



नई दिल्ली  
NEW DELHI

याचिका संख्या /Petition No.: 19/MP/2018

कोरम/Coram:

श्री पी. के. पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson  
डॉ. एम. के. अय्यर, सदस्य/ Dr. M.K. Iyer, Member  
श्री आई. एस. झा, सदस्य/ Sh. I.S. Jha, Member

आदेश दिनांक /Date of Order: 11<sup>th</sup> of December, 2019

**IN THE MATTER OF:**

Petition under Section 79(1)(f) of the Electricity Act, 2003 and the other applicable provisions of the Act in relation to the disputes having arisen under the Power Purchase Agreement dated 11.04.2016 between Talettutayi Solar Projects Four Private Limited (TSPFPL) and Solar Energy Corporation of India.

**AND IN THE MATTER OF:**

M/s Talettutayi Solar Projects Four Private Limited (TSPFPL)  
304, ILD, Trade Centre,  
Sector 47, Sohna Road,  
Gurgaon- 122001

**...Petitioner**

Versus

1. Solar Energy Corporation of India Ltd.  
1st Floor, A-Wing,  
Prius Platinum Building  
D-3, District Centre, Saket  
New Delhi 110017
2. Kotak Mahindra Bank Limited  
Through the Branch Manager,  
1st Floor, JMD Regent Square, MG Road,  
Gurgaon- 122022
3. Maharashtra State Electricity Distribution Company Ltd.  
Prakashgad, 5<sup>th</sup> Floor,  
Anant Kanekar Marg,  
Bandra (E),  
Mumbai- 400051

...Respondents

**Parties Present:** Shri Sanjay Sen, Senior Advocate, TSP(4)PL  
Shri Madhavan Srivatsava, Advocate, TSP(4)PL  
Shri Puneet Singh Bindra, Advocate, TSP(4)PL  
Shri Sanampreet Singh, Advocate, TSP(4)PL  
Ms. Radhika Dubey, Advocate, TSP(4)PL  
Shri Shatrajit Banerji, Advocate, TSP(4)PL  
Shri M.G. Ramachandran, Senior Advocate, SECI  
Ms. Poorva Saigal, Advocate, SECI  
Shri Shubham Arya, Advocate, SECI  
Ms. Tanya Sareen, Advocate, SECI

### आदेश/ ORDER

1. The Petitioner, M/s Talettutayi Solar Projects Four Private Limited, is a solar developer engaged in the business of setting up, installation, operation and management of solar energy plant and other renewable energy projects. The Petitioner has set up a solar power project based on photo voltaic technology of 50 MW capacity. The Petitioner has filed petition under Section 79 (1) (f) read with Section 79 (1) (b) of the Electricity Act, 2003 in relation to the disputes arising out of the Power Purchase Agreement (hereinafter referred to as 'PPA') dated 11.04.2016. The Petitioner has filed the original petition on 18.01.2018. However, the Petitioner requested the Commission that it may be allowed to amend petition. The request

of the Petitioner was accepted by the Commission on 26.07.2018 and the Petitioner filed the amended petition on 09.08.2018.

2. The Respondent No. 1, Solar Energy Corporation of India (hereinafter referred to as 'SECI'), is a Government of India Enterprise under the administrative control of the Ministry of the New and Renewable Energy (hereinafter referred to as 'MNRE'). SECI is a trading licensee within the meaning of the Electricity Act, 2003. One of its main functions is to implement and facilitate the Jawaharlal Nehru National Solar Mission (hereinafter referred to as 'JNNSM') for development, promotion and commercialization of the solar technologies in the country.
  3. The Respondent No. 2 i.e. Kotak Mahindra Bank Limited is the bank which has issued the bank guarantees in favour of Respondent No. 1 at the instance of the Petitioner. In the hearing held on 19.03.2019, the Respondent No.2 submitted that since it is not a necessary party to the Petition, its name may be deleted from the memo of parties. The Petitioner had no objection in this regard. Accordingly, the Commission directed that name of the Respondent No.2 be deleted from the memo of parties.
  2. The Respondent No. 3 is Maharashtra State Electricity Distribution Company Ltd, (hereinafter referred to as 'MSEDCL') a distribution utility created with the principal object of engaging in the business of distribution and supply of electricity across all districts in the State of Maharashtra.
  3. The Petitioner has made the following prayers through amended petition:
    - (a) *Direct Respondent No. 1 to accept August 10, 2017 as the Scheduled Commissioning Date or in the alternative, grant extension of time from May 10, 2017 to August 10, 2017 under Article 4.5 of the PPA;*
    - (b) *Restrain Respondent No. 1 from taking any penal action and/or claim damages against the Petitioner including under Article 3.3.3 and/or Article 4.6 and/or Article 9.2 of the PPA;*
    - (c) *Direct Respondent No. 1 to withdraw its letter dated September 29, 2017 bearing reference no. SECI/FIN/BG/2017-18/16166 wrongfully invoking the PBGs;*
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- (d) *Restrain Respondent No. 1 from invoking and/or encashing the two (2) Performance Bank Guarantees totaling to INR 15,00,00,000/- (Rupees Fifteen Crore Only) i.e. Bank Guarantees bearing No. 02980BG16003516 and 02980BG16003515 and direct Respondent No. 1 to forthwith release of the said Bank Guarantees;*
- (e) *Direct Respondent No. 1 to withdraw its letter/email dated October 05, 2017 reducing the applicable tariff;*
- (f) *Set aside Respondent No. 1's letter dated October 05, 2017 whereby the direction has been passed by Respondent No. 1 reducing the applicable tariff;*
- (g) *Direct Respondent No. 1 to make payment in full towards the pending invoices of the Petitioner for the Project;*
- (g1). *Direct Respondent No. 1 to release the entire amount of monies amounting to INR 15 Crore due in favour the Petitioner which have been wrongly withheld by Respondent No.1 from the invoices bearing reference nos. 2017-18/11/003; 2017-18/12/004; SA/TT4/ MH/BD/2018/003; SA/TT4/ MH/BD/2018/006 pursuant to Consent Order dated 21.02.2018 passed in OMP (1) (Comm) 410 of 2017 by the Hon'ble High Court along with interest @ 15% p.a.(as per Clause 10.3.3 of PPA).*
- (h) *Direct Respondent No. 1 to forthwith release monies with respect to the Viability Gap Funding;*
- (i) *Direct Respondent No. 1 to issue Letter of Credit in terms of Article 10.4.2 of the PPA;*
- (j) *Pass any or such further orders as may be deemed fit and proper in the facts and circumstances of the case; and*
- (k) *Award costs of the present Petition to the Petitioner.*

**OR IN THE ALTERNATIVE**

- (a) *Since the disputes are arbitrable in nature, the matter may be referred to arbitration and an arbitral tribunal may be constituted accordingly, if this Commission deems fit and proper;*
- (b) *Pass any or such further orders as may be deemed fit and proper in the facts and circumstances of the case; and*
- (c) *Award costs of the present Petition to the Petitioner.*

## **BRIEF FACTS OF THE CASE**

4. On 04.08.2015, the Government of India issued JNNSM Guidelines for implementation of scheme for 2000 MW Grid connected Solar PV Power Project under Phase-II-Batch-III, State specific VGF Scheme
5. On 27.08.2015, SECI invited proposals from various SPDs by RfS No. SECI/JNNSN/P-2/B-3/RFS/MH/082015 for development of cumulative capacity of 500 MW in the State of Maharashtra on the basis of Build-Own-Operate by way of e-reverse auction process.
6. On 10.03.2016, SECI issued Letter of Intent (hereinafter referred to as 'LoI') in favour of the Petitioner for development of solar power project, generation and sale of solar power.
7. On 29.03.2016, the Petitioner in accordance with the RfS and LoI furnished two irrevocable and unconditional Performance Bank Guarantees for a total amount of Rs. 15 Crores.
8. On 11.04.2016, the Petitioner executed PPA with SECI for a period of 25 years. The parties also executed a VGF Securitisation Agreement.
9. On 10.06.2016, the Petitioner applied for connectivity.
10. On 11.07.2016, the Petitioner requested for Line-In-Line-Out (hereinafter referred to as 'LILO').
11. On 20.07.2016 and 29.08.2016, the Petitioner sent reminders to SECI for approval of LILO.
12. On 30.08.2016, SECI granted permission for LILO.
13. On 04.11.2016, SECI executed a Power Sale Agreement (hereinafter referred to as 'PSA') with MSEDCL.
14. On 08.11.2016, the Government of India declared demonetisation of certain denominations of Indian Currency notes.

15. On 29.11.2016, MNRE extended time for Financial Closure and Condition Subsequent till 31.01.2017.
16. On 30.11.2016, SECI extended the date of financial closure from 10.11.2016 to 31.01.2017 (i.e. period of 82 days).
17. On 02.12.2016, the MNRE issued Office Memorandum which, inter alia, provided that time till 31.01. 2017 for complying with the requirements of Financial Closure may be allowed without levying penalty.
18. On 08.12.2016, MSETCL (State Transmission Utility) raised Demand note for Service Line-cum-Development (hereinafter referred to as 'SLD')
19. On 26.12.2016, the Petitioner submitted SLD for plant side.
20. On 04.02.2017, MSETCL gave approval for SLD.
21. On 01.03.2017, 07.04.2017 and 02.05.2017, the Petitioner submitted application for approval of Point of Supply.
22. On 06.03.2017, 24.03.2017 and 03.04.2017, the Petitioner sought help from SECI regarding the 'Right of Way'
23. On 03.04.2017 and 12.04.2017, the Petitioner informed SECI specifically giving details of causes of delay in the execution of the project including the delay already condoned by SECI and sought extension in SCoD without levy of any penalty. However, the same was not allowed by SECI.
24. On 08.05.2017, the Petitioner requested SECI for extension of SCoD from 10.05.2017 to 10.08.2017 without invoking the Bank Guarantees on account of Demonetization, ROW, Lack of Support from Regulatory Authorities.

25. On 16.06.2017 & 23.06.2017, the Petitioner again requested SECI for extension of SCoD to 10.08.2017 on account of delay in approval of line clearance by MSETCL.
26. On 28.07.2017, the Petitioner again sought extension of SCoD from SECI.
27. On 10.08.2017, the project was commissioned by the Petitioner.
28. On 29.09.2017, SECI invoked Two Performance Bank Guarantees totaling Rs. 15 Crores.
29. On 04.10.2017, the Petitioners approached the Hon'ble Delhi High Court Under Section 9 of the Arbitration and Conciliation Act, 1996 for restraining SECI from invoking the said Performance Bank Guarantee by way of a temporary injunction. The Hon'ble High Court, directed the parties to maintain the status quo and further restrained the bank to make payments to SECI with respect to encashing the said Bank Guarantees.
30. On 05.10.2017, SECI informed the Petitioner that the tariff agreed in terms of the PPA has been reduced by 1.00 paise.
31. On 12.10.2017, Commissioning Certificate was issued mentioning that the project was commissioned on 11.08.2017.
32. On 24.10.2017, the Petitioner requested SECI to issue the Letter of Credit due since 09.01.2017 and also sent several reminders thereafter.
33. On 09.11.2017, the Petitioner submitted two invoices dated October 03, 2017 and November 06, 2017 for the power supplied by it to Respondent No. 1. The Petitioner received a revised JMR format from the Respondent No. 1. The Petitioner raised its objection with regard to the same vide letter dated November 9, 2017
34. On 30.12.2017, SECI released part payment towards the Invoice dated 03.10.2017 while the invoice dated 06.11.2017 remains unpaid.

35. On 10.01.2018, Petition under Section 79 (1) (a) of the Electricity Act was filed before this Commission.

### **SUBMISSIONS OF THE PETITIONER IN THE PLEADINGS AND HEARINGS**

36. The Petitioner has submitted that Respondent No.1 (SECI) invited proposals by its Request for Selection vide RfS. No. SECI/JMNSM/P-2B-3/RfS/MH/082015 dated August 27, 2015 and prescribed the technical and commercial terms and conditions for selection of the Bidders for undertaking the development of aggregate capacity of 500 MW grid connected solar PV power projects in the state of Maharashtra under the JNNSM Phase-II Batch-III, Tranche-I on “Build Own Operate” basis. The Petitioner submitted its bid for a capacity of 50MW under category B for a pre-determined tariff of INR 4.43/- per kWh which was accepted by the SECI. On 10.03.2016, a Letter of Intent was issued in favour of the Petitioner for development of the Solar Power Project, generation and sale of solar power under the JNNSM. The contracting parties executed PPA on 11.04.2016 (effective date as 10.04.2016) for a period of 25 years from the date of commissioning and the Petitioner was allotted a 50 MW solar project in the State of Maharashtra. The Petitioner had also furnished two irrevocable and unconditional bank guarantees amounting to INR 15,00,00,000/- (Rupees Fifteen Crores Only) towards performance security for due and punctual performance of its obligations in terms of and in the manner provided under Article 3.3 of the PPA. A VGF Securitisation Agreement was also executed wherein under, the Petitioner was eligible to receive VGF support to the extent of INR 23,00,00,000/- (Rupees Twenty Three Crores Only). The Project was to be commissioned by the Petitioner within a period of thirteen (13) months from the date of the signing of the PPA of the Effective date i.e. by 10.05.2017. The Petitioner has submitted that it being fully committed towards successful completion of the Project invested close to Rs. 411,00,00,000/- (Rupees Four Hundred Eleven Crores Only) in the Project.
37. The Petitioner has submitted that for the Project to be implemented successfully and in time, it was extremely critical that the relevant State agencies involved in implementation of the Project were in complete sync and understanding of their roles and responsibilities in the implementation of such projects. Conscious of this fact, Section 5 of the RfS provided as follows:-



*“5.1. Role of State Nodal Agencies*

*It is envisaged that the State Government shall appoint any Agency as a State Level Agency which will provide necessary support to facilitate the required approvals and sanctions in a time bound ' manner so as to achieve commissioning of the Projects within the scheduled Timeline,-This may include facilitation in the following areas :*

- Coordination among various State and Central agencies for speedy implementation of projects*
- Support during commissioning of. projects and issue of commissioning certificates”*

38. The Petitioner has submitted that in order for all the State agencies to be aware of their roles and responsibilities in the implementation of the Project, it was of utmost importance that the Respondent No. 1 executed Power Sale Agreement prior to or simultaneously with signing PPA with the Petitioner.
39. The Petitioner has submitted that there was delay in execution of the project on account of Demonetization, ROW, Lack of Support from Regulatory Authorities. Accordingly, SECI was requested for extension of SCoD from 10.05.2017 to 10.08.2017 without invoking the Bank Guarantees. However, on 29.09.2017, SECI invoked the Performance Bank Guarantees. On 04.10.2017, the Petitioners approached the Hon'ble Delhi High Court Under Section 9 of the Arbitration and Conciliation Act, 1996 for restraining SECI from invoking the said Performance Bank Guarantee by way of a temporary injunction. The Hon'ble High Court directed the parties to maintain the status quo and further restrained the bank to make payments to SECI with respect to encashing the said Bank Guarantees.
40. The Petitioner has submitted that SECI informed the Petitioner that the tariff agreed in terms of the PPA has been reduced by 1.00 paise since the project was commissioned on 11.08.2017. When the Petitioner submitted two invoices dated 03.10.2017 and 06.11.2017, SECI released only part payment towards the Invoice dated 03.10.2017 while the invoice dated 06.11.2017 remains unpaid. Hence the Petitioner filed the Petition.
- a. SECI has not suffered any loss on account of the alleged delay of CoD and therefore liquidated damages cannot be levied.*

41. The Petitioner has submitted that it is a well settled principle of law of damages that no party to a contract can seek compensation by way of damages from the other contracting party where the parties seeking compensation fails to plead and establish loss being suffered by it. SECI has failed to plead and/or prove any legal injury/loss being caused to it and hence, cannot be permitted to unjustly enrich itself by invoking the Liquidating Damages article under the PPA, thereby depriving the Petitioner of a huge sum of monies. SECI has not filed any counter claim nor sought any relief of set off or forfeiture of the amounts from any court. It is only after such claims were adjudicated by a Court, could SECI withhold any amounts. The amount encashed by SECI has not been transferred to MSEDCL/DISCOM. SECI, being a trading licensee cannot have encashed huge amounts under the guise of invoking the Liquidating Damages article especially when it has not suffered any loss. SECI has not received any claim from DISCOM nor is there any averment in the reply filed by SECI that the DISCOM is affected due to the said delay in execution of commissioning the project by the Petitioner.

42. The Petitioner has submitted that the PSA between SECI and the DISCOM does not provide any stipulated date from which power was to be supplied by SECI to the DISCOM. Any alleged delay in commissioning of the Project has not affected any of SECI's obligations to with respect to supply of power under the PSA. Therefore, no loss has been suffered by SECI under the PSA on account of delay in commissioning of the Project and consequently, SECI cannot claim any damages from the Petitioner for the same. The Petitioner has placed its reliance upon the judgment of the Commission in the case of *M/s Godawari Green Energy Limited (GGEL) v NTPC Vidyut Vyapar Nigam Limited* decided on 11.10.2017 and the Judgement of the Hon'ble Supreme Court of India in *Kailash Nath Associates v Delhi Development Authority and Another* (2015) 4 SCC 136.

***b. Grant of extension in Financial Closure without levy of penalty entitles the Petitioner for an equitable extension in SCoD***

43. The Petitioner has submitted that in terms of PPA, the Financial Closure was to be completed within a period of 7 months from the date of signing of the PPA. However, on account of various reasons beyond the control of the Petitioner including the event of demonetisation which was duly acknowledged as an event akin to *force majeure*, SECI vide its letter dated

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30.01.2017, granted extension of time without levy of penalty, in completion of financial closure upto 31.01.2017. The Petitioner was thus granted extension of 82 days (from 08.11.2016 (event of demonetisation) upto 31.01.2017. The total delay (assuming that the same is attributable to the Petitioner) in commissioning of the Project is 92 days.

44. The Petitioner has submitted that time and again SECI was requested that in terms of the PPA, the Petitioner was entitled to equitable extension in the SCoD besides extension of financial closure. The contents of the letter dated 30.01.2017 is contrary to the specific provisions of the PPA, since SECI did not grant extension of SCoD. The same would amount to a unilateral amendment to the PPA at the sole instance of SECI to the grave prejudice of the Petitioner.
45. The Petitioner has submitted that the contents of the Minutes of Meeting dated 29.11.2016 issued by MNRE as well as the contents of the letter dated 30.01.2017 granting extension without levy of penalty is an admission and acknowledgment on the part of SECI to consider demonetisation as an event deserving extension in financial closure and therefore SECI now cannot be permitted to retract from its position. In terms of the Article 4.5 of the PPA, SECI was empowered to grant extension only in cases contemplated under the said Article:

***“4.5 Extension of Time***

*4.5.1 In the event that the SPD is prevented from performing its obligations under Article 4.1 by the Scheduled Commissioning Date due to:*

- a. Any SECI Event of Default, or*
- b. Force Majeure Event affecting SECI, or*
- c. Force Majeure affecting the SPD*

*The Scheduled Commissioning Date and the Expiry Date shall be deferred for a reasonable period but not less than ‘day for day basis’, to permit the SPD or SECI through the use of due diligence to overcome the effects of the Force Majeure Events affecting the SPD or SECI, or till such time such event of default is rectified by SECI*

*4.5.2 [Void]*

*4.5.3 In case of extension due to reasons specified in Article 4.5.1(b) and (c), and if such Force Majeure Event continues even after a maximum period of three (3) months, any of the parties may choose to terminate the Agreement as per the provisions of Article 13.5*

*4.5.4 If the parties have not agreed, within thirty (30) days after the affected Party’s performance has ceased to be affected by the relevant circumstances, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred, any Party may raise the Dispute to be resolved in accordance with Article 16.*

*4.5.5 As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined shall be deemed to be the Scheduled Commissioning Date and the Expiry time for the purposes of the Agreement.”*

46. The Petitioner has submitted that SECI, by its conduct has acknowledged demonetisation as an event within Article 11 of PPA as akin to *Force Majeure* and SECI having granted extension in financial closure without levy of penalty is now estopped from retracting from the same. In accordance with Article 3.2.5 of the PPA, the Petitioner is entitled to an equitable extension in the SCoD in case of extension of date for financial closure. The relevant extract are as under:

*“3.2.4 In case of inability of the SPD to fulfil any one or more of the conditions specified in Article 3.1 due to any force majeure event, the time period for fulfilment of the Conditions Subsequent as mentioned in Article 3.1 shall be extended for a period of such Force Majeure event,*

*3.2.5 Provided that due to the provisions of Article 3.2.4, any increase in the time period for completion of conditions subsequent mentioned in Article 3.1, shall also lead to an equal extension in the Scheduled Commissioning Date. ...“*

47. The Petitioner has submitted that even if it assumed that there is a delay of 92 days in SCoD which is attributable to the Petitioner (since SECI has already granted an extension of 82 days in Financial Closure without levy of any compensation), SECI was under an obligation for grant of extension of an equal no. of 82 days in commissioning for the project. In view of the same, the delay in completion of project is 10 days (92 days – 82 days) only. Therefore, SECI should have only enquired 20% of the Performance Bank Guarantee on a per day basis in terms Article 4.6.1 of the PPA.

48. The Petitioner has submitted that overall 13 months are prescribed for commissioning of the Project out of which seven months are for financial closure. SECI having acknowledged and condoned 82 days delay on account demonetization for financial closure ought to have granted extension for same period for commissioning as delay in financial closure would automatically affect the commissioning of the Project.

*c. Delay in commissioning of the Project is especially on account of delay in execution of PSA*

49. The Petitioner has submitted that in accordance with Article 3.14.4 of the RfS, SECI was under an obligation to execute the PSA with the DISCOM back-to-back with the PPA. Since the PPA was signed on 11.04.2016, the PSA ought to have been signed and executed either before or simultaneously with the PPA. However, SECI had signed the PSA only on 04.11.2016 i.e. with a delay of almost 3 months. Hence, there was failure on part of SECI to duly sign the PSA with the concerned DISCOM. Schedule I of the PSA reads as ‘List of SECI-SPD PPAs’ and further says that the list is “to be filled after selection of Projects through the provisions of RfS...”. Thus, PPAs were to be entered with the SPDs after the execution of PSA between SECI and the Buying entity. The same is also in consonance to the MNRE Guidelines which mandate simultaneous signing of the PPA and PSA. The Petitioner has submitted that since SECI had failed to execute the PSA with MSEDCL, therefore there was lack of support from local authorities while commissioning the Project.

***d. Delay in commissioning of the Project was also for other reasons beyond the control of the Petitioner***

50. The Petitioner has submitted that due to announcement of ‘Demonetisation’ on 08.11.2016, there was scarcity of funds in the market. ‘Demonetisation’ impacted land levelling, land development activities that require daily labour to be paid in cash. In accordance with the Article 11, ‘Demonetisation’ falls within the ambit of force majeure since the Petitioner was in no control of the same and thus, financial closure could not be reached.

51. The Petitioner has submitted that on 03.04.2017, SECI was apprised of the fact that solar projects are best built on barren lands. In Maharashtra, reconciling the ownership histories was not easy and required a longer diligence. Also, the local authorities were not accustomed for supporting such a project. On 12.04.2017, SECI was informed that there were difficulties in acquiring right of way for transmission line. On 08.05.2017, the Petitioner asked for a further extension on account of issues of Demonetisation, Right of Way, lack of support from Regulatory Authorities. On 16.06.2017 and 23.06.2017, SECI was intimated of further delays on account of no line clearance by MSETCL, over certain line stringing issues. The above causes are akin to “force majeure” events for which the Petitioner ought not be held liable. The Petitioner has placed its reliance on *Petition No. 247/MP/2016 NTPC Limited vs Madhya Pradesh Power Management Company Limited*; *Petition No 95/MP/2017 Welspun Energy*

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*Private Limited vs. SECI* before the Commission and in similar cases *O.P. No. 51 of 2018, 53 of 2018, 55 of 2018* and *56 of 2018* before the Telangana State Electricity Regulatory Commission, Hyderabad.

*e. Admissions made by SECI that helps the case of the Petitioner*

52. The Petitioner has submitted that SECI in its reply to the petition has not made any averments:

- i) of any loss suffered on account of the alleged delay in commissioning of the Project by the Petitioner. SECI merely relied upon the Article 4.6 of the PPA hereunder wherein SECI in certain cases was contractually permitted to invoke Liquidated Damages Clause in case where the Petitioner has delayed the project.
- ii) that it has received any claim from any third party including any Discom on account of delay in supply of power caused by SECI on account of delay in commissioning of the Project by the Petitioner.

Rather, SECI has admitted to grant of extension of the time in financial closure for the reasons acknowledged by SECI including the event of demonetization declared by the Government of India. Therefore, having acknowledge the event of demonetization to be worth grant of extension in terms of the PPA, SECI could have granted the extension in financial closure on the condition that such extension shall not extend the date of scheduled commissioning. Therefore, when the Petitioner was granted an extension of time for achieving financial closure, the Petitioner also has to be given an extension with respect to SCoD under Article 3.2.5 of the PPA.

53. The Petitioner has submitted that SECI has admitted to the delay in execution of the PSA on its part. Such submissions of SECI are in aid of the Petitioner for grant of reliefs sought in the petition. The admitted delay of 7 months on the behalf of SECI itself is a ground alone to grant extension of time of 92 days of delay sought by the Petitioner.

*f. Reply filed by MSEDCL is not maintainable*

54. The Petitioner has submitted that the Commission has ordered vide Record of Proceedings dated 31.01.2019 to implead MSEDCL as a party to the present proceedings and strictly

directed it to file its reply by 21.02.2019 with an advance copy to the Petitioner. However, MSEDCL failed to file its reply as per the direction of this Commission despite having been served with the copy of the Petition on 09.02.2019. Further, the Petitioner with bona fide intent *vide* letter dated 22.02.2019 to MSEDCL, inquired if a reply had been filed by it. However no response was received from MSEDCL. However, MSEDCL filed its reply with the Commission at a belated stage on 26.04.2019 i.e. after the Order was reserved. From a bare perusal of the affidavit it appears that the reply was prepared on 09.04.2019, but was deliberately filed on 26.04.2019 which indicates that it was an afterthought with an ulterior motive to delay conclusion of proceedings and to frustrate the Petitioner and deprive it of its legitimate dues as claimed under the Petition. On account of the foregoing reasons, the reply filed by MSEDCL is not maintainable before the Commission and deserves to be rejected.

### **SUBMISSION OF RESPONDENT NO. 1 IN THE PLEADINGS AND HEARINGS**

a) **Extension of time granted on account of Demonetisation should enure to the extension of time for Commissioning**

55. The Respondent has submitted that vide letter dated 30.01.2017, SECI had granted additional time till 31.01.2017 for the Petitioner to fulfill the conditions subsequent provided under Article 3.1 of the PPA. The letter itself specifically and unequivocally states that the extension of time on account of Demonetisation is only for fulfilment of the conditions subsequent and not for the SCoD. The letter itself expressly states (as quoted above) that there shall not be any effect on the date of Scheduled commissioning date. The letter dated 30.01.2017 is also consistent with the decision of the MNRE, Government of India contained in the Office Memorandum dated 02.12.2016, which, inter alia, provides as under:

*“3. Demonetization:*

*The participants in the meeting were informed that several developers have represented MNRE/NTPC/SECI regarding the difficulties being faced by the solar project developers in fulfilling with the requirements of “Financial Closure” and “Conditions Subsequent” due to the Demonetization Order of Government of India and that some time has been requested by the solar developers for fulfilling with the said requirement. It was agreed that considering the practical problems in the short run, due to Demonetization, time till 31<sup>st</sup> January, 2017, without penalty, for complying with the requirements of Financial Closure, may be allowed. However, it*

*shall have no effect on the Effective Date of Financial Closure or the Scheduled Commissioning Date as per the respective PPAs.”*

***Legal basis for issue of Office Memorandum dated 02.12.2016 of the Government of India and Extension of time granted by SECI***

- 1) The Office Memorandum was issued by the MNRE in pursuance to the meeting held on 29.11.2016 with representatives of the Solar Power Developers and was an accommodation shown in respect of the achievement for financial closure, considering the temporary impact of the demonetisation. The Office Memorandum was issued in pursuance to the stipulation and powers contained in the Guidelines, namely, Clause 4.4 of the Guidelines dated 04.08.2015 which reads as under:

*“4.4 Power to Remove Difficulties*

*If any difficulty arises in giving effect to any provision of these guidelines or interpretation of the guidelines or there is a requirement to modify the guidelines for better implementation the matter will be referred to a Committee constituted by MNRE for this purpose Thereafter clarifications /modifications rectification of anomalies may be issued with approval of Secretary MNRE”*

- 2) In any event, the Government of India being the Authority to issue the Guidelines in exercise of the powers under section 63 of the Electricity Act, 2003, has also the power to issue clarification, variation, modification and also to the extent necessary the waiver of the conditions.

56. The Respondent has submitted that Petitioner as well as the other SPDs duly accepted the decision contained in the Office Memorandum dated 02.12.2016, acted upon it and did not challenge the same on the ground that the Office Memorandum could not have stipulated that there will be no effect on the date of the SCoD. It is, therefore, not open to the Petitioner now to contend that part of the stipulation contained in the letter dated 30.01.2017 is not to be made applicable while take advantage of the extension of time for fulfilling the conditions subsequent. Except for the letter dated 30.01.2017 providing for the extension of time for fulfilling the conditions subsequent, the Petitioner would have been liable to pay additional monetary compensation at the rate specified in Article 3.2 of the PPA. It is well-settled that a document is required to be accepted a whole and it is not open to a party to take advantage of part of the document while terming the remaining part as non-est. [Ref: Para 40 of ONGC



*Ltd. –v- Saw Pipes Ltd. (2003) 5 SCC 705; Super Poly Fabriks Ltd. –v- CCE, Para 8 of (2008) 11 SCC 398]*

57. The Respondent has submitted that in terms of Article 3.1.1 of the PPA, SECI is entitled to waive in writing, in part or in full the fulfilment of conditions subsequent. The opening part of Article 3.1 of the PPA reads as under:

*“ARTICLE 3: CONDITIONS SUBSEQUENT*

*Satisfaction of conditions subsequent by the SPD*

*The SPD agrees and undertakes to duly perform and complete all the following activities at SPD’s own risk and cost within seven (7) months from the Effective Date unless such completion is affected by any Force Majeure event or if any of the activities is specifically waived in writing by SECI”*

58. The Respondent has submitted that Article 17.3 of the PPA deals with the waiver and stipulates as under:

*“17.3 Waiver*

*17.3.1 No waiver by either Party of any default or breach by the other Party in the performance of any of the provisions of this Agreement shall be effective unless in writing duly executed by an authorized representative of such Party:*

*17.3.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement nor time or other indulgence granted by one Party to the other Parties shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right under this Agreement, which shall remain in full force and effect.”*

59. The Respondent has submitted that the legal implication of a waiver is summarized as under:
- i. The waiver is a discretion of the person in whom the authority to waive is vested. The other party cannot claim the exercise of waiver as a matter of right;
  - ii. It is open to SECI to waive either conditionally or unconditionally as SECI considers appropriate;
  - iii. It is open to SECI to waive only a specific part of the terms or conditions or provisions of the PPA such as waiving the timeline for fulfilment of condition subsequent for a limited period of two (2) months and not generally granting time for all purposes.
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60. The Respondent has submitted that it is open to SECI to waive only the time for fulfilling the conditions subsequent for the specified period i.e. until 31.01.2017 and not the commissioning date or the commencement of the supply of power. It is also open to SECI to provide for a condition that the waiver shall be restricted to the time for fulfilment of the conditions subsequent and shall not be considered as waiver for the time in regard to the commissioning of the power project.
61. The Respondent has submitted that it is also not necessary that if SECI waives the time for fulfilling the conditions subsequent that it should necessarily also waive the time for the commissioning date. Such an interpretation is completely contrary to Article 17.3.2 of the PPA. Thus, there is a legal basis for both the Central Government and SECI to have allowed a further period of time for fulfilling condition subsequent without generally extending the time for all purposes, particularly, for the commissioning of the units after the scheduled commissioning date. The Respondent has placed its reliance on the following judgments: *All India Power Engineer Federation v. Sasan Power Ltd. (2017) 1 SCC 487*; *Talwandi Sabo Power Limited –v- Punjab State Power Corporation Limited*; *Sikkim Subba Associates -v- State of Sikkim, (2001) 5 SCC 629*.
62. The Respondent has submitted that in view of the above, the attempt made by the Petitioner to place its claim for extension of time for achieving the commissioning on grounds of demonetisation and the decision of SECI to extend the time for fulfilling the conditions subsequent is misconceived and is liable to be rejected.

***Demonetisation is neither Force Majeure nor Change in Law for grant of relief under the PPA***

63. The Respondent has submitted that the PPA does not expressly provide or otherwise cover the demonetisation as either Force Majeure or Change in Law within the scope of Articles 11 and Article 12 of the PPA. Article 11 of the PPA is a restricted clause. Further, Demonetisation is specifically excluded under Article 11.4. Article 11.4.1 (e) expressly states that ‘insufficiency of finances or funds or the agreements becoming onerous to perform’ falls under Force Majeure exclusions. Insofar as the Change in Law is concerned, the Commission
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in the decision dated 29.03.2019 passed in Petition No. 238/MP/2017 in the matter of *Darbhanga-Motihari Transmission Company Limited –v- Bihar State Power transmission Company Limited and Ors.* has inter-alia held that “*the event of ‘Demonetization’ does not fall within the definition of ‘Change in Law’ event*”. In the absence of demonetization being a Force Majeure or Change in Law, there is no remedy provided under the PPA for either extension of time or otherwise a relief from the fulfilment of any condition.

***Parties can mutually agree on substitution of a term of a contract***

64. The Respondent has submitted that it is always open to the contracting parties to mutually agree on deviation from the terms of the PPA. In this regard Section 62 of the Indian Contract Act provides as under:

*“62. Effect of novation, rescission, and alteration of contract  
If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”*

65. The Respondent has submitted that in terms of the communication dated 30.01.2017 from SECI which was acted upon by the Petitioner, the parties had specifically agreed that due to demonetization, the time for fulfilment of the conditions subsequent only be extended without there being any effect on the SCoD.

***b) Delayed execution of the Power Sale Agreement on 04.11.2016***

66. The Respondent has submitted that the Petitioner has wrongly claimed that it was affected by the alleged delay on the part of SECI in executing the PSA with MSEDCL i.e. only on 04.11.2016 in place of executing the same by 10.05.2016.

***Wrong guidelines relied on by the Petitioner***

67. The Respondent has submitted that the Petitioner has referred to Clause 2.8.3 of the JNNSM Guidelines dated 25.10.2013 which reads as under:

*“2.8 Implementation Arrangement*

*2.8.3 Within 30 days of the date of issue of LoI, PPAs between SECI and the solar power developers for purchase of power from their projects will be executed. During this period, back-to-back PSAs will also be executed by SECI with the interested State Utilities/DISCOMs/ other Bulk Consumers for sale of solar power to them.”*

68. The Respondent has submitted that the Petitioner has referred to the Guidelines, Phase-II for Implementation of Scheme for setting up of 750 MW Grid-Connected Solar PV Power Projects under Batch-I dated 25.10.2013. However, the relevant and applicable Guidelines for the present matter is JNNSM Guidelines, Phase-II for implementation of scheme for 2000 MW Grid connected Solar PV Power Project under Batch-III, State specific VGF Scheme dated 04.08.2015. In this regard, the PPA defines the Guidelines in Article 1 as under:

“ARTICLE 1 DEFINITIONS AND INTERPRETATIONS

.....  
*“Guidelines” shall mean the “JNNSM Guidelines for selection of 2000 MW Grid Connected Solar PV Power Projects under Phase-II Batch-III” notified vide No. 32/2/2014-15/GSP dated 04<sup>th</sup> August 2015 including its subsequent amendments and clarifications.*

69. The Respondent has submitted that there is no provision in the governing Guidelines dated 04.08.2015 stipulating that the execution of the PSA between SECI and the Buying Entity (MSEDCL) should be within one month from the date of the PPA, between SECI and the Petitioner.

***Execution of PSA is not a Condition Subsequent to be fulfilled on part of SECI. PSA being executed on 04.11.2016 has no adverse impact. The plea raised is an after-thought***

70. The Respondent has submitted that Article 3.1 provides for various conditions subsequent to be fulfilled in regard to the PPA. There is no provision in Article 3.1 or otherwise in the PPA providing any time-limit for signing the PSA. Accordingly, there is no legal basis for the Petitioner to claim that there is any default on the part of SECI of not having executed the PSA within one (1) month from the date of PPA.

71. The Respondent has submitted that the plea of the non-execution of the PSA within one month from the date of the PPA has been raised as an after-thought for the first time after the execution of the PSA. The Petitioner should have approached SECI immediately, if the State

Authorities in Maharashtra did not proceed with any activities related to the implementation of the power project. To the contrary, for the first time, the Petitioner had raised this issue of the execution of the PSA only on 14.12.2016 which is after one month of execution of the PSA. Immediately when the issue was raised, SECI vide letter dated 19.12.2016 informed the Petitioner that the copy of executed PSA is available with MSEDCL and the same was also made available to the Petitioner.

72. The Respondent has submitted that the communications dated 25.11.2016, 03.04.2017, 12.04.2017 and 23.06.2017 as relied upon by the Petitioner establishes the following:
- i. There is no allegation that any activity has got affected on account of non-execution of the PSA during the period till 04.11.2016;
  - ii. The Authorities had called upon the Petitioner to undertake various activities and as a condition for proceeding with the works to be undertaken by them.;
  - iii. The Petitioner while seeking extension of time did not allege that there was any delay on account of non-execution of the PSA till 04.11.2016.
73. The Respondent has submitted that the Petitioner is wrongly alleging that PSA has not been executed in communication dated 09.05.2017, 28.07.2017 and 05.09.2017. This is patently erroneous since the PSA was executed on 04.11.2016 and the communications under reference are after 6-11 months of the execution of the PSA. The contents of these communications only deal with the clarification required by MSETCL on the application of PSA to certain aspects and not on the lack of execution of the PSA affecting the MSEDCL granting approval etc. In terms of Article 4.1 and 4.2 of the PPA, it is the responsibility of the Petitioner to take necessary steps and to convince the authorities for grant of necessary consents, clearances, approvals, permits, connectivity etc. Further, the letter dated 28.07.2017 is after the SCoD of 10.05.2017 and has been sent as an after-thought.

c) **Claim of delays attributable to the State Authorities**

74. The Respondent has submitted that Article 3 and Article 4 of the PPA provide that the SPDs shall be responsible for applying and obtaining all the consents, approvals, permissions etc. SECI has no obligation in regard to the same. These include the interconnection facilities with MSETCL, metering issue etc. The Respondent has placed its reliance on the judgement given by Hon'ble High Court of Delhi in the matter of *NTPC Vidyut Vyapar Nigam Limited – v- Precision Technik Private Limited*. In any case, there is no Force Majeure Event delaying the Petitioner from implementing the projects and, therefore, the delay cannot be a ground for extension of time. Furthermore, in terms of Article 11.5, it was incumbent on Petitioner to issue a notice of Force Majeure as a pre-condition for claiming relief. However, no notice of Force Majeure was issued.

d) **Liquidated Damages not admissible without proof of actual loss is contrary to settled principles**

75. The Respondent has submitted that the Petitioner has in fact mixed up the issues on compensation payable for shortfall in generation during the operation period (which is to the benefit of the buying utility) and the liquidated damages payable for the delay in the commissioning, which is to the account of the Payment Security Mechanism Fund maintained by SECI as per the Central Government's directions contained in the Guidelines dated 04.08.2015. The PPA broadly contains following three distinct and independent provisions for the monetary compensation to SECI to be paid by the Petitioner.

- i. Compensation to be paid for the delay in the fulfillment of the conditions subsequent as provided in Article 3.2 of the PPA.;
- ii. Liquidated Damages to be paid to SECI for the delay in the commissioning of the power project as provided in Article 4.6 of the PPA. The Liquidated Damages provided in Article 4.6.1 of the PPA is a specific ascertained sum of money;
- iii. After the commissioning of the power project and during the operation period, the compensation for the shortfall in the generation to be paid to buying utilities (MSEDCL) as provided in Article 4.4 of the PPA.

76. The Respondent has submitted that in the instant case, there were delays on the part of the Petitioners in fulfilling the conditions subsequent provided in Article 3 of the PPA; the obligations with respect to construction and development of the project as provided in Article 4 of the PPA; as well as in achieving the SCoD, which as per the PPA is 10.05.2017. On account of the non-achievement of commissioning by the SCoD, the Petitioner became liable to pay liquidated Damages as specified in the PPA.
77. The Respondent has submitted that in terms of Article 3.17 of RfS and Article 4.6 of the PPA dated 11.04.2016, SECI is entitled to the payment of liquidated damages from the Solar Power Developer for the delay in commencement of supply of power and for delay in making the contracted capacity available for dispatch by the SCoD i.e. by 10.05.2017 (13 month from the effective date i.e. 11.04.2016). The Petitioner commissioned the project only on 10.08.2017. There was, therefore, a delay from 10.05.2017 to 10.08.2017 i.e. 92 days and the Petitioner is required to pay the Liquidated Damages to SECI for such delay in terms of Article 4.6 of the PPA. There is a legal injury/loss entitling SECI to the recovery of liquidated damages on account of non-availability of power from the SCoD till the actual Commercial Operation Date.

***Settled principles in regard to liquidated damages***

78. The Respondent has submitted that as per settled law, a stipulation of Liquidated Damages could either be a genuine pre-estimate of damages or by way of penalty depending on the nature of the provision. If it is a genuine pre-estimate of damages, there is no requirement to prove damage or loss. If it is a penalty, there is a requirement to establish loss for getting a reasonable compensation. The Respondent has placed its reliance on Section 74 of the Indian Contract Act, 1872 dealing with liquidated damages, as interpreted by the Constitution Bench decision in *Fateh Chand case (1964) 1 SCR 515* in two (2) categories, namely, (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. The differentiation of the two (2) categories mentioned in *Fateh Chand's case* has been taken note in subsequent cases, namely: *Maula Bux (1969) 2 SCC 554*; *K.S. Subramasastri –v- K. S. Raghavan (1987) 2 SCC 424*; *ONGC –v- Saw Pipe Limited (2003) 5 SCC 705*; *Kailash Nath –v- Delhi Development Authority (2015) 4 SCC 136*; *Ultratech Cement v Sunfiled Resources, decision dated 21.12.2016 passed by Hon'ble*
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*High Court of Bombay in Appeal No.881 of 2005 in Arbitration Petition No.35 of 2004; Mahadeoprasad –v- Siemens (India) Limited 1933 ILR Vol. LX Cal. 1379.*

79. The Respondent has submitted that the issue whether the liquidated damages specified falls under the category of being a genuine pre-estimate of the loss that will be suffered or whether it is by way of penalty, has to be decided with reference to the time when the contract was entered into and based on circumstances then prevalent. If at the time of execution of the contract, the non-defaulting party acted in *terrorem* or unreasonably and imposed an exorbitant burden on the other party at the time when the contract was executed, it could be held to be a penalty. The Respondent has placed its reliance on *ONGC –v- Saw Pipe Limited (2003) 5 SCC 705; Kailash Nath –v- Delhi Development Authority (2015) 4 SCC 136; Mahadeoprasad –v- Siemens (India) Limited 1933 ILR Vol. LX Cal. 1379; Ringrow Case.*
80. The Respondent has submitted that if the sum named as liquidated damages is not by way of penalty, there is no necessity to enquire into actual loss and the agreement reached between the parties stipulating the sum is binding and is payable. What is required to be established is the legal injury, which is distinct from the quantum of loss to be proved as interpreted in: *Fateh Chand case (1964) 1 SCR 515; Maula Bux (1969) 2 SCC 554; Surjit Kaur –v- Naurata Singh (200) 7 SCC 379; ONGC –v- Saw Pipe Limited (2003) 5 SCC 705; Construction Design case AIR 2015 SCC 1282; Kailash Nath –v- Delhi Development Authority (2015) 4 SCC 136; BSNL case (2011) 1 SCC 394; Ultratech Cement v Sunfiled Resources, decision dated 21.12.2016 passed by Hon'ble High Court of Bombay in Appeal No.881 of 2005 in Arbitration Petition No. 35 of 2004; Mahadeoprasad –v- Siemens (India) Limited 1933 ILR Vol. LX Cal. 1379.*
81. The Respondent has submitted that the onus of proving that no loss whatsoever was suffered by the non-defaulting party as a result of the breach is on the defaulting party. It is for the defaulting party who wishes to avoid payment of liquidated damages to assume the burden of establishing no loss whatsoever. It is not for the non defaulting party to prove that it had incurred a loss. This has been interpreted in: *ONGC –v- Saw Pipe Limited (2003) 5 SCC 705; Construction Design case AIR 2015 SCC 1282; The decision of Bombay High Court in Ultratech Cement case dated 21.12.2016.*



82. The Respondent has submitted that when the claim for liquidated damages is in the field of regulatory regime such as Electricity Sector, the actual loss caused in monetary terms cannot be assessed and therefore it falls within the exception provided in *Maula Bux case (1969) 2 SCC 554*, *Kailash Nath –v- Delhi Development Authority (2015) 4 SCC 136*; *BSNL case (2011) 1 SCC 394*; *PTC case 2014 ELR (APTEL) 1243*; *Lanco case 2015 ELR (APTEL) 755*.
83. The Respondent has submitted that Appellate Tribunal for Electricity has already examined the issue of the liability to pay liquidated damages. The Tribunal has considered the difficulty in calculating the actual loss and held that since the compensation payable has been pre-estimated and is not penal in nature, there is no need to provide evidence that actual loss is incurred. The Respondent has placed its reliance on *PTC India Limited -v- Gujarat Electricity Regulatory Commission and Anr 2014 ELR (APTEL) 1243*; *Lanco Kondapalli Power Limited -v- Andhra Pradesh Electricity Regulatory Commission 2015 ELR (APTEL) 755*.
84. The Respondent has submitted that the Hon'ble High Court of Delhi has also recognized that liquidated damages as specified in the PPA should be awarded. The Respondent has placed its reliance on *Dalmia Solar Power Ltd. –v- NTPC Vidyut Vyapar Nigam Ltd vide Order dated 14.03.2017 in OMP (COMM) 120/2017*.
85. The Respondent has submitted that in terms of the principles settled by the Hon'ble Apex Court, it is for the Petitioner to prove that SECI had not suffered any loss and it is not for SECI to establish that it has suffered any loss, much less an actual loss. The legal injury in the present case (as in the case of *BSNL –v- Reliance Communications*) is writ large. The reliance placed by the Petitioner on the decision dated 11.10.2017 passed by the Commission in the matter of *M/s. Godawari Green Energy Limited -v- NTPC Vidyut Vyapar Nigam Limited* is misplaced. In the above matter, the Liquidated Damages claimed by the Respondent from the Petitioner was on account of shortfall in generation and supply of electricity. It is a well settled principle that applicability of a decision depends upon facts of that case and a little difference in facts may lead to a different conclusion.

e) **Miscellaneous Issues**

86. The Respondent has submitted that the Petitioner will only be entitled to make a claim in the VGF support if the Petitioner fulfils the conditions as prescribed in the VGF Securitization Agreement (VGFSa). For the ease of the SPDs, SECI Vide its E-mail dated 31.01.2018 informed all the SPDs including the Petitioner about the checklist of compliance documents (which are already detailed out in the VGFSa) to be furnished to SECI for processing the first tranche of VGF amount. This was done by SECI on voluntary basis and not as an obligation. The Petitioner has not fulfilled the requirements of VGF disbursement as per VGF Securitization Agreement.
87. The Respondent has submitted that the issue of Letter of credit has no relevance for the commissioning of the solar power project in accordance with the provisions of PPA or RFS. The Letter of credit is in respect of the payment to the Petitioner during the operation period namely after due Commissioning and Commercial Operation of the solar power project and generation and supply of electricity by the Petitioner. Obviously the issue of letter of credit is relevant after the date of commercial operation. The Opening of the letter of credit is not a condition precedent for construction and commissioning of the solar power project. Furthermore, SECI is a wholly owned Government of India undertaking and there can be no issue with regard to the payment security of the money due to the Petitioner. The letter of credit is being operationalized by the SECI in coordination with the procurers of electricity under the PSA.
88. Accordingly, the Petition is liable to be dismissed.

**SUBMISSION OF RESPONDENT 2 (MSEDCL)**

89. The Respondent No. 2 has submitted that there was delay in commissioning of project by the Petitioner. The Petitioner has commissioned its 50 MW solar PV project on 10.08.2017.
90. The Respondent No. 2 has submitted that SECI could not supply the power as committed in PSA (due to delay in commissioning of projects by the Petitioner) resulting in shortfall in fulfilment of RPO obligations set by the State Electricity Regulatory Commission. The

commissioning of the project has got delayed by 3 months as per SCoD. The resultant delay in SCoD has adversely affected the power procurement planning of MSEDCL to meet RPO obligation as set by the State Electricity Regulatory Commission. MSEDCL is in shortfall of about 1476 MUs for FY 2017-18 due to delay in supply of committed energy by SECI. Hence as per the provisions of PSA, MSEDCL is liable for seeking compensation from SECI. SECI, in turn, is seeking compensation from the Petitioner whereas it is MSEDCL who suffered due to delayed commissioning / non- commissioning of such projects.

91. The Respondent No. 2 has submitted that SECI is eligible for only 0.07 paisa/ KWh trading margin and hence SECI shall also pass on other compensations (by virtue of PPA) to MSEDCL. Hence, SECI is liable to pay compensation as set out in PSA and PPA, (towards encashment of PBGs and reduction in tariff) as the PSA and PPA is a back to back arrangement.
92. The sale and delivery of power by SECI to MSEDCL is on terms and conditions contained in the PSA and are enforceable on back to back basis as per terms and conditions in the PPA. Hence, MSEDCL is also eligible for compensation as per provisions under PPA.
93. The Respondent No. 2 has submitted that as per the above provisions of PSA and PPA, the compensations payable by Respondent No. 1/SECI to Respondent No.2/MSEDCL are as under:

**i) For Short supply of committed energy:**

As per Clause 6.8.2 of PSA dated 04.11.2016, if for a contract year Respondent No.1/SECI has not been able to supply minimum committed energy till 10 years i.e. 861.108 MUs, then such non-compliance make Respondent No.1/SECI liable to pay compensation to Respondent No.2/MSEDCL at the rate of RECs. During the first contract year, Respondent No. 1/SECI was supposed to supply for 11 months only (considering 10.05.2017 SCoD). The shortfall in minimum committed energy during contract year 2017-18, considering MUs on pro-rata basis, is calculated as under:

Contract Year	Contracted capacity	Minimum Energy Committed during Contract year (MUs) till 10 years	Minimum Committed Energy during Contract year on pro-rata (MUs)	Actual Energy Supplied during Contract year (MUs)	Short fall in Minimum Energy supplied in MUs
FY 2017-18	500 MW	861.108	766.74	414.614	352.126

The Respondent No.2/MSEDCL is in shortfall of meeting solar RPOs for FY 2017-18 and has to mitigate this shortfall by way of purchase of RECs. Hence Respondent No.2/MSEDCL is eligible for compensation towards shortfall in supply of energy at the rate of REC i.e. Rs. 1900/ MWh (max. clearing price for REC purchase in exchange) which is estimated to Rs. 66.90 Crores (for Batch-III).

**ii) Encashment of Performance Bank Guarantee of SPDs:**

It is to state that, as per clause 4.6.1 of PPA, Respondent No.1/SECI is liable to recover liquidated damages from SPD in terms of encashment of Performance Bank Guarantee (PBG) for delay in commencement of supply of power to Respondent No.1/SECI up to 3 (Three) months from Scheduled Commissioning Date (SCD). Accordingly, Respondent No.1/SECI is entitled to recover an estimated Rs 128.40 Crores from SPDs through encashment of PBGs for delay in commissioning of Batch-III projects. Thus, Respondent No.2/MSEDCL is also liable to get benefit of PBG amount so collected (around 128.40 Cr).

**iii) Reduction in tariff rate of Solar projects:**

As per clause 4.6.1 of PPA, if the project is delayed beyond three months, the pre-fixed tariff shall be reduced at the rate of half paisa (0.5 paisa) per kWh per day of delay for the remaining capacity of the project which is not commissioned. Accordingly, Respondent No.1/SECI should have revised the tariff for the projects delayed beyond three months of Scheduled Commissioning Date (SCD). However Respondent No.1/SECI has claimed the pre-fix tariff even for such delayed projects from Respondent No.2/MSEDCL. Hence, Respondent No.2 MSEDCL is liable to recover around INR Rs. 13.26 Cr. towards reduction of tariff rate of Solar projects by SECI.

94. The Respondent No. 2 has submitted that since MSEDCL is the buying utility and has already suffered heavy losses and therefore SECI should indemnify MSEDCL as per the provisions of the PSA and PPA as enumerated above.

**ANALYSIS AND DECISION:**

95. The Petition was admitted on 22.03.2018 and was listed for hearing on 26.07.2018, 12.12.2018, 31.01.2019, 19.03.2019 and was reserved for Orders on 16.04.2019. On 26.07.2018, the Petitioner had prayed before the Commission for seeking permission to amend the original petition. The request of the Petitioner was allowed by the Commission and the Petitioner filed the amended petition on 09.08.2018. We have carefully perused the records. The brief facts of the case are as under:
96. The Respondent No.1 (SECI) invited proposals by its Request for Selection dated 27.08.2015. The Petitioner (M/s Talettutayi Solar Projects Four Pvt. Ltd.) submitted its bid for a pre-determined tariff of INR 4.43/- per kWh. On 10.03.2016 SECI issued a Letter of Intent in favour of the Petitioner. The contracting parties executed PPA on 11.04.2016 with effective date as 10.04.2016 for a period of 25 years from the date of commissioning. The Petitioner furnished two irrevocable and unconditional bank guarantees amounting to Rs. 15,00,00,000/- (Rupees Fifteen Crores Only). A VGF Securitisation Agreement was also executed wherein under the Petitioner was eligible to receive VGF support to the extent of Rs. 23,00,00,000/- (Rupees Twenty Three Crores Only). The Project was to be commissioned by the Petitioner within a period of thirteen (13) months from the date of the signing of the PPA of the Effective date i.e. by 10.05.2017. The project was commissioned by the Petitioner On 10.08.2017. On 29.09.2017 SECI invoked two Performance Bank Guarantees. On 04.10.2017, the Hon'ble High Court, directed the parties to maintain the status quo and further restrained the bank to make payments to SECI with respect to encashing the said Bank Guarantees. On 05.10.2017, SECI informed the Petitioner that the tariff agreed in terms of the PPA has been reduced by 1.00 paise. On 09.11.2017, the Petitioner submitted two invoices dated 03.10. 2017 and 06.11.2017 for the power supplied by it to Respondent No. 1. SECI released part payment towards the Invoice dated 03.10.2017 while the invoice dated 06.11.2017 remains unpaid. The Petitioner has requested that the

SCoD may be revised to 10.08.2017 since there was delay attributed to SECI. **Per Contra**, the Respondents have submitted that extension in the Financial Closure without levy of penalty has been allowed by SECI in view of the Office Memorandum dated 02.12.2016 issued by Government of India. Further, as per PPA the date of SCoD is specifically mentioned as 10.05.2017. The project was commissioned on the 11.08.2017 which is beyond three months of SCoD mentioned in PPA. Hence, as per provisions of PPA they can levy Liquidated damages.

97. From the submissions of the parties, the following issues arise before this Commission:

***Issue No. 1:** Whether Respondent No. 1 can be directed to accept the Scheduled Commissioning Date as 10.08.2017 or in the alternative, an extension can be granted from 10.05.2017 to 10.08.2017 under Article 4.5 of the PPA? And Whether, Respondent No. 1 should be restrained from taking any penal action and/or claim damages against the Petitioner including under Article 3.3.3 and/or Article 4.6 and/or Article 9.2 of the PPA?*

***Issue No. 2:** Whether Respondent No.1 should be directed to withdraw its letter dated 29.09.2017 wrongfully invoking the Performance Bank Guarantees totaling to INR 15,00,00,000/- (Rupees Fifteen Crore Only)?*

***Issue No. 3:** Whether, Respondent No. 1 should be directed to withdraw its letter/email dated 05.10.2017 reducing the applicable tariff? And Whether Respondent No. 1 should be directed to release the entire amount of monies amounting to Rs. 15 Crores due in favour the Petitioner which have been wrongly withheld by Respondent No.1 from the invoices?*

***Issue No. 4:** Whether Respondent No. 1 should be directed to forthwith release monies with respect to the Viability Gap Funding? And Whether Respondent No. 1 can be directed to issue Letter of Credit in terms of Article 10.4.2 of the PPA?*

98. No other issues were pressed or claimed.

99. We now discuss the issues one by one:

***Issue No. 1:** Whether Respondent No. 1 can be directed to accept the Scheduled Commissioning Date as 10.08.2017 or in the alternative, an extension can be granted from 10.05.2017 to 10.08.2017 under Article 4.5 of the PPA? And Whether, Respondent No. 1 should be restrained from taking any penal action and/or claim damages against the Petitioner including under Article 3.3.3 and/or Article 4.6 and/or Article 9.2 of the PPA? And*

**Issue No. 2: Whether Respondent No.1 should be directed to withdraw its letter dated 29.09.2017 wrongfully invoking the Performance Bank Guarantees totaling to INR 15,00,00,000/- (Rupees Fifteen Crore Only)?**

100. The Petitioner has submitted that the PPA came into effect from 10.04.2016 and the Project was to be commissioned by the Petitioner within a period of thirteen (13) months from the date of the signing of the PPA of the Effective date i.e. 10.05.2017 subject to the Respondent No. 1 performing all its obligation under the PPA in a timely and organized manner. The Project was commissioned successfully on 11.08.2017. The Petitioner has submitted that SECI failed to comply with the critical obligation of execution of PSA. Also, there was delay of several days on part of State Authorities as under:

	Event	Application date	Approval date	Delay (days)
	<b>Delay on the part of State Authorities</b>			
1	Final Connectivity	10.06.2016	02.09.2016	84
2	Demand note	02.09.2016	08.12.2016	97
3	SLD	26.12.2016	04.02.2017	46
4	Earthing calculation and equipment layouts	09.03.2017	10.04.2017	30
5	Point of supply	01.03.2017	07.04.2017	36
6	Point of supply was again changed from plant end to S/S end		02.05.2017	61
7	Registration with MEDA			Several days
8	Line clearance from MSETCL	01.06.2017	28.06.2017	28
9	Absence of the Right of Way	06.03.2017	03.04.2017	28
10	Granting the LILO approval	11.07.2016	30.08.2016	50
	<b>Other reasons</b>			
11	Demonetization	08.11.2016		

101. The Petitioner has submitted that there was delay due to the procedural anomalies perpetrated by SECI and State authorities who led to a delay in commissioning of the Project for no fault of the Petitioner and the State lagged behind in the garb of procedural formalities and therefore, held up the commissioning of the Project till 10.08.2017. In view of above, an extension in SCoD should be granted from 10.05.2017 to 10.08.2017 under

Article 4.5 of the PPA and Respondent No. 1 should be restrained from taking any penal action and/or claim damages. **Per Contra**, Respondent No. 1 (SECI) has submitted that Articles 3 and Article 4 of the PPA provides that the Petitioner shall be responsible for applying and obtaining all the consents, approvals, permissions etc. SECI has no obligation in regard to the same. In any event, there is no Force Majeure Event delaying the Petitioner from implementing the projects and, therefore, the delay cannot be a ground for extension of time. Furthermore, in terms of Article 11.5, it was incumbent on Petitioner to issue a notice of Force Majeure as a pre-condition for claiming relief. However, no notice of Force Majeure was issued. In view of above the SCoD as mentioned in the PPA cannot be extended.

102. The relevant provisions of the PPA document executed on 11.04.2016 stipulates as under:

*“1.1 Definitions*

*Scheduled Commissioning Date ; shall mean 10.05.2017;”*

*“2.1 Effective Date*

*2.1.1 This agreement shall come into effect from 10.04.2016 and such date shall be referred to as the Effective Date.”*

*“3 ARTICLE 3: CONDITIONS SUBSEQUENT*

*3.1 Satisfaction of conditions subsequent by the SPD*

*The SPD agrees and undertakes to duly perform and complete all of the following activities at SPD's own risk and cost within seven (7) months from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by SECI:*

- a) The SPD shall obtain or apply (as applicable) for all Consents, Clearances and Permits required for construction of the Project as per the terms of this Agreement. The SPD shall also obtain all Consents, Clearances and Permits required for operation and supply of power to SECI before Commissioning of the Project;*
  - b) The SPD shall execute VGF Securitization Agreement (if applicable) with SECI as per format provided in Schedule-4 of this Agreement ;*
  - c) The SPD shall make Project financing arrangements and provide necessary certificates to SECI in this regard;*
  - d) The SPD shall make adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at the Delivery Point;*
  - e) The SPD shall sign a Transmission Agreement with CTU/STU/ Transmission Utilities confirming the evacuation and connectivity of the CTU/STU / Transmission Utilities system up to the delivery point of SPD by the Scheduled Commissioning Date; -*
  - f) The SPD shall produce the documentary evidence of the clear title and possession of the acquired land @ minimum 1.5 hectare/MW in the name of*
-



SPD;

- g) *The SPD shall be required to demonstrate/infuse cumulative capital in the form of Equity for an amount of at least Rs. 0.84 Cr./MW. The SPD shall be required to demonstrate / infuse cumulative capital in the form of Equity for an amount of at least Rs. 1.20 Cr./MW before the disbursement of first tranche of VGF. For avoidance of any doubt, the SPD not availing any VGF shall be required to demonstrate / infuse cumulative capital in the form of Equity for an amount of at least Rs. 1.20 Cr./MV/before the COD;*
- h) *The SPD shall fulfil the technical requirements according to criteria mentioned under Clause 2.6 (B) of JNNSM guidelines for selection of new projects and produce the documentary evidence of the same. The SPD shall also specify their plan for meeting the requirement for domestic content (if applicable).*

*The SPD shall submit to SECI the relevant documents as stated above, complying with the Conditions Subsequent, within seven (7) months from the Effective Date.”*

### *“3.3 Performance Bank Guarantee*

*3.3.3 If the SPD fails to commence supply of power from the Scheduled Commissioning Date specified in this Agreement or any further extension thereof granted by SECI, subject to conditions mentioned in Article 4.5, SECI shall encash the Performance Bank Guarantee without prejudice to the other rights of SECI under this Agreement.”*

## *“4 ARTICLE 4: CONSTRUCTION & DEVELOPMENT OF THE PROJECT*

### *4.1 SPD's Obligations*

*4.1.1 The SPD undertakes to be responsible, at SPD's own cost and risk, for:*

- a) obtaining all Consents, Clearances and Permits other than those obtained under Article 3.1 and maintaining all Consents, Clearances and Permits in full force and effect during the Term of this Agreement; and*
- b) designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the applicable Law, the Grid Code, the terms and conditions of this Agreement and Prudent Utility Practices; and*
- c) the commencement of supply of power up to the Contracted Capacity to SECI no later than the Scheduled Commissioning Date and continuance of the supply of power throughout the term of the Agreement;*
- d) connecting the Power Project switchyard with the Interconnection Facilities at the Delivery Point; and*
- e) owning the Power Project throughout the Term of Agreement free and clear of encumbrances, except those expressly permitted under Article 15;*
- f) maintaining its controlling shareholding (controlling shareholding shall mean not less than 51% of the voting rights and paid-up share capital) prevalent at the time of signing of PPA in the Company/Consortium developing the project up to a period of one (1) year after Commercial Operation Date. However transfer of controlling shareholding within the same Group Companies will be allowed with the permission of SECI even before one year period from COD subject to the condition that the management control remains within the same Group Companies; and*

g) *fulfilling all obligations undertaken by the SPD under this Agreement.*

*4.2 Information regarding Interconnection Facilities*

*4.2.1 The SPD shall be required to obtain all information from STU/ CTU / concerned authority with regard to the Interconnection; Facilities necessary to enable it to design, install and operate Plant and all interconnecting apparatus/ equipment on the SPD's side of the Delivery Point to enable delivery of electricity at the Delivery Point.”*

*“4.5 Extension of Time*

*4.5.1 In the event that the SPD is prevented from performing its obligations under Article 4.1 by the Scheduled Commissioning Date due to:*

*a) any SECI Event of Default, or*

*b) Force Majeure Events affecting SECI, or*

*c) Force Majeure Events affecting the SPD,*

*the Scheduled Commissioning Date and the expiry Date shall be deferred for a reasonable period but not less than day to day basis, to permit the SPD or SECI through the use of due diligence to overcome the effects of the Force Majeure Events affecting the SPD or SECI or till such Event of Default is rectified by SECI”.*

*“4.6 Liquidated Damages for delay in commencement of supply of power to SECI*

*4.6.1 If the SPD is unable to commence supply of power to SECI by the Scheduled Commissioning Date other than for the reasons specified in Article 4.5.1, the SPD shall pay to SECI, damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date as per the following:*

*1. Delay upto one(1) months - SECI will encash 20% of the total Performance BG on per day basis and proportionate to the Capacity not Commissioned.*

*2. Delay of more than one (1) month and upto three (3) months - SECI will encash the remaining Performance BG on per day basis and proportionate to the Capacity not Commissioned.*

*In case the commissioning of the Project is delayed by more than 3 months after the scheduled Commissioning Date, the pre-fixed tariff given in the Article 9.1 shall be reduced at the rate of half paisa (0.50) per kWh per day of delay for the delay in such remaining capacity which was not commissioned.”*

103. From the above, the Commission observes that the PPA come into effect from 10.04.2016 and Scheduled Commissioning Date was 10.05.2017. However, the Project was commissioned by the Petitioner on 11.08.2017. The Petitioner has cited various reasons for the delay of the commissioning of the project and has alleged that the delay in achieving SCoD was either due to SECI or State Authorities. As per Article 3 of the PPA, the Petitioner agreed to complete the activities mentioned as ‘Condition Subsequent’ at its own risk and cost within seven months from the Effective Date of the PPA viz. 10.04.2016, unless such completion is affected by any Force Majeure event or is specifically waived in writing by SECI. Therefore,

the Petitioner was to complete the activities included as 'Condition Subsequent' before 10.11.2016.

104. The Commission observes that Article 3.1 provides for various conditions subsequent to be fulfilled in regard to the PPA. There is no provision in Article 3.1 or otherwise in the PPA providing any time-limit for signing the PSA. The Commission observes that the Petitioner had raised this issue of the execution of the PSA only on 14.12.2016 which is after one month of execution of the PSA dated 14.11.2016. SECI vide letter dated 19.12.2016 informed the Petitioner that the copy of executed PSA is available with MSEDCL. In terms of Article 4.1 and 4.2 of the PPA, it is the responsibility of the Petitioner to take necessary steps and to convince the authorities for grant of necessary consents, clearances, approvals, permits, connectivity etc. The Commission further observes that the Petitioner was duty bound to obtain or apply (as applicable) for all Consents, Clearances and Permits required for construction of the Project as per the terms of the PPA and for operation and supply of power to SECI before commissioning of the project. The Petitioner was to execute VGF Securitization Agreement with SECI as per format provided in the PPA. Further, the Petitioner was to make adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at the Delivery Point and also to sign a Transmission Agreement with CTU/STU/ Transmission Utilities confirming the evacuation and connectivity of the CTU/STU / Transmission Utilities system up to the delivery point of Petitioner by the SCoD. The Petitioner was to fulfil the technical requirements according to criteria mentioned under JNNSM guidelines for selection of new projects and produce the documentary evidence of the same. An extension in SCoD can be granted under Article 4.5 of the PPA only in case of any SECI event in default or Force Majeure event affecting the contracting parties. Hence, the Commission is of the view that as per Article 3 and Article 4 of the PPA it was the duty of the Petitioner to complete the activities mentioned as 'Condition Subsequent' before 10.11.2016 unless and until the events were covered under Force Majeure i.e. Article 11 of the PPA.

105. The Petitioner has further submitted that due to announcement of '*Demonetisation*' on 08.11.2016, there was scarcity of funds in the market. In accordance with the Article 11, '*Demonetisation*' falls within the ambit of *force majeure* since the Petitioner was in no control of the same. The Petitioner has submitted that SECI has acknowledged *demonetisation* as an event within Article 11 of PPA as akin to *Force Majeure* and had
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granted extension without levy of penalty. In accordance with Article 3.2.5, the Petitioner is entitled to an equitable extension in the SCoD and extension in the date of financial closure. Since SECI has already granted an extension of 82 days in Financial Closure till 31.01.2017, SECI was under an obligation in accordance with Article 3.2.5 of PPA to provide for an extension of equal number of days in commissioning for the project. **Per Contra**, the Respondent No.1 has submitted that due to 'demonetisation', it has granted additional time till 31.01.2017 to the Petitioner to fulfil the conditions subsequent provided under Article 3.1 of the PPA in view of the Office Memorandum dated 02.12.2016 issued by the Government of India. Further, the PPA does not expressly provide or otherwise cover the 'demonetisation' as either Force Majeure or Change in Law within the scope of Articles 11 and Article 12 of the PPA. In the absence of 'demonetisation' being a Force Majeure or Change in Law, there is no remedy provided under the PPA for either extension of time or otherwise a relief from the fulfilment of any condition. Furthermore, in terms of Article 11.5, it was incumbent on Petitioner to issue a notice of Force Majeure as a pre-condition for claiming relief. However, no notice of Force Majeure was issued. Further, the Liquidated Damages payable in terms of Article 4.6 for the delay in the commencement of supply of power to SECI is an amount to be appropriated by SECI and not to be passed on to MSEDCL. Such amount is required to be deposited by SECI in a separate fund under Payment Security Mechanism to be maintained by SECI under the guidance of Ministry of New and Renewable Energy (MNRE). Hence the Petition may be dismissed.

106. The Commission observes that the relevant provisions of the PPA executed on 01.04.2016 stipulates as under:

*“3.1 Satisfaction of conditions subsequent by the SPD*

*The SPD agrees and undertakes to duly perform and complete all of the following activities at SPD's own risk and cost within seven (7) months from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by SECI: ....*

.  
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*The SPD shall submit to SECI the relevant documents as stated above, complying with the Conditions Subsequent, within seven (7) months from the Effective Date”*

*“3.2 Consequence of non-fulfilment of conditions subsequent*

*3.2.2 An extension without any impact on the Scheduled Commissioning Date, can however be considered on the sole request of SPD on payment of Rs. 10,000/- per day per MW to SECI.*

...

*3.2.4 In case of inability of the SPD to fulfil any one or more of the conditions specified in Article 3.1 due to any Force Majeure event, the time period for fulfilment of the Conditions Subsequent as mentioned in Article 3.1, shall also lead to an equal extension in the Scheduled Commissioning Date.”*

107. The Commission observes that the relevant extract of O.M. No.29/5(6)/2011-12/JNNSM(ST) dated 02.12.2016 stipulated as under:

*“3- Demonetization:*

*The participants in the meeting were informed that several developers have represented MNRE/ NTPC/ SECI regarding the difficulties being faced by the solar project developers in fulfilling with the requirements of "Financial Closure" and "Conditions Subsequent" due to the Demonetization Order of Government of India and that some time has been requested by the solar power developers for fulfilling with the said requirements. It was agreed that considering the practical problems in the short run, due to Demonetization, time till 31st January, 2017, without penalty, for complying with the requirements of Financial Closure, may be allowed. However; it shall have no effect on the Effective Date of Financial Closure or the Scheduled Commissioning Date as per the respective PPAs.”*

108. The Commission further observes that Article 11 of the PPA stipulates as under:

*“11. ARTICLE 11: FORCE MAJEURE*

*11.1 Definitions*

*11.1.1 In this Article, the following terms shall have the following meanings:*

*11.2 Affected Party*

*11.2.1 An affected Party means SECI or the SPD whose performance has been affected by an event of Force Majeure.*

*11.3 Force Majeure*

*11.3.1 A 'Force Majeure' means any event or circumstance or combination of events those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to*

*the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:*

- a) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado if and only if it is declared/ notified by the competent state/ central authority/ agency (as applicable);*
- b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action if and only if it is declared/ notified by the competent state/ central authority/ agency (as applicable); or*
- c) radioactive contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party.*
- d) An event of Force Majeure identified under SECI-Buying Utility PSA, thereby affecting delivery of power from SPD to Buying Utility.*

109. The Commission further observes that Article 11.4.1 (e) of the PPA stipulates as under:

*“11.4 Force Majeure Exclusions:*

*11.4.1 Force Majeure shall not include(i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an even of the Force Majeure:*

*...  
e) insufficiency of finances or funds or the agreements becoming onerous to perform”*

110. The Commission observes that on 08.11.2016, the Government of India declared ‘demonetisation’ of certain denominations of Indian Currency notes. As per the O.M. No.29/5(6)/2011-12/JNNSM(ST) dated 02.12.2016 the Ministry of Power, Government of India decided that “considering the practical problems in the short run, due to demonetization, till 31.01.2017, without penalty, for complying with the requirements of Financial Closure, may be allowed. However, it shall have no effect on the Effective Date of Financial Closure or the Scheduled Commissioning Date as per the respective PPAs.” Therefore, in view of the above, the last date for achieving the Financial Closure stood extended by 82 days i.e. from 10.11.2016 upto 31.01.2017 without impacting the SCoD. It is pertinent to note that as per Article 11.4.1 (e), insufficiency of finances or funds is not covered as Force Majeure event. In our view that event of demonetization was not a ‘force majeure’ event in terms of the PPA.

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111. In view of above the Commission holds that Scheduled Commissioning Date cannot be extended under Article 4.5 of the PPA and it remains to be 10.05.2017. The Commission finds no reason to restrain Respondent No.1 from claiming damages under Article 3.3.3 and Article 4.6 of the PPA. The issues are decided accordingly.

***Issue No. 3: Whether, Respondent No. 1 should be directed to withdraw its letter/email dated 05.10.2017 reducing the applicable tariff? And Whether Respondent No. 1 should be directed to release the entire amount of monies amounting to Rs. 15 Crores due in favour the Petitioner which have been wrongly withheld by Respondent No.1 from the invoices?***

112. The Petitioner has submitted that it was constrained to approach the Hon'ble Delhi High Court under Section 9 of the Arbitration and Conciliation Act, 1996 being O.M.P. (I) (COMM.) 410/2017, for urgent interim measures including restraining the Respondent No. 1 from invoking the PBGs. The Hon'ble High Court, after hearing the parties, vide its Order dated 04.10.2017, held the maintenance of the status quo with respect to the PBGs and further restrained the Bank to make payments to the Respondent No. 1. The Respondent No. 1 vide its letter dated 05.10.2017 issued an arbitrary and belated direction reducing the tariff of the Petitioner's plant by 1.00 paise. Such action of reduction of tariff is nothing but a mere afterthought. The Respondent No. 1, without a proper hearing, unilaterally imposed a revised tariff upon the Petitioner, as against the tariff of INR 4.43/kWh agreed upon between the parties under the PPA, which was consequent to the process of competitive bidding, in accordance with the Guidelines. The said direction for revision of tariff is not in accordance with the PPA entered into between the Petitioner and Respondent No. 1 or under applicable law. The Respondent No. 1 was under an obligation to grant an extension of time to the Petitioner. However, the Respondent No.1 has gone ahead and arbitrarily and unilaterally imposed reduction of tariff which is unjust, unfair and untenable. **Per Contra**, the Respondent No.1 has submitted that the Article 4.6 read with Article 9.2 of the PPA provides that in case the commissioning of the Power Project is delayed beyond three months from the Scheduled Commissioning date, the pre-fixed tariff given in Article 9.1 shall be reduced at the rate of half a paisa per kWh per day. Thus, for a delay of 92 days, after excluding three months, the reduction in tariff in the present case is from Rs. 4.43/kWh to 4.42/kWh i.e. reduction of 1 paisa for two days delay.

113. The Respondent No. 2 has submitted that SECI could not supply the power as committed in PSA (due to delay in commissioning of projects by the Petitioner) resulting in shortfall in

fulfilment of RPO obligations set by the SERC. MSEDCL is in shortfall of about 1476 MUs for FY 2017-18 due to delay in supply of committed energy by SECI and hence as per the provisions of PSA, MSEDCL is eligible for seeking compensation from SECI. SECI is seeking compensation from the Petitioners herein whereas it is MSEDCL who suffered due to delayed commissioning / non- commissioning of such projects. SECI is eligible for only 0.07 paisa / kWh trading margin and hence SECI has to pass on other compensations to MSEDCL.

114. The Commission observes that Article 4.6 of the PPA dated 11.04.2016 stipulates as under:

*“4.6 Liquidated Damages for delay in commencement of supply of power to SECI*

*4.6.1 If the SPD is unable to commence supply of power to SECI by the Scheduled Commissioning Date other than for the reasons specified in Article 4.5.1, the SPD shall pay to SECI, damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date as per the following:*

- 3. Delay upto one(1) months - SECI will encash 20% of the total Performance BG on per day basis and proportionate to the Capacity not Commissioned.*
- 4. Delay of more than one (1) month and upto three (3) months - SECI will encash the remaining Performance BG on per day basis and proportionate to the Capacity not Commissioned.*

*In case the commissioning of the Project is delayed by more than 3 months after the scheduled Commissioning Date, the pre-fixed tariff given in the Article 9.1 shall be reduced at the rate of half paisa (0.50) per kWh per day of delay for the delay in such remaining capacity which was not commissioned.”*

115. The Commission observes that Article 4.6.1 of the PPA stipulates that, in case the commissioning of the Project is delayed by more than three (3) months after the SCoD, the pre-fixed tariff given in the Article 9.1 shall be reduced at the rate of half paisa (0.50) per kWh per day of delay for the delay in such remaining capacity which was not commissioned. As per PPA, the SCoD was 10.05.2017. In order to enjoy the protection of retaining the pre-fixed tariff, the Petitioner was to commission its project within three months from the date of SCoD of 10.05.2017 i.e. 10.08.2017. However, the Petitioner failed to commission the project before or on 10.08.2017 and the project was commissioned on 11.08.2017. Therefore there was a delay of one (1) day. In light of above, the Commission directs the Respondent No.1 to downward revise the tariff strictly as per Article 4.6.1 of the PPA.

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116. The Respondent No.2 (MSEDCL) has submitted that Respondent No.1 failed to supply the power as committed in PSA resulting in shortfall in fulfilment of RPO obligations set by the SERC. The Commission observes that the issue relates to the Power Sale Agreement between Respondents. The relief being sought by Respondent No. 2 is qua Respondent No.1 which is not the subject matter of the instant petition. The Commission feels that relief if any is beyond the scope of the instant petition.

***Issue No. 4: Whether Respondent No. 1 should be directed to forthwith release monies with respect to the Viability Gap Funding? And Whether Respondent No. 1 can be directed to issue Letter of Credit in terms of Article 10.4.2 of the PPA?***

117. The Petitioner has submitted that SECI has not released the first Tranche of VGF amount i.e. Rs.11.5 crore in terms of the consent order dated 21.2.2018 and other governing documents. The Respondent has submitted before the Commission on 31.01.2019 that as per the consent order dated 21.02.2018, the payment of VGF shall be considered in terms of the VGF Securitization Agreement. Further, the issue of direction to Respondent No.1 for issuance of 'Letter of Credit was neither argued in the pleadings nor pleaded during hearings. Therefore, the Commission feels no direction is required to be issued in the matters.

118. Accordingly, the Petition No. 19/MP/2018 is disposed of in terms of the above

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