was revised to 09.03.2014, as the Ministry of New and Renewable Energy (hereinafter referred to as 'MNRE') gave a general extension of 10 months and revised the SCoD to be 38 months instead of 28 months from the date of signing of the PPA.
 9. On 04.11.2014, the Petitioner achieved commissioning of its 50 MW solar thermal power project i.e. with a delay of about 240 days.
 10. On 11.10.2017, the Commission vide its Order in Petition No. 16/MP/2014 allowed the prayer of extension of SCoD and directed the Respondent to ascertain the duration of the drought based on the necessary notification/circular issued by the Government of Andhra Pradesh and revise the SCoD of the project accordingly.
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11. On 17.10.2017, the Petitioner approached Respondent and furnished the necessary notifications/circulars issued by the Government of Andhra Pradesh declaring the project site as drought affected area. A copy of the said letter was also submitted to MNRE for its consideration.
12. On 28.11.2017 & 22.12.2017, the Petitioner once again wrote to the Respondent providing a year wise explanation and evidence of the drought and the period during which the timely development of the 50 MW solar thermal power project was impacted.
13. On 26.03.2018, MNRE pursuant to the directions of the Commission at Para 242 of the Order dated 11.10.2017 has declined the joint representations made by the solar thermal power developers dated 05.03.2014 maintaining that both parties are bound by the contractual provisions.

Submissions of the Petitioner

14. The Petitioner has submitted that it is a generating Company and has established a 50 MW solar thermal power project near Nagalapuram, Peddavaduguru Mandal in the Anantapur district, Andhra Pradesh. It has entered into a PPA dated 10.01.2011 which was subsequently amended on 23.01.2012, 30.10.2013 and 27.09.2016 with the Respondent for supply of power from its 50 MW solar thermal power project(hereinafter referred to as 'Generation Project').
15. The Petitioner has submitted that as per the terms of the PPA, the SCoD was 09.05.2013. Subsequently, MNRE gave a general extension of 10 months and revised the SCoD to be 38 months i.e. 09.03.2014. instead of 28 months from the date of signing of the PPA. The Petitioner achieved CoD of its Generation Project on 04.11.2014 i.e. with a delay of about 240 days.
16. The Petitioner has submitted that it's Generation project suffered various force majeure eventualities such as unforeseen variation in Direct Normal Irradiation (hereinafter referred to

as ‘DNI’) at project site affecting project design, drought, fire, delay due to re-organization of the State of Andhra Pradesh and statutory approvals, etc. during the construction phase of the Generation Project. As a prudent utility, the Petitioner from time to time intimated NVVN about the happening of such force majeure eventualities and mitigation steps undertaken as counter-measures. It also sought for extension of SCoD on such occasions in view of the force majeure events.

17. The Petitioner has submitted that it approached this Commission vide Petition No. 16/MP/2014, wherein, inter-alia, it sought extension of SCoD due to force majeure events such as drought, fire, re-organisation of the State of Andhra Pradesh, etc. The Commission vide its Order dated 11.10.2017 in Petition No. 16/MP/2014 held that only the incident of ‘drought’ was squarely covered as Force Majeure event under Clause 11.3.1(a) of the PPA, accordingly, the prayer of extension of SCoD for the Generation Project for the period during which the drought persisted was allowed. NVVN was directed to ascertain the duration of the drought based on the necessary notification/circular issued by the Government of Andhra Pradesh and revise the SCoD of the project accordingly. The Commission also considered restraining NVVN from invoking the performance bank guarantees submitted by the solar power developers. It was held as under:

“The Commission observes that three of the Petitioners namely, M/s GGEL, M/s MEIL and M/s RSTPL have commissioned the projects despite facing similar challenges. This demonstrates their commitment and intent to set up the solar thermal plants, which the Commission appreciates. In their cases, we request the Central Government to consider their cases for extension of SCOD on the basis of their representations which are under consideration of the Central Government. Till the decision of the Central Government for extension of SCOD, their bank guarantees shall not be invoked. These generators are directed to maintain the bank guarantee.”

18. The Petitioner has submitted that pursuant to the Order dated 11.10.2017, it approached NVVN and vide letter dated 17.10.2017 furnished the necessary notifications/circulars issued by the Government of Andhra Pradesh declaring the project site as drought affected area. A copy of the said letter was also submitted to MNRE for its consideration. Considering that NVVN was required to ascertain the period for delay caused in the development of the Generation Project due to drought, the Petitioner once again on 28.11.2017 and 22.12.2017

wrote to NVVN providing a year wise explanation and evidence of the drought and the period during which the timely development of the Generation Project was impacted. NVVN was to only confirm the period of drought as per the Order dated 11.10.2017. NVVN is yet to indicate to the Commission about the revision in the SCoD pursuant to the direction vide Order dated 11.10.2017.

19. The Petitioner has submitted that on 26.03.2018, MNRE pursuant to the directions of this Commission at Para 242 of the Order dated 11.10.2017 has disposed off the joint representations made by the solar thermal power developers dated 05.03.2014. MNRE has taken a view that there is no case for MNRE's intervention in granting any time extension of SCoD as claimed by the solar thermal power developers under JNNSM Phase- I, Batch -I. MNRE has stated that formal contracts in form of PPA were executed between NVVN and the respective solar thermal power developers under JNNSM Phase-I, Batch -I, and both parties are bound by the contractual provisions. NVVN is therefore allowed to follow the mechanism in relation to extension of SCoD provided under respective PPAs.
20. The Petitioner has submitted that by virtue of the directions of this Commission's Order dated 11.10.2017 and MNRE's letter dated 26.03.2018, NVVN is required to consider the period of delay suffered by the Petitioner's Generation Project due to the force majeure event i.e. drought and accordingly revise the SCoD provided under the PPA and place the same before this Commission. Therefore, NVVN cannot proceed to initiate any coercive measures against the Petitioner herein, w.r.t. delay in SCoD.
21. The Petitioner has submitted that considering that once MNRE has disposed off the joint representation made by the solar thermal power developers, there is a specific direction required to maintain a stay on the encashment of the Bank Guarantee by MNRE/NVVN, the Commission is requested to direct NVVN to refrain from taking any coercive measures against the Petitioner, till the ascertaining of period of force majeure arising out of drought and other circumstances.

Submissions of the Respondent (NVVN)

22. The Respondent has submitted that:

- a. As against the above Scheduled Commissioning Date of 09.03.2014, the Petitioner commissioned its solar power plant on 4.11.2014 i.e. after a delay of 7 months and 25 days.
- b. Article 4.5 of the PPA stipulates that in the event that the Petitioner is prevented from performing its obligations under Article 4.1 by the SCoD due to any Force Majeure Events, the SCoD and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.5.2, for a reasonable period.
- c. Article 4.6 of the PPA stipulates that if the Petitioner is unable to commence supply of power to NVVN by the SCoD, then the Petitioner shall pay to NVVN, Liquidated Damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the SCoD.
- d. In terms of the above, in the absence of any force majeure event or delay attributable to NVVN, the Petitioner is liable to pay the liquidated damages for the delay in the commissioning of the power plant.
- e. The Commission vide Order dated 11.10.2017 in Petition no. 16/MP/2014 and connected matters decided the claim of the petitioner with regard to the force majeure under various heads namely Direct Normal Irradiance (DNI); Fire and Drought. As regards the drought the Commission held that *“claim of the Petitioner held that on 9th January, 2013, Government of Andhra Pradesh had declared the area in which the project was situated to be drought affected area and the same was brought to the notice of the Respondents by MEIL on 2nd February, 2013. This incident is squarely covered as Force Majeure event under Clause 11.3.1(a) of the PPA. Accordingly, the prayer for extension of Scheduled Commercial Operation Date or the SCoD of the 50 MW project of MEIL for the period during which the drought persisted is allowed. The Respondent No.1 (NVVNL) is directed to ascertain the duration of the drought based on the necessary notification/circular issued by the Government of Andhra Pradesh and revise the SCOD of this project accordingly.”*
- f. The claim of the Petitioner on other force majeure events of DNI and Fire was rejected by the Commission.
- g. Aggrieved by the decision of the Commission on the aspect of drought as a force majeure, NVVN has filed an appeal being no. 4 of 2018 before the Appellate Tribunal

for Electricity (hereinafter referred to as 'APTEL') and the same is admitted and pending for hearing. NVVN has also filed an application for stay and has also disputed the claim of the Petitioner with regard to the aspect of drought contained in the Order dated 11.10.2017 and the same is also pending before APTEL.

- h. Without prejudice to the above the claim of the Petitioner on account of drought allowed by the Commission in pursuance of the notification of the Government of Andhra Pradesh on 09.01.2013 extends only for a period of 4 months as against the actual delay period of 7 months and 25 days. The Petitioner is liable to pay the liquidated damages for the delay beyond 4 months i.e. for a period of 3 months and 25 days. The amount of liquidated damages payable for 3 months 25 days works out to Rs 47.01 Crores as principal and in addition, the delayed payment surcharge is payable thereon.

23. The Respondent has submitted that in the circumstances mentioned above, the petitioner should be directed to pay liquidated damages in terms of article 4.6 of the PPA with regard to the said period of 3 months and 25 days. The balance claim of NVVN towards liquidated damages is to be finalised after the decision of the APTEL in Appeal No. 4 of 2018. The claim of the Petitioner that no liquidated damages is payable with regard to the delay in the commissioning of the power project as no legal injury or actual loss has been suffered by NVVN, is not correct and is liable to be rejected. In para 241 of the Order dated 11.10.2017, the Commission has held '*As per Article 4.6 of the PPA, the Respondent 1 has the right of invoking the Bank Guarantee against these plants for the number of days delayed beyond the period extended by MNRE i.e. beyond revised SCOD.*' Further the legal injury to NVVN is writ large in as much as the quantum of electricity which would have been available from the SCoD or in the context of the present case, the electricity for a period of 3 months and 25 days was not made available.

24. The Respondent has submitted that vide present petition, the Petitioner is seeking extension of SCoD to be allowed pursuant to this Commission's order dated 11.10.2017 in Petition No. 16/MP/2014 and as per the drought GOs issued by the State of Andhra Pradesh dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014. The Petitioner is seeking to enlarge the claim for force majeure on account of drought in the present proceedings for a period exceeding 4 months. The Commission has decided drought as a force majeure event only

with regard to the notification of the Government of Andhra Pradesh dated 09.01.2013 which accounts for only 4 months of delay of the power project. The said claim cannot be entertained beyond 4 months related to the notification dated 09.01.2013, i.e. the delay of 12 months cannot be entertained in the present proceedings as the same has not been pleaded before the Commission and in the Order dated 11.10.2017. The period for which the drought is admissible for a claim of force majeure in pursuance to the notification dated 09.01.2013 is 4 months as stated by Petitioner in letters dated 17.10.2017, 28.11.2017 and 22.12.2017.

25. The Respondent has submitted that the Commission in the present proceedings can examine the period for which the claim for force majeure on account of drought is admissible in terms of para 206 of the order dated 11.10.2017 and the notification dated 09.01.2013 issued by the Government of Andhra Pradesh.
26. The Respondent has submitted that in the letters dated 17.10.2017, 28.11.2017 and 22.12.2017, the Petitioner, apart from the notification of the Government of Andhra Pradesh dated 09.01.2013, has also relied on notifications dated 02.11.2011, 03.01.2014 and 17.12.2014 passed by the Government of Andhra Pradesh declaring drought. Against each of these notifications, the Petitioner has claimed 4 months of delay to be condoned as a force majeure event. However, in the Petition no. 16/MP/2014 in which the Order dated 11.10.2017 was passed by the Commission, the Petitioner claimed relief on account of force majeure only the notification dated 09.01.2013. There was no relief claimed by the Petitioner against the notifications dated 02.11.2011, 03.01.2014 and 17.12.2014 passed by the Government of Andhra Pradesh declaring drought.
27. The Respondent has submitted that in the circumstances mentioned above, the Commission may decide on the exact duration of the force majeure event namely drought (on account of the notification dated 09.01.2013) affecting the construction of the power project not exceeding the period of 4 months as claimed by the Petitioner.
28. The Respondent has submitted that without prejudice to the above, NVVN specifically denies the claim of the Petitioner in the letters dated 17.10.2017, 28.11.2017 and 22.12.2017 and suo-motu extension of the SCoD of the Project from 9.3.2014 to 8.7.2015. In order to

satisfy that the notifications dated 02.11.2011, 03.01.2014 and 17.12.2014 with regard to the drought condition qualify as a Force Majeure Event under Article 11 of the PPA dated 10.01.2011, the Petitioner needs to establish as to how the requirement specifically provided in Article 11 of the PPA is satisfied.

29. The Respondent has submitted that in terms of Article 11.5 of the PPA, it is incumbent on the part of Petitioner to give notice of the occurrence of Force Majeure Event within a period of 7 days. This is a pre-condition for Petitioner to claim any relief on ground of Force Majeure. In the present case, Petitioner had not given notice of the existence of Force Majeure in the manner provided under Article 11.5 with regard to the notifications dated 02.11.2011, 03.01.2014 and 17.12.2014. It has been settled in the decision of the Hon'ble High Court of Andhra Pradesh in *Krishna kilaru and Another –v- Maytas Properties Limited (2013) 176 Comp Cas 483 (AP)* that the absence of notification of the Force Majeure is critical. Accordingly, in the absence of the notice for Force Majeure by the Petitioner to NVVN, the Petitioner cannot by way of letters dated 17.10.2017, 28.11.2017 and 22.12.2017 claim that it was affected by the notification of drought by the Government of Andhra Pradesh dated 02.11.2011, 03.01.2014 and 17.12.2014.
30. The Respondent has submitted that even the MNRE in its communication dated 26.3.2018 has stressed on the aspect that parties are bound by its contractual provisions of the PPA.

Submissions of the Petitioner through Rejoinder

31. The Petitioner vide Rejoinder dated 11.09.2018 has reiterated its submissions already made in petition as such the same are not reproduced herewith for the sake of brevity. Additionally, the Petitioner has denied and disputes all the averments and allegations made by the Respondent in its Reply dated 31.05.2018. The Respondent has not set out any reason for non-compliance of this Commission's Order dated 11.10.2017. On the other hand, it has through its Reply obliquely tried to displace/disregard the finding of this Commission by making out a case against the findings of the Commission.

32. The Petitioner has submitted that it needs to be noted that the law is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the Appellate Court and the Appellate Court has discretion to grant an order of stay or to refuse the same. Since, the appeal filed along with the application for stay before the APTEL is still not admitted and also APTEL had not passed any order staying the Order dated 11.10.2017 passed by the Commission in Petition No. 16/MP/2014, therefore, the Order dated 11.10.2017 passed by the Commission in Petition No. 16/MP/2014 is operating and binding, and filing of an appeal before the APTEL does not have any effect on the current proceedings.
33. The Petitioner has submitted that with regard to the applicability of notifications dated 02.11.2011, 09.01.2013, 01.01.2014 and 17.12.2014 issued by the State of Andhra Pradesh, it needs to be noted that the Commission vide its Order dated 11.10.2017 in Petition No. 16/MP/2014 held that the incident of 'drought' was squarely covered as Force Majeure event under Clause 11.3.1(a) of the PPA. Accordingly, the Commission allowed the prayer of extension of SCoD for the Petitioner for the period during which the drought persisted during the construction of the Generating Project. The Respondent was directed to ascertain the duration of the drought based on the 'necessary notification/circular issued by the Government of Andhra Pradesh' and revise the SCoD of the Generating Project accordingly. Since drought is a force majeure event, therefore, the directions issued by the Commission to ascertain the actual period of delay on account of drought suffered at Project Site is based on all 'necessary notification/circular issued by the Government of Andhra Pradesh' on drought and not only the notification dated 09.01.2013. Hence, the notification dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014 issued by Government of Andhra Pradesh are squarely covered within the scope of Order dated 11.10.2017 passed by the Commission in Petition No. 16/MP/2014.
34. The Petitioner has submitted that vide its letters dated 22.04.2012, 27.04.2012, 02.02.2013, 05.04.2013, 10.09.2013, 01.01.2014, 17.10.2017, 28.11.2017 and 22.12.2017, it informed the Respondent about the occurrence of force majeure event in terms of the PPA. In letters dated

22.04.2012 and 27.04.2012, while referring to the drought notification dated 02.11.2011 issued by Government of Andhra Pradesh, it informed the Respondent about occurrence of force majeure event due to drought situations in the State of Andhra Pradesh.

35. The Petitioner has submitted that the issue of whether notice of force majeure had been issued or not, is irrelevant in view of the fact that Commission has accepted drought as an event of force majeure and has issued directions for ascertaining the period of force majeure as per the notifications issued by the Government of Andhra Pradesh. As per the Order dated 11.10.2017 passed by the Commission in 16/MP/2014, the Respondent is only required to determine/ascertain the actual period of delay due to which the commissioning of Generating Project got delayed. Keeping in mind that the drought is a force majeure event in terms of the PPA, the Commission may direct the Respondent to determine/ascertain the period of delay based on the notification dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014 issued by Government of Andhra Pradesh.

36. The Petitioner has submitted that it is a settled principle of law that without demonstrating actual loss, liquidated damages cannot be claimed under law. Therefore, in order to claim liquidated damages, the Respondent is required to prove the actual losses suffered due to the delay of 240 days or more considering the intervening period, during the commissioning of the Generating Project.

Hearing on 07.02.2019

37. During the hearing held on 07.02.2019, the Petitioner submitted that the present petition has emanated from the order of the Commission dated 11.10.2017 in Petition No. 16/MP/2014, wherein the Commission had held the incident of drought as a force majeure event and the same being covered under the force majeure clause of the PPA. The Commission had, in its Order dated 11.10.2017 directed the Respondent, NVVN to ascertain the duration of drought based on the necessary notification/circular issued by the Govt. of Andhra Pradesh and revise the SCoD of the Petitioner's project accordingly. However, the Respondent has not declared SCoD even after making available the document related to the period of drought as declared by the Govt. of Andhra Pradesh from time to time. Accordingly, the Petitioner has filed the

present Petition for seeking direction to the Respondent to comply with the order dated 11.10.2017 and compute the delay suffered by the Petitioner's project due to force majeure event and revise the SCoD. The Respondent objected to the prayers sought by the Petitioner and submitted that the Commission's order dated 11.10.2017 only refers to one of the notifications issued by the Govt. of Andhra Pradesh and other three notifications of drought referred by the Petitioner are not on record. The Petitioner has not impleaded the distribution companies as party to the Petition whereas the distribution companies were impleaded in Petition No. 16/MP/2014. After hearing the learned counsel for the parties, the Commission observed that *"vide order dated 11.10.2017, the Commission had held the incident of drought as a force majeure event and had directed the Respondent to compute the period of delay on the basis of necessary notification/circular issued by the Govt. of Andhra Pradesh. The Commission directed the Petitioner to amend the Petition and place on record all the four notifications of drought issued by Govt. of Andhra Pradesh."*

38. In compliance to the Order passed by the Commission on 07.02.2019, the Petitioner filed an affidavit on 16.04.2019 seeking amendment of the current Petition to bring on record all four notifications of drought issued by the Government of Andhra Pradesh. The Petitioner submitted that following paragraphs may be allowed to be added after para 11 of the Petition:

"11a. In regard to the above it is important to note that the Government Of Andhra Pradesh vide its Notifications dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014 has notified the project area as drought affected area for the period June 2011 – September 2011, June 2012 – September 2012, June 2013 – September 2013 and June 2014 – September 2014, respectively. As per the Hon'ble Commission's Order dated 11.10.2017 in Petition No. 16/MP/2014, the Respondent is required to ascertain the duration of the drought based on the 'necessary notification/circular issued by the Government of Andhra Pradesh' and revise the SCOD of the Generating Project accordingly. Therefore, in the compliance of Hon'ble Commission's Order dated 11.10.2017, the Respondent is required to consider all the required four notifications and amend the date SCOD accordingly. The copy of the Notifications dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014 are annexed herewith and marked as Annexure-P/5a.

11b In regard to the above, it is important to note that the Appellant vide its various letters has communicated to the NVVN about the existence of event of drought at the project site and has requested the NVVN to compute the period of delay based on the drought notification issued by Government of Andhra Pradesh, as mentioned above. However, the NVVN, without considering that the Hon'ble

Commission vide its Order dated 11.10.2017 in Petition No. 16/MP/2014 has directed the NVVN to ascertain the duration of drought based on the all necessary notification/circular issued by the Government of Andhra Pradesh, has refused to consider the aforementioned notification while computing/ascertaining the duration of drought.”

Analysis and Decision

39. The petition was filed on 05.04.2018 and admitted on 10.04.2018. The petition came up for hearing on 07.02.2019 and was reserved for Orders on 24.09.2019. 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:
40. The Petitioner executed PPA with NVVN for its 50 MW solar thermal power project which was subsequently amended on 23.01.2012, 30.10.2013 & 27.09.2016. The SCoD as per PPA was 09.05.2013. The SCoD was subsequently revised to 09.03.2014 on the directions of MNRE. The Petitioner achieved commissioning of its 50 MW solar thermal power project on 04.11.2014 i.e. with a delay of about 240 days. The Petitioner approached the Commission for extension of SCoD due to various force majeure eventualities such as unforeseen variation in Direct Normal Irradiation (hereinafter referred to as ‘DNI’) at project site affecting project design, drought, fire, delay due to re-organization of the State of Andhra Pradesh and statutory approvals, etc. The Commission vide its Order dated 11.10.2017 in Petition No. 16/MP/2014 allowed the prayer of extension of SCoD only due to drought and directed the Respondent to ascertain the duration of the drought based on the necessary notification/circular issued by the Government of Andhra Pradesh and revise the SCoD of the project accordingly. On 17.10.2017, the Petitioner approached Respondent and furnished the necessary notifications/circulars issued by the Government of Andhra Pradesh declaring the project site as drought affected area. A copy of the said letter was also submitted to MNRE for its consideration. On 26.03.2018, MNRE pursuant to the directions of the Commission at Para 242 of the Order dated 11.10.2017 declined the joint representations made by the solar thermal power developers dated 05.03.2014 maintaining that both parties are bound by the contractual provisions as per PPA. The Petitioner has now again approached the Commission for extension of SCoD as per the drought G.O.Ms issued by the State of Andhra Pradesh

dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014. **Per Contra**, the Respondent has submitted that the SCoD of the project was 09.03.2014. However, the Petitioner commissioned its solar power plant on 04.11.2014 i.e. after a delay of 7 months and 25 days. Subsequently, the Commission allowed extension in SCoD on account of drought in pursuance of the notification of the Government of Andhra Pradesh on 09.01.2013, which extends only for a period of 4 months as against the actual delay period of 7 months and 25 days. Therefore, the Petitioner is liable to pay the liquidated damages for the delay beyond 4 months i.e. for a period of 3 months and 25 days. The amount of liquidated damages payable for 3 months 25 days works out to Rs 47.01 Crores as principal and in addition, the delayed payment surcharge is payable thereon. The G.O.Ms dated 02.11.2011, 03.01.2014 and 17.12.2014 issued by Government of Andhra Pradesh are outside the scope of Order dated 11.10.2017 passed by the Commission in Petition No. 16/MP/2014.

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

Issue No. 1: Whether the Petitioner should be allowed extension of SCoD for it's Project pursuant to this Commission's Order dated 11.10.2017 in Petition No. 16/MP/2014 and as per the drought GOs issued by the State of Andhra Pradesh dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014? and

Issue No. 2: Whether the Respondent can be refrained from taking any coercive measures pursuant to the terms of the Power Purchase Agreement dated 10.01.2011 and supplementary agreements executed subsequently till the period of force majeure is finalized pursuant to this Commission's Order dated 11.10.2017 in Petition No. 16/MP/2014 read with Petitioner's letter dated 17.10.2017, 28.11.2017 and 22.12.2017?

42. No other issue was pressed or claimed.

43. Since issue no. 1 and issue no. 2 are interlinked, therefore, both issues are taken together for discussions.

Issue No. 1: Whether the Petitioner should be allowed extension of SCoD for it's Project pursuant to this Commission's Order dated 11.10.2017 in Petition No. 16/MP/2014 and as per the drought GOs issued by the State of Andhra Pradesh dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014?

AND

Issue No. 2: Whether the Respondent can be refrained from taking any coercive measures pursuant to the terms of the Power Purchase Agreement dated 10.01.2011 and supplementary agreements executed subsequently till the period of force majeure is finalized pursuant to this Commission's Order dated 11.10.2017 in Petition No. 16/MP/2014 read with Petitioner's letter dated 17.10.2017, 28.11.2017 and 22.12.2017?

44. The Petitioner has submitted that the Commission vide its Order dated 11.10.2017 in Petition No. 16/MP/2014 has allowed the prayer of extension of SCoD due to drought and accordingly, directed the Respondent to ascertain the duration of the drought based on the necessary notification/circular issued by the Government of Andhra Pradesh and revise the SCoD of the project. The Petitioner has submitted that the notifications dated 02.11.2011, 09.01.2013, 03.01.2014 and 17.12.2014 issued by Government of Andhra Pradesh are squarely covered within the scope of Order dated 11.10.2017 passed by the Commission in Petition No. 16/MP/2014, hence the Respondent should be directed to extend the SCoD of its project accordingly. ***Per Contra***, the Respondent has submitted that since only the notification dated 09.01.2013 was considered by the Commission in its Order dated 11.10.2017, therefore, the GOs dated 02.11.2011, 03.01.2014 and 17.12.2014 issued by Government of Andhra Pradesh are outside the scope of the impugned Order dated 11.10.2017.
45. The Commission observes that in its Order dated 11.10.2017 in Petition No. 16/MP/2014 and connected matters, it was held as under:

“D. Drought: 192.MEIL vide its Petition No. 16/MP/2014 submitted that on 9th January, 2013, Government of Andhra Pradesh declared the area in which project was situated to be drought affected area. On 2nd February, 2013, Petitioner wrote to Respondent No.1 intimating that there has been a severe drought at the project site which hindering the implementation of the project. These incidents should be considered as Force Majeure event under Article 11.5 of the PPA. The Petitioner again wrote to Respondent No.1 on 5th April, 2013 intimating that due to prevailing force majeure event regarding drought situation, synchronizing of the project to grid system would be delayed.”

...
“206. The Commission is of the view that on 9th January, 2013, Government of Andhra Pradesh had declared the area in which the project was situated to be drought affected area and the same was brought to the notice of the Respondents by MEIL on 2nd February, 2013. This incident is squarely covered as Force Majeure event under Clause 11.3.1(a) of the PPA. Accordingly, the prayer for extension of Scheduled Commercial Operation Date or the SCoD of the 50 MW project of MEIL for the period during which the drought persisted is allowed. The Respondent No.1 (NVTNL) is directed to ascertain the duration of the drought based on the necessary notification/circular issued by the Government of Andhra Pradesh and revise the SCoD of this project accordingly.”

...

“246. ...
d. Issue No. 4: Variation between assessment of DNI by the Petitioner vis-à-vis actual DNI, fluctuation in foreign exchange rate and fire from an internal source are not Force Majeure events. Hence, no compensation can be awarded to the Petitioners under the provisions of the PPA. However, the drought in Andhra Pradesh that affected the project of MEIL is covered as Force Majeure event under Clause 11.3.1(a) of the PPA and accordingly, SCoD of the project shall stand extended by the period of actual drought after ascertaining from the Government of Andhra Pradesh.”

46. Thus, the Petitioner in its Petition No. 16/MP/2014 had sought extension of SCoD of its project only on the basis of notification dated 09.01.2013 issued by Government of Andhra Pradesh vide which the Government declared the area in which project was situated to be drought affected area. The Petitioner had served the notice on the Respondent on 02.02.2013 in compliance with Article 11.5 of the PPA. Accordingly, the Commission has taken a view that the prayer for extension of SCoD of the 50 MW project of MEIL for the period during which the drought persisted is allowed.
47. The Commission notes that as per G.O.Ms. No.: 1 dated 09.01.2013 during South West monsoon from 01.06.2012 to 30.03.2012, Ananthapur district of the State of Andhra Pradesh received a rainfall with a deficit of (-) 24% until 28.09.2012. A Committee was constituted vide G.O. Rt. No. 233, Revenue (DM.II) Dept., dated 14.11.2012 for Scientific Review of Drought affected Mandals. The Committee finally suggested that 63 Mandals including Peddavaduguru Mandal in the Anantapur district, Andhra Pradesh were eligible for declaration as drought affected Mandals during Kharif, 2012.

48. The Commission observes that the SCoD of the project was 09.03.2014. However, the Petitioner commissioned its solar power plant on 04.11.2014 i.e. after a delay of 7 months and 25 days. As per G.O.Ms. No.: 1 dated 09.01.2013, during South West monsoon from 01.06.2012 to 30.09.2012, Ananthapur district of the State of Andhra Pradesh received a rainfall with a deficit of (-) 24% until 28.09.2012. The Respondent has also submitted that the extension in SCoD on account of drought in pursuance of the notification of the Government of Andhra Pradesh on 09.01.2013 extends for a period of 4 months as against the actual delay period of 7 months and 25 days. Further, the G.O.Ms dated 02.11.2011, 03.01.2014 and 17.12.2014 issued by Government of Andhra Pradesh are outside the scope of the impugned Order dated 11.10.2017. In view of the above, considering the G.O.Ms. No.: 1 dated 09.01.2013, the Commission holds that the SCoD of the Generation Project of the Petitioner is hereby extended by four months i.e. upto 09.07.2014.
49. The Commission in the ROP of the hearing dated 24.09.2019 in the instant petition has already held that:

“Learned counsel for the Petitioner submitted that the present Petition has been filed for implementation of the Commission’s order dated 11.10.2017 in Petition No. 16/MP/2014, wherein the Commission has held the incident of drought as a force majeure event in terms of the PPA and has allowed the extension of Scheduled Commercial Operation Date (SCOD) of the Project for the period during which drought persisted with direction to the Respondent, NRVNL to ascertain the duration of drought based on the necessary notification/circular issued by the Government of Andhra Pradesh and to revise the SCOD of the project. Learned counsel further submitted that the Commission vide Record of Proceedings for the hearing dated 7.2.2019 had directed the Petitioner to amend the Petition and place on record all the four notifications regarding drought issued by the Government of Andhra Pradesh as well as to implead the distribution companies as parties to the present Petition. Accordingly, the Petitioner has amended the Petition and has placed on record all the four notifications issued by the Government of Andhra Pradesh.

2. Learned counsel for the Respondents, NTPC Vidyut Vyapar Nigam Limited and Punjab State Power Corporation Limited submitted that the decision of the Commission declaring the drought as force majeure event in terms of the PPA and the extending the SCOD of the Project in Petition No. 16/MP/2014 was only with respect to the notification of the Government of Andhra Pradesh dated 9.1.2013 i.e. for the period of 4 months. The Petitioner cannot seek further extension of SCOD in the present Petition on the basis of notifications dated 2.11.2011, 3.1.2014 and

17.12.2014 which were neither the part of Petition No.16/MP/2014 nor any relief was claimed by the Petitioner against these notifications in Petition No. 16/MP/2014.

3. In its rebuttal, the learned counsel for the Petitioner submitted that other three notifications are similar to notification dated 9.1.2013 declaring drought in the region with respect to various time lines.

4. The Commission observed that since the present Petition has been filed for implementation of direction dated 11.10.2017 in Petition No. 16/MP/2014, no new grounds/documents can be considered in the present Petition. However, the Petitioner may file separate Petition in accordance with law if the other three notifications are of similar nature.

5. Learned counsel for the Respondents sought permission to encash bank guarantees after accounting the extended SCOD as per notification dated 9.1.2013. The Commission directed the Respondent not to encash the performance bank guarantee of the Petitioner till further order. The Petitioner was directed to keep the performance bank guarantee valid accordingly.”

50. In view of above, the Commission holds that since the present Petition has been filed for implementation of direction dated 11.10.2017 in Petition No. 16/MP/2014, no new grounds/documents can be considered in the present Petition. Further, the Commission observes that in compliance to the ROP dated 24.09.2019, the Petitioner has already filed a separate Petition No. 427/MP/2019 on 03.12.2019, which is pending for adjudication. Therefore, the Respondents are directed not to encash the performance bank guarantee till the disposal of Petition No. 427/MP/2019 and the Petitioner is also directed to keep the performance bank guarantee valid.

51. Accordingly, the Petition No. 100/MP/2018 is disposed of in terms of the above.

Sd/-

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सदस्य

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डॉ एम. के. अय्यर
सदस्य

Sd/-

पी. के. पुजारी
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