

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 33 of 2022

Petition of M/s. Avaada Sunce Energy Private Limited seeking extension/ deferment of the Scheduled Commissioning Date on account of certain Force Majeure events including Covid-19 and disruption in import of modules from China impacting the progress of the Project.

M/s. Avaada Sunce Energy Private Limited (ASEPL)...	Petitioner
Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL)...	Respondent

Coram

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

Appearances:

For the Petitioner	: Ms. Deepa Chavan (Adv)
For the Respondent	: Mr. Ravi Prakash (Adv)

ORDER

Date: 24 August 2022

1. ASEPL has filed this Case on 04 February 2022 under Section 86(1)(f) and other relevant provisions of the Electricity Act, 2003 seeking extension/ deferment of the Scheduled Commissioning Date for commissioning of 150 MW capacity out of 350 MW contracted capacity on account of certain Force Majeure events including Covid-19 and disruption in import of modules from China impacting the progress of the Project.

2. **Prayers of ASEPL in its Petition are as follows:**

- i. *Declare that the events narrated above which prevented the Petitioner from commissioning the Project as scheduled are Force Majeure events affecting the Project and consequently, the Petitioner is entitled for extension from extended Scheduled Commissioning Date being February 08, 2022 to actual Commercial Operation Date (COD) i.e., by May 31, 2022 for balance 150 MW capacity ;*
- ii. *Hold and declare extension of time for achieving SCOD by revised date May 31, 2022 to the Petitioner for commissioning of the balance 150MW out of the total 350MW of the Project;*
- iii. *Restrain the Respondent/ MSEDCL from taking any adverse or coercive steps / actions against the Petitioner;*
- iv. *Grant ex-parte ad-interim relief against the Respondent / MSEDCL by restraining it from taking any coercive steps against the Petitioner, including from invoking the Performance Bank Guarantee during the pendency of the present proceedings;*
- v. *Pass such other order(s) as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case. ”*

3. **ASEPL in its Petition has stated as follows:**

3.1 M/s. Avaada Sunce Energy Private Limited (ASEPL) is a Special Purpose Vehicle promoted and incorporated by M/s. Avaada Energy Private Limited (AEPL) for the purpose of developing a 350 MW solar photovoltaic power project located at Village Noorsar, Taluka - Bikaner, District - Bikaner, State – Rajasthan.

3.2 Chronology of Events:

Sr. No.	Event	Date
1	MSEDCL issued a Request for Selection (RfS) to procure solar power up to capacity of 1000 MW through competitive bidding process.	05.12.2018
2	MSEDCL conducted the pre-bid meeting and responded to certain queries of prospective bidders in the terms of the RfS.	19.12.2018
3	MSEDCL issued certain clarifications and Addendum-3.	14.01.2019

4	E-reverse auction was conducted	05.02.2019 & 18.02.2019
5	AEPL was selected as a Successful Bidder for the bidding capacity of 350MW out of 500MW. Accordingly, Letter of Award (LoA) dated 19 March 2019 was issued by MSEDCL in favour of AEPL.	19.03.2019
6	The tariff of Rs.2.75/kWh has also been approved and adopted by the Commission vide its Order in Case No. 87 of 2019.	27.05.2019
7	SBI on behalf of ASEPL, issued Performance Bank Guarantee (PBG) bearing guarantee No. 0480319BG0000618 worth Rs. 49,00,00,000/- (Rupees forty-nine crores only) to MSEDCL	13.06.2019
8	Power Purchase Agreement is executed.	26.06.2019
9	The PBG issued by SBI was replaced by ASEPL with another PBG issued by Yes Bank Ltd. bearing guarantee No. 136BG01202830002.	09.10.2020
10	The validity of amended PBG was extended up to 31 May 2022.	18.03.2021
11	ASEPL requested MSEDCL for reduction of PBG from 10% or 5% to 3% in accordance with the Government of Maharashtra (GoM) notification dated 12 December 2020.	19.03.2021
12	MSEDCL reduced the amount of PBG to 3% from 5%. Hence, the PBG payable by ASEPL was reduced to Rs. 28,00,00,000/-	07.04.2021
13	ASEPL amended the PBG issued by YES Bank to reduce to security amount to Rs. 28,00,00,000/-	16.04.2021
14	The validity period for amended PBG was extended up to August 31, 2023	03.12.2021

3.3 As per the PPA, ASEPL was inter alia required to do the following: -

- (i) Obtain Financial Closure within ten (10) months from the date of execution of the PPA i.e. by 26 April 2020;
- (ii) Commission the Project within a period of twenty-one (24) months from the date of execution of the PPA i.e. by 26 June 2021 (since their project capacity was above 250 MW).

In case of failure to achieve the Scheduled Commercial Operation Date (SCOD) milestone, MSEDCL is entitled to forfeit the Performance Bank Guarantee (PBG) in the manner stipulated under Clause 3.3(2) and Clause 4.2.3 of the PPA.

3.4 Owing to the disruptions of the supply chains due to spread of coronavirus in the entire world, the Ministry of New and Renewable Energy recognized the issues faced by the Renewable

Energy (RE) Developers and therefore vide its Office Memorandums dated 20 March, 2020 and 13 August, 2020 directed all Renewable Energy implementing agencies of the Ministry of New & Renewable Energy to consider these disruptions in the supply chains from China or any other country owing to the coronavirus pandemic as a case of natural calamity and as Force Majeure (FM) event for grant of appropriate time-extension in Scheduled Commissioning Date of RE projects as per Force Majeure Clause in concerned contractual agreements.

- 3.5 ASEPL vide its letter dated 18 May 2020 requested MSEDCL to grant certain relaxations in achieving the Financial Closure and SCOD by the scheduled date. MSEDCL vide its letter dated 14 September 2020 revised the date for achieving Financial Closure and SCOD for the project to 24 September 2020 and 24 November 2021.
- 3.6 ASEPL thereafter vide its letters/email dated 24 April 2020, 18 May 2020, 25 August 2020, and 10 October 2020 furnished all the documents for financial closure and sought extension of time for six (6) months for achievement of SCOD for the project.
- 3.7 MSEDCL vide its letter dated 13 November 2020 issued its approval on the documents furnished for achieving Financial Closure and recorded the achievement date as 27 October 2020.
- 3.8 ASEPL vide letter dated 01 May 2021 apprised MSEDCL that, despite the disruption caused due to of COVID-19 pandemic, it is committed towards early part capacity of the Project to the tune of 100 MW. Further, in pursuance to Article 4.1 of the PPA, ASEPL informed MSEDCL that the part commissioning of the 100 MW capacity of the project is tentatively planned for 15 June 2021.
- 3.9 ASEPL subsequently on 03 June 2021, informed MSEDCL that owing to the of COVID-19 pandemic and lockdown restrictions, the tentative date for commissioning of 100 MW capacity has now been planned for 31 July 2021.
- 3.10 In mean time, ASEPL vide its letter dated 18 May 2020 requested MSEDCL to grant time extension in achieving SCOD by six months. The reasons for seeking extension, inter alia, includes delay caused due to COVID-19 and lockdown restrictions in disbursement of funds from lender, supply of plants and equipment and commencement of construction activities. In response, MSEDCL vide its letter dated 14 September 2020 extended the SCOD to 24 November 2021.
- 3.11 ASEPL contended that owing to the further restrictions across the country on account of the 2nd Covid wave, the MNRE vide its Office Memorandums dated (i) 29 June 2021, (ii) 15

September 2021 and (iii) 3 November 2021 granted various relaxations and dispensations to the RE Projects. Pursuant to repeated requests, MSEDCL vide its email dated 28 October 2021, shared a format for undertaking (in compliance with the MNRE notifications dated 12 May 2021 and 29 June 2021) to be submitted in respect of the request for extension in Financial Closure and SCOD for the balance (250 MW) capacity of the Project.

- 3.12 On 28 October 2021, ASEPL submitted their undertaking to MSEDCL. Accordingly, MSEDCL granted its approval vide letter dated 9 November 2021 and extended the timeline for SCOD up to 8 February 2022 for the solar power Project.
- 3.13 ASEPL pointed out that MNRE vide its notification dated 03 November 2021, clarified that the change in law in context of the above-mentioned notifications shall continue to be governed by the provisions of the PPA signed between the parties. It is, therefore, submitted that clauses of the said undertaking of ASEPL should accordingly be read in light of the MNRE notification dated 03 November 2021.
- 3.14 Despite the extensions granted by MSEDCL and the restrictions owing to the 1st and 2nd Covid wave, on 3 November 2021 ASEPL with enormous efforts were able execute 'Early Part Capacity Commissioning' of 100 MW part capacity with ISTS network out of total 350 MW capacity.
- 3.15 In the interregnum, one of ASEPL's vendors from China vide their customer notification dated 14 October 2021 informed that on account of excessive energy consumption in 2021 the Chinese Government through its National Development and Reform Commission has issued a 'Dual Control of Energy Consumption' policy owing to which there has been a rationing on high-energy consumption enterprises which includes the manufacturing sector. The vendor has further informed ASEPL that these rationing measures on the industry will seriously disrupt the entire supply chain resulting in delay in deliveries by them and has accordingly invoked a Force Majeure situation.
- 3.16 ASEPL vide its letter dated 7 December 2021 brought the above situation to the notice of MSEDCL and informed them that no supply is expected from China till February 2022 and vendors were committing new shipment timelines starting from March 2022/April 2022. ASEPL, vide the said letter, further apprised MSEDCL that ASEPL even explored the options of securing solar PV modules from the domestic suppliers. However, ASEPL is facing issues, inter alia, in respect of size and efficiency of the modules and capacity available with Indian module manufacturers.
- 3.17 ASEPL furthermore informed MSEDCL that they were ready to schedule another 50MW part capacity of the Project. However, owing to the above disruptions, ASEPL sought for further

extension of time for completion of SCOD of the balance 200MW capacity out of the total 350 MW ISTS connected Solar project.

- 3.18 As committed, ASEPL vide its letter dated 27 December 2021, requested MSEDCL to allow early part commissioning of 2nd part of 50 MW capacity. Central Transmission Utility (CTU) on 31 December 2021 granted operationalization of 50 MW LTA to ASEPL. Accordingly, MSEDCL issued its Commissioning Certificate for the 50MW part capacity on 4 January 2022 and COD has been achieved on 7 January 2022. Similarly, ASEPL achieved the commissioning of the 3rd part of 50 MW capacity on 02 February 2022.
- 3.19 The debilitating Force Majeure circumstances caused on account of the Covid-19 pandemic since March 2020 and the supply chain disruptions of ASEPL's vendors on account of the energy crisis in China which are a direct consequence of the pandemic situation have caused delay in fulfillment of the commissioning of the Project by the SCOD. ASEPL has from time to time duly notified MSEDCL of the circumstances that are beyond the control of it that were delaying commissioning of the Project as scheduled.
- 3.20 Although, the SCOD has been extended on two previous occasions on account directions issued by the MNRE through their notifications to redress grievances emanating from the Covid-19 pandemic, MSEDCL has failed to grant further extension of SCOD sought for vide the ASEPL's letter dated 7 December 2021.
- 3.21 ASEPL contended the extension sought is on account of the issues faced by its vendors in China which are beyond its reasonable control hence attributable to Force Majeure events under the PPA which have prevented ASEPL from achieving SCOD. Hence, the delay caused by such Force Majeure events is liable to be excluded from the period causing delay in achieving COD.
- 3.22 As per Article 8.1 (a) of the PPA, Force Majeure with respect to an affected party means any event, circumstances which satisfy the following two conditions:
- a. It has affected the performance of obligations under the PPA; and
 - b. It is not under the reasonable control of the Affected Party.
- 3.23 Due to the following Force Majeure events faced by the vendors, the delivery of solar modules and such equipment is uncertain and the same is not attributable and beyond the reasonable control of ASEPL. Therefore, the events / factual scenario is squarely covered under Article 8 of the PPA. The Force Majeure events inter alia are the following:

- Shortage of Power/Black-out in China:

It may be noted that the industries in China since October 2021 have been facing acute shortage of power due to coal shortage in China necessary for running the thermal power projects.

Further, on account of the notification of the 'Dual Control System of Total Energy Consumption and Energy Intensity' policy, which regulates and restricts the supply hours for electricity to the industry has substantially caused disruptions in the supply chain.

- Impact of Covid-19:

On account of outbreak of Covid-19, the Department of Expenditure Procurement Policy, Ministry of Finance on 19 February 2020 had clarified that disruption of the supply chains due to spread of Covid-19 in China or any other country should be considered as a case of natural calamity and Force Majeure clause may be invoked wherever considered appropriate following the due procedure.

- 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.

3.24 ASEPL has even made sincere efforts towards mitigating this risk through exploring options of securing solar PV modules from the domestic suppliers. However, it is facing issues, inter alia, in respect of size and efficiency of the modules, capacity available with Indian module manufacturers and dependence of domestic manufacturers on supply of cells/ wafers from China. Owing to the difficulties in procuring the solar PV modules in India as well as cost factors, ASEPL has to rely on its suppliers in China.

3.25 MNRE vide its Order dated 3 November 2021 has taken into account the plight of the renewable energy project developers such as ASEPL. In the said Order, the Ministry has acknowledged that apart from Covid-19 there can be several other factors (*consequential to the pandemic*) which could lead to supply chain disruptions and in turn require additional time extension to the RE project developers having their SCOD before 1 April 2022.

3.26 MSEDCL has failed/refrained to grant its approval for further extension of the SCOD from 8 February 2022 to 31 May 2022 and therefore there is an apprehension that in terms of Clause

4.2.3 of the PPA it will forfeit the amended PBG post 8 February 2022 towards Liquidated Damages for non-achievement of the extended SCOD without considering the issues raised by ASEPL on merits and difficulties faced by it for reasons beyond its reasonable control.

4. ASEPL along with the Petition in Case No.33 of 2022 filed Interlocutory Application (IA) Dairy No.23 of 2022. In IA, ASEPL prayed for urgent hearing in the matter. Accordingly, the Commission heard the Petition along with IA on 8 February 2022.

4.1. During hearing, Advocate of ASEPL submitted that considering Covid-19 pandemic situation, MSEDCL has extended the timeline for commissioning of 350 MW Project till 8 February 2022. ASEPL has already commissioned 200 MW of project and PV panels for part of remaining capacity are under customs clearance. On account of continued difficulties dues to Covid-19 pandemic and supply disruption, ASEPL requested MSEDCL for further extension of the SCOD from 8 February 2022 to 31 May 2022. MSEDCL has not responded to such request of the ASEPL. As earlier extended SCOD was expiring the same date i.e. 8 February 2022, out of abundant caution, ASEPL has approached this Commission with request to restrain MSEDCL in the interim from taking any coercive action such as forfeiting of PBG of ASEPL.

4.2. Advocate of MSEDCL sought time to respond to the averments made in the Petition and Interlocutory application. Further, he stated that MSEDCL will abide by the directives of the Commission in this matter.

4.3. Considering the fact that ASEPL has already commissioned 200 MW capacity and is making expeditious efforts to commission remaining 150 MW Solar project capacity, the Commission directed MSEDCL not to take any coercive action against ASEPL till this case is finally decided by the Commission.

5. **MSEDCL in its submission dated 02 May 2022 stated as below:**

5.1 MSEDCL has already granted ASEPL an extension till 8 February 2022. The project has attained COD on 08 April 2022; hence the prayer to extend SCOD up to 31 May 2022 becomes infructuous. Project is delayed by 59 days.

5.2 ASEPL has purportedly identified the disruption in supply from China of solar modules as a Force Majeure event that has arisen under the PPA executed between the parties. ASEPL has placed no material on record to substantiate the factum of such alleged disruptions. ASEPL has failed to advert to what steps, if any, were taken to mitigate these disruptions to ensure compliance with the PPA.

- 5.3 In terms of Article 1 of the PPA, ASEPL ought to have followed ‘Prudent Utility Practices’, which ostensibly include sourcing their material in the most economically prudent manner.
- 5.4 The term prudent utility practices have been defined in the PPA and was enshrined to ensure that parties are made aware to adopt all such practices as are generally acceptable, to ensure maximization realization of value from the PPA. This included liberty given to ASEPL to decide how they would like to procure material to comply with the PPA.
- 5.5 APTEL in its Judgement dated 7 April 2016 in Appeal No.100 of 2013 and Ors (*Uttar Haryana Bijli Vitran Nigam Limited and Ors v. Central Electricity Regulatory Commission and Ors*) laid down the test while determining whether a party can take recourse to the Force Majeure clause of a PPA, particularly in view of the PPA containing a ‘Prudent Utility Practice’ clause. An Affected Party can successfully take a plea of Force Majeure Event if the Affected Party is seen to be vigilant and careful, who could not avoid the occurrence of the said event despite taking reasonable care and complying with prudent utility practices described in Article 1.1 of PPA.
- 5.6 ASEPL also made referred to Hon’ble Supreme Court Judgement dated 11 April 2017 in Civil Appeal Nos. 5399-5400 of 2016 (*Energy Watchdog vs. Central Electricity Regulatory Commission*). It is unequivocally clear that hurdles with procuring material simpliciter would not mechanically become Force Majeure events, and parties claiming such compensation must first satisfy the Commission to have followed all requisite prudent utility practices. Keeping in mind that ASEPL has adverted to absolutely no steps taken to procure material from third party sources, it is ostensible that ASEPL has dishonestly approached the Commission.
- 5.7 ASEPL has not sought extension in SCOD for the purported Force Majeure event in accordance with the terms of the PPA, and on this ground alone, ASEPL’s claim ought to be summarily rejected. This is particularly so in terms of the Hon’ble Appellate Tribunal for Electricity’s findings in *Maruti Clean Coal and Power Limited v. Power Grid Corporation of India Limited and Anr* [2017 SCC OnLine APTEL 70]. In the said Judgement it has been held that a Petitioner claiming compensation citing a Force Majeure event, is required to do so in accordance with the respective agreement, being the PPA, in the instant matter.

6. At the e-hearing through video conferencing held on 6 May 2022:

- 6.1. Advocate of ASEPL informed that the Petition was filed only to the limited extent of seeking extension towards balance 150 MW out of total 350 MW project. During the pendency of the Petition, ASEPL has successfully commissioned 150 MW capacity. Last Phase of 50 MW part capacity achieved COD on 8 April 2022. Accordingly, the intervening period

between 9 February 2022 to 8 April 2022 be declared as period affected by Force Majeure events.

6.2. Advocate of MSEDCL submitted that conditionalities for invocation of Force Majeure in PPA have not been followed. ASEPL has failed to place on record document supporting Force Majeure issues. ASEPL ought to demonstrate that it has followed up prudent utility practices to avert/alleviate the situation.

6.3. As requested, the Commission granted two (2) weeks' time to ASEPL to file its Rejoinder.

7. **ASEPL in its Written submission cum Rejoinder dated 17 May 2022 stated as below:**

7.1. The Petition was filed only to the limited extent of seeking extension towards balance 150 MW out of the total 350 MW Project. ASEPL had prior to filing of the Petition already part-commissioned 200 MW to the satisfaction of MSEDCL. Pursuant thereto on sincere efforts of ASEPL, it commissioned the remaining 150 MW in three phases as mentioned below:

- MSEDCL issued Commissioning Certificate for 4th part of 50 MW part capacity out of 350 MW capacity on 24 February 2022 and the Project achieved COD on 25 February 2022.
- MSEDCL issued Commissioning Certificate for 5th part of 50 MW part capacity out of 350 MW capacity on 16 March 2022 and the Project achieved COD on 17 March 2022.
- MSEDCL issued Commissioning Certificate for 6th part of 50 MW part capacity out of 350 MW capacity on 7 April 2022 and the Project achieved COD on 8 April 2022.

7.2. The PBG for Rs. 49,00,00,000/- (Rupees forty-nine crores only) issued to MSEDCL by Yes Bank Ltd. which is valid up to 31 May 2022. In terms of Clause 4.2.4 the PPA, the PBG is to be returned/ released by MSEDCL or shall stand reduced upon completion/ commissioning of the project.

7.3. This PBG was issued for the entire Project i.e. 350MW out of which admittedly 200MW has been commissioned within the revised SCOD date i.e. 8 February 2022 approved by MSEDCL.

7.4. The dispute between the parties, if at all, is only pertaining only to the balance 150MW which has been commissioned post 8 February 2022 in a scenario wherein the MSEDCL had failed to respond either positively or negatively to the request of the Petitioner dated 7 December 2021 to extend the SCOD to 31 May 2022.

- 7.5. The entire capacity was commissioned on 8 April 2022 and intervening period between the 9 February 2022 to 8 April 2022 (i.e., 59 days) is the delay period experienced by ASEPL, which was caused due to disruption in supply chain, an event/ circumstance beyond the reasonable control of ASEPL and a Force Majeure Event.
- 7.6. It was owing to the ASEPL's proactive steps that the Project was commissioned well in advance than anticipated by it which goes to show their bona-fide to complete the Project and therefore ASEPL cannot be penalised for the same.
- 7.7. MSEDCL vide its letter dated 9 November 2021 granted its approval and extended the timeline of SCOD up to 8 February 2022. In view of this revised SCOD, the due date for applicability of liquidity damages would automatically stand revised to 8 May 2022 i.e. three (3) months from 8 February 2022 as per Clause 3.3 (2) of the PPA.
- 7.8. As per MSEDCL's own admission, the ASEPL has commissioned the entire Project as on 8 April 2022 i.e. well in advance of the stipulated time period under Clause 3.3 (2) of the PPA. Hence, Clause 3.3 (2) of the PPA cannot be invoked by MSEDCL in the present case and is not liable for any liquidated damages as alleged or at all.
- 7.9. The ASEPL was genuinely faced with Force Majeure events on account of Force Majeure situation faced by their vendors which consequently affected the delivery of solar modules and such equipment. These events were uncertain and beyond the reasonable control of the ASEPL.
- 7.10. To implement the Project and commission the entire capacity of the Project earlier, than the anticipated extended SCOD contemplated by the ASEPL in December 2021 which even included sincere efforts towards mitigating this risk through exploring options of securing solar PV modules from the domestic suppliers. However, the ASEPL faced serious issues, inter alia, in respect of size and efficiency of the modules, capacity available with Indian module manufacturers and dependence of domestic manufacturers on supply of cells/ wafers from China.
- 7.11. During the arguments, it was pointed to the Commission that, although MNRE Order dated 3 November 2021 may not be binding on the Commission, but it certainly does have a persuasive value which ought to be considered by the Commission while taking cognizance of the issues faced by the entire industry on account of the Covid-19 pandemic and its cascading effect.
- 7.12. The extensions granted on earlier occasion by MSEDCL was on the basis of the notification

issued by MNRE, therefore the MNRE notification dated 3 November 2021 needs consideration of the Commission, while deciding the issue of time extension in the SCOD of the Project.

Commission’s Analysis and Ruling:

8. ASEPL has signed PPA with MSEDCL for 350 MW Solar power with initial SCOD of 26 June 2021. Said SCOD has already been extended twice by MSEDCL on account of COVID-19 pandemic by relying upon MNRE notifications as follows:

Planned Timeline		1 st Extension		2 nd extension	
Date of Financial Closure	SCOD	Date of Financial Closure	SCOD	Date of Financial Closure	SCOD
26.04.2020	26.06.2021	24.09.2020	24.11.2021	27.10.2020 #	08.02.2022

Actual Date of Financial Closure.

9. Prior to filing of present Petition, ASEPL had already commissioned part capacity of 200 MW in following manner:

	COD
1 st Part-100 MW	3 November 2021
2 nd Part- 50 MW	7 January 2022
3 rd Part-50 MW	02 February 2022

10. Therefore, this Petition has been filed with limited relief seeking extension for SCOD towards balance 150 MW out of the total 350 MW Project. In the Petition, ASEPL has sought time upto 31 May 2022 for achieving SCOD. But during the pendency of present proceeding, ASEPL has commissioned balance capacity of 150 MW in following manner:

	COD	Delay
4 th Part-100 MW	25 February 2022	17 Days
5 th Part- 50 MW	17 March 2022	37 Days
6 th Part-50 MW	8 April 2022	59 Days

11. As complete capacity has been commissioned on 8 April 2022, through its written submission dated 17 May 2022, ASEPL restricted its relief to period between 9 February 2022 to 8 April 2022 (i.e., 59 days) and requested the Commission to declare that said period is covered by Force Majeure Event of disruption in supply chain. Accordingly, ASEPL pleaded that the SCOD be extended up to 8 April 2022 without encashment of Bank Guarantee or imposition

of any Liquidated Damages.

12. Thus, the only issue that the Commission has to decide in present matter that is whether Supply Chain disruption in China qualify as Force Majeure event under the PPA and whether ASEPL has been affected on account of the same.
13. ASEPL in its Petition has narrated its difficulties faced by its vendors for procurement and supply of photo voltaic modules for the Project. ASEPL vide its letter dated 7 December 2021 brought the above situation to the notice of MSEDCL and informed them that no supply is expected from China till February 2022 and vendors were committing new shipment timelines starting from March 2022/April 2022. ASEPL, vide the said letter, further apprised MSEDCL that ASEPL even explored the options of securing solar PV modules from the domestic suppliers. However, ASEPL is facing issues, inter alia, in respect of size and efficiency of the modules and capacity available with Indian module manufacturers. ASEPL in its Petition underscored following major issues which lead to disruption in supply chain of solar module in China:
 - Shortage of Power/Black-out in China
 - Impact of Covid-19
 - Shortage of raw materials
14. MSEDCL in its reply has rebutted ASEPL's argument by pointing that ASEPL has failed to advert to what steps, if any, were taken to mitigate these disruptions to ensure compliance with the PPA. As per MSEDCL, ASEPL need to showcase that it has followed all requisite prudent utility practices.
15. In view of above submissions by parties, the Commission notes that PPA has following provision related to Force Majeure:

“

8.1 Force Majeure Events:

- i. 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”*
- ii. *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.

16. In the present case, ASEPL’s vendor i.e. M/s JA Solar on account of shortage of Power / Black-out in China has conveyed delay in deliveries. On 7 December 2021, ASEPL requested MSEDCL for extension of SCOD on account of supply chain disruption. Relevant part of that letter is reproduced below:

“

China is a major supplier of Solar PV Module in India. China, for the last 4-5 months, has been experiencing a massive power crisis. As a result, supply hours to industries have been regulated, leading to a major reduction in production output. These rolling power cuts have impacted the entire value chain from polysilicon, glass, EVA, wafer, aluminum, and PV cell production. Consequently, all the Chinese modules suppliers have invoked Force

Majeure provision and cited their inability to honour and deliver solar PV modules as per the delivery schedule of supply contracts.

Solar Power Developers in India have explored options of sourcing modules from domestic suppliers. However, they are facing issues which are elaborated below:

- *Capacity of India Module Manufacturers: As the ALMM list notified recently, the total domestic manufacturing capacity stands at around 8 GW, which current projects cannot use under execution due to design limitations. It is to be noted that various Tranches of CPSU tender and all projects that have been bid out after BCD & ALMM imposition will anyway be buying modules from domestic suppliers.*
- *Size and Efficiency of Modules: The low tariff quoted by the SPDs have been on the back of Mono Perc & Bifacial technologies, where panels are above 500 Wp. The projects are viable with these modules above 400 Wp, as seen in the latest ALMM list published on September 29, 2021. It is not feasible to use these smaller Wp modules in the projects at this stage of implementation.*
- *Frequent instances of breach of contract by domestic module manufacturers: On many occasions, Indian module manufacturers have not honoured the signed contract. They do not supply the contracted capacity and increase the price after signing firm agreements.*

No supply is expected from China till February 2022; however, the issues are expected to be resolved by the end of February with the Beijing winter Olympics and Suppliers are committing new shipment timelines starting from the end of March 2022/ April 2022.

.....
Under aforementioned circumstances, the entire time and cost overrun in the projects are being borne by the SPD as the financial closure for the projects are already done and any increase in project cost are required to be funded by the project proponent.

..... ***Government has also acknowledged the crisis situation that has emerged and it trying to provide relief to the SPDs in every possible way, for instance, instructing the Dispute Resolution Committee (DRC) as formed by Ministry of New and Renewable Energy (MNRE), Govt. of India to review the applications of SPDs on case-to-case basis for grant of appropriate relief.***

As out of total 350 MW contracted capacity, 100 MW part capacity already commissioned on 31.10.2021; we are scheduled to commission another 50 MW part capacity by the end of December' 2021. We would, therefore, considering aforementioned request MSEEDCL, kindly grant as an extension of time to commission

the 200 MW capacity within 31st May' 2022.”

In the above said letter, although ASEPL has raised issue of supply chain disruption and requested for extension of SCOD as such event is beyond their control but has not specifically referred to Force Majeure Clause in the PPA for seeking such extension. At the same time, ASEPL has referred to the Government intervention to provide relief to affected projects on case-to-case basis.

17. In this regard, 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.

18. Considering all above aspects, the Commission is of the opinion that as ASEPL has been affected on account of disruption in supply of Solar module from China, which is beyond their control. MSEDCL has objected that ASEPL should have resorted to prudent utility practices

for ensuring commissioning of the project within SCOD. In this regard, the Commission is of the opinion that as ASEPL has already commissioned 200 MW capacity within extended SCOD, and commissioning of balance 150 MW capacity is delayed by only 17 to 59 days, it cannot be claimed that ASEPL has failed in undertaking prudent utility practices. Infact, due to such prudent practices power from 1st phase of 100 MW is made available almost 3 months before SCOD and 2nd phase of 50 MW is made available one month before SCOD. Hence, MSEDCL contention in this regard is not correct.

19. The Commission notes that ASEPL in present Petition has sought extension of up to 31 May 2022 during which it was affected by 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, ASEPL has requested to grant only 59 days extension corresponding to actual delay in commissioning of the project.
20. 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.

21. In the present case, although specific notice referring to Force Majeure clause has not been issued, ASEPL letter dated 7 December 2021 reproduced in para 16 above effectively served the same purpose of bringing disruption in supply to the notice of MSEDCL and informed them that no supply is expected from China till February 2022 and sought extension in SCOD till 31 May 2022. Hence, the Commission is of the opinion that disruption in supply chain needs to be considered as event of Force Majeure under the PPA.
22. As ASEPL has intimated MSEDCL about disruption in supply chain only on 7 December 2021, effect of said Force Majeure event has to be considered only from that date. Further, as there is no cession notice for this event, end of February 2022 as stated in above said letter dated 7 December 2021 by which supply chain can be restored needs to be considered as cession of event. Accordingly, relief for Force Majeure event on account of disruption of supply chain can be considered only for the period of 7 December 2021 to 28 February 2022 i.e. 84 days.
23. 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 82 of the PPA, ASEPL is eligible for time extension for meeting its obligations i.e. SCOD by 84 days. However actual delay in commissioning is lesser i.e. 59 days. Hence, SCOD of ASEPL plants is extended from 8 February 2022 to actual date of commissioning i.e. 8 April 2022 without any penalty.
24. Hence, the following Order.


ORDER

1. **Case No. 33 of 2022 is allowed.**
2. **Scheduled Commercial Operation Date of 350 MW Solar Project of M/s. Avaada Sunce Energy Private Limited is extended to actual commissioning date i.e. 8 April 2022.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member

Sd/-
(Sanjay Kumar)
Chairperson


(Abhijit Deshpande)
Secretary

