

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 7 of 2022

Petition of M/s. ACME Heergarh Powertech Private Limited seeking extension of the Scheduled Commercial Operation Date on account of certain Force Majeure events including second surge of Covid-19 in India and disruption in import of modules from China.

M/s ACME Heergarh Powertech Private Limited (AHPPL).... Petitioner

Maharashtra State Electricity Distribution Company Limited (MSEDCL).... Respondent

Coram

Sanjay Kumar, Chairperson
I.M. Bohari, Member
Mukesh Khullar, Member

Appearance:

For the Petitioner: Mr. Sanjay Sen (Adv.)

For the Respondent: Mr. Ravi Prakash (Adv.)

ORDER

Date: 7 July 2022

1. M/s ACME Heergarh Powertech Private Limited (AHPPL) filed the present Petition on 24 December 2021 under Section 86 (1) (e), (f) and (k) of the Electricity Act, 2003 read with Article 8 of the Power Purchase Agreement (PPA) dated 21 August 2019. AHPPL in its Petition is seeking two extensions in Scheduled Commercial Operation Date (SCOD). First period starts from 28 December 2021 to 14 March 2022 (i.e. 2.5 months) on account of certain Force Majeure events including second surge of Novel Corona Virus (Covid-19) in

India (referred as Force Majeure Event 1). Further, an extension of additional time period of 6 months from 15 March 2022 to 14 September 2022 for achieving SCOD is being sought on account of the disruption in supply of solar modules and other solar equipment from China (referred as Force Majeure Event 2).

2. AHPPL's major prayers are as follows:

"

- b) *Hold and declare that the Petitioner in terms of the OM dated 03.11.2021, issued by the Ministry of New and Renewable Energy is entitled to extension of 2.5 months in achieving the Scheduled Commercial Operation Date on account of second surge of Covid-19 as a Force Majeure Event under Article 8 of the Power Purchase Agreement dated 21.08.2019 and any consequent delay thereof;*
- c) *Hold and declare that the Petitioner in terms of the disruption caused in China and its resulting after effects on the project is a Force Majeure Event under Article 8 of the Power Purchase Agreement dated 21.08.2019 and the Petitioner is entitled to an extension of 6 months on this account for achieving Scheduled Commercial Operation Date and any consequent delay thereof;*
- d) *Direct MSEDCL to extend the Scheduled Commercial Operation Date of the Project from 28.12.2021 to 14.09.2022 (a period of 2.5 months plus 6 months in terms of prayers made above) Force Majeure Event in terms of Article 8 of the Power Purchase Agreement dated 21.08.2019 i.e., second surge of Covid-19 and supply chain disruption in China, without imposition of any penalty /adverse financial impact on the Petitioner; and*
- e) *Hold and declare that the Undertaking as being insisted upon by MSEDCL is unlawful, arbitrary and unjustifiable in law;*
- f) *Hold and declare that the Undertaking as submitted by Petitioner is just and proper;*

... ”

3. Considering AHPPL's Application for early hearing in the matter, the Commission allowed AHPPL to mention its case on 4 January 2022. Advocate of AHPPL stated that after its request for mentioning the matter, MSEDCL has granted an extension to scheduled commercial operation date up to 14 March 2022. Thus, there is no urgency in the matter and hence the Commission directed the parties to complete the pleadings.

4. AHPPL in its Petition has stated as follows:

- 4.1 AHPPL is a Special Purpose Vehicle (SPV) incorporated by ACME Solar Holding Ltd. (ASHL) for setting up a 300 MW Solar power project in Badisid, District-Jodhpur, State-Rajasthan to supply its power to MSEDCL.

42 **Chronology of events:**

Date	Event
05.12.2018	MSEDCL Floated RfS to Procure 1000 MW power from Solar Power Projects through Competitive Bidding Process.
19.03.2019	Letter of Award (LOA) was issued by MSEDCL to ASHL.
03.04.2019	MSEDCL approached to the Commission seeking approval for adoption of tariff for long term procurement of 1000 MW Solar power under Section 63 of the Electricity Act, 2003.
27.05.2019	The Commission accorded its approval for procurement and adopted the discovered tariff of Rs. 2.74 per unit.
21.08.2019	AHPPL and MSEDCL executed the PPA.

43 Outbreak of Covid-19 (first wave) and the ensuing uncertainty in delivery of solar modules and inverters from China, made it impossible for AHPPL to perform its obligations within the prescribed timeline.

44 Owing to the above circumstances and denial by MSEDCL to accept the contents of the Force Majeure Notice dated 21 February 2020, on 24 April 2020 AHPPL was constrained to approach the Commission vide Petition in Case No. 78 of 2020. In said Petition, AHPPL sought directions against MSEDCL for declaring that the PPA stands frustrated on account of Force Majeure and impossibility of performance. In support of its contentions, AHPPL relied upon Office Memorandum dated 13 August 2020, 09 February 2021 and 30 March 2021 issued by MNRE.

45 The Commission by virtue of its Order dated 20 June 2020 was pleased to grant an extension of timelines for achieving Financial Closure and SCOD of the Project for a period starting from notice of Force Majeure i.e., 21 February 2020 till supply chain is restored and lockdown is lifted completely, plus 30 days.

46 Subsequently, based on Office Memorandum dated 13 August 2020; MSEDCL vide its Letter dated 23 September 2020 communicated revised Financial Closure Date and SCOD of the Project as 28 October 2020 and 28 December 2021 respectively.

Force Majeure Event 1 (Second surge of Covid-19 in India)

47 In the wake of sudden surge of second wave of Covid-19 infections in India, various state governments imposed complete lockdown to reduce the spread of Covid-19 virus in the

nation. The State of Rajasthan was amongst the top ten (10) states in India that was worst hit by the second wave. The Rajasthan Government in its efforts to curb the transmission of virus, issued various Orders setting out the Guidelines qua second wave of Covid-19, whereby the state government imposed certain restrictions on movement and in some cases complete curfew. AHPPL relied upon Rajasthan Government Orders dated 14 April 2021, 16 April 2021 and 18 April 2021.

- 48 Considering situation, AHPPL issued a Force Majeure notice dated 19 April 2021 to MSEDCL under Article 8.1(c) of PPA citing impact of second surge of Covid -19 as a material event impairing the ability of AHPPL to proceed with its obligation to commission the Project of the PPA (1st Force Majeure Notice).
- 49 Considering large number of cases and infection rate, Rajasthan Government extended the restrictions vide its subsequent Orders dated 23 April 2021 and 30 April 2021 and 6 May 2021. On 12 May 2021, AHPPL in continuation to the 1st Force Majeure Notice issued another Force Majeure notice (2nd Force Majeure Notice) on account of issuance of the Order dated 23 April 2021, 30 April 2021 and 06 May 2021 and the subsequent lockdown in the state of Rajasthan.
- 4.10 The Government of Rajasthan further issued Order No. P. 7(1) Grah-7/2021 dated 23 May 2021, imposing state-wide lockdown from 05:00 am on 24 May 2021 to 05:00 am on 08 June 2021. On 26 May 2021, AHPPL herein again issued a Force Majeure notice (3rd Force Majeure Notice) intimating MSEDCL regarding Government of Rajasthan Order dated 23 May 2021.
- 4.11 In meantime, to address plights of Renewable Energy generators due to second surge of Covid-19, Ministry of New and Renewable Energy (MNRE) issued Office Memorandums (OM) dated 12 May 2021, 29 June 2021, 15 September 2021 and 3 November 2021. Major stipulations in MNRE notifications are as below:
- (a) OM dated 12 May 2021(OM-1): MNRE OM dated 12 May 2021, directed that the renewable energy projects, having their scheduled commissioning date on or after 01 April 2021 will be eligible to claim time-extension for completion of their project activities.
- (b) OM dated 29 June 2021 (OM-2): MNRE OM dated 29 June 2021, declared that the entire period of disruption i.e., 01 April 2021 to 15 June 2021 (both dates inclusive) due to second surge of Covid-19 can be availed by the renewable power projects as time extension.

- (c) OM dated 15 September 2021(OM-3): MNRE OM dated 15 September 2021, stipulated that the time-extension given vide MNRE's OMs dated 12 May 2021 and 29 June 2021 is an out-of-contract concession extended by MNRE to facilitate Renewable Energy projects. This time-extension is optional and can be claimed by Renewable Energy Project Developers/ EPC contractors provided they do not claim any increase in project cost on account of this time extension of 2.5 months. This increase in project cost includes any possible impact due to any change-in-law event which would not have been there had this optional time-extension was not claimed. RE developers shall have the option of not claiming the time-extension as per MNRE's O.M.s dated 12 May 2021 and 29 June 2021 but approaching the appropriate forum as per their respective PPAs, for claiming appropriate time-extension as may be admissible.
- (d) OM dated 3 November 2021(OM-4): Considering several representations issued by renewable power developers (being aggrieved by the OM3), MNRE clarified OM3 and stipulated that the change-in-law shall continue to be governed by the provisions of Power Purchase Agreement (PPA) and to be decided by the Appropriate Commission.

MSEDCL on previous occasions has acted within the terms of various OMs as issued by MNRE from time to time.

- 4.12 Considering the Force Majeure Notices issued by AHPPL; MSEDCL issued a letter dated 16 June 2021, by virtue of which it requested for status of the various project activities undertaken by AHPPL and the impact of the Force Majeure event on the project activities in details.
- 4.13 Pursuant to MSEDCL's letter dated 16 June 2021, AHPPL vide its letter dated 02 July 2021, submitted (a) abstract of solar projects which have attained financial closure but not commissioned wherein it was informed that the Financial Closure was attained on 05 February 2021; (b) letters / documentary proof regarding request received from Sub-vendors regarding delay in delivery of equipment due to ongoing Covid-19 pandemic situation; (c) revised project schedule; (d) photos of transmission line, land development and other site activities. It further informed MSEDCL that imposition of lock-down by the Rajasthan Government is beyond the reasonable control and is not attributable to it and affected the planning and overall Project costs adversely as the works were suspended/disrupted during the imposed lockdown situation. Accordingly, in line with the eventualities specified in OM2, it requested MSEDCL to grant 3 months extension of SCOD from 28 December 2021 to 28 March 2022 on account of second surge of Covid-19.
- 4.14 Subsequently, MSEDCL vide an email dated 07 September 2021, shared a draft Undertaking to be submitted by AHPPL with regard to grant of extension of SCOD on account of

disruption caused due to second surge of Covid-19. As per Clause 7 of the MSEDCL Undertaking, AHPPL was required to undertake that it will be restricted from claiming any increase in project cost among such other for the period of extension as will be provided by MSEDCL.

- 4.15 In response to the said email, AHPPL vide its letter dated 13 September 2021 informed MSEDCL that the interpretation/construction of the Undertaking is such that it restricts AHPPL from claiming any increase in Project cost among such other for the period of extension as will be provided by MSEDCL. In response to the aforesaid letter, MSEDCL by way of its email dated 21 September 2021, denied modification as requested by AHPPL in the MSEDCL Undertaking and informed that for availing the benefit of extension to SCOD on account of second surge of Covid-19, AHPPL will have to mandatorily submit the undertaking in the prescribed format.
- 4.16 Subsequently, OM4 is issued by MNRE clarifying stipulations in OM3 and clarified that the change-in-law shall continue to be governed by the provisions of PPA and to be decided by the Appropriate Commission. SECI in conformity with the terms of OM4 modified its format of Undertaking.
- 4.17 Pursuant to issuance of OM4, AHPPL wrote a letter dated 08 November 2021. It is to be noted that the regime under which the MSEDCL Undertaking was being asked for has now been amended / modified by the MNRE itself. In this regard, reference is drawn to the SECI Undertaking issued in terms of now applicable OM4 which nowhere makes any such onerous and unsustainable restrictions upon the project developers.
- 4.18 Further, on 26 November 2021 AHPPL issued a representation, by virtue of which is confirmed that it is committed to executing the Project and hence submitted an Undertaking (modified to the limited extent as instructed / allowed by OM4) along with the said letter towards the request for extension of timelines/SCOD.

Force Majeure Event 2 (Supply Chain Disruption in China):

- 4.19 AHPPL executed an agreement for supply with M/s ACME Cleantech dated 27 April 2021 for procurement and supply of photo voltaic modules for the Project.
- 4.20 After the execution of the Module Supply Agreement, M/s. ACME Cleantech placed Purchase Orders for supply/import of solar PV modules from China. A table consisting of the details of the Purchase Orders along with the details of the vendors/suppliers in China is mentioned below:

Sr. No.	Purchase Orders Date	Vendor/manufacture	Quantity	Capacity (in MW)
1	11.06.2021	ZNSHINE PV-TECH CO. LTD	90,000	48.6
2	14.06.2021 Amendment dated 06.09.2021	CECEP Solar Energy Technology (Zhenjiang) Co. Ltd.	375,000	202.5
3	17.06.2021	BEYONDSUN Green Energy Technology Co. Ltd.	80,000	43.2
4	16.08.2021	Tangshan Haital New Energy Technology Co., Ltd	510,000	275.4
5	16.08.2021	Econess Energy Co. Ltd	560,000	302.4
		Total		872.1

- 421 The solar modules of total capacity of 872.1 MW are being sourced from vendors in China for solar power plants being developed by M/s. ACME Aklera Power Technology Pvt. Ltd. and AHPPL. Out of the said capacity, the solar modules of capacity 250 MW are being sourced for the current project.
- 422 Under the Purchase Orders, the vendors were required to deliver/release the solar PV Modules from the port in China by July 2021 to August 2021. Accordingly, it was expected to receive the solar PV modules at the Indian ports by September 2021. Therefore, AHPPL duly performed its obligation relating to placing of work order through M/s. ACME Cleantech well in time.
- 423 However, owing to the Force Majeure Events in China impacting the timely execution of the Project, the delivery of solar modules could not be ascertained and the same is beyond the reasonable control of AHPPL. Therefore, it is squarely covered under Article 8 of the PPA.
- 424 AHPPL elaborated following events which are attributable to non-performance:
- (a) **Shortage of Power/Black-out in China:** The industries in China since October 2021 have been facing acute shortage of power due to (i) coal shortage in China necessary for running the thermal power projects; (ii) Chinese Government imposing rolling power blackouts across industries and mandating dual control of energy consumption policy in order to meet carbon reduction targets
- (b) **Shortage of container ships:** Due to restrictions and lockdowns being imposed by various countries including China, there was acute shortage of shipping containers from March 2021, resulting in turmoil to the shipping industry which severely impacted the supply of goods across industries throughout the world including the solar modules.

(c) **Impact of Covid-19:** The outbreak of Covid-19 has been one of the biggest crises that the China has seen in the recent past and the impacts of which are still continuing. Further, in order to normalize the situation, China has imposed stringent restrictions / lockdowns / strict protocols to restrain any further spread of COVID-19 virus since July 2021 which has severely affected the manufacturing and shipping.

(d) **Shortage of raw materials:** The shortage of raw material and output constraints for Solar PV modules in China which is still continuing and has adversely affected manufacturing of the solar cells in the factories of vendors.

425 Considering the aforementioned Force Majeure events, the vendors in China informed M/s. ACME Cleantech about Force Majeure situation by issuing notices and intimated that delivery date of equipment will be delayed and exact date for the same cannot be ascertained. Pursuant thereto, M/s. ACME Cleantech issued Force Majeure notices to AHPPL under the provisions of Module Supply Agreement.

426 AHPPL has made all and sincere efforts towards mitigating this risk. With regard to the Force Majeure Event 2, the Commission may note that AHPPL vide its letters dated 26 November 2021 have conveyed cogent reasons seeking extension of additional 6 months, however, despite several follow up including personal meetings / requests, MSEDCL has refused to respond to the said representations and in absence of such requests not being accepted, AHPPL is constrained to approach the Commission.

427 A conjoint reading of Article 8.1 and 8.2 of the PPA clearly demonstrates that if due to any Force Majeure events the contractor/sub-contractor/vendor is unable to provide delivery of parts and equipment (including solar PV modules), then the same will qualify as Force Majeure event and the Petitioner is allowed to seek appropriate relief/ extension of time on this account.

428 Considering disruption in supply chain of solar module in China, for risk mitigation AHPPL contacted the Indian vendors. However, considering shortage of parts and materials throughout the world on account of COVID-19, even the domestic manufacturers/vendors have declined to provide the solar modules. Domestic manufactures have conveyed to AHPPL that considering the current situation it is not possible to provide any delivery of modules before March 2022.

429 Further, it is important to note that for commissioning and operation of the solar plant, sourcing of various other equipment apart from solar modules like invertors switchyard, transmissions system, cables, etc., are also necessary. Due to various Force Majeure reasons including Covid-19 impact in India, the delivery of other equipment has also been impacted.

Various other equipment necessary for the commissioning of the project are yet to be delivered at the project site. Therefore, even if AHPPL would have received the solar modules on time as per schedule from its vendors, even then AHPPL would not have been able to achieve commissioning as other components of solar power plant including inverters, etc have not/ would not have been received at site due to various Force Majeure events.

5. AHPPL has also filed an Interlocutory Application (Dairy No.40 of 2022) on 4 March 2022. AHPPL in its Application sought following reliefs:

- a. *Allow the present Application and issue appropriate direction(s) to Maharashtra State Electricity Distribution Company Limited to not encash the Bank Guarantee of Rs. 24 Crores (being Bank Guarantee No. 1945IGFIN005119 dated 19.08.2019 (as amended on 31.03.2021) submitted in terms of the PPA and not to levy any Liquidated Damages thereof;*
- b. *Direct Maharashtra State Electricity Distribution Company Limited to not take any coercive/precipitative actions against the Applicant and facilitate synchronization and commissioning(s) of the Project; and'*

6. **MSEDCL in its Reply dated 9 March 2022 stated as follows:**

6.1. AHPPL in its Petition is claiming for extension of the SCOD of solar power plant from:

- 28 December 2021 to 14 March 2022 *inter alia* due to impact of the second wave of the Covid-19 pandemic, and
- From 15 March 2022 to 14 September 2022 *inter alia* due to restrictions imposed in China for supply of goods.

Extension to SCOD from 28 December 2021 to 14 March 2022 inter alia due to impact of the second wave of the Covid-19 pandemic:

6.2. MSEDCL has granted AHPPL an extension till 14 March 2022 to achieve SCOD in terms of the Subject Undertaking as per prescribed format of MSEDCL.

6.3. AHPPL desires to amend the undertaking in line with the changes carried by M/s SECI. MSEDCL contended that, M/s SECI's undertaking has provided that, the increase in project cost due to ICD, BCD or upward revision tariff shall be subjected to provisions of change in law clause of PPA.

6.4. The Commission in Case No. 78 of 2020 has specifically ruled that, the OM are optional for State Agencies like MSEDCL. The same is reproduced as under:

“

16.10 Now, the Commission

...

As stated in the above OM, these directives are mandatory for the agencies of MNRE and optional for State Agencies like MSEDCL.”

6.5. Further, extension to the SCOD has been granted only in view of the force majeure conditions. The force majeure clause of the PPA clearly states that any relaxation given due to force majeure shall not put any financial liability on the other party. Also, adjustment in tariff shall not be allowed on account of Force Majeure event. For sufficing the arguments, MSEDCL relied upon Articles 8.6 and 8.9 of the PPA.

Request for extension of SCOD till 24 September 2022 due to a disruption in import of modules from China:

6.6. MSEDCL highlighted following important milestones in view of the PPA:

Sr. No	Event	End Date
1.	PPA	21 August 2019
2.	Effective Date	26 June 2019
3.	Financial Closure (10 months from Effective date)	25 April 2020
4.	Scheduled Commercial Operation Date (SCOD) (24 months from Effective date)	25 June 2021
5.	Extension to SCOD in view of first wave of Covid 19.	28 December 2021

6.7. The Commission in its Order dated 20 June 2020 in Case No.78 of 20220 has categorically held that, M/s AHPPL has the liberty to look for the suppliers for completing the project without restricting itself to a specific manufacturer or Country. The relevant portion of the Order is reproduced below:

“16.13 Having ruled as above, the Commission would like to clarify that PPA puts responsibility of constructing project on AHPPL without binding it to specific supplier of the materials.

*Hence, after restoration of supply chain, **AHPPL should not restrict itself to present supplier and may look for other suppliers including domestic manufacturers for completing the project within extended time period at its own risk and cost.**”*

6.8. Present status of solar projects of successful bidders selected through the same tender is as follows:

Sr. No.	Name of Bidder	Capacity Awarded	Present Status
1	Shiv Solar Pvt. Ltd .	50	PBG encashed.
2	ACME Solar holdings Ltd.	300	Not Commissioned.
3	Renew Solar Power Pvt. Ltd.	300	Commissioned 300 MW
4	Avaada Energy Pvt. Ltd.	350	Part Commissioned 250 MW

The above table shows that the prayer of M/s ACME for grant of extension of further six months shall not be entertained.

- 6.9. The extension to SCOD will have cascading and irreparable financial and operational consequences on MSEDCL.
- MSEDCL will be denied its lawful claim of penalty to be levied on generator and reduction in tariff in case of delay in achievement of SCOD as per provisions of PPA.
 - Stringent RPO targets not being achieved.
 - Levy of penalty in view of non-compliance of RPO.
 - Additional cost may be borne for complying with RPO.
 - Further, it is pertinent to note that failing to supply the power from the project under the PPA, MSEDCL shall have to purchase the same from the market at the higher short-term rates. Considering the declared CUF, MSEDCL will have to purchase around 780 MUs power annually from the market.
 - In case of the purchasing REC against the energy expected from the project of AHPPL, MSEDCL will have to procure RECs at the existing market rate of around Rs. 2000 per certificate, for which, MSEDCL will not get any actual power and the consumers of the MSEDCL will unwantedly be burdened.
- 6.10. In view of the above facts and circumstances, it is crystal clear that AHPPL is somehow trying to wriggle out of its obligations under the PPA without there being any just and valid reasons. AHPPL because of its poor business decisions and financial issues is delaying project execution and seeking extension to SCOD. Hence, any relief if allowed by the Commission can only be done after providing for an appropriate compensation.

7. At the hearing with respect to Interlocutory Application held on 11 March 2022:

- 7.1. Advocate of Petitioner submitted that AHPPL is having PPA with MSEDCL and accordingly developing a 300 MW solar PV based power project located in Rajasthan. AHPPL has filed the present Petition in Case No.7 of 2022 seeking extension of the Scheduled Commercial Operation Date (SCOD) on account of second surge of novel Corona

Virus (Covid-19) and disruption in supply of solar modules and other solar equipment from China. Subsequent to filing of present Petition, MSEDCL has extended the timeline for commissioning of 300 MW Project till 14 March 2022. AHPPL assured that it is commissioning 100 MW capacity (out of total of 300 MW) within the month of March 2022 and committed to commission the rest of the capacity in phases as early as possible within outer limit of 6 months. As extended SCOD is expiring on 14 March 2022, out of abundant caution, AHPPL has approached this Commission by way of Interlocutory Application (Dairy No.40 of 2022) with a request to restrain MSEDCL from taking any coercive action such as forfeiting PBG of AHPPL as such action reflects adversely on its credit score in financial market. As far as invocation or encashment of the Bank Guarantee is concerned, MSEDCL has failed to reflect any financial injury or damages being suffered by it. Thereafter, AHPPL stated that MSEDCL filed its reply in main matter belatedly on 9 March 2022 and it required time for filing its rejoinder.

- 7.2. Advocate of MSEDCL submitted that as far as the contention in respect of force majeure is concerned, AHPPL has completely failed to substantiate its case within the parameters of the force majeure as enumerated under Article 8 of the PPA. It is settled position of law that an unconditional bank guarantee is an independent and distinct contract and if the terms thereof are unconditional then the courts would not grant any injunction except in a case of egregious fraud or a case based on special equities of irretrievable injury.
- 7.3. On reply to the enquiry from the Commission, it was informed that PBG is valid till sometime in August 2022. MSEDCL can encash it as per applicable law till it is valid. Therefore, the Commission observed that interests of MSEDCL are not adversely affected if the Commission ordered no coercive action in this matter till the main matter is disposed off, which will be much earlier to expiry of PBG. Therefore, without expressing any views on merits of the matter, the Commission directed MSEDCL not to take any precipitative coercive action in this matter till final disposal of the main matter.
- 7.4. Further, as requested, the Commission allowed AHPPL to submit rejoinder to MSEDCL's Reply in this matter within two weeks.
8. **AHPPL in its written submission dated 11 March 2022 submitted as below:**
 - 8.1. AHPPL has suffered certain headwinds adversely affecting the timely progress of the project but AHPPL through its efforts is undertaking commissioning of 100 MW capacity of its Project (out of total Project capacity of 300 MW) within the month of March 2022.
 - 8.2. AHPPL reported following progress as a part of its effort to Commission 100 MW capacity:

- a) Construction of dedicated transmission system for entire Project capacity of 300 MW is completed.
 - b) Application by way of FORM-A and FORM-B were filed before Central Electricity Authority (CEA) on 14 February 2022 and 13 February 2022 respectively, seeking approval for evacuation of power through dedicated transmission system.
 - c) Pursuant thereto, CEA by way of its letters dated 18 February 2022, informed AHPPL to fulfil/comply with certain provisions/stipulations of CEA (Measures relating to Safety and Electric Supply) Regulations, 2010 (as amended).
 - d) Resultantly, AHPPL vide its letters dated 28 February 2022 reported its compliance with the provisions/stipulations as observed by CEA vide its letters dated 18 February 2022.
 - e) Considering the compliance, CEA on 28 February 2022 granted its Approval for Energization for:
 - 220/33KV Pooling Station (4 No. 220KV bays, 33KV Switchgear & 2 No. 150MVA, 220/33KV Power Transformers (1&11) along with associated equipment); and
 - 220 kV Single Ckt Transmission Line (Length 9.9 Km) from 765/400KV Bhadla-II Substation - Bap, Jodhpur (Raj.) of PGCIL to 220/33KV Pooling Station.
 - f) The solar modules have started to arrive at the Project site.
- 8.3. As is evident from the above, Project's part commissioning of 100 MW from the total of 300 MW at advance stages unequivocally reflects that AHPPL has made all efforts to commission the part capacity and is committed to commission the rest of the capacity in phases within the prayed period of 6 months / earlier.
- 8.4. Considering the dispensation provided by MNRE through OMs dated 12 May 2021, 29 June 2021, 15 September 2021 and 03 November 2021, MSEDCL after acknowledging and accepting the fact that Covid-19 is an event of Force Majeure and thereby by virtue of its letter dated 28 December 2021 granted an extension of 74 days i.e., upto 14 March 2022 subject to the condition that AHPPL will not claim any increase in the Project Cost including Interest During Construction (IDC), impact of BCD or upward revision in tariff for the period of extension provided by MSEDCL.
- 8.5. Hence, considering the extension as granted by MSEDCL, it evidences that Covid-19 is a Force Majeure event, thus, the only issue which remains to be adjudicated is the period of extension which could be granted to AHPPL on account of the claimed Force Majeure events under Article 8 of the PPA.
- 8.6. MNRE issued an Order dated 03 November 2021 acknowledging disruption in supply of

imported solar PV modules and its impact on Renewable energy projects. The said Order provided that RE projects with COD prior to 01 April 2022 and which are impacted by such disruption in supply chain can approach Dispute Resolution Committee (DRC) for additional time extension in COD beyond the extension already granted by MNRE vide its earlier OMs on account of Covid-19. Such dispensation was allowed for projects implemented through MNRE's Renewable Energy Implementing Agencies (SECI/NTPC/NHPC etc.).

- 8.7. MNRE by way of its letter dated 03 March 2022 has requested the State Governments/authorities to consider setting up DRC and follow similar mechanism as already instituted/constituted by MNRE *vide* its Order dated 18 June 2019 and subsequent amendments thereto for dispute resolution in respect of renewable energy projects directly bid out by the State Government/authorities.
- 8.8. In furtherance of the same, AHPPL has issued a letter dated 04 March 2022 to MSEDCL to bring to its notice that MNRE vide its letter dated 03 March 2022 has requested each State to formulate a committee for resolution of disputes w.r.t. renewable energy projects directly bid out by the State Government.
- 8.9. It is the case of AHPPL that formulation of such committee only evidences that issues of extension of project commissioning timelines have been recognized by MNRE not only at the Central level but also at State level.

Erroneous interpretation of the findings of Case No 78 of 2020 by MSEDCL:

- 8.10. AHPPL at all times have maintained all prudent business utility practice and has acted in compliance with the directions issued by the Commission in Case No 78 of 2020, including approaching domestic manufacturers and other international vendors. AHPPL in order to mitigate the risks/losses pertaining to non-supply/restricted supply of solar modules have also contacted various other vendors in China.
- 8.11. In addition to the vendors available in the year 2020, AHPPL has in addition also appointed – (i) BEYONDSUN Green Energy Technology Co. Ltd; and (ii) Tangshan Haital New Energy Technology Co. Ltd. Further, AHPPL has also made efforts to procure modules and equipment from India.
- 8.12. AHPPL has made all and sincere efforts towards mitigating this risk. However, the situation in China in being overwhelming for its vendors, AHPPL is now constrained henceforth to approach the Commission for an extension of additional 6 months of time for execution of the Project. However, being on the verge of commissioning 100 MW in the month of March 2022 and commissioning the rest capacity of 200 MW in phases within six months thereafter,

however, this six-month sought is the outer limit and AHPPL shall make all its efforts to commission the remaining part capacity before the completion of six months.

The status of solar projects of successful bidders selected through the same tender

- 8.13. MSEDCL in its reply/ during the course of arguments on 11 February 2022 has submitted that other generator/bidders in selected through the bid have commissioned/part commissioned the Project. Therefore, the extension as sought by AHPPL is not liable be entertained.
- 8.14. In this regard, AHPPL submitted that the conditions and working of all projects are not the same and are incomparable.

Adverse financial impact if any on MSEDCL

- 8.15. MSEDCL has not made out any case for encashing the Bank Guarantee since it has failed to reflect any financial injury or damages being suffered by it.
- 8.16. It is clear from the Reply dated 09 March 2022 that there is neither any quantification of damages nor any evidence qua the alleged injury. MSEDCL despite being in the know of correct facts is wanting to encash the said Bank Guarantee without merits on the basis of an assumption.
- 8.17. Further, AHPPL cannot be subjected to any Liquidated damages as a matter of right and must pass the test as provided under Section 74 of the Indian Contract, 1862 and the Judgments of the Hon'ble Supreme Court in the case of *Kailash Nath Associates vs. Delhi Development Authority cited as, (2015) 4 SCC 136*, which followed the settled law laid in *Fateh Chand vs Balkishan Das, (5 judges Constitution bench)*.

The scope of the provision made it clear that the party seeking the liquidated damages have to prove the loss and the only exception is in the case where the actual loss cannot be quantified. The Hon'ble Supreme Court also reconfirmed the settled law that if actual damage or loss is not suffered by a party, the party cannot claim liquidated damages as stipulated in the contract.

- 8.18. To suffice the arguments, AHPPL referred to CERC Order dated 11 October 2017 in Petition No.304/MP/2013 (M/s Godawari Green Energy Limited v. NTPC Vidyut Vyapar Nigam Limited & Ors). The CERC Judgement highlights that the law w.r.t. imposition and payment of liquidated damages is well established. It stipulates that – (a) the party complaining of breach of contract and claiming compensation is entitled to such compensation only on proof

of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach; (b) the actual loss need not be proved and can be given on the basis of pre-estimate of damage or loss; and (c) the Commission is required to find out the genuineness of the pre-estimate damages incurred by MSEDCL and the extent of reasonable compensation which can be accounted for as “liquidated damages”.

8.19. Further, Hon’ble Supreme Court in the case of *M/s Gangotri Enterprises Ltd. vs. Union of India (UOI) and Ors.*, cited as (2016) 11 SCC 720 has categorically held that if the proceedings are pending before the Court and the Court has admitted/adjudicated the amount in dispute then the same cannot be claimed as damages till the final adjudication takes place.

9. AHPPL in its Rejoinder dated 20 May 2022 submitted as below:

9.1. AHPPL in its Rejoinder has re-iterated the facts, which are already submitted by it as a part of written submission dated 11 March 2022 and the Main Petition. For sake of brevity, only new arguments have been captured herein.

9.2. In support of its case of Force Majeure 2 event, AHPPL has relied on several documents and necessary factual events as emerging from the publicly available information / data.

9.3. MSEDCL in its Reply has not refuted / disputed the disruption in supply of solar modules on account of various Force Majeure events in China, hence the events causing the delay in commissioning of the Project qualify as an event of force majeure under Article 8 of the PPA.

9.4. AHPPL has taken cogent steps towards commissioning of the Project and has already achieved part-commissioning of 200MW capacity out of 300 MW capacity of the Project under the PPA. Further, AHPPL is in advance stages of commissioning the remaining 100 MW capacity for which it has obtained approval of CEA for energization of electrical installation vide letters dated 19 May 2022.

9.5. The event being claimed as a Force Majeure Event is within the contractual construct of the PPA. Further, it is not reflecting from the contents of MSEDCL’s Reply that there is any financial burden being put on MSEDCL.

9.6. AHPPL is claiming what is permissible in law and under the specific provisions of the PPA. Article 8.9 PPA clearly states that the other party is not responsible for losses to the affected party due to occurrence of a force majeure event and adjustment in tariff shall not be allowed on account of Force Majeure event. Based on this PPA provision, it cannot be the case that MSEDCL can invoke the Bank Guarantee and levy Liquidated Damages indiscriminately

upon AHPPL for a force majeure event which is beyond the reasonable control of AHPPL.

- 9.7. MSEDCL in its Reply raised issue of its failure to achieve stringent RPO targets, consequential levy of penalty and additional cost in view of non-compliance of RPO. In this regard, it is submitted that the Commission vide its Order dated 07 September 2021 in Case No 49 of 2021 has observed that even though MSEDCL is unable to comply with its RPO obligation a particular financial year. However, considering certain Force Majeure events including Covid-19, MSEDCL was allowed to comply with its RPO Obligation in FY- 2022-2023.
10. At the E-hearing held on 24 May 2022, Advocate of AHPPL submitted that on 23 May 2022 it has achieved full commissioning of the project. Advocate of MSEDCL submitted that AHPPL ought to have followed prudent utility practices which ostensibly includes sourcing of material in prudent manner.

11. AHPPL in its written arguments dated 27 May 2022 submitted as below:

- 11.1. AHPPL had commissioned its 300 MW in phases starting from 30 March 2022 and achieved full commissioning of the Project on 23 May 2022. Hence, the period between 15 March 2022 to 23 May 2022 (70 days) be declared as a period affected and covered by Force Majeure 2.
- 11.2. AHPPL pleaded that the SCOD be extended up to 23 May 2022 without encashment of Bank Guarantee or imposition of any Liquidated Damages.
- 11.3. A table demonstrating the commissioned capacity of the Project along with the date of commissioning is presented below:

Capacity	Status	Date of Commissioning	Delay to be condoned
50 MW	Commissioned	30 March 2022	15 days
50 MW	Commissioned	14 April 2022	30 days
100 MW	Commissioned	02 May 2022	48 days
100 MW	Commissioned	23 May 2022	70 days

- 11.4. By virtue of commissioning its project in a period of 70 days having asked for 180 days is a testament of AHPPL's commitment and seriousness towards the said project.
- 11.5. Owing to the Force Majeure Events in China, the Chinese vendors issued Force Majeure notices to M/s ACME Cleantech and intimated that delivery date of equipment will be delayed as against the Delivery Schedule as provisioned under Para 6.1 of the Purchase orders issued to such vendors and exact date for the same cannot be ascertained. Pursuant thereto, M/s. ACME Cleantech issued Force Majeure notices to under the provisions of Module Supply

Agreement. A table encapsulating the schedule of delivery under the Purchase Orders executed between M/s. ACME Cleantech and Chinese vendors is stated hereinbelow:

Sr. No.	Details of Purchase Order(s)	Delivery Schedule as per Para 6.1 of the Purchase Order(s)
1	Purchase Order dated 11.06.2021 executed between ACME Cleantech and ZNSHINE PV Tech Co. Ltd. for 48.6 MW capacity	25 July 2021
2	Purchase Order dated 14.06.2021 executed between ACME Cleantech and CECEP Solar Technologies (Zhenjiang) Co. Ltd. for 202.5 MW capacity	25 July 2021
3	Purchase Order dated 17.06.2021 executed between ACME Cleantech and BEYONDSUN Green Energy Technology Co. Ltd. for 43.2 MW capacity	25 July 2021
4	Purchase Order dated 16.08.2021 executed between ACME Cleantech and Tangshan Haitai New Energy Technology Co. Ltd. for 275.4 MW capacity	17 September 2021- 17 November 2021
5	Purchase Order dated 16.08.2021 executed between ACME Cleantech and Econess Energy Co. for 302.4 MW capacity	17 September 2021- 02 December 2021

11.6. It is imperative to point out that MNRE issued an Order dated 03 November 2021 acknowledging disruption in supply of imported solar PV modules and its impact on Renewable energy projects and inter alia opined constitution of a Dispute Resolution Committee. However, AHPPL herein is not praying for the matter to be undertaken before such Dispute Resolution Committee. The reliance on the said MNRE Order dated 03 November 2021 is placed to emphasize that disruption(s) in China causing delay in commissioning of projects in India.

11.7. A conjoint reading of Article 8.1 and 8.2 of the PPA clearly demonstrates that if due to any Force Majeure events the contractor/sub-contractor/vendor is unable to provide delivery of parts and equipment (including solar PV modules), then the same will also qualify as a Force Majeure event under the PPA.

11.8. The Commission's Order dated 20 June 2020 in Case No.78 of 2020 has been passed in favor of AHPPL and it upholds the validity of Article 8 of the PPA to include global disruption in China as a Force Majeure event. The Commission in said Order categorically noted following:

“.....disruption in global supply chain due to outbreak of Covid-19 and imposition of consequential lockdown in India is considered as event of Force Majeure. ACME Heergarh Powertech Pvt. Ltd. is exempted from its obligation for the period granted under Force Majeure without any compensation”.

At this stage, it is not open for MSEDCL to dispute the same.

- 11.9. With regards to comparison with other successful bidders selected through the same tender, AHPPL stated that the conditions and working of all projects are not the same and are incomparable. Hence, in this regard MSEDCL cannot broad base its contentions to generalize the setting up of all projects to be similar. AHPPL cannot be placed at the same footing as that of the other developers.
- 11.10. MSEDCL has referred to the Project being developed by M/s. Avaada Sunce Energy Pvt Ltd without explaining that M/s. Avaada Sunce Energy Pvt Ltd itself has approached the Commission by the Petition (Diary) No. 21 of 2022 seeking extension of SCOD owing of Force Majeure events affecting execution of the Project, and the facts of the present case are *pari materia* to that of M/s. Avaada Sunce Energy Pvt Ltd. Therefore, the stand taken MSEDCL is self-contradictory and misplaced.
- 11.11. As far as project of bidder M/s. Shiv Solar Pvt. Ltd. is concerned, it has not commissioned the project and hence the said comparison in itself is perverse.
- 11.12. MSEDCL during the course of the arguments as held on 23 May 2022 alleged that upon the passing of the Order on 20 June 2020 in Case No. 78 of 2020, AHPPL appointed its Module Supplier through the contract dated 27 April 2021 and had the Module Supplier been appointed earlier, the delay in SCOD could have been avoided. It is a well-established business practice that the module ordering takes place at the last leg of project schedule as delivery of modules starts 4-5 months prior to SCOD. If modules are ordered much prior to SCOD then it may expose to damage at sites, derating of modules may happen, and project cost gets increased due to impact of IDC (interest during construction).
12. **MSEDCL in its Written Arguments dated 14 June 2022 submitted as below:**
 - 12.1. MSEDCL vide its letter dated 28 December 2021 granted extension of SCOD till 14 March 2022. Hence, Prayer on that account has become infructuous.
 - 12.2. As far as the second extension, as sought by AHPPL from 15 March 2022 to 14 September 2022 is concerned, admittedly SCOD for the remaining Project has been achieved on 23 May 2022. Thus, extension sought in excess of 23 May 2022 till 14 September 2022 may not be required to be adjudicated upon by the Commission.
 - 12.3. In view of the aforesaid the dispute remains with regard to period 14 March 2022 to 23 May 2022 only and the Commission need to determine whether the aforesaid period can be

condoned on account of Force Majeure event or not.

- 12.4. After bare perusal of the Order dated 20 June 2020 passed in Case No. 78 of 2020; it is clarified that AHPPL was directed, as back as in June 2020, to look for other suppliers including the domestic manufacturers for completing the Project within the extended time. It may not be out of place to mention here that the Commission had quite foreseen the difficulties which may occur in supply of necessary equipment from the present suppliers of AHPPL thus, have categorically asked them to look for alternatives including domestic manufacturers for completion of the Project in time.
- 12.5. AHPPL in its Petition and supporting Arguments have provided details of the Purchase Orders placed by AHPPL with different vendors. The bare perusal of the said details would make it clear that AHPPL, despite the categoric instructions of the Commission, chose to place its purchase Orders to the vendors in China itself. AHPPL has not placed any documents on record if at all, he has explored the domestic or international vendors other than China. All supportive correspondences are found to be made with the Chinese Companies counterparts except one Indian Company. It is worthwhile to mention here that the said Indian Company has responded favorably to supplier; however, AHPPL has not disclosed as what happened further to the transaction with the said company.
- 12.6. In terms of Article 1 of the PPA, AHPPL ought to have followed prudent utility practices, which ostensibly include sourcing their material in the most economically prudent manner. That procurement of raw material as well falls under the purview of prudent utility practices is no longer *res integra* and has been settled by a host of decisions rendered by the Hon'ble Appellate Tribunal for Electricity as also by the Commission.
- 12.7. For sufficing the Argument, MSEDCL relied upon APTEL Judgment dated 7 April 2016 in Appeal No. 100 of 2013 & I.A. No. 116 of 2013 (*Uttar Haryana Bijli Vitran Nigam Limited and Ors vs Central Electricity Regulatory Commission*), Judgment dated 8 November 2017, Appeal No. 226 of 2016 (*Adani Transmission (India) Ltd. v. CERC and Ors*) and Judgment dated 14 July 2021, Appeal No. 374 of 2019, IA Nos. 1938 of 2019, 391 and 675 of 2020 (*SEI Diamond Pvt. Ltd. and Ors v. KERC and Ors*).
- 12.8. AHPPL has sought extension of time from 15 March 2022 to 23 May 2022 on the basis the alleged Force Majeure 2. It is pertinent to note that AHPPL for the first-time had sought extension of the SCOD in terms of Force Majeure 2 only vide its letter dated 26 November 2021. Article 8 of the PPA defines Force Majeure and Article 8.1 (c) and 8.1 (d) provide for the mechanism/procedure to be adopted by the affected party to take benefits under the said Force Majeure event. It is an admitted position in the matter at hand that AHPPL has failed to adhere with the said procedure enumerated under Article 8.1 (c) and 8.1 (d) of the

PPA. As a pre-condition of availing Force Majeure benefits, AHPPL was also duty bound give regular (and not less than weekly) reports to MSEDCL on the process of the remedial measures.

- 12.9. Hon'ble Appellate Tribunal for Electricity in the case of *Maruti Clean Coal and Power Limited v. Power Grid Corporation of India Limited and Anr* [2017 SCC OnLine APTEL 70], has specifically held that a party claiming relaxation/compensation citing a Force Majeure event, is mandatorily required to fulfil such pre-requisite as mentioned in the corresponding Article of the respective agreement, being the Subject PPA, in the instant matter.
- 12.10. MSEDCL mentioned that AHPPL is wrongly taking shelter of supply chain disruption in China. It is relevant to mention that the similarly placed generators who were also importing the module and other equipment for the project from China has been able to procure the said product and commission the projects within the extended time period. For reference, MSEDCL gave detailed timeline of project commissioning with reference to M/s. ReNew Solar Pvt. Ltd. and M/s. Avaada Energy Pvt.Ltd.
- 12.11. The liquidated damages could only be calculated after the date of final commissioning of the project at large. The date of final commissioning in the present case was on 23 May 2022. Hence, the LD could not have been calculated by MSEDCL before the said commissioning.

Commission's Analysis and Rulings

13. The Commission notes that prior to this Petition, AHPPL had approached this Commission in Case No. 78 of 2020 claiming frustration of contract on account of Force Majeure event of Covid-19 pandemic and impossibility of performing the obligations under the PPA. The Commission vide its Order dated 20 June 2020 recognised Covid-19 as Force Majeure event and extended the date for Financial Closure and SCoD as follows:

15.6 Further, it is important to note that the Ministry of Finance (Department of Expenditure), Government of India vide Office Memorandum dated 19 February 2020 in relation to 'Manual for Procurement of Goods, 2017' has clarified that disruption in supply chain on account of spread of Covid-19 in China and other countries is to be treated as Force Majeure. Relevant part of said Office Memorandum is reproduced below:

"2. A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard it is clarified that it should be considered as a case of natural

calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above.”

15.7 In view of the above, as Covid-19 is an epidemic and AHPPL’s suppliers have been affected on account of spread of Covid-19 causing delay in supply of material to AHPPL, the Commission rules that AHPPL is affected from Force Majeure event i.e. spread of Covid19, and it is eligible for relief under Force Majeure Article of the PPA.

.....
16.10 Now, the Commission has upheld AHPPL’s claim of Force Majeure on account of spread of Covid-19. Hence, in terms of Article 8.2 of the PPA, AHPPL is eligible for time extension for meeting its obligations i.e. Financial Closure and commissioning of Project by the period for which Force Majeure event is in force and subject to the condition that AHPPL remains affected by it. In this regard, the Commission notes that Ministry of New and Renewable Energy (MNRE), Govt. of India vide its OM dated 17 April, 2020 has provided the treatment/roadmap regarding time-extension in Scheduled Commissioning Date of RE Projects considering disruption due to lockdown due to COVID-19 as under:

.....
As stated in the above OM, these directives are mandatory for the agencies of MNRE and optional for State Agencies like MSEDCL. However, in order to have consistency of relief available to the RE generators, the Commission deems it fit to use this OM dated 17 April 2020 as guiding document for deciding on time extension to be allowed on account of Covid-19. Accordingly, the Commission directs MSEDCL to extend due date of Financial Closure and Schedule Commissioning Date of the project for a period starting from notice of Force Majeure i.e. 21 February 2020 till restoration of supply chain and Government of India withdrawing lockdown imposed on account of Covid-19, plus 30 days. MSEDCL is directed to ascertain the exact period for relief under Force Majeure after lockdown is completely lifted. Further, AHPPL shall provide Bank Guarantee as per PPA valid for period extended from time to time on account of Force Majeure.

.....
16.13 Having ruled as above, the Commission would like to clarify that PPA puts responsibility of constructing project on AHPPL without binding it to specific supplier of the materials. Hence, after restoration of supply chain, AHPPL should not restrict itself to present supplier and may look for other suppliers including domestic manufacturers for completing the project within extended time period at its own risk and cost.”

Based on above Order of the Commission, MSEDCL extended SCoD for AHPPL’s 300 MW Solar PPA to 28 December 2021.

14. Present Petition has been filed by AHPPL seeking extension in SCOD on two Force Majeure events. First event is on account of second surge of Covid-19 and second is due to disruption

in supply of solar modules and other solar equipment from China. As per AHPPL both the events qualify as Force Majeure events under Article 8 of PPA. Details of extension sought is as under:

Sr. No.	Event	Period of Extension
1	Second surge of Covid-19- (Force Majeure Event 1)	28 December 2021 to 14 March 2022
2	Disruption in supply chain of solar modules and other solar equipment from China (Force Majeure Event 2)	15 March 2022 to 14 September 2022

15. To supplement argument for Force Majeure event 1, AHPPL relied upon MNRE OM dated 12 May 2021, 29 June 2021, 15 September 2021 and 3 November 2021.
16. During the pendency of present proceeding, MSEDCL vide its letter dated 28 December 2021 granted extension to SCOD till 14 March 2022. Thus, relief against first event of Force Majeure has already been granted and hence need not be adjudicated by this Commission. Hence, the Commission is dealing with only the claim for second event of Force Majeure i.e. disruption in supply chain of solar modules and other solar equipment from China.
17. Considering disruption in supply chain in China, AHPPL has sought extension from 15 March 2022 to 14 September 2022. However, during pendency of present proceedings, AHPPL has commissioned the project in phased manner as per following timelines:

Capacity	Status	Date of Commissioning	Delay to be condoned
50 MW	Commissioned	30 March 2022	15 days
50 MW	Commissioned	14 April 2022	30 days
100 MW	Commissioned	02 May 2022	48 days
100 MW	Commissioned	23 May 2022	70 days

Hence, through its written submission dated 27 May 2022, AHPPL restricted its relief to period between 15 March 2022 to 23 May 2022 (70 days) and requested the Commission to declare that said period is covered by Force Majeure Event. Accordingly, AHPPL pleaded that the SCOD be extended up to 23 May 2022 without encashment of Bank Guarantee or imposition of any Liquidated Damages.

18. Thus, the only issue that the Commission has to decided in present matter that whether Supply Chain disruption in China qualify as Force Majeure event under the PPA and whether

AHPPL has been affected on account of the same.

19. AHPPL narrated its difficulties faced by its supplier M/s ACME Cleantech Solutions Private Limited for procurement and supply of photo voltaic modules for the Project. ACME Cleantech in June-2021 placed Purchase Orders for supply/import of solar PV modules from vendors China. Despite placing the orders in timely manner in June-2021 & August-2021, AHPPL is unable to receive delivery of the solar PV modules from the vendors/manufactures in China. AHPPL stated that following major issues which lead to disruption in supply chain of solar module in China:
 - Shortage of Power/Black-out in China
 - Shortage of container ships
 - Impact of Covid-19
 - Shortage of raw materials

20. Opposing AHPPL's contentions, MSEDCL stated that the Commission vide its Order dated 20 June 2020 in Case No. 78 of 2020 had directed AHPPL to look for other suppliers including the domestic manufacturers for completing the Project within the extended time. AHPPL ought to have followed prudent utility practices, which ostensibly include sourcing their material in the most economically prudent manner. Further, AHPPL has failed to adhere to the procedure enumerated under Article 8.1 (c) and 8.1 (d) of the PPA. As a pre-condition of availing Force Majeure benefits, AHPPL was duty bound to give regular (and not less than weekly) reports to MSEDCL on the process of the remedial measures.

21. In this regard, the Commission notes that its earlier Order dated 20 June 2020, has recognized disruption in global supply chain on account of Covid-19 as Force Majeure Event. Relevant part of the Order is reproduced below:

“ *Final Order*

.....

2. Disruption in global supply chain due to outbreak of Covid-19 and imposition of consequential lockdown in India is considered as event of Force Majeure. ACME Heergarh Powertech Pvt. Ltd. is exempted from its obligation for the period granted under Force Majeure without any compensation.”

Above said ruling of the Commission is consistent with the Ministry of Finance (Department of Expenditure), Government of India's Office Memorandum dated 19 February 2020 in relation to 'Manual for Procurement of Goods, 2017' which clarified that disruption in supply chain on account of spread of Covid-19 in China and other countries is to be treated as Force Majeure. Relevant part of said Office Memorandum is reproduced below:

“2. A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard it is clarified that it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above.”

In view of above, it is already ruled that disruption in supply chain on account of spread of Covid-19 in China is a Force Majeure event.

22. In view of above background, the Commission notes following provision of PPA related to Force Majeure:

“

8.1 Force Majeure Events:

- a) Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a “Force Majeure Event”) beyond the reasonable control of the Party experiencing such delay or failure, including occurrence of any of the following:*
 - i) acts of God;*
 - ii) typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;*
 - iii) acts of war (whether declared or undeclared), invasion or civil unrest;*
 - iv) any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the Power Producer or MSEDCL of any Law or any of their respective obligations under this Agreement);*
 - v) Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
 - vi) earthquakes, explosions, accidents, landslides, fire;*
 - vii) expropriation and/or compulsory acquisition of the Project in whole or in part by Government Instrumentality;*
 - viii) chemical or radioactive contamination or ionizing radiation; or*
 - ix) An event of force majeure affecting the concerned STU/MSEDCL..as the case may be, thereby affecting the evacuation of power from the delivery points by MSEDCL*
 - x) damage to or breakdown of transmission facilities of CTU/STU/DISCOM;*
 - xi) exceptionally adverse weather condition which are in excess of the statistical measures of last hundred (100) years”*

b) Force Majeure Exclusions: Force Majeure shall not include the following conditions, except to the extent that they are consequences of an event of Force Majeure:

- i) Unavailability, late Delivery or Change in cost of plants and machineries, equipment, materials, spare parts or consumables for the project;*
- ii) Delay in performance of any contractor / sub-contractor or their agents*”

Thus, as per Article 8.1(b) of the PPA, late delivery of plant & machineries and delay in performance of any contractor / sub contractor of generator on account of Force Majeure Event shall be considered a Force Majeure Event for the Generator.

23. In the present case, AHPPL’s contractor i.e. M/s ACME Cleantech Solutions Pvt Ltd has invoked Force Majeure as its solar module suppliers in China has invoked Force Majeure clause on account of Covid-19 impact, shortage of container ships, shortage of raw material and shortage of Power / Black-out in China. As per Article 8.1(b) of the PPA, said Force Majeure invoked by suppliers in China can be treated as Force Majeure for AHPPL. However, it is important to note that the Commission while granting extension of SCoD vide Order dated 21 June 2020 directed AHPPL as follows:

16.13 Having ruled as above, the Commission would like to clarify that PPA puts responsibility of constructing project on AHPPL without binding it to specific supplier of the materials. Hence, after restoration of supply chain, AHPPL should not restrict itself to present supplier and may look for other suppliers including domestic manufacturers for completing the project within extended time period at its own risk and cost

Thus, before providing any relief under Force Majeure, it is important to look into compliance of above directives of the Commission.

24. The Commission notes that as against limited supplier from Solar Module and Inverters identified in its submission in Case No. 78 of 2020, from submission in present Petition, it is observed that 5 suppliers were identified. Further, AHPPL has also approached domestic manufacturers, but they have expressed difficulties in providing Solar Module before March 2022. This shows that AHPPL has taken efforts to source material from various suppliers without restricting to limited suppliers. Hence, AHPPL has complied with directives in Order dated 21 June 2020.
25. The Commission also notes that MNRE vide Order dated 3 November 2021 taken cognizance of temporary disruption in supply of imported solar module and stated as follows:

“2. It has been represented to this Ministry that there are some temporary disruptions in supply of imported solar PV modules on account of various factors, for which extension

in project commissioning timelines and postponement of scheduled date of imposition of BCD on import of solar cells & modules have been requested.

- 3. The issue was examined. It is noted that generally the procurement of solar PV modules for the solar power project takes place only in the last few months of commissioning and so only the projects scheduled for commissioning in coming 5-6 months are likely to get affected due to this temporary situation. It is also noted that to facilitate Renewable Energy (RE) projects, this Ministry has already granted time extensions on account of 1st and 2nd waves of COVID-19.*
- 4. In order to further address specific issues cited in Para-2 above, for projects under implementation through MNRE's Renewable Energy Implementing Agencies (REIAs) [SECI/NTPC/NHPC] and having Scheduled Commissioning Date (SCD) before April 1, 2022 after considering all time extensions including the extensions given on COVID-19, and considering the scheduled date of imposition of BCD on import of solar cells & modules as April 1, 2022, it has been decided to empower the Dispute Resolution Committee (DRC) to look into any additional time extension requirement of these projects in exceptional circumstances on account of issues cited at Para-2 above, and make a recommendation to this Ministry on merits on a case-to-case basis."*

Although above MNRE Order is with reference to Dispute Resolution Committee, it is important to note that MNRE after granting extension on account of 1st and 2nd wave of Covid-19 has also taken note of temporary disruption in supply of imported solar module and directed Dispute Resolution Committee to take decision of granting additional time extension on case to case basis.

26. Considering all above aspects, the Commission is of the opinion that as AHPPL has been affected on account of disruption in supply of Solar module from China, it needs to be considered as event of Force Majeure under the PPA.
27. The Commission notes that AHPPL in present Petition has sought extension of six months corresponding to July 2021 to December 2021 during which it was affected due to Force Majeure event of disruption of supply chain of solar modules and other solar equipment from China. However, as project has been commissioned during the pendency of the present Petition, AHPPL has requested to grant only 70 days (instead of 6 months) extension corresponding to actual delay in commissioning of the project.
28. For allowing claim against any event of Force Majeure, it is mandatory that affected party gives notice of such event to other party. Relevant clause of the PPA is reproduced below:

"8.1. Force Majeure Events:

.....

c) The affected Party shall give notice to other party of any event of Force Majeure as soon as reasonably practicable, but not later than 7 days after the date on which such Party knew or should reasonably have known of commencement of the event of Force Majeure.

*d) **Provided that such notice shall be a pre-condition to the affected party's entitlement to claim relief under this Agreement.** Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed, and the Affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other party may reasonably request about the situation.*

*i. **The affected Party shall give notice to the other Party of (1) cessation of relevant event of Force Majeure; and (2) cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this agreement, as soon as practicable after becoming aware of each of these cessations.***"

[emphasis added]

Thus, notice for Force Majeure event is precondition for claiming relief under Force Majeure. Further, affected party also has to give notice to other party regarding cessation of such event of Force Majeure. The Period between these two notices can be considered as period of Force Majeure for the affected party.

29. In the present case, although AHPPL has stated that it was affected on account of Force Majeure event of supply chain disruption in China during the period of July 2021 to December 2021, it has issued letter to MSEDCL on this account only on 26 November 2021. It is important to note that in present Petition, AHPPL had sought extension on account of two different events of Force Majeure. In first event i.e. 2nd wave of Covid-19, MSEDCL has issued proper notice of Force Majeure to MSEDCL, as has been laid down in the PPA. Whereas in second event i.e. disruption of supply chain in China, instead of issuing proper notice under article 8.1 (c) of the PPA, AHPPL has simply issued a letter dated 26 November 2021 to MSEDCL seeking extension in SCOD by six month. Further, AHPPL has not issued any notice for cessation of event. As AHPPL has intimated MSEDCL about disruption in supply chain in China only on 26 November 2021, effect of said Force Majeure event has to be considered based on the merits and the provisions of PPA and other applicable provisions, only from that date. The vendors in China have started issuing Force Majeure notice in July 2021, but AHPPL has decided to communicate the same to MSEDCL only on 26 November 2021. Hence, effect of this Force Majeure event cannot be considered for the period prior to 26 November 2021. Further, as there is no cession notice for this event, December 2021 as stated in Petition needs to be considered as cession of event. Accordingly, relief for Force Majeure event on account of disruption of

supply chain in China can be considered only for the period of 26 November 2021 to 31 December 2021 i.e. 36 days.

30. The Commission is inclined to consider the Force Majeure event due to the fact that AHPPL had informed the Formed Majeure event on 26 November 2021, they did make efforts to procure the modules/equipment required for advancing the commissioning from alternate source and the fact that there was a disruption in supply from China for the period between 26 November 2021 (the date on which AHPPL informed MSEDCL), till the cessation of the event. Thus, the Liquidity damages as per provisions of the PPA stand limited to 34 days instead of 70 days.
31. Once, the Force Majeure event has been upheld, only relief available under the PPA is that the affected party is exempted from its obligation for that period without any compensation in tariff. Hence, in terms of Article 8.2 of the PPA, AHPPL is eligible for time extension for meeting its obligations i.e. SCOD by 36 days. Hence, SCOD of AHPPL plants is extended from 14 March 2022 to 19 April 2022.
32. The Commission notes that out of 70 days of delay in SCOD, only 36 days has been covered under above Force Majeure event and for balance 34 days of delay, liquidated damages as stipulated under the PPA need to be imposed. In this regard, AHPPL has contended that for claiming any liquidated damages, MSEDCL has to demonstrate actual loss incurred to it. In reply, MSEDCL without quantifying losses / damages has stated various parameters on which it could have incurred losses on account of delay in commissioning of the project.
33. In this regard, the Commission notes that APTEL in its Judgement dated 12 January 2015 in Appeal No. 154 of 2013 & I.A. No. 222 of 2013 (M/s. Lanco Kondapalli Power Limited vs Andhra Pradesh Electricity Regulatory Commission &Ors) categorically held that it is very difficult to compute the actual loss due to breach of contract by a generating company to the Distribution licensee. The relevant para reads as below:

*51. We agree with the contentions of Learned Senior Counsel for Respondent nos. 2 to 7 that in view of the difficulties in calculating the actual damages, suffered by a party due to non-supply of electricity by another party, a pre-calculated liquidated damages on pre-estimated basis are agreed between the parties in the PPAs for breach of contract. Electricity is accounted for on the basis of 15 minutes time block for each day and the demand for electricity varies during the day depending on the time of the day and also varies in different seasons. The Distribution Companies also have contracts with a number of generating stations and also buy electricity in the short term market to meet their varying demand from different hours of the day. Sometimes, due to mis-match between the demand and availability of electricity load shedding is also resorted to. **Due to non-availability of power from a contracted source due to delay in COD of the project, the distribution licensee may have to***

carry out load shedding or procure power from alternate sources which may be more expensive. It is very difficult to compute the actual loss due to breach of contract by a generating company to the Distribution licensee. For this reason a provision is kept in the PPA for Liquidated Damages at a pre-estimate of the loss as agreed between the parties at the time of entering into the PPA. (Emphasis added)

Above ruling of the APTEL is squarely applicable in present matter and hence MSEDCL is eligible to raise liquidated damage for delay of 34 days in SCOD as per provisions of PPA. MSEDCL has not raised such claim as project is commissioned during pendency of this proceeding.

34. Hence, the following Order.

ORDER

1. **Case No. 7 of 2022 is partly allowed.**
2. **Scheduled Commercial Operation Date of 300 MW Solar Project of ACME Heergarh Powertech Pvt. Ltd. is extended to 19 April 2022.**
3. **For delay in commissioning beyond this date of 19 April 2022, Maharashtra State Electricity Distribution Co. Ltd. can raise claim for Liquidated Damages as per provisions of PPA in terms of para 30 above.**

**Sd/-
(Mukesh Khullar)
Member**

**Sd/-
(I.M. Bohari)
Member**

**Sd/-
(Sanjay Kumar)
Chairperson**


**(Abhijit Deshpande)
Secretary**


MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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