

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 162 of 2020

Case of ACME Heergarh Powertech Pvt. Ltd seeking Commission's indulgence to direct Maharashtra State Electricity Distribution Company Ltd. to replace the Bank Guarantee submitted under the Power Purchase Agreement dated 21 August 2019 with equally effective alternate proposed mechanism.

ACME Heergarh Powertech Pvt. Ltd.
ACME Solar Holdings Ltd.

..... Petitioner No.1
..... Petitioner No. 2

Maharashtra State Electricity Distribution Co. Ltd.

..... Respondent

Coram

I.M. Bohari, Member
Mukesh Khullar, Member

Appearance

For the
Petitioner No. 1
Petitioner No. 2

}
}

: Smt. Deepa Chawan (Adv.)

For the Respondent

: Sh. Shashwat Kumar (Adv.)

ORDER

Date: 8 March, 2021

1. ACME Heergarh Powertech Pvt. Ltd. (**AHPPL**) (Special Purpose Vehicle (SPV) of ACME Solar Holdings Ltd. (**ASHL**)) and ASHL have filed this Petition dated 9 July 2020 seeking Commission's indulgence to direct Maharashtra State Electricity Distribution Co. Ltd.

(MSEDCL) to replace the Performance Bank Guarantee (**PBG**) for Rs. 42 Crores submitted under the Power Purchase Agreement (**PPA**) dated 21 August 2019 by AHPPL to MSEDCL with equally effective alternate proposed mechanism.

2. AHPPL and ASHL together have been termed as Petitioners in this Order.

3. **Petitioners main prayers are as follows:**

a) *Hold and declare that Bank Guarantee No. 1945IGFIN005119 & OGT0005190035016 for Rs. 42,00,00,000/- (at the rate of Rs. 14 lakh per MW) issued to MSEDCL be returned forthwith to the Applicant.*

b) *Hold, declare and direct MSEDCL that in lieu of the said Bank Guarantee No. 1945IGFIN005119 & OGT0005190035016, MSEDCL can obtain any one of the alternate mechanism as set out in the Petition and as directed by this Hon'ble Commission*

4. **Petitioners in their Case have stated as follows:**

4.1. AHPPL had approached the Commission in Case No. 78 of 2020 to declare that the PPA with MSEDCL stands frustrated on account of Force Majeure Event which has made completion of the Project impossible within the timelines prescribed under the PPA with MSEDCL and for grant of consequential relief in relation thereto.

4.2. The Commission in its Order dated 20 June 2020 in Case No. 78 of 2020 held as below:

“16.12 As the Commission has allowed extended time as above for meeting obligations under the PPA, AHPPL’s contention of impossibility to perform the obligations under the PPA does not survive. Hence, the Commission is not going into the arguments relating to frustration of contract under the Contract Act.

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

17 Hence, the following Order

ORDER

1. *The Case No. 78 of 2020 is partly allowed.*
2. *Disruption in global supply chain due to outbreak of Covid-19 and imposition of consequential lockdown in India is considered as event of Force Majeure. ACME Heergarh Powertech Pvt. Ltd. is exempted from its obligation for the period granted under Force Majeure without any compensation.*
3. *Maharashtra State Electricity Distribution Limited is directed to ascertain the exact period for relief under Force Majeure after lock down is completely lifted and accordingly the timeline for Financial Closure and Scheduled Date of Commissioning shall be extended with additional 30 days thereafter as ruled in paragraph 16.10 above.”*
- 4.3. The PPA was executed between the parties on 21 August 2019 pursuant to Section 63 proceedings. The Commission has approved and put its imprimatur on the process, vide its Orders dated 27 May 2019.
- 4.4. AHPPL filed its earlier Petition on 24 April 2020, in Case No.78 of 2020. The force majeure events have continued during the pendency of the proceedings and after passing of the Order dated 20 June 2020. The pandemic and its cascading effects have greatly hampered the economy, the financial transactions and among other things like logistics issues, lack of labour, etc., There is dearth of the manufactured product even in the Country presently to explore the possibility of alternative procurement. Additionally, the AHPPL has made payments to the Chinese entities from whom the plant and equipment was to be procured. There are no guidelines issued under Section 63 to deal with extra ordinary situation of continuing and cascading effects of force majeure and therefore the Commission has the Authority and Jurisdiction to consider the present case.
- 4.5. This is not a case of abnormal rise or fall in prices which is an unexpected obstacle to execution. The cascading, ever changing, volatile and extra ordinary circumstances arising from the pandemic have inter-alia affected AHPPL as part of the global supply chain. The existing circumstances are a completely different situation from the time when the parties have entered into the agreement. In such circumstances, AHPPL seeks the indulgence of MSEDCL for acting in accordance with the letter and spirit of the Order dated 20 June 2020 without prejudice to its legal remedies and rights.
- 4.6. AHPPL is adversely impacted due to the unprecedented situations and effects arising out of COVID-19 including severe financial crisis coupled with various other issues of obstruction of global supply chain, lack of logistics, etc., Further, in absence of any delivery schedule from Chinese suppliers towards modules and inverters, it is finding it difficult to get the

project financed and disbursement of funds as the same is entirely dependent upon AHPPL paying the advance amounts under the purchase orders for procurement of modules and inverters in definite timelines which in the present case is affected due to Force Majeure.

- 4.7. On 19 August 2019, AHPPL furnished PBG for Rs. 42 Crores (at the rate of Rs. 14 lakh per MW) to MSEDCL. AHPPL have submitted huge amounts of margin money (ranging from 20% to 100%) and other collateral securities to banks for obtaining the above PBG, thereby significantly blocking their equity capital. As per RFS, the purpose of PBG is to ensure timely commissioning of the Project in as much Clause 3.9 (ix) of the RfS provides that the PBG shall be returned within 30 days of successful commissioning of the Project.
- 4.8. AHPPL is in dire needs of funds in order to commission the Project within the terms / directives of the Commission and for it to undertake such Project (which was submitted as being impossible to be commissioned owing to Force Majeure conditions), it is most humbly requested that the said BGs be returned to AHPPL for it to utilize the margin money and other collateral securities to fund the construction and commissioning of the project within the prescribed timelines in accordance with the letter and spirit of the Order dated 20 June 2020 subject to the caveat mentioned herein before.
- 4.9. It is further submitted that it is not the endeavour of the petitioner to evade or escape its obligations as enshrined through the said PBG in favour of MSEDCL. In order to cogently, effectively and fairly secure MSEDCL's interest in terms of the PPA, AHPPL submits the following alternatives:
 - a. That the PBG be released and replaced with Corporate Guarantee of Parent Company of Petitioner (or)
 - b. That the PBG be released and replaced with Bonds for the amount equivalent to Rs. 42 Crores. It is pertinent to note that the concept of execution of bond is a widely accepted security instrument by the State / Central Governments of India. For example, the Customs Department, GoI, provisionally clears the goods on execution of suitable bond as security for payment of duties.

AHPPL undertakes to utilize the amount of Rs. 42 Crores towards the construction and commissioning of the project and not in any other activity whatsoever.

- 4.10. AHPPL issued a Letter dated 3 July 2020 to MSEDCL requesting it to release PBG of Rs. 42 Crs and allow it to replace it with other security instruments so that the interest of MSEDCL is also protected in terms of security against the obligations of AHPPL. Return of

PBG will enable it to execute the construction and commissioning of the project and further, it will also protect and maintain the rights of MSEDCL.

- 4.11. AHPPL has approached the Commission to exercise its regulatory powers for issuance of direction to MSEDCL to accept its prayer and for return of the PBG. The Hon'ble Appellate Tribunal for Electricity (APTEL) in Judgment dated 7 September 2018 in Appeal No. 336 of 2017 and 359 of 2017 titled Uttar Pradesh Power Corporation Ltd. v. Lanco Anpara Power Ltd. & Ors. has held that general regulatory power of Central/State Electricity Regulatory Commission are not done away with entirely and can be exercised in circumstances where there are no guidelines and in cases where there is a need to strike judicious balance between generating companies and Discom to prevent occurrence of any unforeseen or adverse event which was not contemplated by the parties at the time of execution of the contract, as under:

“10.25 We are of the considered view, based on the findings of the Apex Court cited hereinabove, that the general regulatory powers of the Central/State Commission are not done away in its entirety and can be exercised in the exceptional circumstances where there are no guidelines or in a situation which is not covered by the guidelines. As in the present case, such a change in law impacting several consequential issues is required to be dealt by the State Commission as an unforeseen event and to be decided by striking a judicious balance between the generator and the Discom/consumers.”

The present case is fit for the Commission to exercise its general regulatory powers.

5. MSEDCL in its reply dated 29 September 2020 has stated as under:

- 5.1. The Letter of Intent (LoI) dated 19 March 2019 was issued to AHPPL and thereafter the PPA was signed on 21 August 2019 with an effective date of 26 June 2019. AHPPL is bound by the terms and conditions of all these documents by virtue of it having participated in the bid process and thereafter having executed the PPA.
- 5.2. PBG provided by AHPPL as per the terms and conditions of the RfS can only be returned by MSEDCL upon achievement of the Commercial Operations Date. As per the RfS, AHPPL has unconditionally accepted the terms and conditions. There is no provision under the RfS and PPA which provide for any replacement of PBG. AHPPL cannot invoke the regulatory powers of the Commission to modify the RfS and the PPA. This ratio of law has further been settled in the judgment dated 29 July 2020 passed by the APTEL (in the matter of Haryana Power Purchase Centre Vs. Haryana Electricity Regulatory Commission and Anr) that an electricity regulatory commission cannot issue directions to modify/ change the terms of the contract between the parties. The relevant extract of the said judgment is extracted below:

“8.11 No doubt that the tariff will be determined by the State Commission only but, the final decision regarding signing of Power Purchase Agreement on the basis of tariff determined by the State Commission lies with the parties only. It is a commercial decision and the parties will take an independent decision taking into consideration their commercial interest in the long term during the tenure of the PPA without any influence from third party. This is an utmost important aspect. As such though the State Commission in exercise of its power under Section 62 of the Electricity Act, 2003 may determine the tariff but it cannot force either the generating company or the licensee to enter into a contract based on such tariff against their will/consent and cannot give direction to change the terms of the contract invoking inherent jurisdiction”

- 5.3. It is a settled position of law that courts cannot override or rewrite or amend or modify the terms of a contract entered between the parties. The terms of a contract mirror the intent of the parties which existed while entering into such contract, and such terms cannot be modified or altered through direction from the court, unless mutually agreed between the parties.
- 5.4. On perusal of the prayers sought by AHPPL vide its earlier petition filed in Case No. 78 of 2020, it seems as though AHPPL is trying to absolve itself from its obligation under the PPA, by directly seeking frustration of the PPA due to occurrence of various Force Majeure events (as alleged by it), instead of seeking extension of time for fulfilling its obligations under the PPA. Additionally, AHPPL has also attempted to seek return of the PBG which is currently in possession of MSEDCL, which clearly is an attempt to absolve itself of any financial liabilities qua its non-performance or non-fulfillment of its obligations under the PPA.
- 5.5. The present Petition is filed within 21 days of the date of the Commission's order granting relief to the Petitioner for the achievement of Financial Closure (FC) and SCOD.
- 5.6. ASHL boasts of being the largest solar IPP in India, having a portfolio of solar power projects with an aggregate capacity of more than 5500 MWp out of which over 2900 MWp is operational. It is therefore unfathomable by MSEDCL as to how the Petitioners cannot arrange financing for their Project and are requesting for release of INR 42 Crore PBG. It is also unfathomable that where the approximate cost of the Project should be about INR 1500 Crores (with an assumption of @5 Crore per MW), how is the release of INR 42 Crore going to assist AHPPL. Accordingly, MSEDCL apprehends that the Petitioners are in all likelihood not interested in completing its Project.
- 5.7. Considering the fact that the project completion has already delayed significantly, it is highly risky for MSEDCL to accept a performance security which is not as effective as a Bank

Guarantee. Hence, MSEDCL cannot accept the corporate guarantee as a performance security for this instant case.

- 5.8. AHPPL's reliance on the judgment dated 7 September 2018 passed by APTEL in Appeal No. 336 of 2017 and 359 of 2017 is highly misplaced. In the instant case before the Commission, the terms of the contract (RfS and PPA) are abundantly clear and reflect the true intentions of the party which existed at the time of submission of the bid proposal by ASHL and signing of the PPA. As stated above, it is a stated legal position of law that courts cannot intervene and alter/ modify the terms of a contract. This ratio of law is clearly applicable to the present case.
- 5.9. Through the reasoned Order dated 20 June 2020, the Commission has already granted further time to achieve FC and SCoD of the project, and accordingly, the reliefs against the impact of Force Majeure circumstances/exceptional circumstances as contended by the Petitioners have already been addressed, dealt and remedied. Hence, the reliefs sought in the instant application are uncalled for and do not amount to any Force Majeure or exceptional circumstances as contended by the Petitioners.

6. AHPPL in its rejoinder dated 30 October 2020 has stated as under:

- 6.1. AHPPL is making all reasonable efforts towards Project execution and has acquired more than 650 acres of land and also appraisal process of Loan sanction with Rural Electrification Corporation Limited (REC Limited) is going on, which establishes the intent of AHPPL and progress in the construction of said 300 MW Solar Power Project
- 6.2. It is requested that the said PBG of Rs. 42 Crores be returned to utilize the margin money and other collateral securities to fund towards the construction and commissioning of the project within the prescribed timelines in accordance with the letter and spirit of the Order dated 20 June 2020. It is submitted that the same would provide AHPPL much needed financial help required to undertake and execute the project, in light of the cascading effect of the pandemic which still continues to persist.
- 6.3. It has to be the intent of both the parties to mitigate the difficulties arising from the uncontrollable, unforeseen, unprecedented effect of the pandemic, the resultant lockdown, disruption of supply chain, financial uncertainty. MSEDCL has itself approached the Commission on many counts due to the adverse impact of the pandemic. It has even sought to alleviate problems faced by its consumers due to the pandemic on various occasions.
- 6.4. The Ministry of New and Renewable Energy (MNRE), vide resolution dated 25 September 2020, amended the tariff-Bidding Guidelines for procurement of grid-connected solar power

whereby it has notified that a Letter of Undertaking from Indian Renewable Energy Development Agency (IREDA)/ Power Finance Corporation Limited (PFC)/ REC Limited (REC) would have the same effect as that of a bank guarantee:

“Procurer(s) may release the Bank Guarantees submitted by a Solar Power Generator as ‘Performance Bank Guarantee (PBG)’ if the Solar Power Generator is able to replace the same with “Payment on Order instrument”/Letter(s) of Undertaking from Indian Renewable Energy Development Agency Limited (IREDA) or Power Finance Corporation Limited (PFC) or REC Limited (REC) to pay in case situation of default of Solar Power Generator in terms of Power Purchase Agreement (PPA) arises. Solar Power Generators can seek such Letters(s) by offering due security to the above mentioned three non-banking financial institutions (IREDA, PFC & REC) for seeking replacement of their Bank Guarantees already pledged with the Procurer(s).”

- 6.5. The Hon’ble Supreme Court of India vide its order dated 11 April 2017 in Energy Watchdog v. Central Electricity Regulatory Commission and Ors., on the use of regulatory powers of the Commission has held that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission and State Commission are bound by those guidelines and must exercise its regulatory functions, albeit under Section 79 and Section 86 of the Electricity Act, 2003 respectively, only in accordance with those guidelines.
- 6.6. The Commission can exercise its inherent regulatory powers and allow AHPPL to replace the BG by equally placed financial instruments i.e. bonds or corporate guarantee which will safeguard the interest of both the parties.
- 6.7. AHPPL has a pipeline of 1750 MW AC under-construction Solar Power Projects including the 300 MW PPA with MSEDCL. Remaining PPAs to the tune of 1450 MW are signed with SECI. Due to ongoing Pandemic situation and disruption in supply chain, all the timelines of the said projects are extended and accordingly AHPPL’s huge cash margin to the tune of Rs. 332 Crs in the form of BGs is stuck with various agencies including MSEDCL. It is also submitted that had the Global Pandemic situation not arrived, AHPPL would have got back its Rs. 290 Crs BG by end of December 2020, however, the same is now extended with revised COD timelines which is causing huge financial distress.
- 6.8. The intention of AHPPL to file the instant Petition within 21 days is merely to expedite the process of implementing the project. Due to the constrained timelines, it does not intend to waste any time and actively explore all the possible remedial options that can AHPPL in developing the project.

7. At the e-hearing through video conferencing held on 12 January 2021, the representative of the Parties reiterated their submissions. The Commission inquired from the Petitioners about the present status of the project and if Petitioners have filed similar Petition at any other Electricity Regulatory Commission. The Petitioners sought some time to file their reply.

8. AHPPL made the below additional submissions on 15 January 2021:

8.1. In compliance of the directions of the Commission, additional information is brought on record on the following:

- i. Details of the matters filed by ACME Solar Holdings Pvt. Ltd (ASHPL) (parent company of the AHPPL) pending before other regulatory forums.
- ii. Details of the land acquisition and FC achieved
- iii. Details of the payments made to vendors

Matters filed before other Regulatory Forums

8.2. The pandemic and its effects have greatly hampered the ability of developers to fulfill their obligations under the PPA, however the DISCOMS have been oblivious to the problems being faced by the Developers, as a result of which the Developers were forced to file petitions before various commissions to mitigate the situation and AHPPL being one such developer has filed petitions which are pending adjudication. The details of such petitions are mentioned hereinbelow:

Title of Case	Case No.	Forum	Petitioner	Respondent	Dispute and Status
ACME Solar Holdings Limited & Ors vs SECI & ors	484/MP/2020	CERC	ACME Solar Holdings Limited ACME Deoghar Solar Power Pvt. Ltd ACME Dhaulpur Powertech Pvt. Ltd.	Solar Energy Corporation of India (SECI) & PGCIL	Due to continuous force majeure events, ACME has exercised its contractual right to mitigate the issues being faced in fulfilling its obligation under the PPA. While the said petition is pending adjudication, notably without prejudice to the rights of the parties, collective efforts of parties including SECI and ACME are being undertaken to resolve the same in the interest of implementing the Projects.

Title of Case	Case No.	Forum	Petitioner	Respondent	Dispute and Status
ACME Solar Holdings Limited & Ors vs SECI & ors	483/MP/2020	CERC	ACME Solar Holdings Limited ACME Phalodi Solar Energy Pvt. Ltd ACME Raisar Solar Energy Pvt. Ltd	SECI & PGCIL	Due to continuous force majeure events, ACME has exercised its contractual right to mitigate the issues being faced in fulfilling its obligation under the PPA. While the said petition is pending adjudication, notably without prejudice to the rights of the parties, collective efforts of parties including SECI and ACME are being undertaken to resolve the same in the interest of implementing the Projects.
ACME Solar Holdings Limited & Ors vs SECI & ors	1732 of 2020	RERC	ACME Solar Holdings Limited ACME Aklera Powertech Pvt Ltd	SECI	Due to continuous force majeure events, ACME has exercised its contractual right to mitigate the issues being faced in fulfilling its obligation under the PPA. While the said petition is pending adjudication, notably without prejudice to the rights of the parties, collective efforts of parties including SECI and ACME are being undertaken to resolve the same in the interest of implementing the Projects.

- 8.3. AHPPL has sent letters to SECI requesting to reduce the PBG from 5-10% to 3% of the value of the contract owing to the Office Memorandum dated 12 November 2020 on Performance Security issued by the Ministry of Finance (O.M). The said O.M. is made applicable to all the existing contracts/tenders concluded till 31 December 2021 and such reduced percentage of the said Performance Security shall continue for the entire duration of the contract and shall not increase beyond 31 December 2021.

Land acquisition and FC achieved

- 8.4. AHPPL has acquired 1119 acres of land which is sufficient to execute 300 MW solar power project. The details of the land acquisition and the expenses incurred on land and land development till date are as below:

Month of Acquisition	Lease*	Sale*	Grand Total*
Aug	417	11	429
Sept	203		203
Oct		42	42
Nov	219	227	445
	839	280	1119

* Area in Acres

Expenses incurred for 300 MW Project	Amount
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Lease	1,62,15,840
Lease paid by LF	35,00,000
Lease – Special Approval	66,15,360
Purchase	13,30,85,500
LF Charges + GST	1,00,22,778
Stamp Duty – Lease	19,83,883
GST on Lease Rent – Through NFA	8,30,390
Total	17,22,53,751

8.5. AHPPL has achieved FC and has intimated MSEDCL about the same vide letter dated 27 November 2020 which contains the requisite details of the land acquired for the project. The required financial assistance for the completion of the project has also been sanctioned to AHPPL vide letter dated 24 November 2020 by the Rural Electrification Corporation (REC). It is submitted that by achieving FC, AHPPL has fulfilled one of its crucial obligations as stipulated under the PPA which clearly demonstrates its intention to execute the Project.

Payments made to vendors

8.6. AHPPL has made certain payments to the vendors post the passage of order dated 20 June 2020, the details of which are mentioned hereinbelow:

Particulars	Vendor	Inv No	Inv Date	Amount	Material	Remarks
Pre-Operatives & Fin Cost	Luthra & Luthra	LL2/20-21/G00640	27.08.2020	32,19,232	Preops	TSR expenses
Pre-Operatives & Fin Cost	RRECL	Advance	12.10.2020	35,40,000	Preops	Advance Paid for RRECL Registration fees
Pre-Operatives & Fin Cost	REC	44582	24.11.2020	67,96,800	UABC	TRANSACTION FEE
Pre-Operatives & Fin Cost	REC	LLC Fees	18.12.2020	6,99,740	Preops	LLC Fees in Advance
Pre-Operatives & Fin Cost	REC	44728	29-12-2020	5,82,21,200	UABC	TRANSACTION FEE
				7,24,76,972		

8.7. Upon perusal of the abovementioned information and the willingness to fulfill its obligation under the PPA, bearing in mind the spirit and letter of the order dated 20 June 2020, the Commission may exercise its regulatory powers for issuance of direction to MSEDCL to allow the prayers of the AHPPL and return PBG for successful completion of the project.

9. On 21 January 2021, MSEDCL filed its written submissions:

9.1. AHPPL vide its letter dated 30 November 2020 informed MSEDCL that it has already received a sanction of Rupee Term Loan equivalent to Rs. 1152 Crores from REC on 24

November 2020. Having received sanction of such loan amount, the prayers of the Petitioners qua the return of PBG of Rs. 42 Crores (which is not even 5% of loan sanctioned) now seem infructuous and unnecessary.

- 9.2. Petitioners may not really be interested in completion of the Project for reasons stated in the reply, and that except the PBG of Rs. 42 Crores, there is no other immediate and/or enforceable remedy available with the Respondent so as to seek completion of Project by the Petitioners.
- 9.3. The value of PBG submitted by the Petitioners as per the bidding documents is already in line with the OM dated 12 November 2020 issued by MNRE, which has been referred by the Petitioners to support their case. With regard to the OM dated 12 November 2020, the following is pointed out:
- a. It is applicable for future bids;
 - b. The value of PBG is to be reduced from existing 5-10% to 3% of the contract value.
- 9.4. The PBG submitted by the Petitioners is already on the lower side for an amount equivalent to ~3% of the contract value, hence, any reliance on the OM dated 12 November 2020 by the Petitioners is absolutely unnecessary.
- 9.5. Petitioners have further relied on the ‘Amendments to the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects’ dated 25 September 2020 issued by MNRE wherein the alternative of PBG have been mentioned. The relevant part of Clause 11.2 is reproduced below for ready reference:

“11.2.1 Performance Guarantee (PG), to be fixed by the Procurer [but not to be more than 4% (four per cent), in case of site specified by the Procurer, and 5% (five per cent), in case of site selected by the Solar Power Generator, of the Project cost, as determined by CERC, if any, for the financial year in which the bids are invited or the estimated project cost] to be submitted at the time of signing of the PPA, in the form of:

(a) Bank Guarantee(s);

OR

(b) "Payment on Order instrument"/Letter of Undertaking to pay in case situation of default of solar power generator in terms of Power Purchase Agreement (PPA) arises, from Indian Renewable Energy Development Agency (IREDA)/Power Finance Corporation Limited (PFC) and REC Limited (REC);"

EMPHASIS SUPPLIED

- 9.6. Although MSEDCL is not agreeable to replacement of PBG with any of the instrument mentioned by the Petitioners, however, it is pointed out that in the instant case, the

Petitioners, as per their letter dated 30 November 2020 having submitted the documents for achievement of FC, is seeking to replace the PBG with such instruments i.e., some bonds or corporate guarantee, which have not even been mentioned in the notification relied upon by the Petitioners. Further, at no instance has the Petitioners submitted to provide alternate instruments as mentioned in the above referred notification of MNRE amending the bidding guidelines. This again raises the Respondent's apprehensions qua the intentions of the Petitioners towards their seriousness in completion of the Project.

- 9.7. Further, as the Petitioner have submitted documents required for achievement of FC, it is clear that the Petitioners have completed major activities such as land procurement, financial tie up i.e loan of approximately Rs. 1152 Crores from REC and it is also learnt during the course of hearing that, the Petitioners have placed orders for the modules. As such, all these highlight the fact that release of mere Rs 42 Crores against BG is not the need of the hour as far as the PPA with MSEDCL is concerned. MSEDCL should not be compelled to release the PBG in order to meet the financial crunch of the ASHL in any of the projects developed by it, if any, and that too beyond the PPA provision.
- 9.8. In response to the Commission's query on any such replacement/reduction of Performance bank Guarantee has been received or requested by the Petitioners for their other projects in the country, Petitioners have just mentioned some petitions pending before various Commissions, however, the Petitioners have mentioned some cases pending before CERC and RERC, but have not brought on record or have not made any submissions to substantiate whether replacement of PBG has been sought by the Petitioners for any of their other projects being developed in the country. As far as the value of PBG is concerned, it is already at the reduced rate of 3% and hence, no further reduction is necessary even after considering the OM dated 12 November 2020 issued by MNRE. It clearly shows that the Petitioners are just vaguely trying to attempt to seek such remedies before the Commission, for which the finances are already in place.
- 9.9. PBG so provided, as per the terms and conditions of the RfS, can only be returned by the Respondent upon achievement of the Commercial Operations Date. In the alternative, AHPPL may consider replacing the BGs submitted by it with fresh Bank Guarantee (s) from ASHL, which is the holding company of AHPPL (which is also the bidder in the instant bid) and which clearly has all financial capabilities and resources to replace the BGs. It is a matter of fact that ASHL 2 has a solar power project's portfolio of almost 5.5 GW in the country and hence, is capable of replacing the BGs submitted AHPPL with its own Bank Guarantee.

Commission's Analysis and Rulings

10. AHPPL had previously filed a Petition in Case No. 78 of 2020 seeking directions to declare its PPA with MSEDCL as frustrated on account of force majeure and discharge the parties from their respective responsibilities, obligations and liabilities and also to direct MSEDCL to return its PBG.
11. The Commission in its Order dated 20 June 2020 in Case No. 78 of 2020 did not find merits in the submissions of AHPPL and did not allow prayers of AHPPL. However, the Commission provided relief to AHPPL by extending the FC and SCoD and held as under:

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

(a) All Renewable Energy implementing agencies of the Ministry of New & Renewable Energy (MNRE) will treat lockdown due to COVID-19, as Force Majeure.

(b) The Renewable Energy implementing agencies may grant extension of time for RE projects, on account of lockdown due to COVID-19, equivalent to the period of lockdown and additional 30 (thirty) days for normalisation after end of such lockdown. Thus, the extension will be for the period of lockdown plus 30 (thirty) days. This will be a blanket extension - there will be no requirement of case to case examination. There will be no need to ask for any evidence for extension due to lockdown.

(c). 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.

(d). The extension on account of disruption in supply of RE equipment prior to lockdown shall be dealt separately for additional Extension of Time as per para 1 above.”

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

12. Present Petition has been filed by AHPPL and ASHL (Petitioners) requesting to direct MSEDCL to replace the PBG of Rs. 42 Crores, as submitted by AHPPL, with alternative options of:
 - a. Corporate Guarantee of Parent Company (or)
 - b. Bonds for the amount equivalent

Further, AHPPL has submitted that it has been adversely impacted due to the unprecedented situations and effects arising out of COVID-19 including severe financial crisis coupled with various other issues of obstruction of global supply chain, lack of logistics, etc. It has also submitted that it will utilize the refunded PBG amount towards raising margin money and other collateral securities to fund the construction and commissioning of the project within the prescribed timelines.

13. Opposing such request, MSEDCL contended that there is no provision under the RfS and PPA which provides for any replacement of PBG. MSEDCL has submitted that AHPPL has been trying to absolve itself of its obligation under PPA, initially by filing Petition under Case No. 78 of 2020 seeking frustration of PPA and now by seeking return of PBG, which is currently under MSEDCL's possession.
14. AHPPL has also highlighted the amendment to the tariff-Bidding Guidelines for procurement of grid-connected solar power notified by MNRE on 25 September 2020 whereby a Letter of Undertaking from IREDA/PFC/ REC would have the same effect as that of a bank guarantee:

“Procurer(s) may release the Bank Guarantees submitted by a Solar Power Generator as ‘Performance Bank Guarantee (PBG)’ if the Solar Power Generator is able to replace the same with “Payment on Order instrument”/Letter(s) of Undertaking from Indian Renewable Energy Development Agency Limited (IREDA) or Power Finance Corporation

Limited (PFC) or REC Limited (REC) to pay in case situation of default of Solar Power Generator in terms of Power Purchase Agreement (PPA) arises. Solar Power Generators can seek such Letters(s) by offering due security to the above mentioned three non-banking financial institutions (IREDA, PFC & REC) for seeking replacement of their Bank Guarantees already pledged with the Procurer(s).”

The Commission notes that the amendment to the tariff-Bidding Guidelines for procurement of grid-connected solar power provides the option of replacing PBG with Payment on Order instrument or Letter of Undertaking from IREDA/PFC/REC. However, the Petitioners have not offered any of the options as provided in the amended guidelines dated 25 September 2020.

15. The Commission notes that Petitioners have received the Rupee Term Loan equivalent of Rs. 1152 Crores from REC on 24 November 2020. The Petitioners have also acquired land for developing the project and have also achieved the FC. Further, it has made certain payments to the vendors for the development of the project. All such activities demonstrate the seriousness of the Petitioners/developer to execute the project.
16. The Commission further notes that in response to the Commission’s query raised during e-hearing about Petitions filed before other Electricity Regulatory Commission on the similar matter by the Petitioners, AHPPL in its additional submissions dated 15 January 2021 has provided a list of certain cases pending before different regulatory Commissions. However, with the submission made by AHPPL, it cannot be ascertained if the matter filed before these regulatory Commission is for replacement of PBG with any other instrument or for any other matter.
17. As far as Petitioner’s request to use regulatory powers, the Commission is of the opinion that such use of Regulatory Powers by the Commission is possible only under the circumstance when guidelines notified by the Central Government or PPA signed by parties do not have provisions to deal with issues at hand. However, in the present case, PPA clearly provides submission of PBG and conditions under which it can be returned. Under such circumstances, this Commission cannot go beyond the provisions of PPAs and directing return of PBG.
18. In view of above, the Commission opines that as there are no provisions available in the PPA to replace PBG with any other instrument as proposed by the Petitioners and also, the Petitioners have secured Rupee Term Loan from REC, the Commission is not inclined towards the Prayers of the Petitioners.
19. Hence, the following Order:

ORDER

1. Case No. 162 of 2020 is rejected.

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

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

