

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 102 of 2020

Case of ReNew Vayu Urja Private Limited seeking direction to Maharashtra State Electricity Distribution Co. Ltd. for not encashing the Performance Bank Guarantee and Declaration of Extension of Scheduled Commercial Operation Date on account of Force Majeure

Renew Vayu Urja Private Limited Petitioner
Maharashtra State Electricity Distribution Company Ltd. Respondent No. 1
Maharashtra State Electricity Transmission Company Ltd. Respondent No. 2
Maharashtra Energy Development Agency Respondent No. 3

Coram

I.M. Bohari, Member
Mukesh Khullar, Member

Appearance

For the Petitioner	: Smt. Dipali Seth (Adv.)
For	
Respondent No. 1	: Sh. Ashish Singh (Adv.)
Respondent No. 2	: Sh. Shrikant Petkar (Rep)
Respondent No. 3	: Sh. Manoj Pise (Rep.)

ORDER

Date: 14 July, 2020

1. ReNew Vayu Urja Private Limited (**RVUPL**) has filed this Case on 16 June 2020 under Sections 86(1)(e), 86(1)(f) and 86(1)(k) of the Electricity Act, 2003 (**EA**), read with provisions of Request for Selection (**RfS**) and Power Purchase Agreement (**PPA**) dated 17

July 2018 between RVUPL and Maharashtra State Electricity Distribution Company Ltd (MSEDCL) seeking direction to MSEDCL for not encashing the Performance Bank Guarantee (PBG) and declaration of extension of Scheduled Commercial Operation Date (SCOD) on account of Force Majeure.

2. RVUPL's main prayers are as follows:

- (a) Declare the circumstances faced by the Petitioner in delay in grid connectivity and acceptance of the grid connectivity in the name of Developer by MSEDCL only on July 22, 2019 as force majeure events;*
- (b) Declare the delay in attaining FC on July 23, 2019 as delay on account of force majeure event in line with this Hon'ble Commission's orders in Case No. 286 of 219 and case No. 131 of 2019;*
- (c) Declare delay in Project registration by MEDA and delay in providing start-up power as force majeure event;*
- (d) Declare delay in SCOD as an event consequent to force majeure and delay in attainment of FC in line with this Hon'ble Commission's orders in Case No. 286 of 219 and case No. 131 of 2019;*
- (e) Direct the Respondent No. 1 to declare SCOD for Project Phase I as December 5, 2019 and Project Phase II as December 26, 2019 without levy of any liquidated damages of any nature whatsoever;*
- (f) Quash notice dated May 29, 2020 issued by MSEDCL to make a commitment to pay penalties levied on MSEDCL due to non-fulfiment of RPO;*
- (g) Direct Respondent No. 1 to return the PBG furnished by the Petitioner without adjusting any damages;*

3. RVUPL in its Case has stated as follows:

- 3.1. On 21 December 2017, MSEDCL issued a RfS for procurement of power on long term basis through competitive bidding from 500 MW grid connected wind power projects.
- 3.2. On 11 May 2018, Siemens Gamesa Renewable Power Private Limited (SGRPPL/ Developer), Developer of RVUPL, submitted the details regarding power evacuation arrangements and various other details required for setting up of the 100 MW wind power

project at Kavldhara, Osmanabad and requested Maharashtra Energy Development Agency (MEDA) to issue grid connectivity recommendation to MSETCL. However due to technical issues, said Grid Connectivity request was subsequently resubmitted as two phases of 50 MW each. Out of these, RVUPL has utilized grid connectivity of project size selected under competitive bidding process.

- 3.3. On 22 May 2018, MSEDCL informed that KCT Renewable Energy Private Limited (RVUPL's former name) had been declared successful bidder for capacity of 75 MW in the e-reverse auction conducted by MSEDCL for long term procurement of 500 MW on 6 March 2018.
- 3.4. On 9 April 2018, MSEDCL had filed a Petition seeking approval for adoption of Tariff for Long term procurement of 500 MW under Section 63 of the EA. Pursuant to filing of the Petition, vide Order dated 14 June 2018 in Case No. 129 of 2018, the Commission approved the rates of the procurement as proposed by MSEDCL.
- 3.5. On 18 June 2018, MSEDCL issued the LoA to RVUPL for 75 MW wind power project situated at Osmanabad at rate of Rs. 2.85/kWh for twenty-five (25) years. As stated in the LoA, PPA was to be signed within one (1) month of the issuance of LoA.
- 3.6. On 20 June 2018, RVUPL vide its letter sought clarification from MSEDCL regarding the LoA and whether they could grant relaxation for building the Project with the available configuration of WTGs being in the band of +/- 5%.
- 3.7. On 28 June 2018, Yes Bank issued a PBG for Project amounting to Rs.15,00,00,000/- (Rupees Fifteen Crore Only) on behalf of RVUPL to MSEDCL valid till 31 July 2020 in compliance of conditions as set out in the RfS and LoA.
- 3.8. On 16 August 2018, MSEDCL forwarded the original copy of the PPA dated 17 July 2018 to RVUPL executed between MSEDCL and RVUPL.
- 3.9. On 11 September 2018, MSETCL informed that grid connectivity for 100 MW Wind Power Project proposed by the developer is not technically feasible at 132 kV level. However, it is feasible on 33kV level at 220/33 kV Osmanabad substation on fulfilment of certain conditions listed out therein. Pursuant to the letter of MSETCL, on 29 September 2018, the Developer informed MEDA that due to technical reasons, it intended to reduce the proposed capacity of the wind power project to 50 MW (Phase I) instead of the earlier 100 MW. The Developer also submitted the revised proposal for establishment of 50 MW (Phase I) and 50 MW (Phase II) project along with the proposed power evacuation

arrangement and requested for issuance of revised technical feasibility report for grid connectivity recommendation.

- 3.10. On 6 October 2018, MEDA issued the Certificate of Registration to RVUPL as a developer for installation and commissioning of wind power projects in the State of Maharashtra.
- 3.11. On 30 October 2018, pursuant to the meeting held on 23 August 2018, MSEDCL permitted the deviation in the band of +/- 5% basis available configuration of WTGs as sought by RVUPL in its letter dated 20 June 2018.
- 3.12. On 26 November 2018, RVUPL requested MSEDCL to allow to use the power evacuation for the Project in Developer's name as RVUPL appointed and awarded the contract to Developer and it would be a very lengthy process for RVUPL under MEDA's set procedures to get the evacuation in their own name. RVUPL apprised MSEDCL about timeline which ran into six (6) to seven (7) months for obtaining power evacuation in its name from MEDA. RVUPL also stated that there was a set procedure in the State of Maharashtra issued vide the Government of Maharashtra's (GoM) Renewable Energy Policy dated July 20, 2015 issued vide the Government Resolution No. NCE-2015/C.R. 49/Energy-7 (Wind Policy 2015) and its methodology dated 9 September 2015 (Methodology Circular 2015), wherein a developer already registered with MEDA would submit application for grid connectivity, start project development related activities like Land Acquisition, secure all approvals from MSETCL for construction of evacuation infrastructure, construction of roads etc. after which the MEDA would allow registration in the name of the successful bidder or the Developer. Therefore, RVUPL on the basis of the set procedures under the Wind Policy, 2015, Methodology 2015 and consequential lengthy time requirement for obtaining evacuation arrangement in its own name requested MSEDCL to waive off the requirement of the evacuation arrangement being in the successful bidder's name.
- 3.13. On 13 February 2019 MSEDCL replied to RVUPL email dated 7 February 2019 and granted extension for the Financial Closure (FC) by thirty (30) days i.e. upto 16 March 2019 on account of delay in signing of PPA. MSEDCL further stated that there would be no effect on SCOD.
- 3.14. On 7 March 2019, MSETCL granted the grid connectivity approval for fifty (50) MW capacity wind power project (Phase I) valid for a period of twelve (12) months to the Developer.
- 3.15. On 8 March 2019, RVUPL vide its letter sought extension of thirty (30) to forty-five (45) days for attaining the FC of the said Project which was due to expire on March 16, 2019 on

account of delay in grant of grid connectivity approval for fifty (50) MW by MSETCL and grid connectivity for Phase-II was still awaited to be issued by MSETCL.

- 3.16. On 18 March 2019, RVUPL in order to comply with the conditions laid down in the PPA submitted all the relevant documents required for obtaining FC and requested MSEDCL to accept the Power Evacuation Approval (**PE**) in the name of the Developer and allow RVUPL to use the grid connectivity of Developer. RVUPL stated that they had complied with majority of the conditions to achieve FC and only the permission for evacuation for Phase-II was in final stages and would soon be submitted.
- 3.17. On 25 March 2019, MSETCL issued a letter to the Deputy Secretary (Energy), GoM in reply of email dated 6 March 2019, for the transfer of the existing grid connectivity in the name of developer to the successful bidder who has contract with MSEDCL. The said letter further clarifies that as per Clause 1.9 of the Procedure for Grant of Grid Connectivity Procedure issued under the Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2016, the Grid Connectivity is not transferrable.
- 3.18. On 28 March 2019, MSETCL granted the grid connectivity approval in the name of the Developer for the remaining fifty (50) MW capacity wind power project for Phase II which was valid for a period of twelve (12) months.
- 3.19. On 4 April 2019, RVUPL submitted the remaining documents i.e. PE in the name of the Developer for the balance 25MW capacity in addition to the submission of the other documents vide its letter dated 18 March 2019 for achievement of FC. RVUPL once again reiterated its demand and requested MSEDCL to consider the evacuation permission in the name of the Developer.
- 3.20. On 21 May 2019, MSEDCL vide their letter to RVUPL stated that it proposes to forfeit the PBG provided by RVUPL as it had not attained the FC due to its failure to provide the grid connectivity i.e. PE in the RVUPL's name. MSEDCL granted seven (7) days to RVUPL to provide an explanation as to why its PBG should not be forfeited. MSEDCL had further stated that it would consider extending time for attaining FC in case of RVUPL submitting a fresh PBG.
- 3.21. On 28 May 2019, RVUPL in reply stated that they had undertaken all steps to secure the 100% land in their name and that they had incurred huge costs for setting up the Project. RVUPL reiterated that the grid connectivity approval should be accepted in the name of the Developer as per prevalent practice and their PBG should not be encashed.

- 3.22. On 29 June 2019, the MSEDCL's internal Committee set up to examine the contentions of petitioner, released a report on grid connectivity of the successful bidders of MSEDCL's 500 MW Wind tender.
- 3.23. On 22 July 2019, MSEDCL informed that it had considered RVUPL's request for considering the grid connectivity in the name of the Developer for satisfying the condition as set out in the RfS and for attainment of FC. MSEDCL further stated that the Committee had recommended signing of Memorandum of Understanding (MoU) between the Developer and RVUPL and directed to submit the MoU within seven (7) days.
- 3.24. On 23 July 2019, RVUPL immediately submitted to MSEDCL a copy of the MoU signed between RVUPL and the Developer.
- 3.25. On 30 July 2019, RVUPL served a notice to MSEDCL towards the Force Majeure event under Article 8 of the PPA and extension of SCOD.
- 3.26. On 21 August 2019, RVUPL submitted letter to MSEDCL for provision of start-up power connection for the Project before the commissioning of the Project.
- 3.27. On 31 August 2019, MSEDCL rejected the invocation of the Force Majeure Clause by RVUPL made vide its letter dated 30 July 2019 and rejected the request to extend the SCOD beyond 31 July 2019 on the grounds that RVUPL was unable to get the required MEDA registration. Further, MSEDCL while rejecting such request stated that it did not recognize such situation as a force majeure event and invoked the Article 3.3 of PPA whereby MSEDCL was entitled to levy liquidated damages from RVUPL for failure to achieve SCOD.
- 3.28. On 6 September 2019, RVUPL submitted a letter for extension for SCOD up to 31 December 2019 due to non-receipt of MEDA registration of the Project on account of exhaustion of the limit as provided existing wind policy and MEDA was awaiting amendment of the wind policy. RVUPL requested extension of SCOD on account of various reasons which are beyond its control.
- 3.29. On 19 September 2019, the Commission passed an Order in Case No. 235 of 2019 filed by MSEDCL to amend the PPA signed between MSEDCL and the successful bidders for procurement of 500 MW and allowed the MoU entered between the Developers and successful bidders for use of the grid connectivity in the name of the Developer by the bidders to be considered as satisfaction of PPA condition.

- 3.30. On 20 September 2019, MEDA issued 38 letters to RVUPL for registration of each WTG of 2MW capacity being part of the Project of 76 MW at different Gut Nos.
- 3.31. On 4 October 2019, MSEDCL recorded the attainment of FC for RVUPL's Project as on 23 July 2019 after fulfilment of all the conditions and submitting all required documents.
- 3.32. On 16 October 2019, MSEDCL wrote a letter to RVUPL approving the sanction of three (3) of Auxiliary/Start up power supply connections on 33 kV level for the Project of the Petitioner.
- 3.33. On 27 November 2019, RVUPL again submitted a letter requesting extension for SCOD up to 31 December 2019 due to various reasons detailed therein including delay in registration of the Project by MEDA, delay in release of start-up power connection amongst others.
- 3.34. On 7 December 2019, MSEDCL issued the Commissioning certificate in respect of twelve (25) WTGs of 2 MW each aggregating to 50 MW and recorded commissioning date as 5 December 2019.
- 3.35. On 12 December 2019, RVUPL submitted a letter to MSEDCL requesting for the commissioning of the balance 26MW of the Project. On the same day, RVUPL submitted another letter seeking extension of SCOD up to 31 December 2019 due to various reasons including delay in grant of registration by MEDA, delay in providing start up power by MSEDCL amongst others.
- 3.36. On 21 December 2019, MSEDCL granted permission to RVUPL for the commissioning of 26 MW of the Project and on 13 January 2020, MSEDCL issued the Commissioning certificate in respect of thirteen (13) WTGs of 2 MW each aggregating to 26 MW recording date of commissioning as 26 December 2019.
- 3.37. On 23 January 2020, RVUPL wrote to MSEDCL seeking release of PBG as the 50 MW part capacity and balance 26 MW which was commissioned on 5 December 2019 and 26 December 2019, respectively.
- 3.38. On 27 January 2020 MSEDCL called upon RVUPL to show cause within seven (7) days why MSEDCL should not encash the PBG as RVUPL had failed to achieve the SCOD by 31 July 2019 as provided under the PPA and it delayed the commissioning to 5 December 2019 (50 MW) and 26 December 2019 (26 MW).

3.39. On 30 January 2020, RVUPL replied to MSEDCL's show cause notice. RVUPL set out detailed reasons as to why the delay in achieving FC and consequently SCOD was not attributable to the RVUPL. RVUPL cited letters dated 26 November 2018, 4 April 2019, 17 April 2019 and 28 May 2019 wherein RVUPL had repeatedly requested MSEDCL to allow them to use the grid connectivity in the name of their Developer. Only on 22 July 2019 after the repeated follow-ups, MSEDCL had finally accepted the request and RVUPL immediately submitted the MoU entered between the RVUPL and the Developer the very next day on 23 July 2019. Thereafter, pursuant to the petition of MSEDCL, the Commission vide its Order dated 19 September 2019 in Case No. 235 of 2019 had allowed amendment of the PPA and held that such MoUs would be valid for fulfilment of grid connectivity condition for attaining the FC. RVUPL further submitted that the application for start-up power required for the Project was submitted on 21 August 2019 and the approval was granted by MSEDCL on 16 October 2019. All the aforesaid reasons led to delays which were not attributable to RVUPL. Further the said letter also drew attention of MSEDCL to the Order dated 20 January 2020 of the Commission in Case No. 286 of 2019 wherein it was held that there were regular follow ups by the petitioner therein and therefore the petitioner therein being power generator had fulfilled its part of responsibilities. The relevant paragraph 16 of the Order of the Commission in Case No. 286 of 2019 is reproduced below for ready reference:

“16. The Commission notes that CWPBPL conducted itself in diligent manner for executing the awarded project. It had been regularly communicating with MSEDCL in order to provide clarity on the issue of grid connectivity. Further, it has performed the required activities to execute the project. Delay in obtaining grid connectivity as noted in paragraph 15 above, is beyond the control of CWPBPL and hence Force Majeure clause is attracted.”

3.40. It was further held that FC was not attained due to no failure of responsibility on petitioner's part and therefore it constituted a force majeure event. The said Order also held that as FC date stood extended, SCOD had to be consequentially extended.

3.41. On 29 May 2020, MSEDCL informed RVUPL that delay in SCOD will be granted only if RVUPL commits to compensate for any penalty which may be imposed by the Commission for shortfall in fulfilment of RPO target.

3.42. On 9 June 2020, RVUPL replied to the letter of MSEDCL dated 29 May 2020 and reiterated that it is not responsible for delay in SCOD. RVUPL apprised MSEDCL of various reasons for delay which led to delay in attaining SCOD and established that the same was not attributable to RVUPL. Vide said letter RVUPL once again requested MSEDCL to declare extension of SCOD and release PBG without deducting any liquidated damages.

- 3.43. While the LoA was issued by MSEDCL on 18 June 2018, one of the conditions of LoA was signing of PPA within one (1) month and whereas RVUPL had fulfilled its obligations, MSEDCL had failed to do so and furnished duly signed PPA dated 17 July 2018 to RVUPL only on 16 August 2018 i.e. a month later.
- 3.44. The grid connectivity had been applied and obtained in the name of the Developer as per current practice in the state of Maharashtra. RVUPL did raise queries after the issuance of RfS on the standard practice being adopted in State of Maharashtra on the use of grid connectivity by the successful bidders in the name of developer to which MSEDCL replied that the “concerned regulations for the same shall prevail”. It is imperative to mention herein that there are no MERC regulations or provisions in RfS which compel RVUPL to obtain the grid connectivity in its name. Further, the Maharashtra RE Policy 2015 permits the Developers to obtain grid connectivity for the Project and it is not mandatory for the generators to procure grid connectivity.
- 3.45. On 22 July 2019, based on recommendations of the MSEDCL’s internal Committee, MSEDCL directed RVUPL to submit an MoU with the Developer for using the Developer’s PE facility within seven (7) days. RVUPL had immediately on 23 July 2019 submitted the MoU with Developer. The Commission has also accepted such condition and allowed the amendment of PPA signed with the Petitioner Vide its Order dated 19 September 2019 in Case No. 235 of 2019.
- 3.46. As per Article 8 (A) of the PPA, the party cannot be deemed in breach to the extent the performance is affected by “force majeure event”. As per Article 8 (C) of the PPA, any affected party shall give notice to other party of any event of Force Majeure as soon as possible but not later than seven (7) days on the commencement of Force Majeure event. As MSEDCL vide its letter dated 22 July, 2019 called upon RVUPL to submit MoU and stated that the grid connectivity in the name of the Developer shall be considered for FC, the RVUPL realized that though delay in FC is accepted and will not be able to attain SCOD as the delay in FC has caused delay to attain SCOD and there was also delay on part of MEDA on account of non-registration of Project which was applied on 5 March 2019. Therefore, RVUPL vide its letter dated 30 July 2019 invoked the force majeure clause and sought extension of SCOD which was to be achieved by 31 July 2019 due to delays and inability to achieve SCOD inspite of taking all steps for complying with the deadline.
- 3.47. Further as per the PPA, “Approvals” means the permits, clearances, licenses and consents as are listed in Schedule 3 hereto and any other statutory approvals. Further Schedule 3 provides “consent from the STU/CTU/MSEDCL for the evacuation scheme for evacuation of the power generated by the windmill power projects” as one of the approval. Therefore,

non-receipt of Project Registration from MEDA despite compliance of all legal requirements amounts to force majeure event.

- 3.48. Under the PPA, MSEDCL is required to ensure that the power as required by RVUPL for the startup of the Project at prevailing MSEDCL's HT temporary tariff rate is provided on reasonable notice and without delay. Whilst RVUPL had applied for start-up power on 21 August 2019, MSEDCL granted such start up power only on 16 October 2019. Such inordinate delay was never explained by MSEDCL and in violation of the provisions of the PPA. Hence, it can be inferred that the delay for providing start-up-power to the Petitioner also led to delay in SCOD and the same is solely attributable to MSEDCL.
- 3.49. Due to various reasons which are beyond the control of the RVUPL such as delay in achieving the FC, MSEDCL's default in supplying start up power to the RVUPL's Project, MEDA's delay in granting project registration to the RVUPL's Project, RVUPL ought to have been granted extension in achieving SCOD by December 31, 2019.
- 3.50. The Appellate Tribunal for Electricity (APTEL) vide its Order dated 4 February 2014 in Appeal No. 123 of 2012 along with IA No. 396 of 2012 in case of GUVNL v. GERC & Ors. (2014) has held that delay in getting approval from government instrumentalities is a Force Majeure event. The relevant paragraph of the Order dated 4 February 2014 in Appeal No. 123 of 2012 of Hon'ble APTEL is reproduced below for ready reference:

“55 (i) The delay in obtaining these approvals by the Government instrumentalities by Cargo Solar would fall in the category of Force Majeure Events under Clause 8.1(a)(v) of the PPA. As such the period of such delay is required to be suspended or excused and to that extent the period of Commercial Operation Date, Date of Construction default and Scheduled Commercial Operation Date are to be extended in terms of the PPA.”

- 3.51. The Commission vide its order dated 21 January 2020 Case No. 286 of 2019 filed by Clean Wind Power (Bhavnagar) Private Limited (CWP) seeking approval for extension / deferment of FC and SCOD on account of Force Majeure events granted relief to CWP by giving extension of FC upto 24 July 2019 and consequently extension of 158 days upto 23 June, 2020 was granted to CWP for SCOD. The relevant portion of the Order in Case No. 286 of 2019 is extracted below for ready reference:

“The Commission notes that CWPBPL conducted itself in diligent manner for executing the awarded project. It had been regularly communicating with MSEDCL in order to provide clarity on the issue of grid connectivity. Further, it has performed the required activities to execute the project. Delay in obtaining

grid connectivity as noted in paragraph 15 above, is beyond the control of CWPBPL and hence Force Majeure clause is attracted.

...
Accordingly, period for which Force Majeure event was effective, the affected party cannot be held in breach of obligation which is prevented or delayed on account of such Force Majeure event.

18. Under present case, on clarification from MSEDCL, CWPBPL has executed MoU for grid connectivity on 24 July 2019. Hence, it can conclude that effect of Force Majeure event relating to Grid Connectivity issue was applicable till 24 July 2019. Since approval of grid connectivity which is mandatory requirement for FC is affected by the Force Majeure event, cut off date for completing FC is deemed to be extended to the date on which effect of Force Majeure ceases to exist i.e. 24 July 2019.

...
21. As date of FC serves extension from 17 February 2019 to 24 July 2019 i.e. by 158 days, if date of SCOD is not extended by same period then bidder will get lower than 11 months period for construction of Wind project post Financial Closure. Hence, in order to maintain time period allowed under the PPA for construction of Wind Projects, date of SCOD would also merit extension by 158 days.”

3.52. Similarly, the Commission vide its order dated 21 January 2020 in Case No. 131 of 2019 filed by Mytrah Vayu Vedavati Private Limited (Mytrah), granted relief to Mytrah by giving extension upto 29 July 2019 and consequently extension of 163 days upto 27 June, 2020 was granted to Mytrah for SCOD. The relevant portion of the Order in Case No. 131 of 2019 is extracted below for ready reference:

*“1. The Case No.131 of 2019 is partly allowed.
2. Due to delay in obtaining grid connectivity, cut-off date of for the Petitioner viz. Mytrah Vayu (Vedavati) Pvt. Ltd. is extended up to 29 July, 2019 on account of Force Majeure event.
3. Consequently, Scheduled Commercial Operation Date stipulated in the Power Purchase Agreement is also extended from 16 January, 2020 to 27 June, 2020 i.e. by 163 days.”*

3.53. This Commission in the same case had also relied on Article 8-Force Majeure of the PPA and directed that the same was an inclusive provision which made the events not in control of the party as a Force Majeure event. RVUPL has a similar clause in its PPA. The relevant portion of the said Order in Case No. 131 of 2019 is reproduced below for ready reference:

“20. The Commission notes that Force Majeure provision reproduced above is not restrictive but an inclusive provision. Use of term ‘including occurrence of any of the following’ makes it inclusive definition which can include any reason which is not listed above but is beyond the control of the party affected by such event.”

- 3.54. The Commission in its Orders dated 20 January 2020 in Case Nos. 131 and 286 of 2016 recognized and declared the force majeure for attaining FC and consequent extension of SCOD, RVUPL is entitled to same extension in SCOD without levy of any damages.
- 3.55. RVUPL well after the commissioning the Project wrote to MSEDCL on 23 January 2020 seeking release of PBG. However, MSEDCL replied that they had taken a decision to encash the PBG because of failure of RVUPL to achieve SCOD by July 31, 2019. RVUPL immediately vide its letter dated 30 January 2020 submitted with detailed reasons that the SCOD stood extended due to delay not attributable to RVUPL. MSEDCL thereafter did not encash the PBG. Such action implied that MSEDCL had accepted RVUPL’s reasons and granted the extension of SCOD. This is a case of implied acceptance as prescribed under Section 8 of the Indian Contract Act, 1872.
- 3.56. Thereafter RVUPL was generating power and raising invoices on MSEDCL for the power generated and MSEDCL made payments for such invoices in terms of PPA.
- 3.57. MSEDCL vide its letter dated 29 May 2020, after taking no action on PBG for almost five (5) months, called upon RVUPL to give commitment that any penalty levied on MSEDCL by the Commission for shortfall in fulfillment of RPO target due to delay in commissioning of the Project shall be borne by RVUPL.
- 3.58. The Clause 5.6.2 of the PPA states that the compensation in case of shortfall of units shall not be applicable in event of Force Majeure as in this present case. Therefore, the Petitioner having invoked the Force Majeure clause which led to delay in SCOD is not liable to give any such undertaking. Further, shortfall in RPO does not entitle MSEDCL to withhold release of PBG under the PPA. In view thereof, RVUPL prays that MSEDCL should release the PBG.
4. RVUPL also submitted an Interim Application seeking interim/ad-interim Order to be passed by the Commission till the petition is finally adjudicated and prayed as following:
- (a) Grant an ex-parte ad-interim order restraining Respondent No. 1 from encashing the PBG till disposal of the Petition;*

(b) Grant an ex-parte ad-interim order restraining Respondents from taking any coercive steps against the Petitioner pursuant to notice dated May 29, 2020 issued by Respondent No. 1;

(c) List the present Interim Application for urgent hearing in view of the grave urgency in the matter;

5. MSEDCL in its reply dated 24 June 2020 made the following submissions:

5.1. The I.A is premature as there is no notice/letter from MSEDCL regarding invocation of the Bank Guarantee as on date. Hence, the I.A needs to be rejected on that ground alone.

5.2. In order to take benefit under 'Force majeure' Clause under the PPA, it is mandatory to: i) to give notice of 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 the commencement of the event of Force Majeure and (ii) notice shall be a pre-condition to the affected party's entitlement to claim relief under this Agreement. However, RVUPL never gave a notice of 'Force Majeure' under the PPA before 30 July 2019.

5.3. 'Force Majeure' was never served upon MSEDCL on the issue of 'Grid Connectivity Permission being in the name of Project Developer and not Successful Bidder'. Hence, no 'Force Majeure' on the said issue can be claimed by RVUPL as it never invoked the 'Force Majeure' for the said issue and served a notice upon MSEDCL.

5.4. The entire case of 'Force Majeure' canvassed by RVUPL is nothing but an afterthought as it never gave notice to MSEDCL on the issue of 'Grid Connectivity Permission being in the name of Project Developer and not Successful Bidder'. It is evident from the list of dates that RVUPL was not even able to submit the complete documents on or before the 'Financial Closure Date' i.e. 16 March 2019. The necessary documents except 'Grid Connectivity' were only submitted after two (2) days of delay i.e. on 18 March 2019. The grid connectivity was only obtained on 28 March 2019 in the name of successful bidder.

5.5. Assuming without admitting that RVUPL claim of 'Force Majeure' is correct on the issue of 'Grid Connectivity Permission being in the name of Project Developer and not Successful Bidder' still it is a matter of fact that 'Grid Connectivity Permission being in the name of Project Developer and not Successful Bidder' was only obtained on 28 March 2019. There is no explanation or justification by RVUPL for such delay beyond the 'Financial Closure Date'. On this count alone, the claim of RVUPL needs to be rejected.

- 5.6. Delay in 'Financial Closure' if any, cannot be attributed to leading to a 'Delay in SCOD' as the same never lead to any impediment in performance of work by RVUPL.
- 5.7. MSEDCL never took any coercive action against RVUPL for delay in 'Financial Closure' if any. Hence, seeking 'Force Majeure' on the issue of 'Financial Closure' is baseless, against the provisions of the PPA, contrary to facts and circumstances of the case and hence needs to be rejected on this count as well.
- 5.8. The case of 'Force Majeure' canvassed by RVUPL regarding 'Delay in Registration of Project by MEDA' is a mere afterthought and not in accordance with the mandate of PPA.
- 5.9. The only notice served by RVUPL was on 30 July 2019 i.e. (just 1 day prior to SCOD as per PPA) regarding 'Delay in Registration of Project by MEDA'. In view of the binding 'Force Majeure' Clause in the PPA, RVUPL cannot be allowed to claim any benefit of 'Force Majeure' on the said issue because of the following reasons:
 - a. The Registration of the project with MEDA was applied on 5 March 2019.
 - b. The 'Force Majeure' notice was only issued to MSEDCL on 30 July 2019.
 - c. Article of 'Force Majeure' is clear i.e. (i) it is mandatory to give notice of 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 the commencement of the event of Force Majeure and (ii) notice shall be a pre-condition to the affected party's entitlement to claim relief under this Agreement.
- 5.10. It is clear from the above sequence of events and facts and circumstances of the case that no delay can be attributed on the part of MSEDCL. However, in case the Commission grants any extension in SCOD, then it is submitted that MSEDCL will be short in meeting the RPO targets.
- 5.11. In case of the purchasing REC against the energy expected from the project of RVUPL, MSEDCL will have to procure RECs at the existing market rate. It is in this background that MSEDCL issued a letter dated 29 May 2020 and requested RVUPL to submit an undertaking which was not complied with by it.
- 5.12. Hence any relaxation, even if allowed by the Commission can only be done after providing for an appropriate compensation to MSEDCL.
6. MSETCL in its reply dated 25 June 2020 submitted the para wise reply to the Petition. Key submissions made by MSETCL are as below:

- 6.1. The Clause No. 1.9 of the MERC approved procedure for grant of grid connectivity related to grid connectivity transfer as stated below;

“Grid Connectivity is not transferrable. It is applicable only to the applicant. In case of Wind or Solar PV Power Projects, where there are multiple investors owing to different capacities are connected to common evacuation infrastructure which is developed by the applicant, the grid connectivity will be applicable to the applicant and such investors, however, no separate grid connectivity shall be issued to the individual investors”

- 6.2. MSETCL/State Transmission Utility (STU) issues grid connectivity in the name of applicant and not in the name of investor which is in line with the abovementioned Clause. STU has no mandate to know the prospective investors in the applicant’s project to whom grid connectivity shall be issued.
- 6.3. Applicant SGRPPL/Developer earlier applied for grid connectivity to 100MW wind power project, however, later revised the capacity in two phases i.e. 50MW Phase-I and 50 MW phase –II and submitted applications accordingly. STU carried out further process as per the revised applications following the approved procedure for grid connectivity as per RE policy 2015.
- 6.4. The Grid Connectivity for 50MW Phase –I wind power project was issued to applicant i.e. SGRPPL/Developer on 7 March 2019 as per process laid down in MERC approved procedure for grant of grid connectivity.
- 6.5. 50 MW (Phase-II) connectivity was issued in the name of SGRPPL. SGRPPL submitted the required undertaking on 30 January 2019 and subsequently the grid connectivity was issued on 28 March 2019. There was no delay in issuance of grid connectivity.
- 6.6. As a nodal agency for grant of grid connectivity to InSTs network, STU grants grid connectivity to applicant only in line with the provisions of State Grid Code 2006 and MERC approved procedure for grant of Grid Connectivity.
- 6.7. RVUPL applied for Grid Connectivity for 76 MW Wind Power Project on 19 November 2018 which was processed as per the stipulated procedure and demand note for commitment fee payment was issued on 10 July 2019. However, as applicant failed to pay commitment fee within stipulated time of 30 days, the application for grid connectivity was cancelled on 15 November 2019.
7. At the e-hearing through video conferencing held on 26 June 2020, the Advocate of RUVPL reiterated its submissions in the Petition and impressed upon need for providing a Daily

Order directing MSEDCL not to take any coercive action. The Advocate of MSEDCL clarified that no coercive action will be taken until final disposal of the Petition. The Commission took a note of MSEDCL assurance and hence did not issue separate Daily Order for this purpose. Thereafter, representative of RVUPL requested for some time to file their rejoinder on the replies filed by MSEDCL and MSETCL. The Commission granted seven days time to RVUPL for filing their rejoinder.

8. MEDA in its reply dated 30 June 2020 has stated that it had received 38 project proposals from RUVPL for 76 MW of wind power project. RUVPL had not submitted required documents as per the GoM's methodology dated 9 September 2015 at the time of submission of application. MEDA had issued registration to wind power projects within a month from the date of submission of required documents. The information about the submission of document and its date of submission for each of their 38 projects is tabulated below:

S No.	Event	Date	Remark
1	Applications received - 4 nos.	11-02-2019	Nil
	Applications received - 7 nos.	16-02-2019	
	Applications received - 14 nos.	08-03-2019	
	Applications received - 1 nos.	25-03-2019	
	Applications received - 8 nos.	28-03-2019	
	Applications received - 2 nos.	16-08-2019	
	Applications received - 2 nos.	11-09-2019	
2	Compliance of Documents for 24 projects	20-08-2019	Recommended for registration in the scrutiny committee meeting dated 9.9.2019
	Compliance of Documents for 7 projects	01-09-2019	
	Compliance of Documents for 3 projects	15-09-2019	Recommended for registration subjected to submission of balance documents in the scrutiny committee meeting dated 9.9.2019
	Compliance of Documents for 2 projects	18-09-2019	
	Compliance of Documents for 2 projects	20-09-2019	Recommended for registration in the scrutiny committee meeting dated 20.9.2019
3	Registration Letters issued for total 76 MW (38 x 2000kW) Capacity	20-09-2019	

9. RVUPL, submitted its rejoinder dated 2 July 2020 responding to the replies filed by the Respondents. Following additional points have been submitted by RVUPL:

Rejoinder to MSEDCL's reply dated 24 June 2020

- 9.1. With respect to MSEDCL's submission that I.A is premature as there is no notice/letter from MSEDCL regarding invocation of PBG, MSEDCL vide its letter dated 27 January 2020 had threatened RVUPL for invocation of the PBG furnished which is due to expire on July 31, 2020 due to delay in achieving the SCOD of RVUPL's 75 MW wind power project. Thereafter, MSEDCL vide its letter dated 29 May imposed a condition on granting of extension of such SCOD and directed RVUPL to provide a commitment towards paying compensation towards any penalties imposed by MERC for shortfall of RPO targets of MSEDCL because of delay in commissioning of the project. Therefore, it is the apprehension of RVUPL that MSEDCL may encash the PBG which is normally returned after successful commissioning of the project even when the reasons for such delay in SCOD are not attributable to RVUPL.
- 9.2. RVUPL vide its letter dated 30 July 2019 invoked the force majeure clause and sought extension of SCOD which was to be achieved by 31 July 2019. It was only on 22 July 2019 that MSEDCL vide its letter called upon RVUPL to submit Memorandum of Understanding and stated that the grid connectivity in the name of the Developer shall be considered for FC and RVUPL realized that though delay in FC is accepted as attained on 23 July 2019, RVUPL will not be able to attain SCOD as the delay in FC has caused delay to attain SCOD. Therefore, RVUPL acted very much in the prescribed time frame of seven (7) days from 23 July 2019 as provided in the PPA in invoking the force majeure Clause. Therefore, the contention of MSEDCL of force majeure not invoked in accordance with PPA is untenable.
- 9.3. Regarding MSEDCL submission on 'Grid Connectivity permission being in the name of project developer and not successful bidder' the Commission has in its Order in Case No. 131 of 2019 had specifically held that delay in getting grid connectivity in the name of the Developer after diligent follow ups by the generator is a force majeure event. MSEDCL is acting oblivious of such Orders of the Commission wherein the Petitioner and the similarly placed generators facing the same problems due to changing goal posts and unclear policies of MSEDCL had been delayed in achieving FC. The Commission in Case Nos. 131 and 286 of 2019 passed in petitions of similarly placed generators and Order in Case No. 285 of 2019 which was passed in the Petition of MSEDCL to permit grid connectivity in name of developer, MSEDCL is making such submissions deviating their own stance on grid connectivity of the developer being accepted. RVUPL has acted diligently and time and again called upon MSEDCL to accept the grid connectivity in the name of the

developer and hence, RVUPL was also affected by force majeure which led to delay in attaining FC and the same has been held in aforesaid Orders of the Commission.

- 9.4. SCOD was delayed on account of force majeure situation even in accordance with the afore mentioned decision of the Commission, as the delay in FC was of 157 days i.e. from February 17, 2019 to July 23, 2019 (when the grid connectivity in the name of the developer was accepted), RVUPL is entitled to an extension of atleast 157 days from the date of its original SCOD i.e. 157 days from July 31, 2019. It may be noted that RVUPL has attained SCOD much before the 157 days extended period on December 5, 2019 for Phase I (which is within 127 days of FC) and December 26, 2019 for Phase II (which is within 148 days of FC). MSEDCL has failed to take a note of the already set precedents by the Commission in similar matters. Thus, RVUPL even on the basis of delay in FC is entitled to extension in SCOD.
- 9.5. MEDA's approval is categorically listed in Schedule 3 of the PPA and any delay thereof is a force majeure event. RVUPL had applied for registration on 5 March 2019 and in the absence of exhaustion of limit under the existing Wind Policy and no amendment thereof, MEDA granted Project registration only on 20 September 2019. Therefore, non-grant of registration is beyond the control of RVUPL and a force majeure event under the terms of PPA. Further, as per terms of RfS, RVUPL is required eleven (11) months from FC to attain SCOD. Therefore, it is only once FC was accepted on 23 July 2019, RVUPL invoked force majeure as MEDA's registration was not granted. Therefore, on 30 July 2019, RVUPL did not see any chance of obtaining Project Registration from MEDA which was crucial for SCOD and the same not being in the hands of RVUPL, it gave a force majeure notice.
- 9.6. Further, the application for start-up power required for the Project was submitted on 21 August 2019 and the approval was granted by MSEDCL on 16 October 2019 which was against the provisions of Clause 5.5 of the PPA wherein it was stated that MSEDCL would provide the start-up power as soon as applied for. Thus, the delay for providing start-up power also led to delay in SCOD and the same is solely attributable to MSEDCL. Further, RVUPL is not responsible or liable to MSEDCL for meeting its RPO targets or for payment of any compensation for the same as the same is de-hors its obligations under the PPA.
- 9.7. There is no clause in PPA which provides for RVUPL to submit any undertaking as requested by MSEDCL in its letter dated 29 May 2020 and thus RVUPL is not liable for furnishing any such undertaking. Therefore, MSEDCL cannot force its failings upon RVUPL, especially in a situation where there is no fault on part of RVUPL.

Rejoinder to MSETCL's reply dated 25 June 2020

- 9.8. MSETCL has reiterated the current practice in the state of Maharashtra in respect of grid connectivity in the name of developer which is used by the generator as such and the same substantiates the case of RVUPL that MSEDCL by not accepting the grid connectivity in the name of the developer till 22 July 2019 caused delay in attaining FC which in turn led to delay in attaining SCOD.
- 9.9. As per the request of the Developer on 11 May 2018 the technical feasibility was directed by MSETCL vide its letter dated 9 August 2018. Pursuant to technical feasibility report dated 11 September 2018, on account of technical constraint, the Developer submitted revised proposal on 29 September 2018. However, it is imperative to note that even after such revised proposal MSETCL took more than five (5) months to grant grid connectivity. It is imperative to understand that grid connectivity is essential for attaining FC and hence, RVUPL could not have attained FC till such grid connectivity for both phases were granted. Therefore, it is evident that RVUPL took all steps for obtaining the grid connectivity in a diligent and timely manner and complied with all its obligations under the RfS and the PPA.
- 9.10. Also, Since MSEDCL was insisting on grid connectivity in the name of RVUPL against the prevalent practice, in the interest of the Project, RVUPL applied for grid connectivity in its own name. Thereafter, when MSEDCL accepted grid connectivity in the name of the developer and declared FC on 23 July 2019 vide its letter dated 4 October 2019, RVUPL did not pursue grid connectivity in its name. Therefore, the contention of MSETCL that RVUPL failed to pay commitment fee is irrelevant.

Rejoinder to MEDA's reply dated 30 June 2020

- 9.11. RVUPL strongly objects filing of submissions by MEDA post the e-hearing dated 26 June 2020. MEDA did not make any submissions during the e-hearing and therefore, RVUPL could not make its arguments vis-a-vis MEDA's submissions. Also, MEDA had not requested to file any reply to the Petition or sought liberty of the Commission during the e-hearing and hence, filing of such reply is mere after thought. Therefore, RVUPL submits that MEDA's reply should not be taken on record and the Commission should not consider anything as filed by the MEDA in its reply dated 30 June 2020 whilst deciding the Petition.
- 9.12. As there was no clarity on the registration of bid out projects or amendment to the GoM's Renewable Energy Policy dated 20 July 2015, MEDA neither had procedure for registration nor any clarity in respect thereof.

9.13. After attainment of FC, when RVUPL through its Developer approached MEDA as a follow up on the application for registration, MEDA vide email dated 14 August 2019 sent the format of undertaking to the RVUPL /Developer. Thereafter vide email dated 19 August 2019, MEDA called meeting of all generators on 21 August 2019 to discuss implementation of wind power program in the State of Maharashtra. One of important agenda item for the said meeting was “Registration of Wind Projects who have won MSEDCL/SECI bid”. During the aforesaid meeting MEDA informed that it will hold scrutiny meeting for the Projects for which it has received documents and grant registration thereafter. Thereafter, pursuant to the scrutiny meetings on 9 and 20 September 2019, MEDA granted registration of the Project on 20 September 2019.

9.14. Due to reasons beyond reasonable control of RVUPL including consequential delay pursuant to delayed FC, delayed receipt of Project registration from MEDA and delay in provision of start up power from MSEDCL, the SCOD could not be achieved as specified in PPA.

Commission’s Analysis and Ruling:

10. This Case has been filed by RVUPL seeking extension in FC and SCOD claiming Force Majeure event which affects its 76 MW Wind project. The Commission notes that KCT Renewable Energy Private Limited (former name of RVUPL) was a successful bidder for 75 MW for the bid carried out by MSEDCL. The Commission further notes that PPA between RVUPL and MSEDCL was signed subsequent to competitive bidding process under Section 63 of EA and after adoption of competitively discovered rate by the Commission vide Order dated 14 June 2018 in Case No. 129 of 2018. Relevant part of the Order is reproduced below:

“13. In view of foregoing, in line with the mandate u/s 63 of the EA, 2003 the following procurement and rates are approved by the Commission as proposed by MSEDCL. Also, the Commission accords approval to consider the proposed Wind Power generation to count towards fulfilment of its non-Solar RPO for the respective periods.”

<i>Sr. No.</i>	<i>Name of the supplier</i>	<i>Quantum of procurement approved (MW)</i>	<i>PPA Period</i>	<i>Time Period of supply</i>	<i>Rate (Rs./kWh)</i>
<i>1</i>	<i>Adani Green Energy (MP) Limited</i>	<i>75</i>	<i>25 years from date of CoD for new Wind projects</i>	<i>As per availability</i>	<i>2.85</i>
<i>2</i>	<i>KCT Renewable Energy Private</i>	<i>75</i>			<i>2.85</i>

	<i>Limited</i>		<i>Or</i> <i>25 years from signing of EPA for existing wind Projects</i>	
3	<i>Inox Wind Limited</i>	<i>50</i>		<i>2.86</i>
4	<i>Mytrah Energy (India) Private Limited</i>	<i>100</i>		<i>2.86</i>
5	<i>Hero Wind Energy Private Limited</i>	<i>75.6</i>		<i>2.86</i>
6	<i>Torrent Power Limited</i>	<i>124.5</i>		<i>2.87</i>
<i>Total</i>		<i>500</i>		<i>-</i>

11. Subsequently, both parties agreed upon relaxation of +/- 5% on the capacity considering the available configuration of WTGs and 76 MW capacity has been accepted against the PPA. PPA signed between RVUPL and MSEDCL which is based on Standard Bidding Guidelines notified by the Ministry of Power under Section 63 of the EA has stipulated timelines for various activities such as FC, SCOD etc. RfS/PPA also includes provisions such as Performance Bank Guarantee and penalty for delay in SCOD for ensuring commissioning of the project within prescribed schedule. The RfS document specified that FC was to be achieved within 7 months from the date of signing of PPA and the SCOD was to be achieved within 18 months from the date of signing of PPA.
12. The PPA between RVUPL and MSEDCL was signed on 17 July 2018. However, RVUPL submitted to MSEDCL that it will achieve SCOD by 31 July 2019 i.e. in about 12 months from the date of execution of PPA. The relevant provisions of PPA are reproduced below:

“ 3.1 Obligation of the Power Producer:

- i) *The Power Producer shall obtain all statutory approvals, clearances and permits necessary for the Project at his cost in addition to those Approvals as listed in Schedule 3.*
- ii) *The Power Producer shall obtain financial closure within Seven (7) months from date of execution of this PPA.*
- iii) *...*

“2. Definitions

.SCOD” or “Scheduled Commercial Operation Date” means 31st July 2019 as declared by power producer.”

13. Accordingly, RVUPL was required to achieve FC within seven (7) months of signing the PPA i.e. by 17 February 2019 and SCOD by 31 July 2019. Based on correspondence between parties, MSEDCL agreed to extend cutoff date for FC by a month on account of its delay in providing signed copy of PPA to RVUPL, however MSEDCL kept the SCOD unaltered.
14. RVUPL has contended that it was unable to achieve the SCOD in the stipulated time period i.e. by 31 July 2019 due to following factors and has requested the Commission to declare them as Force Majeure events:
- a) Delay in Grid Connectivity and acceptance of the Grid Connectivity in the name of Developer by MSEDCL
 - b) Delay in Project registration by MEDA
 - c) Delay in providing start-up power
- MSEDCL in its reply has opposed RVUPL's claim of Force Majeure and has stated that penalty may be imposed for delayed commissioning of the project.
15. The Commission notes that MSEDCL vide its letter dated 4 October 2019, accepted Financial Closure with effective date of 23 July 2019 but did not extend SCOD of the project. MSEDCL has not imposed any penalty for extension of FC. RVUPL has commissioned its projects in phases i.e. 50 MW on 5 December 2019 and balance 26 MW on 26 December 2019, respectively. It is important to note that although this actual commissioning date is beyond agreed SCOD of 31 July 2019, it is still within 18 months allowed under the RFS.
16. One of the reasons stated by RVUPL for delayed commissioning beyond agreed SCOD is the issue of allowing grid connectivity in the name of Developer. The Commission notes that this issue was not limited to RVUPL but had equally affected all successful bidders under MSEDCL's 500 MW bid. The Commission has already decided this issue in respect of M/s M/s. Clean Wind Power (Bhavnagar) Private Limited (which is SPV of Hero Wind Energy Private Limited) which was one of the successful bidders along with RVUPL. Relevant part of the said Order dated 20 January 2020 in Case No. 286 of 2019 is reproduced below:
- “
8. *The PPA between CWPBPL and MSEDCL was signed on 17 July 2018. Accordingly, CWPBPL was required to achieve FC within seven (7) months of signing the PPA i.e. by 17 February 2019 and SCOD within eighteen (18) months of signing of PPA i.e. by 17 January 2020. Based on communication between parties, MSEDCL has agreed to extend cut off date for FC by a month on account of its delay in providing signed copy of PPA to CWPBPL, however MSEDCL has kept SCOD unaltered.*

9. *CWPBPL stated that as per terms of PPA, for achieving FC, along with document confirming financial arrangement for the project, it has to submit documents showing grid connectivity for evacuation of power in its name and evidence of possession of land required for the project. CWPBPL has contended that as per prevalent practice in Maharashtra, grid connectivity is not obtained by the bidder, but is obtained by executing agreement for 'right of use' for power evacuation with the project developer. Hence, CWPBPL through various correspondence has requested MSEDCL to allow grid connectivity in the name of its EPC contractor / project developer, however MSEDCL has initially refused such request. On 22 July 2019, MSEDCL has informed CWPBPL that it can sign an MoU for utilization of grid connectivity of developer. Accordingly, on 24 July 2019, CWPBPL has signed MoU with M/s Suyog Urja Private Limited (vendor of the Petitioner's EPC Contractor M/s. Suzlon) for use of grid connectivity. On the issue of possession of land for the project, CWPBPL has submitted that GoM's Resolution dated 23 October 2018, declaring drought situation in the State of Maharashtra has delayed acquisition of land. CWPBPL stated that both these reasons which caused delay in FC were not within its control and are covered by Force Majeure provisions of the PPA. Hence, it is requested to extend cut off date for FC and SCOD by factoring such delay on account of Force Majeure events.*
10. *While opposing relief sought by CWPBPL, MSEDCL has contended that the RfS document has clearly identified the responsibilities of the successful bidder. Further, it has submitted that the CWPBPL is trying to shift the defaults arising out of its irresponsibility to MSEDCL and is not eligible for any relief under 'Force Majeure' Clause as per the PPA.*
11. *The Commission notes that Article 8 of the PPA relating to Force Majeure reads as under:*
- “ 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) damage to or breakdown of transmission facilities of CTU/STU/DISCOM;
- x) exceptionally adverse weather condition which are in excess of the statistical measures of last hundred (100) years”

12. The Commission notes that Force Majeure provision reproduced above is not restrictive but an inclusive provision. Use of term ‘including occurrence of any of the following’ makes it inclusive definition which can include any reason which is not listed above but is beyond the control of the party affected by such event. Judgments of the Supreme Court, Madras High Court and APTEL quoted in para 3.29 to 3.31 above, supports such interpretation of Force Majeure clause. Thus, to get benefit of Force Majeure Clause, one needs to establish that such event was beyond the control of the affected party and even after taking all necessary steps it would have not prevented it.

13. Issue relating to Grid Connectivity is not exclusively listed as eligible event under the Force Majeure Clause. CWPBPL has contended that MSEDCL’s insistence on having grid connectivity in the name of successful bidder is against prevailing practice of using grid connectivity of project developer. Whereas, MSEDCL has connected that such clause was part of RfS document and known to CWPBPL and hence cannot be ground for invoking Force Majeure clause. The Commission notes the fact that this clause was part of RfS. However, the issue of grid connectivity was not restricted to CWPBPL only but was applicable to all similarly placed projects.

The Commission notes that in order to find a resolution to the grid connectivity issue, MSEDCL referred the matter to the Government of Maharashtra, which in turn

referred to the STU. STU observed that there was no provision for transfer of grid connectivity and that there were many issues that need to be addressed before proposing transfer of grid connectivity from the developer to the bidder. Subsequently, MSEDCL formed a committee which recommended that in order to resolve the issue pertaining to the grid connectivity, the developer and the successful bidder could sign a Memorandum of Understanding (MoU) for utilization of grid connectivity of developer by successful bidder.

14. *Further, the Commission vide its Order dated 19 September, 2019 in Case No. 235 of 2019 filed by MSEDCL, allowed modification in the Clauses of the PPA governing grid connectivity for the Project by recognizing MoU between successful bidder and the project developer as a valid document to achieve FC. The relevant excerpt from the Order is as below:*

“11.8 In view of the above facts, especially with regards to no change in the technical feasibility and for facilitating early procurement of cheaper wind power, as a special case and limited to this petition, the Commission deems fit and proper to allow MSEDCL’s prayer of modification of Clauses of PPA entered with selected bidders regarding grid connectivity, after considering the MoUs between Developer and successful bidders as a requisite document for attaining financial closure. The Commission also thinks it fit to approve that the same MoU for fulfilling the conditions of grid connectivity requirements of RfS and PPA. The MoU shall consider the terms and conditions/obligations of successful bidders and developer in respect of utilization of grid connectivity for the period of agreement and developer shall have the responsibilities related to grid connectivity, all other NOCs and site activities as required.”

15. *Thus, even though having grid connectivity in the name of successful bidder is condition stipulated under the RfS, on account of practical issues and prevalent practice in Maharashtra, MSEDCL has subsequently allowed MoU between successful bidder and project developer as a valid document for complying with the requirement of Grid Connectivity. This development was communicated to CWPBPL by MSEDCL vide letter dated 22 July 2019. MSEDCL also directed the CWPBPL to submit such MoU within seven (7) days of receipt of the said letter for achieving FC. CWPBPL executed the required MoU with M/s Suyog Urja Private Limited (vendor of the CWPBPL’s EPC Contractor M/s. Suzlon) on 24 July 2019. Therefore, CWPBPL cannot be held responsible for delay in obtaining grid connectivity.*

16. *The Commission notes that CWPBPL conducted itself in diligent manner for executing the awarded project. It had been regularly communicating with MSEDCL in order to provide clarity on the issue of grid connectivity. Further, it has performed*

the required activities to execute the project. Delay in obtaining grid connectivity as noted in paragraph 15 above, is beyond the control of CWPBPL and hence Force Majeure clause is attracted.

17. *The Commission notes PPA provides following relief in case of party affected by Force Majeure events:*

“8.2 Available Relief for a Force Majeure Event: No party shall be in breach of its obligations pursuant to this agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure event. However, adjustments in tariff shall not be allowed on account of Force Majeure Event

.....”

Accordingly, period for which Force Majeure event was effective, the affected party cannot be held in breach of obligation which is prevented or delayed on account of such Force Majeure event.

18. *Under present case, on clarification from MSEDCL, CWPBPL has executed MoU for grid connectivity on 24 July 2019. Hence, it can conclude that effect of Force Majeure event relating to Grid Connectivity issue was applicable till 24 July 2019. Since approval of grid connectivity which is mandatory requirement for FC is affected by the Force Majeure event, cut off date for completing FC is deemed to be extended to the date on which effect of Force Majeure ceases to exist i.e. 24 July 2019.*

19. *.....*

20. *CWPBPL has also requested for extension of SCOD by 9 months. In this regard, the Commission notes that PPA has stipulated various milestones to be achieved by the successful bidder till commissioning of the project. Accordingly, FC and CoD is to be achieved within 7 month and 18 months from date of signing of PPA. FC is an important milestone wherein finances for developing the project is tied-up along with additional requirement of possession of land and grid connectivity for the Wind power project. After FC, bidder gets 11 months for construction of the project.*

21. *As date of FC serves extension from 17 February 2019 to 24 July 2019 i.e. by 158 days, if date of SCOD is not extended by same period then bidder will get lower than 11 months period for construction of Wind project post Financial Closure. Hence, in*

order to maintain time period allowed under the PPA for construction of Wind Projects, date of SCOD would also merit extension by 158 days.”

Further, the Commission vide its order dated 21 January 2020 in Case No. 131 of 2019 has granted similar dispensation to another successful bidder i.e. M/s Mytrah Vayu Vedavati Private Limited for same 500 MW bid of MSEDCL.

16. Above order dated 20 January 2020 is squarely applicable to the present matter as well. RVUPL has conducted itself in diligent manner for executing the awarded project. It had been regularly communicating with MSEDCL to provide clarity on the issue of grid connectivity. Delay in obtaining grid connectivity as noted in paragraph 15 of above quoted Order, is beyond the control of RVUPL and hence Force Majeure clause is attracted. Further on clarification from MSEDCL, RVUPL has executed MoU for grid connectivity on 23 July 2019. Hence, it can be concluded that effect of Force Majeure event relating to Grid Connectivity issue was applicable till 23 July 2019. It is important to note that MSEDCL has already accepted extended date of FC and declared vide its letter dated 4 October 2019 that FC has been achieved on 23 July 2019. As far as MSEDCL's contention in present matter relating to non-serving of mandatory notice under Article of Force Majeure is concerned, the Commission notes that this issue of grid connectivity in the name of developer was repeatedly raised by RVUPL and other successful bidders with MSEDCL and finally MSEDCL had agreed for the same. Therefore, in the opinion of the Commission, MSEDCL now cannot take any contrary stand by relying only on the procedural part of serving of notice.
17. Under the present PPA, Financial Closure was to be achieved within 7 months and SCOD in about 12 months from the date of the PPA. Once Financial Closure date is extended, as per para 21 of above quoted Order, SCOD also needs to be extended by same period. As date of FC has been extended from 17 February 2019 to 23 July 2019 i.e. by 157 days, if date of SCOD, which was 31 July 2019, is not extended by same period then bidder will not get any period for construction of Wind project post Financial Closure. Hence, to maintain time period agreed under the PPA for construction of Wind Projects, date of SCOD also merits commensurate extension by 157 days.
18. Accordingly, the Commission allows extension of the SCOD from 31 July 2019 to 4 January 2020, on account of above Force Majeure event. RVUPL's 76 MW wind project has been commissioned on 26 December 2019 i.e. before such extended date of SCOD and hence RVUPL should not be subjected to any penalty on account of delay in commissioning of the project on agreed SCOD.

19. The Commission notes that MSEDCL in its initial notice dated 27 January 2020 sought encashment of Bank Guarantee within 7 days for delayed commissioning of the project beyond agreed SCOD. However, post RVUPL's reply dated 30 January 2020 explaining reasons for delay and pointing out above cited Order dated 20 January 2020, MSEDCL has not encashed RVUPL's Bank Guarantee. However, vide subsequent letter dated 27 May 2020, MSEDCL has communicated RVUPL as follows:

“Further, please note that the procurement of power from your project is done for fulfilling the RPO target given by MERC and delay in commissioning of your project has resulted into shortfall in meeting RPO target for which there is penalty provisions in the MERC Regulations.

Hence, please note that your request to allow delay in Scheduled Commissioning Operation Date (SCOD) will be granted subject to the commitment from your side for compensation towards any penalties imposed by MERC for shortfall in fulfillment of RPO target to MSEDCL because of delay in commissioning of your project.

In view of above, it is to inform you that delay in commissioning will be accepted on your commitment for compensation against shortfall of RPO to MSEDCL within 7 days after receipt of this letter through email otherwise penalty will be recovered as per PPA clause which may please be noted.

RVUPL has opposed above condition imposed by MSEDCL as it is beyond the provisions of PPA.

20. Regarding condition of compensating MSEDCL for any penalty for shortfall in RPO, the Commission notes that such condition was never part of RFS or PPA document. Therefore, MSEDCL cannot impose such condition at this delayed stage. If MSEDCL wishes to include such condition in PPA, it should have included the same in RFS and draft PPA so that bidders would have been aware of these conditions while submitting their bids. Imposing conditions post signing of PPA is not in accordance with competitive bidding process and hence cannot be allowed.
21. The Commission notes that PPA provides for imposition of penalty on generators on account of delayed commissioning. However, as held above such delay in commissioning of the project was on account of Force Majeure event and hence as per provisions of PPA no penalty can be imposed for the period in which performance of the party is affected due to Force Majeure event. Further, as per article 4.2.4 of the PPA, MSEDCL needs to return the performance Bank Guarantee post successful commissioning of the project. As project has been commissioned on 26 December 2019, which is within extended SCOD of 4 January

2020, the Commission directs MSEDCL to return the Bank Guarantee to RVUPL as per provisions of the PPA without adjusting any damages.

22. With the above ruling, main relief sought by RVUPL is allowed. Therefore, now dealing with other contentions of RVUPL i.e. declaring delay in registration by MEDA and MSEDCL's delay to provide startup connection as a Force Majeure events, would be a mere academical exercise. As relief sought has already been granted, the Commission is not inclined to go into these issues as the same have been rendered infructuous.
23. Further, as observed during E-Hearing in the matter, on the basis of statement made by Advocate of MSEDCL that it would not take any coercive action, the Commission has not issued any direction on MA filed by RVUPL seeking ad-interim relief. In any case that application is also rendered infructuous in view of the ruling in the main petition.
24. Hence, the following Order:

ORDER

1. **The Case No. 102 of 2020 is allowed. Accordingly, MA is disposed of.**
2. **Due to Force Majeure event of delay in obtaining grid connectivity, Scheduled Commercial Operation Date agreed in the Power Purchase Agreement is extended from 31 July 2019 to 4 January 2020 i.e. by 157 days.**
3. **Maharashtra State Electricity Distribution Company Ltd. shall return Bank Guarantee without deducting any amount on account of damages due to the commissioning of the project beyond initially agreed Scheduled Commercial Operation Date.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I. M. Bohari)
Member

