

**Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 78 of 2023

Case of ACME Heergarh Powertech Pvt. Ltd & ACME Solar Holdings Private Limited under Section 86 of the Electricity Act, 2003 and PPA dated 21 August 2019, seeking injunction against Maharashtra Electricity Distribution Company Ltd, from levying any penalty for shortfall in generation for FY 2022-23 due to force majeure events.

Coram

**Sanjay Kumar, Chairperson
Anand M. Limaye, Member
Surendra J. Biyani, Member**

1. ACME Heergarh Powertech Pvt. Ltd. (AHPPL)
2. ACME Solar Holdings Private Limited (ASHPL) : Petitioner (ACME)
V/s
Maharashtra State Electricity Distribution Co. Ltd. : Respondent (MSEDCL)

Appearance

- For the Petitioner : Mr. Sanjay Sen (Adv.)
Mr. Girik Bhalla (Adv.)
For the Respondent : Mr. Harinder Toor (Adv.)

ORDER

Date: 20 August 2024

1. The Petitioners, ACME Heergarh Powertech Pvt. Ltd. (AHPPL) & ACME Solar Holdings Private Limited (ASHPL) (Combined as **ACME**), has filed this petition on 21 April 2023 being Case No 78 of 2023, under Section 86 of the Electricity Act, 2003 (EA,2003) and the Power Purchase Agreement (PPA) dated 21 August 2019, seeking injunction against Maharashtra State Electricity Distribution Co. Ltd (MSEDCL) from levying any penalty for FY 2022-23 for under achievement of Capacity Utilisation Factor (CUF) and shortfall of generation from its 300 MW Solar project due to Force Majeure events and consequential relief.

2. Main Prayers of ACME are as follows:

a) Declare that lower CUF and shortfall in generation is a on account of Force Majeure Event being disruption of supply chain leading to delay in supply of solar modules;

b) Injunct MSEDCL from levying any penalty on AHPPL for shortfall in generation for FY 2022-23 due to reasons beyond the control of AHPPL;

c) Pass such other order/orders which this Hon'ble Commission may deemed fit and proper in the facts and circumstances of the case.

3. ACME in its petition has stated as follows:

3.1 This petition has been filed seeking injunction against MSEDCL from levying any penalty for FY 2022-23 for under achievement of CUF and shortfall of generation from its 300 MW Solar project due to Force Majeure events and consequential relief. The Solar Power Project of 300 MW capacity is located at Village-Bhadla, Tehsil-Bap, District-Jodhpur, State-Rajasthan. This project is for generation and sale of the power produced there from to MSEDCL under the PPA dated 21 August 2019 signed between ACME and MSEDCL.

3.2 ACME intimated MSEDCL about under-achievement of CUF for the first year in terms of article 5.5 of the PPA on account of the following force majeure events:

a. It had planned to install a total DC capacity of 444.75 MW but due to Force Majeure events i.e. outbreak of Covid-19 and disruption in supply chain, etc. only 333.19 MW DC capacity has been installed as on COD.

b. Due to lower DC capacity installed (333.19 MW) as compared to actual planned DC capacity (444.75 MW), ACME will not be able to achieve the CUF i.e. the minimum generation specified under Article 5.5 of the PPA.

c. Since the Force Majeure events are beyond ACME's control, no penalty ought to be levied by MSEDCL since Article 5.5.2 exempt it from payment of penalty if shortfall in generation is on account of Force Majeure events.

3.3 MSEDCL vide letter dated 13 June 2022 rejected ACME's request and stated that it is only concerned with the contracted AC capacity and not DC capacity. It was ACME's decision to install 333.19 MW instead of 444.75 MW, knowing well the impact of lower DC capacity on CUF. The actual CUF of the Project was 20.77%, as against the declared CUF in PPA of 29.75%.

3.4 ACMEs commissioned the project on 23 May 2022; therefore, it is seeking time to install the required DC capacity. In line with the MNRE Office Memorandum (OM) dated 25 January 2023, ACME will install the requisite DC capacity of 444.75 MW by 31 March 2024 and make up to MSEDCL the shortfall in supply in FY 2022-23 in the subsequent years.

3.5 Further, no penalty has been imposed on MSEDCL for non-fulfilment of its RPO. The Commission vide Order dated 07 September 2021 in Case No. 49 of 2021 while verifying MSEDCL's RPO compliance for FY 2019-20 has inter alia held that given the ongoing pandemic, no action ought to be taken against MSEDCL for non-fulfilment of RPO and has directed that shortfall in RPO may be carried over up to 31 March 2023.

4. MSEDCL vide its reply dated 22 September 2023 has stated as follows:

4.1. ACME partially and in phases synchronized and commissioned its Solar Power Project. It declared CoD of the Project on 25 May 2022 for full contracted capacity. The total COD capacity and total commissioned capacity is 300 MW AC / 333.19 MWp DC.

4.2. PPA dated 21 August 2019 refers to only AC capacity, and MSEDCL isn't concerned with DC capacity installed by ACME. Furthermore, ACME decided on lesser installed 333.19 MW DC capacity instead of 444.75 MW up to COD declaration, despite knowing impact of the same on CUF. Also, there was no relaxation of Article 5.5.2 of said PPA because of lower / lesser DC capacity installed by the Generator. More-over without prejudice, there wasn't submission of Force Majeure notice by ACME in this regard. Therefore, MSEDCL regarded ACMEs request as an afterthought and rejected the same.

4.3. The shortfall in generation of minimum energy by ACME, has resulted in shortfall of 1176.57 solar MUs in FY 2021-22 and 1174 solar MUs (provisional) in FY 2022-23. The Commission has not exempted MSEDCL for its shortfall in RPO compliance but has only allowed to carry forward the same and finally meet its cumulative shortfall by 31 March 2025.

4.4. In June 2023, MSEDCL duly recovered compensation of Rs. 7,88,97,981/- from ACME under Article 5.5.2 of said PPA dated 21 August 2019 for shortfall in minimum generation for its 1st year till 31 March 2023.

4.5. ACME already took the shelter of Force majeure event to avoid the liquidation damages and took more than maximum period of 27 months for commissioning of project. In case the commissioning of the project would have been delayed beyond Three (3) months from SCOD, the tariff would have been reduced.

4.6. Hence, ACME choose to commission the balance capacity and declare COD on 25 May 2022. Further, if the submission of ACME regarding commissioning of balance DC capacity is considered then, the entire PBG amount of Rs. 24 Crores should be en-cashed

and the tariff attached to such delayed capacity would be reduced to zero (as the delay from COD i.e. 25 May 2022 to expected date of commissioning of balance capacity i.e. 31 March 2024 is twenty two months).

- 4.7. ACMEs present Case is bad in law, as it is substantially barred as Res Judicata or Constructive Res Judicata. It is pertinent that present case is an extension of Case No. 7 of 2022 - as pleaded in Petition. This cause of action and issue(s) have already been fully and finally decided by the Commission in its Order dated 07 July 2022 in Case No. 7 of 2022.
- 4.8. On the one hand ACME on 23 May 2022 has commissioned and declared COD of said Solar Power Project, but on the other hand ACME also is informing that said Solar Power Project remains incomplete and that it is in the process of installing balance DC capacity of 112 MW and would be completed before March 2024. ACME can't be allowed to blow hot and cold at the same time i.e., in the same breath (i) declare COD and consequent completion of said Solar Power Project, and (ii) inform the incompleteness of said Solar Power Project – whilst seeking exemption from attendant compensatory levy & burden. ACME already took the shelter of Force majeure event to avoid the liquidation damages in terms of Clause 3.3 of PPA encashment of PBG for per day delay in not-commissioned balanced capacity.
- 4.9. ACME was and is cognizant that “Contracted Capacity” is defined under Article 1 of said PPA to mean the AC capacity of said Solar Power Project which shall be equal to 300 MW, and as such cannot resile therefrom by referring misleadingly in DC capacity.
- 4.10. Force Majeure events claimed by ACME have already been adjudicated by the Commission in Case No. 7 of 2022; and thereafter there isn't any afresh or further or other invocation by ACME of Article 8: Force Majeure of PPA. In any event, after said Order dated 7 July 2022, ACME has not given to MSEDCL under Articles 8.1(c) and 8.1(d) of PPA (i) notice of any event of Force Majeure, (ii) monthly report(s) of remedial measures, and/or (iii) notice of cessation of such event of Force Majeure and its effect. In absence of specific and complete compliance with said Article 8, the reference or reliance upon the same by ACME is baseless. Alternately and without prejudice, even reference to or reliance upon last sentence of Article 5.5.2 of said PPA doesn't assist ACME.
- 4.11. MNRE letter dated 25 January 2023 is ex-facie not applicable to facts & circumstances of present Case. The MNRE letter is regarding certain projects of Government agencies (SECI/NTPC/NHPC) which are yet to be decided upon and inchoate. The MNRE letter is inapplicable / irrelevant to ACME's Solar Power Project.
- 4.12. It is pertinent that Renew Solar Power Pvt. Ltd. (a similarly placed bidder like AHPPL) has timely commissioned its capacity of 300 MW contracted with MSEDCL, despite Covid-19 pandemic and its resultant supply chain disruption.

4.13. The compensation under said Article 5.5.2 is genuine and reasonable pre-estimate of compensation legally fixed by and between ACME and MSEDCL bearing in mind the background / context of said PPA and the RPO of MSEDCL under EA 2003 & applicable MERC Regulations. It is to meet its statutory / regulatory RPO that MSEDCL has duly executed long-term PPAs with RE Generators, like ACME.

4.14. The shortfall in generation of minimum energy by ACME, has resulted in shortfall of 1176.57 solar MUs in FY 2021-22 and 1174 solar MUs (provisional) in FY 2022-23. It is pertinent that the Commission has not exempted MSEDCL for its shortfall in RPO compliance but has only allowed to carry forward the same and finally meet its cumulative shortfall by 31 March 2025.

4.15. Hence, the Case filed by ACME deserves to be discredited and dismissed with Costs.

5. At the 1st E-hearing held on 10 November 2023: -

During the hearing ACME sought time for filing Rejoinder and accordingly requested for a short adjournment. Considering the request, the Commission adjourned the hearing and allowed ACME to file Rejoinder within 15 days.

6. ACME in its Rejoinder dated 19 December 2023 has stated that:

6.1 It is admitted position that outbreak of Covid-19 pandemic also led to disruption of supply chain in India and globally. This has also been recognised by Ministry of Finance (MoF) vide OM dated 19 February 2020, Ministry of New and Renewable Energy (MNRE) vide OMs dated 20 March 2020, 17 April 2020, 29 June 2021, 03 November 2021 and 25 January 2023. In fact, the Commission vide Order dated 20 June 2023 in Case No. 78 of 2020 and Order dated 07 July 2022 in Case No. 7 of 2022 has inter alia held that outbreak of Covid-19 and consequential disruption of supply chain is a Force Majeure event. In the present case also, shortfall in minimum generation is on account of supply chain disruption only, therefore, the present case will also be considered as a Force Majeure event.

6.2 Article 5.5.1 of the PPA provides that a minimum CUF of 29.75 % over the year is to be achieved to achieve CUF in the range of $\pm 10\%$ of the declared CUF for the entire term of the PPA. Article 5.5.2 states that failure to generate the minimum energy corresponding to the lower limit of CUF, makes ACME liable to pay compensation to MSEDCL. However, no party shall be in breach of performance of its obligations if performance was prevented due to a force majeure event.

6.3 Force Majeure prevented ACME from installing originally planned DC capacity of 444.75 MW (this was submitted in Detailed Project Report (DPR) to MSEDCL during financial closure) as against contracted capacity of 300 MW (AC). Shortfall in generation is due to the same Force Majeure Events that have already been allowed by the Commission vide Orders dated 20 June 2020 and 07 July 2022. Therefore, in accordance with Article 5.5.2

of the PPA, ACME is not liable to pay compensation to MSEDCL for shortfall in generation.

- 6.4 Present dispute could not have been raised earlier as the present issue came into light only after ACME achieved commissioning. After commissioning on 23 May 2022, ACME issued a Force Majeure on 13 June 2022 informing MSEDCL about likely shortfall in generation.
- 6.5 The present petition has been filed with respect to a separate cause of action. The Case No. 7 of 2022 dealt with extension of SCOD on account of Force Majeure events that impacted the Project and partial relief (extension of SCOD) was granted by the Commission from 26 November 2021 to 31 December 2021, however, the relief was sought beyond such timeline. The aforesaid period is not part of the present petition. Being a separate cause of action, bar of Res judicata will not apply to the present case.
- 6.6 As per the PPA, the project commissioning is achieved when all the equipment's as per rated capacity have been installed and energy has flown into the grid. As on the date of commissioning, ACME had successfully installed the solar modules equal to the 333.19 MW DC Capacity modules as ACME could only arrange 333.19 MW modules against 444.75 MW originally planned due to disruption in supply chain. Had ACME waited for the supply of complete modules for installing 444.75 DC capacity, the Project commissioning and commencement of power supply to MSEDCL would have been further delayed. Therefore, the Project was commissioned with the available 333.19 MW DC Capacity modules against the planned DC capacity of 444.75 MW.
- 6.7 Further, ACME has been diligently undertaking steps to ensure that the impact of Force Majeure event i.e. disruption in supply chain is normalised. Accordingly, ACME added the balance DC capacity as a prudent business utility and has installed the DC capacity of 442 MW as on date. Now with DC capacity installation close to planned capacity, ACME is achieving the declared CUF under the PPA.

7. At the 2nd E-hearing held on 07 May 2024:

After hearing both parties, the Commission directed ACME to file additional submission/ written arguments within seven (7) days, with a copy to MSEDCL and further directed MSEDCL to file its reply within seven (7) days, thereafter.

8. ACME in its written submission dated 22 May 2024 has stated that:

- 8.1 Reference to the Force Majeure clause in operational phase and performance of the project is mentioned in Article 5.5.2.
- 8.2 Admittedly, Covid-19 has been declared as epidemic/pandemic and hence Covid-19 and consequent lockdown correctly gets covered under definition of Force Majeure. MNRE

through its various Office Memorandums has recognized Covid-19 and subsequent supply chain disruption as a Force Majeure event. These Office Memorandums have been issued based on pandemic situation and provided relief to project developers in terms of timeline extensions to project milestones. These timeline extensions are typically for the construction phase of the project but at the same time parity with respect to projects which are in operational phase is warranted.

8.3 The present case is typical case wherein ACME have followed prudent utility practices and commissioned the project. LTOA is a mandatory pre-condition but for sake of project and to ensure commencement of supply of power, ACME resorted to STOA, at its own risk. The Commission's Order dated 27 December 2023 passed in Case No.56 of 2023 and Case No. 92 of 2023 has upheld termination of a PPA on account of continued force majeure event being the failure of MSETCL to provide unconditional No-Objection Certificate (NOC) for evacuation of power, which obstructed ACME from obtaining LTOA. The period in which penalty has been levied is the period during which power has been scheduled under STOA.

8.4 ACME objected to the way MSEDCL has recovered the CUF penalty. MSEDCL has without giving any computation and advance notice, has recovered the penalty from energy invoices, details of which are as under:

Recovery Month	FY	CUF Penalty Amount
June 2023	FY 2022-23	7.89 Crores
May 2024	FY 2023-24	29.26 Lakhs*

** Mail dated 29.04.2024 has been received from MSEDCL regarding the amount of penalty which will be recovered from the March 2024 invoice.*

8.5 ACME's project achieved full commissioning on 23 May 2022. While computing CUF expected generation based on declared CUF ought to have been computed for effective period of 23 May 2022 to 31 March 2023 and not from 01 April 2022 to 31 March 2023. MSEDCL's computation of CUF penalty is wrong. Further, phased manner commissioning needs to be considered. In an ideal scenario, for first year annual CUF computation needs to be linked with 1st anniversary of the project and not the financial year. Clause 5.5.1 of the PPA provides for computation of CUF on completion of 1st year from COD.

8.6 ACME has fulfilled its supply obligation through STOA. In line with the rulings of the Commission in its Orders dated 27 December 2023 passed in Case No 56 of 2023 and Case No 92 of 2023. Under such circumstances when there is no surety of scheduling of power, it is not appropriate to penalise the RE generator, who opts to supply the power instead of backing out or frustrating the contract. It is pertinent to note that the referred project in above Order belong to ACME.

8.7 ACME has opted for STOA due to non-availability of requisite transmission corridors and transmission constraints, which is also a Force Majeure event. On 25 July 2023, CTU

granted MTOA to ACMEs project. Today ACME's project has not received LTOA and Force Majeure event has not yet ceased.

- 8.8 ACME's solar module suppliers were unable to deliver the requisite solar modules for balance DC capacity in a timely manner on account of disruption in supply chain caused by the COVID-19 outbreak in China despite ACME having timely executed Module Supply Agreement on 27 April 2021.
- 8.9 Had ACME waited for the supply of complete modules for installing 444.75 DC capacity, the Project commissioning would have been further delayed and it would have resulted in wastage of natural resources. Therefore, the Project was commissioned completely on 23 May 2022, as per prudent utility practices by ACME.
- 8.10 Post Commissioning, apprehending shortfall in generation for FY 2022-23 (i.e., first year of generation), ACME promptly informed and given notice to MSEDCL vide letter dated 13 June 2022 that there may be shortfall in generation since lower DC Panels, were installed at the time of commissioning. Thus, ACME complied with the requirements of the PPA of informing MSEDCL about occurrence of force majeure events in terms of Article 8.1(c)
- 8.11 Article 5.5.2 (dealing with the CUF of the project) and Article 8.2 provides that a party affected by Force Majeure Events shall not be in breach of its obligations and no payments shall be made by the affected party if it is unable to perform due to any Force Majeure event.
- 8.12 There was no bar under the PPA that restricted ACME from commissioning the Project with limited DC capacity and there is no bar in law to commission a project with lower DC Capacity. Installation of higher DC Capacity is envisaged in Article 5.5.4 of the PPA in as much as it permits ACME to repower the Project as per its requirement.
- 8.13 The present force majeure event was recognised by the Ministry of New and Renewable Energy (MNRE) vide its office memorandum dated 25 January 2023 and OM dated 01 May 2023, stating that solar projects wherein bids were finalised prior to 09 March 2021, are affected by Covid-19 related supply chain disruptions and, therefore, such projects may be given time for completion of projects up to March 2024.
- 8.14 Pertinently, the word used by MNRE is 'completion' and not 'commissioning'. Therefore, MNRE included in its fold, Projects such as those of ACME that had been commissioned with part DC capacity and could be completed by 31 March 2024. Therefore, MNRE considered the continued aftereffects of Covid-19 and related supply chain disruptions being continued upto 31 March 2024. Therefore, cessation of Force majeure did not occur even after the project was commissioned. Considering the same, the project was impacted during operational phase by the aforesaid Force Majeure Event.

8.15 ACME has successfully installed the balance DC capacity of 112 MW in December 2023 and now the total installed DC capacity is 443 MW. Post installation of complete DC capacity of 443 MW, ACME has been able to achieve the requisite CUF under the PPA and has achieved 25.1% in FY 2023-24 (as the requisite DC Capacity was completed in December 2023).

8.16 Since MSEDCL has suffered no loss and no financial injury has been caused to MSEDCL, it ought not have imposed penalty on ACME. This position has been upheld by the Hon'ble Tribunal in *PEL Power Ltd. v. CERC & Anr.: (2020) SCC OnLine APTEL 39*, held that parties claiming damages need to prove the actual loss incurred and the liquidated damages merely provide for an upper limit for compensation and actual loss has to be proved, nevertheless.

8.17 MSEDCL has erroneously contended that compensation under Article 5.5.2 is a genuine and reasonable pre-estimate of the compensation fixed by the parties. For an amount to be a genuine pre-estimate of damages, there has to be a mutual understanding that the amount mentioned in the contract is a genuine pre-estimate of loss suffered by aggrieved party.

8.18 Assuming without admitting that penalty is leviable on ACME, the correct approach as per PPA provision requires MSEDCL to serve notice to ACME regarding applicability of such penalty and in no manner MSEDCL can adjust it from the monthly energy bill. Thus, unilaterally adjusting the penalty from the energy bills by MSEDCL is not only a violation of settled principle of law but also against the terms of PPA.

9. MSEDCL in its written submissions dated 22 May 2024 has stated that:

MSEDCL has reiterated its earlier submissions in written submissions, hence the same is not repeated for brevity. Only additional submission is summarized below:

9.1 Under Article 5.5.1 of the PPA dated 21 August 2019, ACME is allowed to revise its declared CUF of 29.75 % only once at the time of first anniversary of the project i.e. on completion of 1 year from COD. Such revision of the CUF shall be done within 1 month of completion of 1 year from COD and no such revision shall be allowed thereafter. Also, under said Article 5.5.1, the declared CUF shall in no case be less than 19 % over a contract year, and ACME shall maintain generation so as to achieve CUF in the range of +/- 10 % of its declared value during the entire PPA. As such, on 23 May 2023, ACME revised its earlier declared CUF of 29.75 % to the CUF of 28.00 % of the project.

9.2 However, even after such revision in the CUF to 28 %, there continued to be shortfall in generation of minimum energy and consequent short supply of energy by ACME to MSEDCL during the FY 2023-24. It is pertinent that ACME achieved the deficient CUF of 25.04 % as against its revised CUF of 28.00 %, during the FY 2023-24.

9.3 In the circumstances, MSEDCL has lawfully recovered the compensation of Rs. 29,26,381/-, under Art. 5.5.2 of the PPA from the invoice for the month of April-24 of ACME. This compensation is bona fide, genuine and reasonable pre-estimate duly agreed under Art. 5.5.2 of the PPA.

Commission's Analysis and Ruling:

10. The Commission notes that the present petition has been filed by ACME opposing levy of penalty by MSEDCL on account of lower generation of electricity from its 300 MW solar project. ACME has signed PPA dated 21 August 2019 with MSEDCL post competitive bidding process under Section 63 of the Electricity Act 2003. ACME has contended that such lower generation is on account of Force Measure and hence penalty cannot be imposed as per provisions of the PPA.
11. The Commission also note that said solar project of 300 MW was commissioned in phases and declared CoD on 25 May 2022 which is after delay of 70 days from SCoD stipulated in the PPA. The Commission in its Order dated 7 July 2022 in Case No. 7 of 2022 has exempted delay of 34 days on account of Force Majeure Event of Covid-19 pandemic and subsequent disruption in supply chain. ACME has contended that because of the same Force Majeure Event i.e. disruption in supply chain, it has not able to achieve desirable generation and hence be exempted from penalty for under generation. MSEDCL has opposed such contentions of ACME.
12. Considering documents placed on records, the Commission frames following issues for its consideration in present matter:
 - a. Whether ACME be exempted from penalty for under generation on account of alleged Force Majeure affecting its performance?
 - b. Whether MSEDCL be allowed to recover penalty amount without establishing actual loss incurred?

The Commission is addressing above issues in following paragraphs.

13. Issue A: Whether ACME be exempted from penalty for under generation on account of alleged Force Majeure affecting its performance?

- 13.1. ACME has contended that Force Majeure event i.e. Covid-19 pandemic and subsequent disruption in supply chain has prevented it from installing originally planned DC capacity of 444.75 MW as against contracted capacity of 300 MW (AC). This Force Majeure Events have already been allowed by the Commission vide Orders dated 20 June 2020 and 07 July 2022. Therefore, ACME has contended that in accordance with Article 5.5.2 of the PPA, it is not liable to pay compensation to MSEDCL for shortfall in generation.

- 13.2. While opposing such contentions, MSEDCL stated that PPA dated 21 August 2019 refers to only AC capacity, and MSEDCL is not concerned with DC capacity installed. In case the commissioning of the project would have been delayed beyond Three (3) months from SCOD, the tariff would have been reduced. Therefore, MSEDCL contended that ACME decided on lesser installed 333.19 MW DC capacity instead of 444.75 MW up to COD declaration, despite knowing impact of the same on CUF.
- 13.3. In this regard, the Commission notes that PPA has following provision related to electricity generation in contract period:

“5.5 Capacity Utilisation Factor (CUF):

5.5.1 Criteria for generation:

The Power Producer has declared a CUF of 29.75% of their project at the time of executing this PPA and will be allowed to revise the same only once at the time of first anniversary of the project i.e. on completion of 1 year from COD. Such revision of the CUF shall be done within 1 month of completion of 1 (one) year from COD and no such revision shall be allowed thereafter. The declared CUF shall in no case be less than 19% over a contract year. They shall maintain generation so as to achieve CUF in the range of $\pm 10\%$ of their declared value during the entire PPA duration of 25 years either from the Commercial Operation Date in case of proposed/new solar power projects or from the date of execution of PPA for existing solar power projects. The lower limit will, however, be relaxable by MSEDCL to the extent of grid non-availability for evacuation which is beyond the control of the developer.

5.5.2 Shortfall in minimum generation:

During the PPA term, if for any contract year, it is found that the developer has not been able to generate minimum energy corresponding to the lower limit of CUF declared by the developer, such shortfall in performance shall make developer liable to pay the compensation provided in the PPA as payable to MSEDCL This will however be relaxable by MSEDCL to the extent of grid non-availability for evacuation, which is beyond the control of the developer. The amount of such penalty will be 25% (twenty-five per cent) of the cost of this shortfall in energy terms calculated at PPA tariff. This compensation shall be applied to the amount of shortfall in generation during the year. However, this compensation shall not be applicable in events of Force Majeure identified under PPA with trading company affecting supply of solar power by seller/power producer.”

As per above provision of PPA, at the time execution of 300 MW PPA, ACME has declared CUF of 29.75%, Further as provided in Article 5.5.1 of the PPA, ACME has revised such CUF to 28.00% with a year from date of CoD. However actual CUF achieved is 25.04% which lower than declared CUF. Therefore, MSEDCL has imposed

penalty for shortfall in minimum generation as per Article 5.5.2. However, ACME has contended that same Article 5.5.2 exempt levy of such penalty if such shortfall in generation is on account of Force Majeure.

- 13.4. The Commission notes ACME's contention that it has originally planned DC capacity of 444.75 MW as against contracted capacity of 300 MW (AC). But on account of Covid-19 pandemic and subsequent disruption in supply chain, it could have installed only 333.19 MW (DC) capacity and declared CoD of the project 25 May 2022. If it has waited for longer period, then supply of solar power would have been delayed. As lower quantum of DC capacity has been installed on account of Force Majeure, it has led to shortfall in generation.
- 13.5. The Commission notes that it is normal practice in solar industries to install higher DC capacity for getting AC output at higher CUF. As bidding document mentions only AC contracted capacity with minimum CUF, it is up to selected bidder to quote higher CUF and accordingly plan for higher DC capacity. In present case, as stated by ACME, it has planned 444.75 MW of DC capacity so as to supply 300 MW AC capacity at CUF of 29.75%. But it has declared CoD of the project on 25 May 2022 after installing only 333.19 MW DC capacity.
- 13.6. The Commission notes that ACME's action of declaring CoD needs to be seen in accordance with provisions of PPA signed between parties. PPA has defined 'Commissioning' and 'Commercial Operation Date' as follows:

"Commissioning" with respect to 'the Project/ Unit as certified by RLDC/SLDC/DISCOM shall mean when all equipment's as per rated capacity has been installed and energy has flown into the grid.

" Commercial Operation Date" with respect to the Project / Unit shall mean the date on which the Project/ Unit is commissioned (certified by RLDC/SLDC/DISCOM) and available for commercial operation and such date as specified in a written notice given at least 30 days in advance by the Power Producer to MSEDCL.

As per above definition, commissioning is possible only after all equipment's as per rated capacity has been installed and energy has flown into the grid. As explained in earlier paragraph, PPA has contracted capacity in terms of 'AC' and it is upto developer to install higher DC capacity to get higher CUF. In present case, ACME has declared CoD of 300 MW AC capacity on 25 May 2022 by installing only 333.19 MW DC capacity. Once, CoD is declared, project cannot be considered as incomplete.

- 13.7. Further, the commissioning certificate dated 23 May 2022 (which has been duly signed by both the parties viz. MSEDCL and ACME) stated that the total commissioned capacity of the Solar power plant is 300 MW AC with corresponding DC capacity of 333.19 MW. It is important to note that ACME has commissioned its project in phases as follows:

Capacity		Status	Date of Commissioning
AC	DC		
50 MW	50.46 MW	Commissioned	30 March 2022
50 MW	50.52 MW	Commissioned	14 April 2022
100 MW	100.92 MW	Commissioned	02 May 2022
100 MW	131.29 MW	Commissioned	23 May 2022

Thus, ACME could have delayed CoD of last phase of project till it receives all DC panels as envisaged. As delay in CoD has implication under the PPA such as invocation of bank guarantee and thereafter reduction in PPA tariff, in the opinion of the Commission, ACME has taken commercial call to declare CoD of the project with lower quantum of DC panels.

- 13.8. Commercial decisions of the ACME to declare CoD with lower DC panels cannot be attributed as Force Majeure event. Although disruption in supply chain is Force Majeure event, once CoD of the project is declared, such Force Majeure event ceases to exist for such project. Post CoD of the project, operation period of the project starts. In operation period, developer has to maintain and operate the project. Force Majeure event of disruption in supply chain does not have any impact on maintaining and operating the project which has declared CoD on 25 May 2022. Hence, in the opinion of the Commission, ACME cannot claim any relief under Force Majeure for operation period.
- 13.9. It is equally important to note that based on PPA provisions, ACME has revised its CUF stipulated in PPA from 29.75% to 28.00% within a year from date of CoD. ACME did have option to reduce such CUF to 25.04% (which it has achieved in 1st year) and avoid such penalty for under generation, but it does not opt for that as such lower CUF will be then applicable for remaining 24 years of PPA and any excess power injection would get only 75% of PPA tariff. Thus, here also ACME has taken commercial decision.
- 13.10. ACME has relied upon MNRE notification dated 25 January 2023 and OM dated 01 May 2023, which allowed time for completion of projects upto March 2024 for solar projects whose bids were finalised prior to 09 March 2021. By relying on such notification, ACME has contended that it should get time upto 31 March 2024 for installing 444.75 MW DC module and should not be levied any penalty for under generation. In this regard, the Commission notes that such MNRE notification is applicable for the projects which was yet to be completed on date of issuance of such notification. But ACME has declared CoD of the project on 25 May 2022 i.e. before issuance of such MNRE notification. Once CoD is declared, project cannot be considered as incomplete. Hence, in the opinion of the Commission, said MNRE notification is not applicable to the present project of ACME.
- 13.11. ACME has also contended that its action of declaring CoD has made power available to MSEDCL at early dates. Further, it has been scheduling such power to MSEDCL under short term Open Access even though long term access is yet to be approved. In

the opinion of the Commission such justification for early commissioning cannot exempt ACME from performing its obligations (minimum generation) under the PPA.

13.12. The Commission also notes that ACME has also contended that computation of CUF/penalty is not correct, however not support it with any detailed computation and hence the Commission is not going into it. ACME has also objected to MSEDCL's action of deduction such penalty amount from its energy bill without providing any computation for the same. The Commission notes that this is just procedural objection and cannot impact merits of the matter. However, in future MSEDCL shall ensure that any such penalty be imposed /deducted only after giving clear notice as envisaged under the PPA.

13.13. In view of above analysis, the Commission rules that ACME is not affected by Force Majeure event during operation period and hence cannot claim any exemption from minimum generation obligation under the PPA. Accordingly, ACME has to pay penalty for under generation as per provisions of the PPA.

14. Issue B: Whether MSEDCL be allowed to recover penalty amount without establishing actual loss incurred?

14.1. AHPPL has contended that for claiming any liquidated damages, MSEDCL has to demonstrate actual loss incurred. ACME contended that no penalty has been imposed on MSEDCL for non-fulfilment of its RPO.

14.2. While opposing such contention, MSEDCL stated that the Commission has not exempted MSEDCL for its shortfall in RPO compliance but has only allowed to carry forward the same and finally meet its cumulative shortfall by 31 March 2025. It has further contended Article 5.5.2 of the PPA has fixed the compensation which is legally binding.

14.3. In this regard, the Commission notes that APTEL in its Judgement dated 12 January 2015 in Appeal No. 154 of 2013 & I.A. No. 222 of 2013 (M/s. Lanco Kondapalli Power Limited vs Andhra Pradesh Electricity Regulatory Commission &Ors) categorically held that it is very difficult to compute the actual loss due to breach of contract by a generating company to the Distribution licensee. The relevant para reads as below:

51. We agree with the contentions of Learned Senior Counsel for Respondent nos. 2 to 7 that in view of the difficulties in calculating the actual damages, suffered by a party due to nonsupply of electricity by another party, a pre-calculated liquidated damages on pre-estimated basis are agreed between the parties in the PPAs for breach of contract. Electricity is accounted for on the basis of 15 minutes time block for each day and the demand for electricity varies during the day depending on the time of the day and also varies in different seasons. The Distribution Companies also have contracts with a number of generating stations and also buy electricity in the short term market to meet their varying demand from different hours of the day. Sometimes, due to mis-

match between the demand and availability of electricity load shedding is also resorted to. Due to non-availability of power from a contracted source due to delay in COD of the project, the distribution licensee may have to carry out load shedding or procure power from alternate sources which may be more expensive. It is very difficult to compute the actual loss due to breach of contract by a generating company to the Distribution licensee. For this reason a provision is kept in the PPA for Liquidated Damages at a pre-estimate of the loss as agreed between the parties at the time of entering into the PPA. (Emphasis added)

Above ruling of the Hon'ble APTEL is squarely applicable in present matter also. Shortfall due to under generation of electricity during operation period is akin to shortfall in energy due to delay in CoD.

14.4. As Article 5.5.2 (reproduced in earlier part of Order) of the PPA has clear provision of computing penalty for under generation of electricity, MSEDCL is entitled to recover penalty in accordance with such provisions of the PPA.

15. Hence, the following Order:


ORDER

The Petition in Case No. 78 of 2023 is rejected.

**Sd/-
(Surendra J Biyani)
Member**

**Sd/-
(Anand M. Limaye)
Member**

**Sd/-
(Sanjay Kumar)
Chairperson**


(Dr. Rajendra G. Ambekar)
Secretary

