

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**Case No. 229 of 2020**

**Case of Krishita Multitrade Pvt. Ltd. seeking direction for returning the monies wrongfully realised by encashing Performance Bank Guarantee by Maharashtra State Electricity Distribution Co. Ltd. and declaration of extension of Financial Closure and Scheduled Commercial Operation date on account of Force Majeure.**

Krishita Multitrade Pvt. Ltd ..... Petitioner  
Maharashtra State Electricity Distribution Co. Ltd. .... Respondent No. 1  
Maharashtra Energy Development Agency ..... Respondent No. 2

**Coram**

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

**Appearance**

For the Petitioner : Smt. Dipali Sheth (Adv.)  
For the Respondent No. 1 : Shri. Abhishek Khare (Adv.)  
Respondent No. 2 : Dr. J. V Torane (Rep.)

**ORDER**

**Date: 3 February, 2021**

1. Krishita Multitrade Pvt. Ltd (**KMPL**) has filed the present Petition on 9 December 2020 under sections 86(1) (e), (f) and (k) of the Electricity Act, 2003 (**EA**), read with provisions of Request for Selection (**RFS**) and Power Purchase Agreement (**PPA**) dated 24 October 2019 entered with Maharashtra State Electricity Distribution Co. Ltd. (**MSEDCL**), seeking direction for returning the monies wrongfully realised by encashing Performance Bank

Guarantee (PBG) and also declaration for extension of Financial Closure (FC) and Scheduled Commercial Operation Date (SCOD) on account of Force Majeure

2. **KMPL's main prayers are as follows:**

- a) *Declare that the delay in attaining FC is on account of force majeure event and grant a further extension for obtaining FC for six (6) months upto March 26, 2021;*
- b) *Direct MSEDCL to return the monies wrongfully realised by encashing the PBG submitted by the Petitioner without following due procedure as enumerated under Articles 4.2.2, 8, 11.3 and 11.4 of PPA;*
- c) *Direct MSEDCL to accept and acknowledge force majeure event and grant a further extension in attaining SCOD for six (6) months upto February 25, 2022;*
- d) *Direct MSEDCL to not initiate any coercive steps against the Petitioner until the final disposal of this Petition*

3. **KMPL in its Case has stated as follows:**

- 3.1 On 5 December 2018, MSEDCL issued a RfS for procurement of power on long term basis through competitive bidding from 1000 MW grid connected solar projects.
- 3.2 On 19 March 2019, KMPL, through its parent company Shiv Solar Pvt. Ltd. (SSPL) was awarded the Letter of Award for the development of Solar Power Project of 50MW at Rs. 2.74/unit.
- 3.3 Tariff was adopted by the Commission in its Order dated 27 May 2019 in Case No. 87 of 2019 at the rates as discovered by MSEDCL through competitive bidding process:

<b>Sr No</b>	<b>Name of supplier</b>	<b>Quantum of procurement approved (MW)</b>	<b>Time period of supply</b>	<b>Rate (Rs/kWh)</b>
1.	Shiv Solar Private Limited	50	25 years from SCOD	2.74
2.	Acme Solar Power Private Limited	300	25 years from SCOD	2.74
3.	Renew Solar Power Private Limited	300	25 years from SCOD	2.75
4.	Avaada Energy Private Limited	350*	25 years from SCOD	2.75

\* 350 MW quantum allocated due to bucket filling

- 3.4 In compliance with Article 3.9 of the RfS, KMPL submitted a PBG to MSEDCL, however MSEDCL was unable to accept the same due to technical reasons of not mentioning the name of the bidder i.e. SSPL in the PBG and the same was returned to KMPL. KMPL had to procure another PBG which included the name of the bidder and made requests to the Union Bank of India for the same. The procedure for acquiring and re-acquiring the PBG was ongoing from June 2019 till October 2019, with the Union Bank of India.
- 3.5 On 19 October 2019, KMPL finally furnished a PBG of Union Bank of India for Rs. 7 Crores (calculated at Rs. 14 Lakh/MW) in favour of MSEDCL valid till 31 December 2021 and claim period till 31 December 2022.
- 3.6 KMPL entered into PPA with MSEDCL dated 24 October 2019 with actual effective start dates as 26 June 2019. As per PPA, the FC was to be achieved within 10 months, i.e. by 26 April 2020 and SCOD by 26 March 2021.
- 3.7 On 8 November 2019, KMPL signed a Memorandum of Understanding (MOU) with Mr. Babulal Chiranjiv Modi (Facilitator), for the purchase of land parcels upto 280 acres in the district of Shahpur, Thane for the development of the Project. However, since there was no revert or communication from the Facilitator, KMPL decided to procure the land parcels in Shahpur, Thane, themselves.
- 3.8 On 24 March 2020, on account of the outbreak of COVID – 19, which was declared a pandemic by the World Health Organization, the Government of India invoked the Disaster Management Act, 2005 by its Order dated 24 March 2020 and directed all Ministries, Departments of Government of India/State, Union Government and the State/Union Territory authorities to take effective measures to prevent the spread of the COVID-19 pandemic. Although the nationwide lockdown was implemented from 25 March 2020, the Government of Maharashtra (GoM) had already imposed a lockdown vide its Notification dated 23 March 2020 bearing No. DMU/2020/CR.92/DisM-1 with effect from 23 March 2020.
- 3.9 Vide letter dated 3 April 2020, KMPL's parent company had sent a request letter to MSEDCL to grant an extension for obtaining the FC by three (3) months and SCOD by six (6) months on account of the lockdown imposed in the country due to the force majeure event as mentioned above.
- 3.10 Further vide email dated 27 April 2020 sent to MSEDCL, KMPL's parent company expressly stated that they had taken all the necessary steps and approvals required and were

at the final stage of obtaining the FC, but were prevented from doing so only due to the outbreak of COVID-19 pandemic.

- 3.11 With a view to curb the spread of COVID-19, Shahpur Nagar Panchayat had been imposing partial lockdowns since May 2020 up to September 2020 and it was getting increasingly difficult for KMPL to continue their work in a single pace as they were continuously halted by the irregular lockdowns.
- 3.12 Ministry of New & Renewable Energy (MNRE) recognized COVID-19 pandemic as Force Majeure and in order to ease the agony and suffering of developers and has given a blanket extension of five (5) months through its Office Memorandum dated 13 August 2020.
- 3.13 With the lockdown imposed due to COVID-19, the FC date stood extended by 5 months (as per MNRE Notification) i.e. by 24 September 2020 and SCOD by 25 August 2021.
- 3.14 Based on a preliminary site visit, technical expert in September 2020 stated that on account of the Project site in the district of Shahapur, Thane, falling right between two highways it will cause huge amounts of dust settlement on the solar panels of the proposed power plant and thereby affect the Capacity Utilization Factor (CUF) of the Project at the said site. Hence, due to restrictions and upon the advice of a technical expert consulted, KMPL decided to shift the Project out of Thane and began taking required measures for the same.
- 3.15 Vide letter dated 14 September 2020, MSEDCL in reply to the email dated 27 April 2020 of KMPL stated that MSEDCL shall grant the extension requested by it due to force majeure event only upon submitting a fresh PBG.
- 3.16 Vide letter dated 24 September 2020, KMPL replied to the aforesaid letter of MSEDCL drawing their attention to the fact that the PBG submitted was valid upto December 31, 2021 and with a claim/lodging period valid upto December 31, 2022 which covered the extension period of SCOD to a large extent.
- 3.17 Further, KMPL informed that due to COVID-19 situation and other technical reasons, KMPL had to shift the project location from Shahapur, Thane and it is looking for new project site in Dhule or around Nashik district.
- 3.18 On 25 September 2020, KMPL had sent the Letter of Intent (LOI) for the acquisition of land subject to satisfactory title investigation for the establishment of their Project to Jenaat Urja Vikas Private Limited (Seller). KMPL had conducted the preliminary site visits and had requested the Seller to provide them with the documents required for conducting the due diligence proceedings for acquiring the land. Further vide letter dated September 30,

2020, the Seller accepted the LOI and agreed to sell the proposed land site for the development of the Project.

- 3.19 As per the PPA and Clause 3.3 of the RfS, the Petitioner is allowed to change the Project location once before the attainment of the FC. KMPL is in process of identifying new site for the project through other sellers (of Project and land).
- 3.20 On 29 September 2020, KMPL received a notice from MSEDCL seeking clarity on not achieving FC within the stipulated date and thereby alleging non-adherence of the Article 4.2.2 of the PPA.
- 3.21 On 5 October 2020, the seller of land replied to KMPL seeking some more time to furnish the details as the functioning of their offices were impacted due to COVID-19.
- 3.22 On 7 October 2020, KMPL replied to MSEDCL's notice dated 29 September 2020 apprising about the status of the Project and the genuine efforts made by it. Further, it submitted that they have already obtained the sanction required for obtaining FC of the Project from a leading financial institution and due to bank holidays, the sanction letter was being delayed.
- 3.23 On 24 October 2020, KMPL submitted following documents to MSEDCL:
  - a. Term Loan sanction letter dated 15 September 2020 from Yes Bank Limited for the Project;
  - b. The net worth certificates of each promoter of KMPL who have a combined net worth of over Rs. 200 crores; and
  - c. Fixed Deposit Receipt of the PBG amount credited by KMPL.
- 3.24 On 17 November 2020, KMPL was notified that MSEDCL had made a request on 13 November 2020 for encashing the PBG. In view of the same KMPL once again called upon MSEDCL to not encash the PBG as almost all the procedures for the attainment of the FC had been complied with and any delay in such attainment of FC was only on account of force majeure.
- 3.25 On 20 November 2020, the banker of KMPL informed that MSEDCL had encashed the entire PBG amount vide their encashment request letter dated 13 November 2020.

- 3.26 On 24 November 2020, KMPL once again called upon MSEDCL to return the monies wrongfully realized by encashing the PBG in order to enable KMPL to furnish a fresh bank guarantee till six (6) months after SCOD. In the said letter, KMPL once again called upon MSEDCL to acknowledge the force majeure event and grant an additional extension of three (3) months for attainment of FC, accept the delay therein on account of force majeure and grant extension of SCOD for six (6) months up to May 24, 2022.
- 3.27 As per Article 8.2 of the PPA, KMPL shall not be deemed in breach of non-attaining FC within the period of ten (10) months as it was prevented on account of a declared force majeure event.
- 3.28 Further, 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 of the commencement of Force Majeure event. Further such notice shall include detail measures.
- 3.29 KMPL has given notice invoking force majeure in April 2020 only. On account of such prolonged force majeure, KMPL kept apprising MSEDCL of steps taken by it to the extent possible to complete the Project. However, MSEDCL in complete obliviousness did not acknowledge the force majeure which continued and the efforts taken by KMPL in the interest of the Project and fraudulently encashed PBG in violation of terms of the PPA.
- 3.30 Assuming but not admitting that MSEDCL did not agree to force majeure invoked by KMPL, MSEDCL ought to have raised dispute as per the terms of the PPA. However, it is matter of record that MSEDCL has neither denied occurrence and continuation of force majeure or raised dispute as provided in the PPA. Therefore, the invocation of PBG at the time when the offices were non-functional due to force majeure as well as Diwali holidays amounts to egregious fraud wherein MSEDCL with malafide intention has tried to take advantage of the holidays and encashed PBG in violation of terms of PPA.
- 3.31 MSEDCL with mala fide intention has taken the decision to encash the PBG in such a hasty manner after realizing that vide notification dated 12 November 2020 the Ministry of Finance (MoF) has given direction to lower the PBG to 3% from 5-10%.
- 3.32 It is pertinent to note that MSEDCL ought not to have encashed the PBG at this stage as they have till date did not incur any monetary loss as the SCOD of Project is 25 August 2021. The PBG was valid till 31 December 2021 with claim lodgment period upto 31 December 2022, therefore, such haste in encashment even when KMPL is affected by force majeure is in gross violation of the terms of PPA.
- 3.33 Various State Electricity Regulatory Commissions, including this Commission, has provided relief and has extended FC and SCOD on account of Force majeure. The Haryana

Electricity Regulatory Commission, vide Order dated 3 November 2020 in the matter of Haryana Power Purchase Company (HPPC) vs. Clean Max Enviro Energy Solutions Pvt. Ltd with respect to the SCOD for a 50 MW solar power project of the petitioner therein, has granted a total extension of nine (9) months in the light of the ongoing COVID-19 pandemic crisis.

4. **MSEDCL, in its reply dated 1 January 2021 has stated as under:**

4.1 PBG has been invoked and encashed for the following reasons:

- a. FC, which is required as per Clause 4.2.2 of the PPA has not been achieved till date. FC had to be achieved on or before 25 April 2020. Even with extension granted on 14 September 2020 on account of Force Majeure, the FC was to be achieved by 24 September 2020
- b. KMPL has not explained the manner in which it was stopped from achieving FC when only a funds tie-up with Bank(s) had to be organised. There is no loan agreement as of date or even as of the date of encashment of the said PBG.
- c. There has been no effort to show as to how the Force Majeure event has prevented from arranging funds when Banks and FIs were working on stretched limits qua human resources and other resources all through the lockdown period
- d. Project site is now being shifted from Shahpur to some other place, confirmation of which has not been given. Identification of the 100% land required for the project shall have to be done by Bidder at the time of submission of bid only. However, additional benefit is given to change the location of the project once in case of any exigency. But the bidder has to complete the same till the time of achievement of Financial Closure i.e. within 10 months from the date of signing of PPA and submit the evidence of clear possession of required 100% land for the project at the time of FC.
- e. The extension for FC is allowed till 24 September 2020. Hence, KMPL ought to have completed the land procurement related to change of location by 24 September 2020. Till date no noteworthy progress with regard to project has been observed.
- f. Procurement of land leads to grid connection. Since the location of project is not fixed, the Grid connectivity permission is not sought by KMPL as of now which needs to be submitted by it.

4.2 Since the inception there are delays from the side of the Petitioner. Such as:

- a. Delay in providing the PBG
  - b. KMPL did not have funds to provide a PBG and requested to convert its EMD into a PBG.
  - c. There were delays from KMPL in executing the PPA.
  - d. Delay in achieving FC.
  - e. Delay in procuring land for the project.
  - f. Delay in obtaining grid connectivity.
- 4.3 MSEDCL invoked and encashed the said BG after intimating KMPL well in time. MSEDCL had addressed a letter to KMPL dated 29 September 2020 categorically intimating that:

*“In view of above, you are hereby called upon to comply with the RfS provisions within seven (7) days from the date of receipt of this notice as to why the performance bank guarantee should not be encashed by MSEDCL as per Clause 4.2.2 of PPA, failing which MSEDCL will be constrained to take further course of action. In such case you shall be solely responsible for costs & consequences of the same which please be noted.”*

Thus, KMPL’s assertion that there was no intimation of invocation and encashment of the PBG is unfounded.

**5. MEDA in its reply dated 1 January 2021 has stated as under:**

- 5.1 Since the matter arises out of some contractual defaults and penalties as per the contract between MSEDCL and KMPL, MEDA has no role and hence relieved from the present case.

**6. KMPL, in its rejoinder dated 5 January 2021 made the following additional submissions:**

- 6.1 It is denied that KMPL has not taken any steps towards achieving FC as vide email dated 24 October 2020 KMPL had categorically stated the steps taken by them towards achieving FC, which also included a letter from Yes Bank Limited sanctioning a Term Loan on 15 September 2020 and also reassurance in the form of promoter net worth certificates and fixed deposit receipt.
- 6.2 The change in location was due to adverse observations in Site Survey Report. KMPL had begun taking the required steps to shift the project in September 2020 itself and hence is not in breach of the provisions of the PPA. Further it is also denied that the Petitioner had not informed MSEDCL regarding the change in locations as KMPL has been extremely



transparent in their conduct and have been duly appraising MSEDCL on their efforts to achieving the FC.

- 6.3 KMPL will be able to apply for grid connectivity only once the land is finalized. However, on account of occurrence of force majeure, KMPL was unable to procure land and grid connectivity and hence has sought reliefs from Commission seeking extension of FC and SCOD.
- 6.4 MSEDCL had only called upon KMPL to state the reasons for their non-compliance vide letter dated 29 September 2020 and KMPL had duly complied with the same vide their letter dated 7 October 2020 and apprised the status of the Project and requested MSEDCL to not invoke the PBG.
- 6.5 Hence, the letter dated 29 September 2020 was in nature of show cause for not invoking the PBG by MSEDCL for which KMPL did show cause which KMPL assumed to have been accepted. Further it is repeated and reiterated that there was absolutely no communication thereafter from MSEDCL and the PBG was directly invoked on 20 November 2020, despite the various requests made which fell on deaf ears.
7. At the e-hearing through video conferencing held on 6 January 2021, the representative of the Parties reiterated their submissions as made in the Petition. Further, MSEDCL assured that they would not take any corrosive action against Petitioner during pendency of the matter before the Commission.

### **Commission's Analysis and Rulings**

8. This Case has been filed by KMPL seeking extension of FC and SCOD by 6 months to 26 March 2021 and 25 February 2022, respectively on account of Force Majeure event i.e. COVID-19 pandemic. Further, KMPL has prayed to direct MSEDCL to return the monies realized by MSEDCL by encashing the PBG submitted by it.
9. The Commission notes following undisputed facts in the present matter:
  - 9.1 PPA between KMPL and MSEDCL was signed subsequent to competitive bidding process under Section 63 of the Electricity Act, 2003 (EA) and after adoption of competitively discovered rate, through SSPL (Parent company of KMPL), by the Commission vide Order dated 27 May 2019 in Case No. 87 of 2019
  - 9.2 The PPA between KMPL and MSEDCL was signed on 24 October 2019 with actual effective start dates of 26 June 2019. Accordingly, KMPL was required to achieve FC

within ten (10) months, i.e. by 26 April 2020 and SCOD within twenty-one (21) months i.e. by 26 March 2021.

- 9.3 As nationwide lockdown was imposed from 25 March 2020 on account of spread of COVID-19 pandemic, KMPL vide Force Majeure notice dated 3 April 2020, initially requested MSEDCL to extend the FC by 3 months and SCoD by 6 months. Further, vide email dated 27 April 2020, KMPL requested MSEDCL for further extension of time to perform its activities.
- 9.4 MSEDCL vide letter dated 14 September 2020 informed KMPL that in view of MNRE's Office Memorandum dated 13 August 2020 recommending blanket extension of 5 months to RE projects on account of COVID-19 pandemic, FC and SCoD of KMPL's project is extended by 5 months and stand revised to 24 September 2020 and 25 August 2021 [By typographical error, MSEDCL in its letter has mentioned it as 24 November 2021], respectively.
- 9.5 On 29 September 2020, MSEDCL issued notice to KMPL for non-fulfilment of condition of Financial Closure under the PPA and sought compliance of the PPA conditions within 7 days, failing which PBG could be invoked.
- 9.6 In reply to above notice, KMPL vide its letter dated 7 October 2020 informed MSEDCL about progress of land acquisition and financial closure. Further vide email dated 24 October 2020, KMPL submitted sanction letter from Yes Bank for project financing.
- 9.7 MSEDCL vide its letter dated 13 November 2020 addressed to Union Bank sought invocation of PBG. Accordingly, Rs. 7 crores assured under PBG has been remitted in accounts of MSEDCL on 18 November 2020.
10. With the above background, the Commission frames following issues for its consideration in the present matter:
- a. Whether FC and SCoD can be extended further on account of Force Majeure event?
  - b. Whether encashment of PBG by MSEDCL was correct?

The Commission is addressing these issues in following paragraphs.

11. **Issue a: Whether FC and SCoD can be extended further on account of Force Majeure event?**

- 11.1 The Commission notes that there is no dispute between the parties that impact of COVID-19 pandemic is a Force Majeure event under the PPA. In fact, due to such Force Majeure event, and in accordance with of MNRE's Office Memorandum dated 13 August 2020, MSEDCL extended FC and SCoD of KMPL's project by 5 months and FC and SCOD is now revised to 24 September 2020 and 25 August 2021, respectively.
- 11.2 Through present Petition, KMPL is requesting further extension of 6 months in FC and SCoD on account of continued impact of COVID-19 pandemic.
- 11.3 The Commission notes that Article 8 of the PPA dealing with Force Majeure stipulates following:

*“ 8.1 Force Majeure Events:*

.....

- c) The affected Party shall give notice to other party of any event of Force Majeure as soon as reasonably practicable, but not later than 7 days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If any event of Force Majeure results in a breakdown of communication rendering it not reasonable to give notice within the applicable time limit specified herein, then the party claiming Force Majeure shall give notice as soon as reasonably practicable after reinstatement of communication, but not later than one day after such reinstatement.*
- b) Provided that such notice shall be a pre-condition to the affected party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed, and the Affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other party may reasonably request about the situation.*
- i. The affected Party shall give notice to the other Party of (1) cessation of relevant event of Force Majeure; and (2) cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this agreement, as soon as practicable after becoming aware of each of these cessations.*

*ii. 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.” [emphasis added]*

Thus, as can be seen from the above-mentioned provision of PPA, to claim relief under Force Majeure, affected party must give notice of such Force Majeure event to other party by 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.

11.4 The Commission notes that in the present matter, KMPL has served the Force Majeure notice on 3 April 2020 to MSEDCL and hence requirement of notice under Article 8.1 (c) has been complied with. However, KMPL has claimed effect of such Force Majeure event from 23 March 2020 with the imposition of lockdown in Maharashtra. As per provisions of PPA, notice for Force Majeure shall be given not later than 7 days from the event affecting the party. Accordingly, KMPL was required to issue the notice to MSEDCL not later than 29 March 2020. KMPL issued the notice on 3 April 2020 i.e. with a delay of 5 days from the cut-off date of notifying MSEDCL.

11.5 The Commission also notes 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. As parties have already agreed that impact of Covid-19 pandemic is Force Majeure event, which was also held by this Commission in several recent Orders, KMPL needs to be relieved of its obligation under the PPA till it continues to be affected by the said FM event. MSEDCL has already extended period of FC and SCoD on account of COVID-19 by 5 months. PPA also mandates affected party to make reasonable efforts to mitigate impact of Force Majeure. The Government has gradually removed the restrictions that were imposed through lockdown. Therefore, granting additional blanket extension of 6 months, as prayed for, at this point of time without ascertaining efforts made by KMPL to mitigate the impact of FM would not be appropriate. The period for granting extension cannot be based on a generic number (6 months) 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 or stated at this point of time.

11.6 The Article 3.3 of the PPA, as reproduced below, deals with the Liquidated damages for delay in Commissioning:

***“3.3 Liquidated damages for delay in Commissioning the Project/Solar Photovoltaic Grid Interactive Power Plant beyond Scheduled Commercial Operation Date:***

- 1) The Projects shall be commissioned within a period of 21 (Twenty One) months from actual effective start date of the PPA i.e 26.06.2019.*
- 2) The Power Producer shall have to submit Commissioning Certificate as verified, inspected and certified by RLDC/SLDC/DISCOM. In case of failure to achieve this milestone, MSEDCL shall forfeit the Performance Bank Guarantee (PBG) in the following manner:
  - a) **Delay upto Three (3) months from SCOD** - MSEDCL will forfeit total Performance Bank Guarantee on per day basis and proportionate to the balance capacity not commissioned.*
  - b) In case the commissioning of the project is delayed beyond Three (3) months from SCOD, the tariff discovered after e-Reverse Auction shall be reduced at the rate of 0.50 paise/kWh per day of delay for the delay in such remaining capacity which is not commissioned. The maximum time period allowed for commissioning of the full Contracted Capacity with encashment of Performance Bank Guarantee and reduction in the fixed tariff shall be limited to 27 months/30 months (as the case may be) from actual effective start date of the PPA i.e 26.06.2019 or till the Tariff becomes zero, whichever is earlier.*
  - c) In case, the Commissioning of the Project is delayed beyond this period as mentioned in Article (b) above, the PPA capacity shall stand reduced / amended to the Capacity commissioned and the PPA for the balance Capacity will stand terminated and shall be reduced from the Contracted Capacity.”**

The Commission 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 3 months and further delay would lead to reduction in tariff by 0.50 Paise/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 0.50 Paise/kWh, if delay is beyond 3 months. Project under present case is to be commissioned on 26 March 2021, however on account of COVID-19 pandemic, which has been considered as Force Majeure events, parties are already agreed to extend SCoD by 5 months i.e. upto 25 August 2021. 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, KMPL 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 KMPL was affected due to FM event can be undertaken. At that time KMPL has to established exact days of delay on account of Covid-19.

## **12. Issue b: Whether encashment of PBG by MSEDCL was correct?**

12.1 The Commission notes that after allowing 5 months extension on account of Force Majeure event, due date for achieving Financial Closure stands revised to 24 September 2020. Said revised date of FC was communicated to KMPL on 14 September 2020. Further vide letter dated 29 September 2020, MSEDCL issued notice to KMPL for non-fulfilment of condition of Financial Closure under the PPA and seek compliance of the PPA conditions within 7 days, failing which PBG can be invoked. Thereafter, vide letter dated 13 November 2020, MSEDCL sought invocation of PBG of KMPL from Union Bank and said Rs. 7 crores assured under PBG has been remitted in accounts of MSEDCL on 18 November 2020. KMPL has contended that MSEDCL has wrongly encashed the PBG and hence requested the Commission to direct MSEDCL to refund encashed PBG amount.

12.2 The Commission notes that purpose of PBG under the PPA has been stipulated under Article 4.2 of the PPA which is reproduced below:

### *“4.2 Performance Bank Guarantee:*

*4.2.1 The Performance Bank Guarantee furnished by Power Producer to MSEDCL as prescribed in the RfS shall be for guaranteeing the commissioning / commercial operation of the project / unit up to the Contracted Capacity within SCOD.*

*4.2.2 If the Power Producer fails to achieve Financial Closure as prescribed in Clause 3.13 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 Power Producer, upon submission of a fresh Performance Bank Guarantee (PBG) with the same conditions, value and validity as stated in Section 3.9 ii 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 Power Producer without any interest within a period of 30 days of achievement of successful commissioning provided*

*such commissioning is within the Scheduled Commissioning Date (SCOD).*

*4.2.3 If the Power Producer fails to commission the project/Unit on or before Scheduled Commercial Operation Date, MSEDCL shall have the right to forfeit the Performance Bank Guarantee without prejudice to the other rights of the Power Producer under this Agreement as per Article 3.3.*

*4.2.4 MSEDCL shall release the Performance Bank Guarantee upon successful commissioning of full contracted capacity after adjusting Liquidated Damages (if any) as per Article 3.3.”*

As can be seen from above provisions, PPA envisages that PBG is submitted mainly for guaranteeing commissioning of the project within SCoD. Although same PBG can be encashed for delay in achieving Financial Closure, said encashed amount is to be returned if project is commissioned within SCoD. Further, on the request of the generator, MSEDCL can extend the FC if generator submit PBG with extended date of validity.

12.3 It is also important to note that as per RfS, PBG needs to be submitted with validity up to 6 months from SCOD. Original PBG submitted by KMPL was valid till 31 December 2021 for the original SCOD of 26 March 2021. However, when MSEDCL extended SCOD to 25 August 2021 on account of COVID-19 pandemic, even after request by MSEDCL, KMPL has not submitted fresh PBG with validity upto 6 months from revised SCOD of 25 August 2021 and instead stated that existing PBG covers most of the part of extended SCOD.

12.4 The Commission notes that before encashing PBG, MSEDCL vide its letter dated 29 September 2020 has communicated to KMPL as follows:

*“However, it is observed that the documents for achieving the financial closure are still not submitted by you till date and thus amounts to non-adherence of the Clause 4.2.2 of the PPA which states as under:.*

***If the Solar Power Developer fails to achieve Financial Closure as prescribed in Clause 3.13 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 Solar Power Generator, upon submission of a fresh Performance Bank Guarantee (PBG) with the same***

*conditions, value and validity as stated in Section 3.9.ii 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 Solar 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). (Emphasis Supplied)*

*In view of above, you are hereby called upon to comply with the RfS provisions within seven (7) days from the date of receipt of this notice as to why the performance bank guarantee should not be encashed by MSEDCL as per Clause 4.2.2 of PPA, failing which MSEDCL will be constrained to take further course of action. In such case you shall be solely responsible for costs & consequences of the same which please be noted.”*

- 12.5 KMPL has contended that on 7 October 2020, it had replied to MSEDCL’s notice dated 29 September 2020 and apprised about the status of the Project and the efforts made by it. Further, on 24 October 2020, it submitted various documents to MSEDCL including Term Loan sanction letter from Yes Bank Limited for the Project dated 15 September 2020, representing the seriousness and the efforts to execute the project. KMPL also requested MSEDCL to extend the FC by three months and SCOD by 6 months upto 24 May 2022. However, MSEDCL encashed the entire PBG amount.
- 12.6 In this regard, the Commission notes that conduct of both parties was not in accordance with spirit of the provisions of the PPA. On the one hand KMPL has stated that it is taking all efforts to execute the projects and updated MSEDCL about the same on regular basis, but on other hand it has not submitted fresh PBG with extended date for revised SCoD, which is pre-condition for extending FC date. Similarly, MSEDCL on one hand has accepted COVID-19 as Force Majeure event and granted blanket extension of 5 months for FC and SCoD, on other hand before encashing PBG, MSEDCL did not consider the efforts taken by KMPL for complying with the PPA conditions and whether Force Majeure event ceases to exist for KMPL’s project.
- 12.7 As observed earlier in the Order, main purpose of the PBG is that it acts a guarantee for commissioning of the project within SCoD. Even if such PBG is encashed due to delay in FC, same needs to be refunded if project is commissioned within SCoD. Therefore, in the opinion of the Commission, before encashing PBG (which was valid till December 2021) it would have been appropriate if some more time would have been provided to KMPL. This is more crucial when KMPLP has submitted sanctioned letter from the Bank and also submitted documents demonstrating its efforts in securing



land for the project. Similarly, KMPL should have complied with the condition of PPA by submitting fresh PBG with validity period of 6 months from revised SCoD.

12.8 In view of above, encashed PBG amount needs to be refunded to KMPL. However, such refund would create situation wherein MSEDCL will not have any security amount / bank guarantee till KPMG submits fresh PBG. Therefore, in order to get refund of encashed PBG amount, the Commission directs that KMPL shall first submit PBG as per PPA conditions with validity of 6 months beyond revised SCoD (24 August 2021) and thereafter MSEDCL shall refund the encashed PBG amount within a week without any interest.


13. Hence, the following Order.

### **ORDER**

- 1. Case No. 229 of 2020 is partly allowed.**
- 2. Parties have already agreed on blanket extension of 5 months in FC and SCoD on account of Force Majeure i.e. COVID-19 pandemic. Further additional extension of 6 months as prayed for cannot be allowed without ascertaining exact period for which Force Majeure event has affected Krishita Multitrade Pvt. Ltd.**
- 3. Krishita Multitrade Pvt. Ltd. shall submit fresh Performance Bank Guarantee with validity of at least six months beyond agreed extended Scheduled Date of Commissioning (24 August 2021) and thereafter within a week Maharashtra State Electricity Distribution Co. Ltd shall refund encashed amount of PBG to Krishita Multitrade Pvt. Ltd.**

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

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

  
**(Abhijit Deshpande)**  
**Secretary**

