

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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CASE No. 138 of 2020 and MA No. 43 of 2020

Case of Clean Wind Power (Bhavnagar) Private Limited seeking extension/ deferment of Scheduled Commercial Operation Date on account of Force Majeure events related to COVID-19 outbreak and consequential reliefs.

M/s Clean Wind Power (Bhavnagar) Private LimitedPetitioner

V/s

Maharashtra State Electricity Distribution Co. Ltd. Respondent

Appearance

For the Petitioner :Shri Aniket Prasoon (Adv.)

For the Respondent :Shri Shashwat Kumar (Adv.)

Coram

**I.M. Bohari, Member
Mukesh Khullar, Member**

ORDER

Date: 15 September 2020

1. M/s Clean Wind Power (Bhavnagar) Private Limited (**CWPBPL**) has filed this Case dated 3 July 2020 seeking extension/ deferment of Scheduled Commercial Operation Date (**SCOD**) on account of Force Majeure (**FM**) events related to COVID-19 outbreak which prevented it from undertaking its obligations under the Power Purchase Agreement (**PPA**) dated 17 July 2019 and consequential reliefs.
2. **Main Prayers of CWPBPL are as follows:**
 - a) *Hold and declare that the Covid-19 pandemic and its consequent implications as set out in the Petition which prevented the Petitioner from achieving commissioning of the Project by the extended SCOD (i.e., 23.06.2020) is a Force Majeure Event under Article 8 of the Power Purchase Agreement dated 17.07.2018;*

- b) *Hold and declare that the Petitioner is not liable to pay any Liquidated Damages or any penalty in terms of PPA as the delay in commissioning is due to a Force Majeure event and as such the Petitioner cannot be held liable for the same;*
- c) *Hold and declare that the COVID-19 pandemic and its consequent implications as set out in the Petition are a continuing Force Majeure Event affecting the Project with effect from 19.02.2020;*
- d) *Extend the Scheduled Commercial Operation Date of the Project from 23.06.2020 without any adverse consequences, till such time that the effects of the Force Majeure event involving COVID-19 pandemic on the Project as narrated in the Petition completely subsides, and in any event not for a period lesser than one year i.e., till 22.06.2021;*
- e) *Hold and declare that the buffer period of 9 months' beyond the SCOD stipulated under Article 3 of the PPA for commissioning the Project will be reckoned from the further extended SCOD in terms of prayer (iv) above, as the Petitioner is unable to complete the Project due to Force Majeure Event;*
- f) *Grant ex-parte ad-interim order restraining the Respondent from taking any coercive steps against the Petitioner, including restraining the Respondent from invoking the Performance Bank Guarantee of the Petitioner, during the pendency of the present proceedings; and*

3. CWPBPL in its Petition has stated as under:

- 3.1 CWPBPL is Special Purpose Vehicle (SPV) of Hero Wind Energy Private Limited (Hero) for the purpose of developing a wind power plant of 75.6 MW capacity at Anjanadi Site, Village – Malegaon Thokal, Gaur Pimpri, Kannad & Phulambri Tehsil, District – Aurangabad. Pursuant to Request for Selection (RfS), Hero participated in bidding process and was selected for developing 75.6 MW Wind capacity in Kannad Taluka of Aurangabad Dist.
- 3.2 After the tariff was adopted by the Commission vide Order dated 15 June 2018 in Case No 129 of 2018, Letter of Award (LoA) was issued on 18 June 2018. CWPBPL and MSEDCL executed PPA on 17 July 2018 for the period of 25 years at tariff of Rs.2.86 per unit.
- 3.3 As per PPA, CWPBPL was required to achieve Financial Closure (FC) within 7 months from the date of the PPA, (i.e., 7 months from 17 July 2018) by 17 February 2019. However, due to the delay of one month in providing the original signed copy of the PPA, MSEDCL had agreed to extend the cut-off date for FC by a month without making any change in SCOD. Further, to achieve such FC, CWPBPL is required to furnish: (i) connectivity agreement with CTU/STU/DISCOM; and (ii) ownership/lease hold/right to use of the project site in the name of CWPBPL. As per PPA the SCOD to be achieved

within 18 months from date of PPA i.e by 17 January 2020.

- 3.4 CWPBPL appointed Suzlon Energy Limited as its EPC contractor. CWPBPL was unable to meet the criteria for achieving FC due to the FM events, including the delay in getting approval from MSEDCL to obtain grid connectivity from MEDA as registered developer and delay in acquiring of land for setting up of the Project.
- 3.5 CWPBPL had approached the Commission in Case No 286 of 2019 seeking extension to FC and SCOD on account of FM event. The Commission by its Order dated 20 January 2020 considered the delay in obtaining grid connectivity, a FM Event and allowed extension of time to achieve FC till 24 July 2019 and SCOD till 23 June 2020.
- 3.6 The outbreak of COVID-19 in China severely impacted the global supply chain as various components for setting up wind and solar projects are imported from China. In the present Project, Wind Turbine Generator (**WTG**) components, such as Main Shaft, AC-DC-AC Converter/ Inverter for Variable Speed, Girder set, Main Bearing Housing, Flexible Coupling, Yaw Base/Main Frame, Climbfree are being sourced from China and Component such as Gear Box, Local Control System, MCCBS, Slipring Cable Resolver, Twist Stop Sensor, Encoder, Wind Sensor, Gear Rim, Shrink Disc, Vibration Monitor are being sourced from Europe, by Suzlon.
- 3.7 The Ministry of Finance (**MoF**), Government of India (**GoI**) vide Office Memorandum (**OM**) dated 19 February 2020 clarified that the disruption of supply chains due to the spread of COVID-19 in China or any other country will be covered under the provisions of FM. The GoM also on 23 March 2020 notified lockdown till 31 March 2020 further by various Orders GoM and GoI extended lockdown till 31 July 2020.
- 3.8 Even after Ministry of Home Affairs (**MHA**) allowed construction activities for renewable energy projects vide its Order dated 15 April 2020, CWPBPL could not continue with the process of land acquisition as well as begin construction activities on the acquired parcels for the project due to the area being classified as a Red Zone (Hotspot) by the Ministry of Health and Family Welfare, Government of India (**MoHFW**) and on account of Section 144 orders issued from time to time in Aurangabad. The relaxations stipulated in MHA's Order would not be applicable in Hotspots identified by the MoHFW.
- 3.9 Ministry of New and Renewable Energy (**MNRE**) vide OM dated 17 April 2020 issued direction that Renewable Energy implementing agencies may grant extension of time for renewable energy projects, on account of lockdown due to COVID-19, equivalent to the period of lockdown and additional 30 days for normalisation after end of such lockdown.
- 3.10 CWPBPL vide its notice dated 20 April 2020 intimated MSEDCL of the occurrence of the FM event invoking terms of Article 8 of the PPA, and requested to extend the timeline of SCOD from the end of lockdown period due to Covid-19 till minimum period of 1 year thereafter. The date of occurrence of the FM event in the present case also needs to be treated from the date of issuance of MoF's Notification dated 19 February 2020.

- 3.11 MSEDCL vide its letter dated 21 April 2020 rejected CWPBPL's request relying upon MHA Order dated 15 April 2020 and the GoM's Order dated 17 April 2020, allowing construction activities of renewable energy projects.
- 3.12 CWPBPL vide its letter dated 29 April 2020 informed MSEDCL that CWPBPL still could not proceed with construction due to Aurangabad being declared as a Red Zone (Hotspot). MSEDCL did not reply. CWPBPL again on 22 June 2020 requested MSEDCL for extension of SCOD by 1 year because of various difficulties (by submitting the various letters from the vendors) it was facing due to outbreak of Covid-19.
- 3.13 Due to following reasons, which are beyond the control of CWPBPL, CWPBPL was unable to commission the Project by the extended SCOD as per the Commission's Order dated 20 January 2020:

Delay in Receipt of WTG Components:

- 3.14 CWPBPL's Original Equipment Manufacturer (**OEM**) i.e., Suzlon, imports 20% of the components for the WTGs mainly from China and European countries and procures the remaining 80% locally, i.e., within India. CWPBPL and Suzlon entered into the Term Sheet on 11 October 2018 and later the Supply Contract in March 2019 for supply of WTGs and the delivery of the equipment was to start from December 2018. As the project was to be commissioned by 17 January 2020, CWPBPL performed its obligation relating to placing of supply order well before the start of the FM event. Further, the supply of 9 x S111-140 HLT WTGs was done at the Project site between March-April 2019 itself. However, due to the impasse between the parties on grid connectivity, which was considered by the Commission vide its Order dated 20 January 2020, CWPBPL kept all further procurement of raw material / components for the balance 27 WTGs on hold.
- 3.15 Due to COVID-19 pandemic and safety measures taken in various countries to curb its spread, the manufacturing and import of WTG components has either stopped or is adversely affected in a significant manner. Indian vendors, from whom 80% components of WTGs were sourced, have also been severely impacted. CWPBPL as well as its EPC contractor have been informed by their vendors and suppliers about FM event and intimated that delivery date will be delayed and exact date for the same cannot be ascertained.
- 3.16 It is anticipated that the Indian manufacturing industries will not be in position to recover completely from the impact of COVID-19 even in the coming 3 months, resulting in the supplies of component probably shifting to Q3 of FY2020-2021, which would result in balance 27 WTGs being supplied at the Project site in or around Q4 of FY2020-2021.

Delay in Availability of Connectivity

- 3.17 CWPBPL has completed work of Power Evacuation (**PE**) infrastructure (which includes one 33KV Bay and two feeders at MSETCL Pishore Sub-Station), Joint Survey for 33KV

internal line and 9 kms of external line, erection of 65 poles, tower profile and supply of materials, and right of way for 16 Tower Lines. However, out of the Contracted Capacity of 75.6 MW, grid connectivity of only 25 MW has been made available to CWPBPL. Pursuant to the Commission's Order dated 20 January 2020 in Case No. 286 of 2019 M/s Suyog Urja Private Limited, vendor of the CWPBPL's EPC Contractor deposited with MSETCL the required commitment fees of Rs. 1 lakh/MW for 50 MW of the Project amounting to Rs. 50 Lakhs (as connectivity for 25 MW was already provided to CWPBPL). This was intimated to MSETCL vide letter dated 12 February 2020 by Suyog. However, till date MSETCL has not released grid connectivity for the Project.

- 3.18 In addition to the above, due to unavailability of Grid Connectivity, various activities related to approval, WTGs, and BoP Supply and Project Work have become affected and are now further delayed due to COVID-19. EPC contractor Suzlon is facing difficulty in getting approval of the Single Line Diagram (SLD), and layout finalization in the Sub-station premises regarding 2 Nos of additional 33 KV bays. This has cascading impact, as in the absence of approved layout and SLD, Suzlon is unable to finalize the vendors for supply of PE material. This adversely impacts the GTP Drawing approval of the equipment to be installed for the said work. This has overall impact on the ascertainment of supply dates by Suzlon.

Delay in Procurement of Land

- 3.19 CWPBPL, through Suzlon, had procured 15 parcels of land for setting up the Project. Further, micro-siting of locations, soil testing, foundation works for 9 of the aforesaid parcels of land, including, excavation, plain cement concrete (PCC), steel reinforcement & concrete works, etc., and right of way for approach roads, have been completed for the Project site, to the extent of the land procured. However, despite the extension of SCOD granted by the Commission Suzlon has been unable to make any substantial progress in procurement of land due to the lockdown imposed by the Government of Maharashtra (GoM) and the MHA.
- 3.20 As regards the land parcels already acquired, the revenue records of the same are required to be updated at the relevant Sub-Registrar's Office, for which the presence of the landowners is necessary. Further, for each parcel of land, there are approximately 10-12 owners, who are all required to be present at the Sub-Registrar's Office as per the applicable procedure. However, due to prevailing lockdown norms, including social distancing, all these people cannot be accommodated in the Sub- Registrar's office without flouting the applicable orders of lockdown and social distancing.
- 3.21 Moreover, to procure land for any project site, physical presence in village is a must for actual possession of the land, and discussion with Farmer. However, at this stage, fear of life and property is so high that, farmers are hesitant to allow outside dwellers into their village. As such, CWPBPL's representatives are neither permitted in the village for procurement of land nor for construction of the Project.

- 3.22 Further, farmers are waiting for compensation from the GoI and GoM under various

schemes and requesting CWPBPL to wait for sale deed till getting the compensation from the concerned Government.

- 3.23 Only after the effects of COVID-19 subside, transactions will resume normally. CWPBPL anticipates that a time period of 7-8 months from the date of lifting of all restrictions will be needed for operations to be conducted in pre COVID-19 manner. Therefore, all activities like land survey, negotiations for entering into relevant agreements, etc., are halted till proper regularization of movement and operations. The delay in acquisition of land for the Project and subsequently delay in achieving the SCOD, as the situation is beyond control of CWPBPL.

Non-availability of Labour/Workforce:

- 3.24 MHA's Order dated 17 April 2020 prohibited inter-district and inter-state movement of individuals, except for medical reasons or activities permitted under the guidelines. Further, MoHFW vide its circular dated 15 April 2020 mentioned Central/ State identified Hotspots and containment areas all over various states across India, which includes Aurangabad.
- 3.25 Section 144 of the CrPC has also been imposed by the Office of Collector and District Magistrate and Policy Commissioner in Aurangabad District vide its various Orders. Due to imposition of various guidelines with restrictions, there has been mass exodus of non-native migrant workers which included skilled work force that have also migrated in large number from the State of Maharashtra. Also, large number of migrant workers have left Aurangabad. Hence it became almost impossible for CWPBPL to continue with site activities. Moreover, with Aurangabad continuing to be a Hotspot in the state of Maharashtra, workers/technicians at the site were reluctant to work in such conditions and demanded to return to their home states.
- 3.26 As per Article 8.1.D of PPA, CWPBPL served the notice to MSEDCL on 20 April 2020. In the said notice, CWPBPL informed MSEDCL about the occurrence of the FM event, due to COVID-19 pandemic, by relying upon MoF's OM dated 19 February 2020. Though the notice is issued on 20 April 2020, the FM event is deemed to have occurred on 19 February 2020 due to the MoF notification. Hence the SCOD be extended till such time that the effects of the FM event involving COVID-19 pandemic on the Project, completely subsides, and in any event not for a period lesser than one year i.e., till 23 June 2021.
- 3.27 Article 3.3 of the PPA an outer limit of 27 months from the date of execution of the PPA, is prescribed for the commissioning of the Project and if the Project/any part of the capacity is not completed within the 27 months' period, then PPA will be terminated with respect to the part of the capacity not completed within the 27 months' period. Till the global supply chain is restored and the restrictions imposed by way of the lockdowns are relaxed, the operation of Article 3.3(ii)(b) (i.e., obligation to commission within 27 months' period from the date of the PPA) is to be suspended. Hence MSEDCL cannot terminate the PPA or invoke the Performance Bank Guarantee (**PBG**) of CWPBPL or take

any coercive steps for the delay on account of the FM event. CWPBPL is entitled for an extension of time for commissioning the Project beyond the 27 months' time period set out in Article 3.3 and accordingly, the SCOD ought to be further extended. The final completion date as per the PPA which includes the buffer period of 9 months although with imposition of penalty in terms of Article 3.3 would inevitably be reckoned from the further extended SCOD.

4. CWPBPL in its Stay Application dated 3 July 2020, submitted along with Petition, has stated as under:

As MSEDCL has not replied to CWPBPL's letters dated 29 April 2020 and 26 June 2020 stating FM event and inability to resume operations, there is apprehension that MSEDCL on account of non-commissioning of the Project by the extended SCOD is likely to terminate the PPA and invoke the Performance Bank Guarantee. Therefore, CWPBPL prayed for following:

- a) grant ad interim ex-parte order restraining the Respondent from initiating any coercive step against the Petitioner including specifically restraining it from invoking the Petitioner's Performance Bank Guarantee dated 13.07.2019 bearing no. OGT0005180022568, until the final disposal of the present matter; and*
- b) Pass such other order(s) as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.*

5. CWPBPL in its MA No 43 of 2020 dated 6 July 2020 has made following submission:

- 5.1 Subsequent to filing of the Petition, CWPBPL received a letter dated 4 July 2020 from MSEDCL, stating that in case CWPBPL fails to submit the PBG with extended claim period till 23 December 2020 on or before 7 July 2020 then MSEDCL is going to invoke the existing PBG issued under the PPA on 7 July 2020.
 - 5.2 The validity of PBG is currently till 31 July 2020. Therefore, CWPBPL was under an impression that it can submit the PBG any time prior to 31 July 2020, in absence of any specific timeline.
 - 5.3 MSEDCL has given CWPBPL only two working days to arrange for PBG with the motive to invoke the PBG before the hearing of the matter. CWPBPL requested the Commission to intervene and restrain MSEDCL from taking any coercive action. Also requested to list the matter at earliest.
6. The Commission vide its Notice dated 7 July 2020 has directed MSEDCL that no coercive action should be taken till date of hearing in the matter and at the same time CWPBPL was also directed to submit extended PBG to MSEDCL before date of Hearing.

7. CWPBPL in its additional submission dated 10 July 2020 has stated that:

- 7.1 CWPBPL by end of business hours on 7 July 2020, has arranged the extended PBG bearing no. OGT0005180022568 having claim period till 23 December 2020. The copy of the extended PBG has been shared with MSEDCL via email dated 7 July 2020,
- 7.2 MSEDCL has instructed not to send original physical copy of the extended PBG as of now because currently offices at Mumbai are not working regularly due to COVID-19 and, entry in offices is also restricted.
8. **MSEDCL in its Reply dated 24 July 2020 has stated as under:**
- 8.1 CWPBPL has not achieved the extended SCOD of 23 June 2020 granted by the Commission vide Order dated 20 January 2020 in Case No. 286 of 2020. Instead, by filing the present Petition, CWPBPL has sought further extension to SCOD and also prayed for declaration of non-imposing of any penalty attributable to failure to achieve the SCOD i.e. 23 June 2020.
- 8.2 CWPBPL has submitted the following reasons for non-commissioning of project within the revised SCOD:
- i) Outbreak of the global pandemic Novel Coronavirus Disease
 - ii) Delay in Receipt of WTG Components.
 - iii) Delay in Availability of Connectivity
 - iv) Delay in Procurement of Land
 - v) Non-availability of Labour/Workforce
- 8.3 Any relaxations to the terms of PPA can only be provided by the provision made under FM clause of PPA. CWPBPL would not be entitled for any benefits as the Ministry of Power Ministry of Home Affairs Order / clarification dated 15 April 2020 makes it clear that construction of renewable energy projects were allowed.
- 8.4 Other reasons cited by CWPBPL for failure to achieve SCOD such as delay in receipt of WTG Components, delay in availability of connectivity, delay in procurement of land and non-availability of Labour/Workforce falls under the FM exclusions clause of PPA. Hence any reliefs sought on these grounds are not tenable.
- 8.5 If CWPBPL had acted diligently, then this delay could have been avoided.

Reply to interim reliefs in the MA:

- 8.6 Interim relief in I.A. is regarding the non-encashment of PBG. The Provision made in the clause 3.9 (ii) of RfS regarding PBG is as follows:
- ii. *Performance Bank Guarantee (PBG): The bidder selected through this RFS shall submit the Performance Bank Guarantee (PBG) of Rs. 20 Lakh / MW according to Format 6.3B, issued in favour of MSEDCL, with a validity*

period upto 6 months from scheduled Commercial Operation Date, 2 days prior to signing of PPA.

- 8.7 The SCOD declared in PPA was 17 January 2020 and accordingly the PBG submitted was valid till 31 July 2020 only. As per the Commission's Order dated 20 January 2020, SCOD has extended from 17 January 2020 to 23 June 2020. Hence, as per terms of RfS, it was binding on CWPBPL to submit the PBG having validity period of prospective six months from the extended SCOD.
- 8.8 MSEDCL vide letter dated 21 April 2020 and 6 May 2020 requested CWPBPL to submit the PBG considering the extension granted to SCOD. However, CWPBPL did not respond to the said letters of MSEDCL and failed to achieve the extended SCOD. It was for such non-compliance on part of CWPBPL for which MSEDCL was constrained to issue the letter dated 4 July 2020 whereby it was once again requested to submit the fresh PBG with validity as desired. If not complied then the existing PBG will be forfeited as the expiry date of same was close, in case the PBG expires then MSEDCL have no means to recover any penalty.
- 8.9 CWPBPL has sent the scan copy of the fresh PBG vide email dated 10 July 2020 same is under verification. CWPBPL has sought a restraint order/stay against MSEDCL for invocation of the Bank Guarantee.
- 8.10 The Hon'ble Supreme Court has clearly held time and again that "It is a general rule that Bank Guarantee has to be honored according to its terms and held that it is only under two "Exceptions" under which the invocation of Bank Guarantee can be stayed. These 2 mandatory exceptions are: Egregious Fraud and Special Equities in favour of injunction/irretrievable injury or irretrievable injustice. CWPBPL has failed to even plead a case of "Egregious Fraud" and "Special Equities in favour of injunction/irretrievable injury or irretrievable injustice".
- 8.11 The reliefs claimed in the Petition can only be granted by the Commission when the reasons cited by CWPBPL strictly fall under the FM event as described under the PPA.
- 8.12 In the event the Commission partly or completely allows the extension sought, then the appropriate relief from compliance with the RPO obligations may also be provided to MSEDCL. Further, CWPBPL should also be directed to immediately submit fresh PBG with validity of six months beyond the revised SCOD.
9. During the e-hearing held on 28 July 2020 the Advocate of CWPBPL requested the Commission for 3-4 weeks' time to submit its Rejoinder to MSEDCL's reply dated 24 July 2020. The Commission granted 10 days' time to submit the Rejoinder and adjourned the hearing.
10. **CWPBPL in its Rejoinder dated 6 August 2020 in reply to MSEDCL's submission dated 24 July 2020 has stated that:**

- 10.1 MHA's Order dated 15 April 2020 allowed construction of RE projects with effect from 20 April 2020, however said order clearly specifies that the relaxations stipulated therein would not be applicable in Hotspots identified by MoHFW. Aurangabad district has been declared as hotspot, further lockdown in containment zone extended till 31 August 2020. Hence MHA's order dated 15 April 2020 is not applicable in the present case and CWPBPL could not have undertaken any work for commissioning of the Project even after issuance of the same. There has been mass exodus of non-native migrant workers which included skilled work force that have also migrated in large number from Maharashtra, specifically the district of Aurangabad, which has severely impacted all industries.
- 10.2 MNRE vide its order dated 17 April 2020 acknowledged the impact of the lockdown on the commissioning of RE Projects and directed renewable energy implementing agencies to grant blanket extension of time to project developers for the period of the lockdown plus 30 days. MoP, GoI has also appreciated the predicaments being faced in completion of construction of the projects, namely disruption in supply chain and manpower, and vide its Order dated 27 July 2020 granted blanket extension of time for 5 months for transmission and RE projects.
- 10.3 The reasons for failure to achieve SCOD such as delay in receipt of WTG Components, delay in availability of connectivity, delay in procurement of Land and non-availability of labour/workforce are excluded from FM as per MSEDCL. It is not true because these are not excluded but are consequences of an event of FM.
- 10.4 MSEDCL's contention that CWPBPL has failed to satisfy the tests for grant of injunction on the invocation of CWPBPL's PBG or that there is no pleading to the said effect are wrong and therefore denied. Further, MSEDCL's reliance upon an alleged paragraph 23A to allege that CWPBPL's case for grant of stay on the invocation of its PBG is based on egregious fraud or even fraud is also vehemently denied and disputed. CWPBPL's case for grant of stay on the invocation of its PBG is based on the second exception, namely special equities in favour of injunction/irretrievable injury or irretrievable injustice.
- 10.5 MSEDCL's submissions regarding its RPO are valid. However same is beyond the scope of the instant Case. The Commission in its Order in Case No 102 of 2020 has provided dispensation on similar issue.
11. CWPBPL has submitted Notes of Arguments dated 11 August 2020 and compilation dated 11 August 2020 of applicable Case laws. CWPBPL in its Notes of Arguments has reiterated its submission made in Petition, additional submission and rejoinder.
12. At the e-hearing through video conferencing held on 11 August 2020, the Advocate of CWPBPL reiterated its submissions in the Petition, additional submission and Rejoinder. The Advocate of MSEDCL reiterated its submissions in its reply. In reply to clarification sought by the Commission regarding the details of financial arrangement made with the lender of the projects to achieve the Financial closure and timelines of various activities in completing the project, the Advocate of CWPBPL sought one-week time to submit its

reply. The Commission granted one-week time to CWPBPL to submit its submission with copy to MSEDCL and 3 days' time thereafter to MSEDCL to file its submission, if any.

13. CWPBPL in its Additional submission dated 17 August 2020 has stated as under:

- 13.1 M/s L&T Finance Services conveyed its approval for Rupee Term Loan of Rs. 100 Cr. to CWPBPL for part financing of the Project vide its Sanction Letter dated 14 March 2019. Simultaneously, M/s L&T Infrastructure Finance Company Ltd. conveyed its approval for Rupee Term Loan of Rs. 305 Cr. to CWPBPL for part financing the implementation of the Project vide its Sanction Letter also dated 14 March 2019. CWPBPL, M/s L&T Finance Services, M/s L&T Infrastructure Finance Company Ltd., and M/s Catalyst Trusteeship Limited (acting as Security Trustee) entered into a Facility Agreement dated 7 June 2019 formalizing the grant of Rupee Term Loan of Rs. 405 Cr. for implementing the Project. Further, CWPBPL also procured a loan of Rs. 200 Cr. from its parent company, i.e., M/s Hero Wind Energy Private Limited, out of which Rs. 150 Crore was disbursed to CWPBPL by 31 March 2019. Therefore, CWPBPL had achieved Financial Closure in terms of the definition under the PPA latest by 7 June 2019.
- 13.2 Out of the total sanctioned limit of Rs. 405 Cr. M/s L&T Finance Services and M/s L&T Infrastructure Finance Company Ltd. disbursed an amount of Rs. 50 Crore to CWPBPL during the Financial Year 2019-20. However, in order to mitigate its losses and avoid making payment of interest on the said loan, at the rate of 10.50% per annum on floating basis, CWPBPL repaid the entire disbursed amount of Rs. 50 Crore to the said lenders by 29 May 2020.
- 13.3 In order to repay the disbursed loan to M/s L&T Finance Services and M/s L&T Infrastructure Finance Company Ltd., CWPBPL has also taken a short-term unsecured loan of Rs. 150 Cr. from M/s Hero Fincorp Limited vide its Sanction Letter dated 24 December 2019. Further, CWPBPL has also repaid an amount of Rs. 100 Cr. to M/s Hero Fincorp Limited within the Financial Year 2019-20. Further, out of the loan taken by CWPBPL from M/s Hero Wind Energy Private Limited, i.e., Shareholder Loan, CWPBPL has repaid approximately an amount of Rs. 44 Crore during the Financial Year 2019-20. Accordingly, an amount of approximately Rs. 156 Cr. is still repayable by CWPBPL to M/s Hero Wind Energy Private Limited and M/s Hero Fincorp Limited towards loans taken for implementing the Project.
- 13.4 As on 31 March 2020, CWPBPL had cumulatively incurred an amount of approximately Rs. 29.72 Cr. towards interest on all the loans availed by CWPBPL for implementing the Project. Further, CWPBPL is still incurring fixed interest at the rate of 9.45% per annum on the loan taken from M/s Hero Wind Energy Private Limited and interest at the rate of 11.20% per annum (payable monthly) on the loan taken from M/s Hero Fincorp Limited. This roughly translates to an amount of Rs. 1.37 Crore per month payable by CWPBPL towards interest on outstanding loans.
- 13.5 CWPBPL has made payment of a net amount of approximately Rs. 99.62 Cr. to its EPC contractor viz. Suzlon Energy Limited. As on 31 March 2020, CWPBPL has cumulatively

incurred an amount of approximately Rs. 181.79 Cr. towards implementing the Project. The same clearly substantiates CWPBPL's commitment towards fulfilling its contractual obligation for setting up the Project, even in the face of repeated adversities in the form of FM event (i.e., earlier delay in grant of connectivity, issues with land acquisition process faced by its land aggregator, and the COVID-19 pandemic along with its impacts) being faced by it.

13.6 In addition to arrangement of necessary funds as required in terms of the definition of Financial Closure under the PPA, under Clause 3.13 of the Revised RfS issued by MSEDCL, in order to achieve Financial Closure CWPBPL was also required to furnish:

- (i) connectivity agreement with CTU/STU/DISCOM; and
- (ii) ownership/lease hold/right to use of the Project site in the name of CWPBPL.

However, due to circumstances beyond the reasonable control of CWPBPL, which qualified as a FM event under the PPA, there was a delay in obtaining grid connectivity and ownership of the Project site. Hence CWPBPL has approached the Commission on 23 October 2019 in Case No. 286 of 2019 seeking extension of time for achieving FC and SCOD on account of intervening FM events.

13.7 Prior to approaching the Commission in Case No. 286 of 2019, CWPBPL had already undertaken the following steps:

- (i) Pursuant to complying with requirement of FC in terms of PPA, it arranged for funds to the tune of Rs. 605 Cr. (Rs. 405 Crore from L&T Finance Services and L&T Infrastructure Finance Company Ltd., and Rs. 200 Cr. from M/s Hero Wind Energy Private Limited) for implementing the Project.
- (ii) Appointed Suzlon as its EPC Contractor for construction of the Project and entered into relevant contracts with Suzlon around January-March 2019.
- (iii) Arranged Grid Connectivity for 25MW of the Project and made payment of Rs. 50 Lakh through M/s Suyog Urja Ltd. towards grid connectivity for the balance 50MW of the Project.
- (iv) Identified 36 land parcels of 65.28 hectares for setting up the Project and acquired 15 land parcels of 29.6 hectares out of the same.
- (v) Placed an order for procurement of 36 WTG and received delivery of 9 x S111-140 HLT WTGs at the Project site.
- (vi) Completed work of Power Evacuation infrastructure for 25 MW Infrastructure which includes one 33kV Bay and 2 feeders at MSETCL's Pishore Sub-Station and also completed Joint Survey for 33kV internal line and about 9 kms of

external line, erection of 65 poles in Internal Line, tower profile and supply of materials, and right of way for 16 Tower Lines, and

- (vii) Undertook micro-siting of locations, soil testing at 15 Locations, Excavation for 9 Locations and Complete foundation works for 4 of the acquired land parcels, including, plain cement concrete (PCC), steel reinforcement & concrete works, etc., and right of way for approach roads for all the acquired land parcels.

13.8 Despite payment of the commitment fees on 12 February 2019, MSETCL has not granted connectivity for 50 MW of the Project. Meaning thereby, since the execution of the MoU between CWPBPL and Suyog, there has been no progress on the aspect of grant of connectivity to CWPBPL's Project. Further, due to the lockdown, MSETCL's offices having been functioning with skeletal staff are carrying out other activities to support the state through the pandemic. Therefore, grant of connectivity to CWPBPL's Project is further delayed for reasons beyond the control of CWPBPL.

13.9 Post hearing, MNRE on 13 August 2020 vide its Office Memorandum directed renewable energy implementing agencies to grant extension of time of 5 months from 25 March 2020 to 24 August 2020 on account of lockdown (due to COVID-19) and additional time required for normalization after such lockdown.

14. MSEDCL made following additional submission on 22 August 2020 in reply to CWPBPL's additional submission dated 17 August 2020:

14.1 CWPBPL has only provided selective details as against the details sought by the Commission. The Commission had sought a comparative analysis of the contractual obligations and the timelines to be met by CWPBPL to fulfil such contractual obligations as per the RfS and the PPA. The Commission had also sought submissions from CWPBPL on what activities were to be completed by CWPBPL prior to the outbreak of COVID-19 pandemic and whether such activities were completed or not.

14.2 As per the terms of the RfS under which CWPBPL was awarded the Project, CWPBPL was obligated to achieve FC within 7 months from the date of execution of the PPA i.e. by 17 February 2019. However, CWPBPL was not able to achieve the FC by 17 February 2019 and subsequently, various requests were made by CWPBPL for extending time for achieving FC. CWPBPL has concealed the relevance of the end date (i.e., 24.07.2019) fixed for achieving FC by the Commission vide the Order in Case No. 286 of 2019. Prior to this Order MSEDCL had intimated its intention to encash PBG in lieu of the failure of CWPBPL to achieve FC as per the provisions of RfS and PPA vide Notice dated 10 October 2019. In response to the said Notice, CWPBPL by its letter 15 October 2019 sought time till 1 November 2019 under the pretext that in case the request for time extension for achieving FC and SCOD is not granted by MSEDCL, CWPBPL requested for return of the PBG against the payments which CWPBPL would make in favour of MSEDCL equivalent to the amount of PBG. Immediately after submission of its letter dated 15 October 2019, CWPBPL proceeded to approach the Commission in Case No. 286 of 2019 to seek extension of time for achieving FC and SCOD.

14.3 The Commission vide its Order dated 20 January 2020 in Case No. 286 of 2019 granted extension to achieve FC till 24 July 2019 and SCOD till 23 June 2020 on account of FM event i.e., delay in obtaining grid connectivity.

14.4 CWPBPL has again agitated the issue of Grid Connectivity and has submitted that MSETCL has not granted Connectivity for 50 MW out of 75.6 MW project. Since the execution of MoU by CWPBPL with Suyog for utilization of the Connectivity, there has been no further progress on grant of Connectivity to CWPBPL's project. The issues agitated by CWPBPL has already been dealt by the Commission in Order dated 20 January 2020 in Case No. 286 of 2019. The Commission has held as under:

“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.”

14.5 As per the above observations of the Commission, which have now attained finality, the issue of delay in achieving FC due to delay in grant of Grid Connectivity now stands settled and the date of FC was extended till 24 July 2019. CWPBPL had been following up with MSEDCL to allow utilization of Grid Connectivity of Suyog for almost a year prior to 24 July 2019, and when this issue is resolved by MSEDCL by allowing CWPBPL to use Suyog's Grid Connectivity by way of signing an MoU, CWPBPL has raised new issues allegedly instilled between Suyog and MSETCL. This conduct of CWPBPL is a blatant demonstration of ineffective planning and lack of coordination with its own Project developer i.e., Suyog. Hence all contentions of CWPBPL with respect to delay in FC due to delay in grant of Grid Connectivity deserve to be dismissed.

14.6 During the proceedings in Case No. 286 of 2019, CWPBPL sought time extension for FC on various grounds, including drought situation in the State of Maharashtra which allegedly posed difficulty in acquiring land for the Project. However, the said ground was dismissed by the Commission with proper reasoning and was granted time till 24 July 2019 for achieving FC of the Project. Said Order in Case No. 286 of 2019 has not been challenged by either party to the Petition, and hence, has achieved finality. Hence both these grounds were appropriately dealt by the Commission and CWPBPL was granted time till 24.07.2019 to achieve FC.

14.7 CWPBPL executed the MoU on 24 July 2019 with Suyog for utilization of Grid Connectivity, and through letter dated 25 July 2019 the parent company of CWPBPL, Hero Wind Energy Private Limited, submitted the copy of the same to MSEDCL. However, along with the said letter, a photocopy of the letter from L&T Financial Services was submitted stating that it has agreed to lend Rs. 405 Cr. to CWPBPL for the

purpose of financing the Project. CWPBPL or its parent company has till date not submitted either the loan agreement or the DPR for ascertaining the project cost.

14.8 The seriousness of CWPBPL towards implementation of the Project can be examined under the scope of the fact that even after almost 2 years from the date of execution of the PPA, CWPBPL has not submitted the requisite Board Resolutions of authorized persons, project financing from lenders, shareholding pattern of CWPBPL company, etc., which are all required to be submitted as per the provisions of the RfS.

14.9 Also, CWPBPL has submitted in its Additional Submissions that it has identified 36 land parcels of 65.28 hectares for setting up the project and acquired 15 land parcels of 29.6 hectares out of the same. However, as per MSEDCL's records, the lease deeds for the total of only 22.32 hectares at around 14 locations have been submitted to MSEDCL by the parent company of CWPBPL. Further, CWPBPL has not submitted the actual plan for all locations for implementation of the complete 75.6 MW wind power project of CWPBPL. Hence, the sanctity of the details submitted by CWPBPL cannot be verified by MSEDCL.

14.10 The above facts clearly set out the fact that CWPBPL has failed to achieve the FC as desired under the contractual arrangements between the parties in terms of the RfS, the PPA and the directions issued by the Commission through Order dated 20 January 2020 in Case No. 286 of 2019. CWPBPL has perpetually failed to achieve FC till the outbreak of COVID-19 in India with effect from second half of March 2020.

14.11 Hence the request for time extension of SCOD by CWPBPL deserves to be dismissed on account of its own failure to achieve FC. Further, MSEDCL should be allowed to encash the bank guarantee in terms of the RfS due to failure of CWPBPL to achieve FC.

15. CWPBPL in its MA dated 28 August 2020 has made following submission:

15.1 CWPBPL is filing the present MA seeking directions of the Commission to not take on record/consider the reply dated 22.08.2020 filed by MSEDCL to the additional submission dated 17.08.2020 filed on behalf of CWPBPL or in the alternative, to take on record the Rejoinder to the aforesaid reply on behalf of CWPBPL.

15.2 During the hearing on 11.08.2020 the Commission raised certain queries and required formal response to such queries by CWPBPL in light of its case seeking further extension of SCOD of the Project. Accordingly, the Commission allowed CWPBPL to file an additional affidavit furnishing details regarding FC of the Project in terms of the PPA, as well as granted an opportunity to MSEDCL to file its reply to the said affidavit.

15.3 CWPBPL filed the additional submission dated 17.08.2020, thereafter, MSEDCL filed a reply dated 22.08.2020. The assertions made by MSEDCL in the reply are beyond the scope of the pleadings as well as arguments made by the counsel for MSEDCL during the final arguments on 11.08.2020 and moreover are based on no new facts, and as such, said reply cannot be taken on record.

- 15.4 It is settled law that the affidavit for evidence should be limited to pleadings, and if any facts given in the affidavit are beyond the pleadings, that cannot be read over by the court. Therefore, the facts given/allegations made in the reply filed by MSEDCL cannot be read over by the Commission.
- 15.5 The Additional Affidavit filed by CWPBPL does not include any new or subsequent facts, except submissions with regard to the execution of the Financial Agreements by CWPBPL with its Lenders and the interest component being borne by it toward such agreement(s), as the same was specifically enquired by the Commission during the course of hearing held on 11.08.2020.
- 15.6 If the Reply filed by MSEDCL is taken on record and CWPBPL is not permitted to file its response, the same would constitute as breach of the principles of natural justice and fair adversarial adjudication process. Therefore, by way of the present Application, CWPBPL is seeking directions from the Commission to:
- i) *Not take on record/consider the Reply dated 22.08.2020 filed by the Respondent to the Additional Affidavit dated 17.08.2020;*
 - ii) *In the alternative to prayer (i) above, take on record the Rejoinder on behalf of the Petitioner to the Reply dated 22.08.2020 filed by the Respondent, annexed herewith as Annexure I;*
 - iii) *Direct listing/mentioning of the captioned matter along with the present Application on 04.09.2020 or any date immediately thereafter as per the convenience of this Hon'ble Commission, if this Hon'ble Commission deems it appropriate to schedule such hearing in view of the subsequent filings;*

16. CWPBPL in its Rejoinder dated 28 August 2020 has made following submission:

- 16.1 MSEDCL's entire reply is primarily predicated on the premise that CWPBPL has not achieved the FC. As per Article 1 of the PPA, FC means *arrangement of necessary funds by the Bidder/Wind Power Generator either by way of commitment of funds by the Company from its internal resources and/or tie up of funds through a bank/financial institution by way of a legally binding agreement for commitment of such finances*. Meaning thereby, CWPBPL can be said to have achieved Financial Closure in terms of PPA, upon commitment of funds by CWPBPL company from its internal resources or execution of legal binding agreements with bank/financial institution for commitment of funds. The PPA in terms of Article 13.10 provides that all the prior documents (such as RfS) will not have any binding effect post the execution of the PPA and that only the provisions of the PPA will be effective, valid and binding. Thus, FC as per the PPA (i.e. execution of Financing Agreements as well tying of funds from internal resources is sufficient compliance) has already been complied with in the present case and that there is

no further requirement of additional compliances to be met the requirement as per Clause 3.13 of the RfS.

- 16.2 CWPBPL in paragraph 8 of the Petition highlighted the conditions required to be fulfilled for achieving FC in terms of the RfS, and in paragraph 12 duly stated that the Commission had vide its order dated 20.01.2020 extended the time for achieving FC till 24.07.2019. Additionally, the delays faced by CWPBPL on account of COVID-19 pandemic in delivery of WTG components, procurement of land, grant of grid connectivity, and lack of workforce, were highlighted by CWPBPL in paragraph 35 of the Petition and paragraph 5 of the Rejoinder. This clearly shows that the CWPBPL in its Petition itself had clearly demonstrated that the FC of the Project in terms of the RfS was not achieved.
- 16.3 Despite the above, MSEDCL in response to the Petition in its Reply dated 24.07.2020, consciously did not make any submissions regarding the delay in achieving FC in terms of the RfS. On the contrary, MSEDCL in reply dated 24.07.2020 specifically made submissions regarding CWPBPL's alleged failure to commission the Project by the extended SCOD and made submissions regarding invocation of CWPBPL's PBG for this delay. However, now after conclusion of the arguments in the present case and the order having been reserved, MSEDCL is attempting to rake up the issues relating to delay in achieving FC in terms of the RfS by way of its Reply dated 22.08.2020.
- 16.4 From the Order dated 20.1.2020 it was clear that the conditions associated with FC in terms of the RfS were not achieved by CWPBPL even as on 20.01.2020, let alone on 24.07.2019, i.e., the extended date for completing FC, which was obviously 6 months prior to issuance of order dated 20.01.2020. It is obvious that on 20.01.2020 itself, MSEDCL was aware about the fact that the FC of the Project in terms of the RfS had not been achieved due to reasons beyond the control of CWPBPL. However, despite a lapse of 7 months from the date of the order dated 20.01.2020, MSEDCL neither raised this issue with CWPBPL, including in its letters, or the Affidavit in Reply dated 24.07.2020 (which has been explained hereinabove in paragraph 7.9), or during the course of the hearing.
- 16.5 The above clearly substantiates the fact that the delay in achieving FC in terms of the RfS was not considered by the parties to be material and the focus of the parties was on commissioning the Project by the extended SCOD. Accordingly, by way of its letters dated 20.04.2020, 29.04.2020, and 23.06.2020, as well as by way of the present Petition, CWPBPL always only sought for extension of SCOD only and not for achieving FC of the Project in terms of the RfS.
- 16.6 The issue highlighted by CWPBPL in the present Petition is the delay in grant of grid connectivity by MSETCL despite a lapse of one year from the payment of fees and submissions of all requisite documents in this regard. The delay which has been highlighted by CWPBPL in the Petition, Rejoinder, Notes of Arguments, and Additional Affidavit is a second FM event and is separate and distinct with the issues placed before the Commission in Case No. 286 of 2019. Clearly, it cannot be MSEDCL's case that since a FM Event with respect to delay in grant of connectivity has been allowed by the

Commission in Case No. 286 of 2019, CWPBPL cannot be granted further time for the same work due to a different and unrelated FM Event.

16.7 The Commission in paragraph 16 of its Order dated 20.01.2020 held that CWPBPL had conducted itself in a diligent manner for executing the awarded Project. Further, the fact that MSEDCL has not challenged the aforesaid order dated 20.01.2020 clearly shows that MSEDCL realizes that CWPBPL has been diligently performing its obligations in executing the Project and thus, the delay in the same is not for any reason attributable to CWPBPL but for reasons beyond the control of CWPBPL.

16.8 Further, due to the reason that the extension of time for SCOD being sought by CWPBPL in the present case is on account of a FM, namely the COVID-19 pandemic, the consequent lockdown, and the disruption in global and domestic supply chain; therefore, in accordance with Article 8.2 of the PPA, CWPBPL hereby undertakes to not claim any change/adjustment in tariff on account of cost escalation.

16.9 MSEDCL in reply has contended that CWPBPL has not provided the following documents to MSEDCL:

- (i) the loan agreements and project financing from lenders;
- (ii) the Detailed Project Report;
- (iii) the requisite Board Resolutions of authorized persons and shareholding pattern of the Petitioner company;
- (iv) out of the 15 land parcels of 29.6 hectares, MSEDCL's records contain lease deeds for only 14 land parcels of 22.32 hectares; and
- (v) the actual plan for all locations for implementation of the complete 75.6 MW wind power project of the Petitioner.

16.10 Despite lapse of 2 years from the execution of the PPA, MSEDCL till 22.08.2020 never requisitioned the said documents. CWPBPL undertakes to provide all documents pertaining to the Project as may be required by MSEDCL in terms of applicable requirements under the PPA. However, the present proceedings which deal with grant of extension of time for the SCOD cannot at this stage be used by MSEDCL to procure documents from CWPBPL.

16.11 CWPBPL has provided all the financing related details in response to the queries raised by the Commission in its Additional Affidavit dated 17.08.2020. However, in view of the approach adopted by MSEDCL, CWPBPL now is constrained to annex the relevant extract of the loan agreements entered by CWPBPL with its lenders as mentioned in the Additional Affidavit dated 17.08.2020 so as to put it on record that the financing agreements were/are all in place as per the requirement in terms of the PPA.

Commission's Analysis and Ruling:

17. The Commission notes that post competitive bidding process under Section 63 of the EA 2003, CWPBPL and MSEDCL have executed PPA between them for 75.6 MW Wind

power on 17 July 2018 for a period of 25 years at tariff of Rs.2.86 per unit. The Commission has already adopted such tariff vide Order dated 14 June 2018 in Case No. 129 of 2018. As per conditions stipulated in the PPA, CWPBPL was to achieve FC within 7 months (by 17 February 2019) and SCoD within 18 months (by 17 January 2020) from the date of signing of PPA.

18. Before filing the present Petition, CWPBPL had earlier approached this Commission in Case No. 286 of 2019 seeking extension in FC and SCOD on account of alleged FM events such as delay in grid connectivity on account of MSEDCL not allowing grid connectivity in the name of developer and delay in land acquisition due to drought situations. The Commission in its Order dated 20 January 2020, accepted delay in grid connectivity as force majeure event and extended FC and SCoD by 158 days. At the same time, the Commission rejected delay in land acquisition due to drought situation as force majeure event. Relevant extract of the said Order is reproduced below:

“

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 *.....In this regard, the Commission notes that even though 'drought' has been identified as eligible event under Force Majeure, in present case effect of 'drought' on the CWPBPL would be increased in cost of procurement of land as land owner may not ready to forgo the compensation from the GoM. Hence, CWPBPL would have to incurred higher expenses on acquiring the land, but it is not impossible to complete this activity. It is settled legal position that increased cost cannot be reason for seeking relief under Force Majeure. Also, drought situation was declared in October 2018. CWPBPL claimed that drought situation continues in the year 2019 but did not submit document to establish the same. Only document submitted is drought compensation letter dated 9 May 2019 which pertains to the drought declared in the year 2018. Hence, there is no document to establish that drought situation continues in the year 2019. Therefore, the Commission does not accept CWPBPL's argument that declaration of drought situation makes it eligible for claiming relief under Force Majeure.....*

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.*

Thus, on account of delay in approval of grid connectivity, the Commission has already extended FC till 24 July 2019 and SCOD till 23 June 2020 i.e. by around 5 months.

19. Now through the present Petition, CWPBPL has sought further extension for SCoD on account of FM event i.e. spread of Covid-19 pandemic. CWPBPL has sought extension till the effects of the FM i.e. COVID-19 pandemic get completely subsided, or for a period not lesser than one year i.e., till 23 June 2021. It has also filed a stay application with an apprehension that MSEDCL may terminate PPA and invoke PBG. Accordingly, CWPBPL had requested for ex-parte order restraining MSEDCL for taking any coercive action. Subsequently, on MSEDCL's letter dated 4 July 2020 for submission of extended PBG on or before 7 July 2020 failing which existing PBG be forfeited, CWPBPL filed MA No 43 of 2020 for early hearing in the matter and requested for ad-interim ex-party Order restraining MSEDCL for invoking PBG. The Commission considered the request of CWPBPL and directed MSEDCL that no coercive action should be taken till date of the hearing and directed CWPBPL to submit the extended PBG to MSEDCL. Accordingly, CWPBPL forwarded scan copy of extended PBG through email to MSEDCL on 7 July 2020, which has been confirmed to have been received by MSEDCL.
20. CWPBPL has stated that spread of Covid-19 pandemic has caused delay in receipt of WTG Components, delay in getting Grid Connectivity from MSETCL for balance capacity of 50 MW though duly applied in February 2020, delay in procurement of Land and non-availability of Labour/Workforce etc. CWPBPL has contended that vide its notice dated 20 April 2020, it has intimated MSEDCL about the occurrence of the FM event due to outbreak of Covid-19 and subsequent lockdown in China and India. As per provisions of PPA, CWPBPL claims that it is eligible to get time extension for meeting its obligations under the PPA from 19 February 2020 (MoF's OM recognizing's disruption in supply chain due to spread of Covid-19 in China and other countries as FM) till the end of lockdown period due to Covid-19 or minimum period of 1 year.
21. While opposing the CWPBPL's contentions, MSEDCL has stated that though lockdown was notified w.e.f. 24 March 2020, CWPBPL is not entitled to any benefits because MHA in its Order dated 15 April 2020 has clarified that construction of renewable energy projects has been allowed. Further the ground cited by CWPBPL for failure to achieve SCOD falls under the FM exclusions clause of PPA. The reliefs claimed by CWPBPL can only be granted when the reasons cited strictly fall under the FM event as per the provisions of the PPA. As the reasons are exclusive to FM event the reliefs sought on these grounds are not tenable.

22. To assess the rival stands of the parties, the Commission took up the examination of Article 8 of the PPA relating to Force Majeure which is reproduced 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”*

B. Force Majeure Exclusions:

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

- 1. Unavailability, Late Delivery or Change in cost of plants and machineries, equipment, materials, spares parts or consumables for the project;*
- 2. Delay in performance of any contractor/ sub-contractor or their agents:*

.....

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 the commencement of Force Majeure event. Such notice shall include full particulars of the Force Majeure event, its effect on the Party claiming relief and remedial measures proposed. 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.

- D. The affected Party shall give notice to the other Party of (1) the cessation of the relevant event of Force Majeure; and (2) the cessation of the effects of such event of Force Majeure on the performances of its rights or obligations under this agreement, as soon as practicable after becoming aware of each of these cessations.*
- E. To the extent not prevented by a Force Majeure event, the affected party shall continue to perform its obligations pursuant to this agreement. The affected party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable.”*

Thus, as can be seen from the above-mentioned provision of PPA, ‘epidemic’ has been included as an event of Force Majeure. Further as per Article 8.1 (b) of the PPA, ‘late Delivery’ of the plant’s machinery, equipment, materials, or delay in performance of any contractor/sub-contractor etc. on account of Force Majeure event is also included in the Force Majeure clause.

23. Admittedly Covid-19 has been declared as epidemic / pandemic and hence spread of Covid19 can be constituted as an event of Force Majeure under the PPA. However, to claim relief under Force Majeure, affected party must give notice of such Force Majeure event to other party not later than 7 days from the dates of the commencement of Force Majeure event. As per Article 8.1 (c) of the PPA, such notice is pre-condition for claiming any relief under the Force Majeure. Further, it is also important to ascertain that event of Force Majeure has affected ability of party to perform its obligation under the PPA.
24. The Commission notes that in the present matter, CWPBPL has served the Force Majeure notice on 20 April 2020 to MSEDCL and hence requirement of notice under Article 8.1 (c) has been complied with. However, CWPBPL has claimed effect of such Force Majeure event from 19 February 2020 i.e. from Ministry of Finance’s OM recognizing disruption in supply chain due to spread of Covid-19 in China and other countries as Force Majeure event. Relevant part of said OM is reproduced below:

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

The Commission notes that although, Ministry of Finance has recognised effect of Covid-19 on supply chain disruption on 19 February 2020, CWPBPL has chosen to issue mandatory notice under PPA only after 2 months i.e. 20 April 2020. As per provisions of PPA, notice for Force Majeure shall be given not later than 7 days from the event affecting the party. Therefore, any relief under the PPA for Force Majeure event needs to be with respect to date of mandatory notice i.e. 20 April 2020, at the most it can be 7 days prior to date of notice but cannot be allowed to be effected from 2 months prior to notice.

25. As already held in earlier part of this Order, spread of Covid-19 pandemic is Force Majeure event under the PPA. However, it is also important to demonstrate that operations of CWPBPL have been affected due to such force majeure event. In the present petition, CWPBPL has stated that spread of Covid-19 has affected its operation as follows:

- a. Manufacturing and import of WTG components has either stopped or is adversely affected. Indian vendors, from whom 80% components of WTGs were sourced, have also been severely impacted.
- b. Required fees for balance grid connectivity of 50 MW has been paid and same was intimated to MSETCL vide letter dated 12 February 2020. However, till date MSETCL has not released grid connectivity for the Project.
- c. Procurement of land has been delayed due to lockdown imposed on account of spread of Covid-19 pandemic.
- d. Non-availability of labour/workforce due to the lockdown impacts project works.

CWPBPL has submitted various documents to establish that even after relaxation in lockdown, Aurangabad District (where project is located) being hotspot area, restrictions on movement of public continued. The Commission acknowledges this fact and notes that especially from 25 March 2020 i.e. imposition of lockdown in India, execution of project works faced various difficulties. At the same time, the Commission also sought details from CWPBPL to ensure that before lockdown it had been performing its duties diligently under the PPA. In reply, CWPBPL has submitted that as per PPA the project was to be commissioned by 17 January 2020, and to achieve this timeline, CWPBPL had arranged funds of Rs. 605 Crore (Rs. 405 Crore from L&T Finance Services and L&T Infrastructure Finance Company Ltd., and Rs. 200 Cr. from parent firm i.e. M/s Hero Wind Energy Private Limited), entered into contract with M/s Suzlon as EPC contractor in March 2019, arranged Grid connectivity of 25 MW and applied for remaining 50 MW to MSETCL, acquired 29.6 hectares of land out of identified land parcels of 65.28 hectares. It has already received delivery of 9 WTG at project site, out of ordered 36 WTG. Further, power evacuation for 25 MW has already been completed.

26. MSEDCL has objected to above submissions on the ground that all these activities were completed well before CWPBPL had first time approached the Commission seeking extension of SCOD on account of FM relating to delay in Grid Connectivity. Although, the Commission has allowed extension of SCOD vide Order dated 20 January 2020, CWPBPL has not taken any steps or submitted milestone wise achievement in support of its case. Commission notes that though details (except grid connectivity application for balance 50 MW capacity) submitted by CWPBPL pertain to period prior to allowing first extension to SCOD, CWPBPL has invested resources into the project and is incurring interest cost for each day of delay which it cannot pass on to MSEDCL. Therefore, the Commission is satisfied that CWPBPL has bonafide intent to execute the project. Further, post issuance of commission's order dated 20 January 2020, CWPBPL had very limited

time before its operations unfortunately got hit by another FM event i.e. spread of Covid-19 pandemic. Therefore, the Commission is of the opinion that CWPBPL is eligible for relief available under the PPA for FM event.

27. The Commission notes that CWPBPL has requested that on account of FM event, its SCoD needs to be extended till the effect of FM i.e. Covid-19 gets completely subsided, or for a period not lesser than one year i.e., till 23 June 2021. In this regard, Commission notes that following relief is available under the PPA for FM event:

“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

For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under this Agreement shall be suspended or excused due to the occurrence of a Force Majeure Event in respect of such Party.”

Thus, PPA provides that during the Force Majeure event, the affected party cannot be held in breach of obligation which is prevented or delayed on account of such Force Majeure event. Once, Force Majeure event has been upheld, the only relief available is that the affected party is exempted from its obligation for that period without any compensation in tariff.

28. As the Commission has already held that spread of Covid-19 pandemic is Force Majeure event, CWPBPL needs to be relieved of its obligation under the PPA till it continues to be affected by the said FM event. At the same time, the Commission also notes that Article 8.1 (E) of the PPA reproduced at para 22 above, mandates affected party to make reasonable efforts to mitigate impact of Force Majeure. Further, the Government has been gradually removing the restrictions that were imposed through lockdown. Therefore, granting blanket extension of 1 year or more, as prayed for, at this point of time without ascertaining efforts made by CWPBPL to mitigate the impact of FM would not be appropriate. The period for granting extension cannot be based on a generic number (1 year) and needs to be consistent with the actual period when the Force Majeure event remained in existence. Further the exact date of cessation of such FM event, till which relief can be granted if justified, is also not known at this point of time.
29. Under the above said uncertainty of period for which relief under FM event can be granted, the Commission notes that MNRE, Govt. of India vide its OM dated 13 August 2020 has provided clarification relating to time-extension in Scheduled Commissioning Date of RE Projects on account of COVID-19 as under:

- a) *All Renewable Energy (RE) implementing agencies of the Ministry of New & Renewable Energy (MNRE) will treat lockdown due to COVID-19, as Force Majeure.*
- b) *All RE projects under implementation as on the date of lockdown, i.e. 25th March 2020, through RE Implementing Agencies designated by the MNRE or under various schemes of the MNRE, shall be given a time extension of 5 (five) months from 25th March 2020 to 24th August 2020. This blanket extension, if invoked by the RE developers, will be given without case to case examination and no documents/evidence will be asked for such extension.*
- c) *The timelines for intermediate milestones of a project may also be extended within the extended time provided for commissioning.*
- d) *The Developers, of the projects covered under para 3(b) above, may also pass on the benefit of such time-extension, by way of granting similar time-extensions, to other stakeholders down the value chain like Engineering Procurement Construction (EPC) contractors, material, equipment suppliers, Original Equipment Manufacturers (OEMs), etc.*
- e) *The State Renewable Energy Departments (including agencies under Power/Energy Departments of States, but dealing in renewable energy) may also treat lockdown due to COVID-19, as Force Majeure and may consider granting appropriate time extension on account of such lockdown.*

MNRE in the above OM has given blanket extension of five months from 25 March 2020 to 24 August 2020 and clarified that the timelines for intermediate milestones of a project may also be extended within the extended time provided for commissioning. The Commission by its Order dated 20 January 2020 had extended the SCOD of the project till 23 June 2020. After imposition of lockdown from 25 March 2020, CWPBPL has not carried out any project activity and was unable to achieve SCOD by 23 June 2020 for the reasons beyond its control. Hence, the Commission deems it fit to use this OM dated 13 August 2020 as guiding document for deciding preliminary time extension to be allowed on account of Covid-19. Accordingly, the Commission directs MSEDCL to extend due date of Scheduled Commissioning Date of the project by 5 months i.e. from 23 June 2020 to 23 November 2020. Further, the Commission directs CWPBPL to provide Performance Bank Guarantee as per PPA having validity as per extended SCoD in present Order on account of Force Majeure.

30. The Commission clarifies that above blanket extension of 5 months is allowed without ascertaining exact date of cessation of FM event. As per Article 8.1 (d) of the PPA, affected party has to notify the date of cessation of FM event and its effect on operations. Further, as mandated under Article 8.1(c) of the PPA, CWPBPL has to provide regular updates (at least on monthly basis) to MSEDCL on the progress of remedial measures being undertaken by it to mitigate impact of FM and such other information as is requested by MSEDCL. Therefore, exact period which can be allowed under present FM

can only be ascertained after the cessation of FM event. At that time, while computing allowable period, start date shall be considered with reference to date of FM notice as ruled in para 24 above.

31. The Commission also notes that ultimate impact of delay in commissioning of the project is imposition of Liquidated Damage on generator which includes forfeiting PBG for delay of 6 months and further delay would lead to reduction in tariff by Rs 0.50/kWh per day of delay. Project capacity not commissioned within 27 months for date of PPA or till tariff become zero on account of delay could be terminated. While calculating such delay, period which has been affected due to Force Majeure is excluded. Therefore, exact dates between which generator is affected by FM event is extremely critical as each day of delay would reduce tariff by Rs. 0.50/kWh, if delay is beyond 6 months. Project under present case was to be commissioned on 17 January 2020, however on account of two different Force Majeure events, the Commission has already granted extension of almost 10 months. Further, exact date of cessation for FM event on account of Covid-19 is yet to be ascertained. Project has already been delayed on account of FM. Now, the Government has relaxed the restrictions imposed during lockdown. Hence, CWPBPL has to make extra efforts to commission the projects as early as is possible. Once project is commissioned, then exact computation of liquidated damages for delay in commissioning of the project after deducting period for which CWPBPL was affected due to FM event can be undertaken. At that time CWPBPL has to established exact days of delay on account of Covid-19.
32. The Commission also notes that MSEDCL in its submission dated 22 August 2020, has raised doubt about CWPBPL's submissions relating to activities performed towards fulfilling obligations under the PPA and has requested to allow invocation of PBG for CWPBPL's failure to meet Financial Closures as per provisions of PPA read with RfS. CWPBPL has objected to such submission of MSEDCL as it was not part of MSEDCL's original reply nor was it argued during the hearing. In this regard, Commission notes that due dates for achieving Financial Closure as per PPA was 17 February 2019, which was extended by the Commission upto 24 July 2019 vide its Order dated 20 January 2020 in Case No. 286 of 2019. However, till filing of its submission dated 22 August 2020, MSEDCL has not proposed to invoke PBG for non-achieving financial closure on extended date. Further following clause of PPA enable non-invocation of PBG if project developer extends the validity of PBG:

“4.2.2 If the Successful Bidder fails to achieve Financial Closure as prescribed in Clause 3.3. of the RfS, the MSEDCL shall encash the Performance Bank Guarantee (PBG) unless the delay is on account of delay caused due to a Force Majeure. An extension for the attainment of the financial closure can however be considered by MSEDCL, on the sole request of the Wind Power Generator, upon submission of a fresh Performance Bank Guarantee (PBG) with the same conditions, value and validity as stated in Section 3.9ii of the RfS. This extension will not have any impact on the Scheduled Commissioning date (SCoD). However, such amount of encashed PBG shall be returned to the Wind Power Generator without any interest within a period of

30 days of achievement of successful commissioning provided such commissioning is within the Scheduled Commissioning Date (SCoD).''

The Commission has already directed CWPBPL to maintain validity of PBG as per requirement of PPA and with reference to extended SCoD of 23 November 2020 approved in this Order. Hence, the Commission directs MSEDCL not to invoke PBG for not achieving Financial Closure as required under clause 3.3. of the RfS at this point of time and allow CWPBPL to commission the project by extended schedule delivery date of 23 November 2020. Further, during this period, MSEDCL may seek additional documents from CWPBPL to satisfy itself about the covenants of financial closure.


33. As far as CWPBPL's prayer to count buffer period of 9 months from extended SCoD is concerned, the Commission notes that as per provisions of PPA, affected party is exempted from its obligations for the period in which it is affected by Force Majeure event. Therefore, to the extent of such period, which is to be ascertained at later stage as ruled in para 30 above, exact date of extended SCoD will be ascertained and buffer period of 9 months provided under the PPA for commissioning of the project will be counted from that date.
34. The Commission also notes that MSEDCL in its submission has requested that in case Commission allows extension of SCoD, then appropriate relief from compliance with the RPO may also be provided to MSEDCL. The Commission notes that MSEDCL has already filed separate Petition in Case No. 21 of 2020 seeking similar relief. This issue will be dealt with in that Petition.
35. CWPBPL through its Miscellaneous Application dated 28 August 2020 has objected for taking on record the MSEDCL's submission dated 22 August 2020 on the ground that the issues raised in the submission were not part of initial reply or argument during hearing. Alternatively, CWPBPL has requested to take on record its reply dated 28 August 2020 to counter MSEDCL's submission. The Commission notes that the said MSEDCL's submission was based on its direction during the hearing wherein CWPBPL was directed to put on record details of financial arrangement made with the lenders and also give detailed status of the activities completed as was envisaged originally. MSEDCL was allowed to file its reply to CWPBPL's submission. However, considering objection filed by CWPBPL, and considering principles of natural justice, the Commission has taken on record only the MSEDCL's submission dated 22 August 2020 and CWPBPL's reply dated 28 August 2020.
36. With the above rulings in the matter, all Miscellaneous Applications filed in these matters are disposed of accordingly.
37. Hence, the following Order.

ORDER

1. The Case No. 138 of 2020 is partly allowed. All Miscellaneous Applications filed in this matter are disposed of accordingly.
2. Disruption in global supply chain and non-availability of manpower due to outbreak of Covid-19 and imposition of consequential lockdown in India is considered an event of Force Majeure. Clean Wind Power (Bhavnagar) Private Limited is exempted from its obligation for the period granted under Force Majeure without any claims of compensation.
3. Preliminary extension of 5 months in SCoD is allowed. Exact period for which Force Majeure event has affected Clean Wind Power (Bhavnagar) Private Limited shall be ascertained after cessation of the event and the same shall be computed with reference to date of Force Majeure notice as ruled in para 24 and 30 above.
4. Accordingly, Scheduled Date of Commissioning stands extended from 23 June 2020 to 23 November 2020. Clean Wind Power (Bhavnagar) Private Limited shall submit fresh Performance Bank Guarantee with validity of six months beyond this extended Scheduled Date of Commissioning to Maharashtra State Electricity Distribution Co. Ltd within a month from the date of this Order.

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member


(Abhijit Deshpande)
Secretary

