

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No.: 95/MP/2017
along with I.A. No. 35 of 2017
and I.A. No. 93 of 2017**

Coram:
Shri P. K. Pujari, Chairperson
Dr. M.K. Iyer, Member

Date of Order: 17th of December, 2018

In the matter of

Petition under Section 79 of the Electricity Act, 2003 for dispute arising out of the Power Purchase Agreement dated 26.07.2016 between Petitioner herein, i.e. M/s Welspun Energy Private Limited and Solar Energy Corporation of India Limited.

And
In the matter of

Welspun Energy Private Limited

3rd Floor, PTI Building
4, Parliament Street,
New Delhi – 110001

...Petitioner

Versus

Solar Energy Corporation of India

1st Floor, D – 3, A – Wing, District Centre
Religare Building, Saket, New Delhi – 110017

...Respondent

Parties Present: Shri Gopal Jain, Senior Advocate, WEPL
Shri Sandeep Sethi, Senior Advocate, WEPL
Shri Avijeet Lala, Advocate, WEPL
Ms. Shikha Pandey, Advocate, WEPL
Shri Amit Ojha, Advocate, WEPL
Shri Ashish Bhardwaj, Advocate, WEPL
Shri Prabhas Bajaj, Advocate, SECI
Shri Ankit Roy, Advocate, SECI
Shri Abhinav Kumar, SECI

ORDER

The Petitioner, Welspun Energy Pvt. Ltd., has filed the present petition under Section 79 of the Electricity Act, 2003 for resolution of disputes arising out of the Power Purchase Agreement dated 26.7.2016 between the Petitioner and the Respondent, Solar Energy Corporation of India Limited (SECI). The Petitioner has made the following prayers:

- (i) *Restrain the Respondent from terminating the PPA;*
- (ii) *Direct the Respondent to permit the assignment of the PPA to Giriraj Renewable Private Limited in terms of Articles 15 of the PPA;*
- (iii) *Direct the Respondent to extend the Scheduled Commissioning Date and the time-period for Conditions Subsequent for the Force Majeure like period; or*
- (iv) *In the alternate to prayer (iii), direct the Respondent to allow extension of time to complete the Conditions Subsequent in terms of Article 3.2.2 of the PPA and the consequent extension of the Scheduled Commissioning Date;*
- (v) *During pendency of the proceedings, grant ad-interim injunction against the Respondent from taking any action towards terminating the PPA.”*

2. On 4.8.2015, The Ministry of New and Renewable Energy (hereinafter referred to as 'MNRE') issued a scheme for setting up of 2000 MW Grid-connected Solar PV Power Projects under Batch-III of Phase-II of the Jawaharlal Nehru National Solar Mission (JNNSM) with Viability Gap Funding support from National Clear Energy Fund. On 27.8.2015, SECI, the nodal agency for implementation of the MNRE Scheme, issued Request for Selection (RfS) document for selection of Solar Power Developer (SPD) for development of 500 MW grid on Build, Own and Operate (BOO) basis in the State of Maharashtra. Welspun Renewable Energy Pvt. Ltd. (WREPL), a subsidiary of the Petitioner, was awarded the project of 100 MW by SECI and in this regard, Letter of Intent (LOI) was issued to it on 10.3.2016.

3. WREPL requested SECI to allow its parent company, namely the Petitioner to execute the PPA with SECI. On 7.4.2016, the Petitioner furnished Performance Bank Guarantees amounting to Rs.30 crore and made an application to Maharashtra State Electricity Transmission Company Limited (hereinafter referred to as MSETCL") on 30.4.2016 for grant of grid connectivity. However, there was no provision in the RfS or the Guidelines which dealt with the issue of execution of PPA and implementation of the project by parent company of a bidder. Subsequent to request of the Petitioner, the MNRE referred the matter to the Empowered Committee. The Empowered Committee in its meeting dated 18.4.2016 recommended for a change in the provisions of signing of the PPA by the way of amendment to the Guidelines. Accordingly, MNRE issued amendment to Guidelines on 19.7.2016. On 26.7.2016, the PPA was executed between the Petitioner and the Respondent which was effective from 10.4.2016. As per Article 2.1 of the PPA, the Petitioner was required to fulfil the Conditions Subsequent (CS) activities within seven months i.e. by 10.11.2016. Article 3.2.5 of the PPA provides that if the SPD is unable to fulfill any CS activities due to force majeure, the time period for fulfillment of CS activities is required to be extended for the period of such force majeure event.

4. The Petitioner has submitted that the following facts have led to filing of this petition:

- a. Despite best efforts of the Petitioner, certain Conditions Subsequent (CS) activities could not be completed within seven months from the effective date due to reason not attributable to the Petitioner.

- b. On 5.9.2016, the Petitioner informed the Respondent that it was not in a position to execute the project and requested for release of the Performance Bank Guarantees (PBGs). In response, the Respondent vide its letter dated 2.11.2016 informed the Petitioner that the request will be dealt as per the provisions of the PPA. On 9.11.2016, the Respondent asked the Petitioner to comply with the terms of the PPA and to deposit extension charges for the delay period by 14.11.2016.
- c. On 11.11.2016, SECI issued notice under Article 3.2 of the PPA to the Petitioner to comply with the terms of the PPA by 17.11.2016 failing which it will be liable for action as per the provisions of the PPA.
- d. MSETCL, vide its letter dated 28.11.2016 granted permission to the Petitioner for connectivity to the Grid. Subsequently, on 28.11.2016, SECI informed the Central Bank of India to invoke the Bank Guarantees issued by the Petitioner. However, on the same day, the Petitioner informed SECI that with respect to financial closure requirement, it has adequate funds for the purpose of equity infusion and shall execute the project entirely through internal sources as per the terms and conditions of the PPA. The Petitioner further informed that it was in process of filing demerger scheme before the National Company Law Tribunal (NCLT) and it would remit Rs 1.9 crore for extension from 11.11.2016 to 29.11.2016 and submitted a letter related to putting on hold the land registration due to on-going digitization process in the State of Maharashtra. Subsequently, on 7.12.2016, the Petitioner remitted extension charges of Rs.1.9 crore along with interest. On 15.12.2016, SECI put on hold the encashment of Bank Guarantee.

e. The Petitioner vide its letter dated 28.2.2017 requested the MNRE to allow the assignment of the PPA to Giriraj Renewable Private Limited (hereinafter referred to as "GRPL") which was going to be the Resultant Company pursuant to demerger and was to be successor to undertake all the obligations and liabilities of the Petitioner. The Petitioner further informed that various safeguards would be put in place to ensure the transfer of the PPA to GRPL till the issuance of final order of demerger by NCLT. SECI vide its letter dated 1.3.2017 informed the Petitioner that it was not satisfied with the documentation regarding title of the land and arrangement of funds and advised the Petitioner to pay the extension charges within seven days failing which SECI will take further necessary action. In response, the Petitioner vide its letter dated 2.3.2017 informed SECI that it was serious about execution of its project and requested to suspend the notice dated 1.3.2017 till decision is taken by the MNRE on demerger and to allow assignment of the PPA to GRPL in terms of Article 15 of the PPA.

f. Since it has undertaken substantial completion of the CS activities pertaining to the arrangement of land as required under the PPA and has reached advance stage of completion of the project and engineering, procurement and construction activities have commenced at site, extension for completing the CS activities on payment of charges ought to be permitted by SECI. SECI is a Central Public Sector Undertaking under the administrative control of MNRE, to facilitate the implementation of JNNSM and achievement of targets set therein and therefore, it should not be

allowed to terminate the PPA. The Petitioner has already incurred and contractually committed substantial amounts on the project on irreversible basis and would suffer irreparable loss if the PPA is terminated.

g. Since, the project is situated in the State of Maharashtra, the same was required to be registered in the State. As per the letter dated 31.12.2016 issued by the Office of Tehsildar, Dahiwadi, Satara, alongwith Circular No.3118-3142/2016 dated 4.10.2016 issued by Office of District Collector, Satara, "Registration process at Sub-Registrar Dahiwadi, Satara Circle was on hold due to digitalization". In the meanwhile, the land deals all over the country were delayed due to the scheme of demonetization which was implemented by the Central Government on 8.11.2016 and subsequent shortage of funds thereafter. Due to delay caused by demonetization, the extension for the period from 8.11.2016 till 31.1.2017 had been given to certain developers by the Respondent. As the situation could not be avoided by the Petitioner, even if it had exercised reasonable care or complied with Prudent Utility Practices, the same is a *Force Majeure* like event. Since, the Petitioner could not complete some of the CS Activities within 7 (seven) months of effective date of PPA i.e. till 10.11.2016, the Respondent vide its letter dated 11.11.2016, issued a notice directing it to submit all the relevant documents to its satisfaction within seven business days, i.e. latest by 17.11.2016, non-compliance of which may attract actions as per the provisions of the PPA. The Respondent vide its letter dated 29.11.2016 to Central Bank of India invoked the Bank Guarantees issued by the Petitioner. The Petitioner vide its letter dated 29.11.2016 informed the Respondent that it had adequate funds for the

purpose of equity infusion and would execute the project entirely through internal sources in terms and conditions of the PPA and debt arrangements was not required. The Petitioner also informed that it was in the process of filing a demerger scheme before NCLT and had committed utilization of internal funds for the purpose of Financial Closure. It further informed that “Registration process at Sub-Registrar Dahiwadi, Satara, was on hold due to digitalization”. On 7.12.2016, the Petitioner remitted a sum of Rs. 1.90 crore along with interest of Rs. 33,523/-to the Respondent on account of extension charges as per Article 3.2 of the PPA.

- h. On 15.12.2016, the Respondent considered the contentions put forth by the Petitioner and put on hold the encashment of Bank Guarantee. The Respondent also accepted the amount of Rs. 1.9 crore with interest paid by the Petitioner.
- i. The Petitioner vide its letter dated 28.2.2017 requested the MNRE to allow the assignment of the PPA to GRPL, which was going to be Resultant Company pursuant to the demerger and was to be successor to undertake all the obligations and liabilities of the Petitioner in respect of the demerged undertakings. The Petitioner further assured that various safeguards would be put in place to ensure the transfer of the PPA to GRPL till the issuance of final order of demerger by NCLT and stated that GRPL was ready to execute and commission the Project at its own risk and shall not demand the applicable VGF and tariff for energy generated until approval of demerger application.

- j. On 1.3.2017, the Respondent issued notice stating that it was not completely satisfied with the documents submitted qua two CS Activities, i.e. with respect to the title of the land and internal arrangement of funds and infusion of equity. The Respondent further directed the Petitioner to comply with the aforesaid CS activities within 7 days and to submit the required amount of penalty/ extension charges as per provisions of the PPA for seeking suitable extension to comply with the CS activities.
- k. In response, the Petitioner vide its letter dated 2.3.2017 informed SECI that it was serious about execution of its project and requested to suspend the notice dated 1.3.2017 till decision was taken by the MNRE on the demerger and to allow assignment of the PPA to GRPL in terms of Article 15 of the PPA. The Petitioner further informed that it was willing to pay the charges for extension of time-period for completion of CS activities and issued a cheque dated 15.4.2017 for an amount of Rs. 6.50 crore in favour of the Respondent.
- l. Since it had undertaken substantial completion of the CS activities pertaining to the arrangement of land as required under the PPA and had reached advance stage of completion of the project and engineering, procurement and construction activities had commenced at site, extension for completing the CS activities on payment of charges ought to be permitted.
- m. However, the Respondent directly wrote to the Petitioner's Bank, namely Central Bank of India seeking invocation of the Bank Guarantees. Against

the decision of invocation of BG, the Petitioner filed O.M.P (I) (Comm.)163/2017 before the Hon'ble High Court of Delhi which vide its order dated 19.4.2017 restrained the Respondent from invoking the Bank Guarantees until the next date of hearing. On 5.5.2017, the Petitioner preferred a Petition before the Commission. However, on 8.5.2017, the Respondent returned the cheque of Rs. 6.50 crore to the Petitioner stating that *“the PPA has automatically stood terminated with the efflux of time.”*

n. On 26.5.2017, NCLT sanctioned demerger scheme of the Petitioner as a result of which the Petitioner stated that M/s GRPL (resultant Company) stepped into the shoes of the demerged undertaking. The Petitioner has submitted the shareholding pattern as under:

At the time of signing the PPA, the shares of WEPL were held by the following (9) shareholders:		
S. No.	Name of the Shareholders	Shares Holding
1	Welspun Enterprises Limited	15.49%
2	Rank Marketing Private Ltd.	11.02%
3	Rank Marketing LLP	24.77%
4	Welspun Mercantile Ltd.	0.64%
5	Welspun Wintex Ltd.	0.59%
6	Mr. B.K. Goenka	0.15%
7	Candor Power Pvt. Ltd.	27.70%
8	Mr. Vineet Mittal	3.33%
9	Bhadrawati Ispat & Energy Limited Pvt. Ltd.	6.31%

- Order of Amalgamation by Bombay HC dated 12.8.2016
- Order of Amalgamation by Ahmadabad HC dated 9.9.2016
- NCLT Order dated 26.5.2017



Shareholding Pattern of Giriraj Renewables Pvt. Ltd. – The Resultant entity of WEPL		
Sr. No.	Name of the Shareholders	Shares Holding
1	M/s Avaada Power Private Limited (<i>Formerly known as Candor Power Private Limited</i>)	99.99%
2	Mr. Vineet Mittal	0.01%

o. Subsequently, by the order of the NCLT dated 26.5.2017, all the responsibilities of renewable energy business of Demerged Undertaking i.e. the Petitioner was vested to the resultant undertaking i.e. GRPL as per the Scheme, by 'operation of law' without any intent to allow intrusion of any third party into the Project. The controlling shareholding of resultant entity is now held by M/s Avaada Power Private Limited (Formerly known as Candor Power Private Limited). Under the scheme of demerger approved by NCLT, the shareholders of the Petitioner and its resultant entity i.e., GRPL have been issued redeemable preference share in the same structure as it was in case of the Petitioner of which details are as under:

Redeemable Preference Shares:

Sr. No.	Name of the Shareholders	No. of Fully paid up Shares held of face value of Rs. 1/- each	Total Amount @ Rs. 1/- per share	% of holding
1	Welspun Enterprises Limited	60,509	60,509	15.49
	Total-A	60,509	60,509	15.49
2	Rank Marketing LLP	1,39,807	1,39,807	35.79
3	MGN Agro Properties Private Ltd	4,805	4,805	1.23
4	Mr. B.K. Goenka	586	586	0.15
	Total-B	145,198	145,198	37.18
5	Avaada Power Private Ltd (Formerly known as 'Candor Power Pvt. Ltd.')	108,205	108,205	27.70

6	Mr. Vineet Mittal	13,008	13,008	3.33
7	Candor Renewable Energy Pvt. Ltd. (Formerly known as 'Reliable Record Keepers Pvt. Ltd)	63,712	63,712	16.31
	Total-C	184,925	184,925	47.33
	Sub Total: (A+B+C)	390,631	390,631	100

5. Giriraj Renewables Private Limited has filed I.A. No. 35 of 2017 allowing it to be impleaded as Petitioner No.2 in the instant Petition.

6. The Petitioner has later filed I.A. No. 93 of 2017 to pass an order for substitution of M/s Giriraj Renewables Private Limited in place of WEPL in these proceedings so as to declare WEPL where mentioned, be read as M/s Giriraj Renewables Private Limited and to direct the registry to place the amended memo of parties on record.

7. The Commission after hearing the parties, vide order dated 11.10.2017 admitted the petition and directed the respondent to file reply and the Petitioner was directed to file rejoinder thereof.

8. The Petitioner has filed Petition on 5.5.2017 and rejoinder on 25.5.2017. M/s GRPL filed I.A. No. 35 of 2017 on 20.6.2017 for it to be impleaded as Petitioner No.2 and the rejoinder to the I.A. No. 35 of 2017 on 21.7.2017. M/s GRPL filed another I.A. No. 93 of 2017 on 21.12.2017 for its substitution in place of the Petitioner. The Petitioner had also filed written submissions on 22.2.2018 and 24.9.2018.

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Submission of Respondent:

9. The Respondent has filed Statement of objection on 20.5.2017 and reply to the I.A.s on 21.12.2017. The Respondent has also filed written submissions on 22.2.2018 and 24.9.2018.

10. The Respondent vide its written submission dated 22.2.2018 has submitted that clause 3.13.1 of the JNNSM scheme document and Clause 3.16 of the RfS document stipulates that the Petitioner shall report, tie-up Financing Arrangements for the project; ii) establish that the required land for project development is in clear possession and iii) also provide with the details of the requisite technical criterion within 7 months from the date from which the PPA is effective. Financial Closure is the most fundamental and crucial condition in the contract which has been breached by the Petitioner. Clause 3.13.3 of the JNNSM scheme document and Clause 3.16 (vii) of the RfS document stipulates that in case of delay, the Respondent shall i) encash Performance Bank Guarantees; ii) shall remove the project from the list of the selected projects, unless the delay is on account of delay in allotment of land in Solar Park or by Government or delay in transmission line or Force Majeure; iii) The Respondent can consider an extension on the request of Petitioner on payment of Rs. 10,000/-per day per MW and iv) Finally, the extension will not have any impact on the Scheduled Commissioning Date. Clause 3.2 of the Scheme Guidelines, inter alia, obliges the Petitioner not to change its shareholding pattern for a period of 1 year from the Commercial Date of Operation and also provides for automatic termination on the expiry of the notice period of seven days. On 5.9.2016, the Petitioner addressed a letter to the Respondent stating that it was not in a position to execute the project and

requested for release of the Performance Bank Guarantees (PBGs). On 2.11.2016, Respondent stated that the request will be dealt as per the provisions of the PPA. On 9.11.2016, the Respondent asked the Petitioner to comply with the terms of the PPA and to deposit extension charges for the delay period by 14.11.2016. However, the Petitioner failed to respond. The Respondent sent the letter dated 28.11.2016 to the concerned bank for encashment of PBGs. The Petitioner deposited Rs. 1.90 crore with the Respondent and the encashment of PBGs was kept on hold. Another notice was issued by the Respondent on 1.3.2017. However, instead of complying with the mandatory condition, the Petitioner requested for the assignment of the PPA to one M/s GRPL in terms of Article 15 of the PPA. The Petitioner requested for extension of time and sent a cheque of Rs. 6.50 crore which was returned by the Respondent on 08.05.2017 informing the Petitioner that "*the PPA has automatically stood terminated with the efflux of time*". Hence, the Petition is not maintainable and is also devoid of merits and hence deserves to be rejected.

Written Submissions dated 24.9.2018 by the Petitioner

11. The Petitioner in its written submissions has reiterated the submissions made in the Petition and has submitted detailed submissions on the two issues raised by the Respondent in its letter dated 1.3.2017 as under:

a. Proof of acquisition of land:

(i) Under Article 3.1 of the PPA, the Petitioner was required to produce documentary evidence of clear title and possession of acquired land @ minimum 1.5 hectares/MW in the name of the SPD. The land to be acquired for the Project was situated in Satara district and therefore, the

conveyance deeds were required to be registered there.

(ii) On 4.10.2016, the Collector's office at Satara district, Maharashtra, issued a circular stating that digitization/ e-Mutation process had commenced. As a consequence of this, the revenue authorities at Satara District suspended the land registration process till the time the Survey/ Gat no. of land parcels are digitized and e-mutated first. It was stated in the said circular that *"E-mutation procedure and formalities are to be completed before registration of the documents"*.

(iii) It had appointed M/s. Glacier Dealer Private Limited as the land aggregator to acquire the land and transfer the same in the name of the Petitioner. The Petitioner submits that from 4.10,2016, the land aggregator could not register sale deed in favour of the Petitioner. The land aggregator had acquired approximately 325 acres of land in its own name via sale deeds and agreements to sell were entered into for another 50 acres of land. The said land was transferred to the Petitioner by the land aggregator. However, the sale deeds could not be registered because e-mutation/digitization process of the said land parcels of Petitioner's Survey/ Gat no. were to be completed by the Government.

(iv) On 31.12.2016, Office of Sub-Registrar informed the Petitioner that registration process at sub-Registrar, Satara had been put on hold due to digitization of records. The letter dated 31.12.2016 demonstrates that land had been purchased before expiry of 7 months for fulfillment of CS activities, but the same could not be registered in favour of the

Petitioner due to delay by Government and events akin to Force Majeure.

(v) In the meanwhile, the land deals all over the country were delayed due to the scheme of demonetization which was implemented by the Central Government on 08.11.2016 and subsequent shortage of funds thereafter. Due to delay caused by demonetization, the extension for the period from 08.11.2016 till 31.01.2017 has already been given to certain developers by the Respondent.

(vi) With the completion of digitization process/e-mutation w.r.t Gat Nos. pertaining to Petitioner's Project, entire 375 acres of land was registered in the name of Giriraj Renewables Private Limited - the resultant entity of demerged WEPL. The same was communicated to the Respondent by letter dated 9.6.2017. Therefore, the delay of 249 days in fulfillment of CS Activities i.e. from 4.10.2016 till 9.6.2017, was on account of delay by Government and events akin to *Force Majeure* as these events were beyond the control of the Petitioner.

(vii) This was an emergent situation that could not have been avoided by the Petitioner, even if it had exercised reasonable care or complied with Prudent Utility Practices. The Petitioner has submitted that this event is akin to a *Force Majeure* event and the Petitioner should be granted relief in respect of the same.

(viii) Importantly, the ultimate beneficiary of the power under the PPA, the State of Maharashtra, has acknowledged the delay caused in

land registration due to ongoing digitization process and has recommended extension of the Scheduled Commissioning Date of the Project by twelve months by letter dated 3.2.2018. Accordingly, the Petitioner submits that this is a fit case for extension of time.

b. Non-submission of Board Resolution regarding finances:

(i) The PPA nowhere provides for infusion of funds through debt only and as such there is no restriction of bringing in funds through equity infusion. By letter dated 29.11.2016, the Petitioner intimated the Respondent that the Petitioner has adequate funds for the purpose of equity infusion and is planning to execute the project entirely through internal sources. The Petitioner submitted to the Respondent a consent letter in this regard from two of its directors (including the Managing Director) assuring and committing that the project would be executed from the internal sources.

(ii) The Respondent vide letter dated 1.3.2017 directed the Petitioner to submit the Board Resolution authorizing such utilization of funds. However, since the Petitioner company was already before the National Company Law Tribunal, Ahmadabad at the time, the Petitioner was not able to provide such board resolution. The Board Resolution was filed by the Petitioner on 9.6.2017 before the Commission.

(iii) Once the Directors of the Petitioner Company had given the commitment in writing that the Project would be executed from internal sources, the provisions of Article 3.1(c) stood complied with. Article

3.1(c) of the PPA does not provide any form or manner in which the said CS Activity had to be fulfilled and the Petitioner submits that the letter signed by two of its directors, which in any event has been followed up with the Board resolution on 9.6.2017, may be accepted as sufficient.

(iv) The PPA itself provides for extension of time for fulfilling CS Activities upon payment of extension charges as per Article 3.2.2 and as a matter of fact, the Respondent had agreed to extend the CS period for the Petitioner after paying such extension charges. Therefore, the instant case is squarely covered by Section 63 of the Indian Contract Act.

(v) In any event, as per the Petitioner, the principles enshrined in Article 14 of the Constitution permeate into the actions of the Respondent even in the contractual sphere. Therefore, the power of the Respondent to grant or refuse extension of time has to be exercised in a fair, just and reasonable manner and based on the relevant factors. Out of 100 MW to be installed by the Petitioner, 28 MW capacity is already injecting power into the grid. The Petitioner has achieved considerable milestones towards commissioning of the Project as under:

Project milestones	Capacity	Status
Land acquisition & registration	100 MW	Done
Evacuation permission from MSETCL	100 MW	Done
Equity infusion by developer	100 MW	Done
Civil work-100 MW		
Piling	100 MW	Done
Inverter buildings	100 MW	Done

Transformer foundations	100 MW	Done
Cable trenches	100 MW	Done
Boundary wall	100 MW	Done
Electrical installation - 100 MW		
Installation of inverters	100 MW	Done
Transformers	100 MW	Done
Cable installations & connections	100 MW	Done
Module installation		
Module installations	28 MW	Done
Modules installations	72 MW	Pending
Plant Charging & related permissions		
CEIG permission -Transmission line	100 MW	Done
Grid connectivity permission – MSETCL	100 MW	Done
Transmission line Charging	100 MW	Done
Main Switchyard charging	300MW	Done
CEIG permission	28 MW	Done
Synchronization permission	28 MW	Done
Power flow	28 MW	Done
Synchronization permission	72 MW	Pending
Power Flow	72 MW	Pending

(vi) Taking into account the huge investment already made into the project, the interests of fairness require that the PPA should be continued and the Petitioner should be given reasonable time to complete the project upon payment of extension charges as contemplated under the PPA.

(vii) The Petitioner is interested in executing the project and has

undertaken large scale measures for this purpose. The Petitioner submits that a termination of the PPA at this stage will not only cause huge losses to the Petitioner but will also derail the project. The Petitioner has prayed for grant of additional time to commission the balance capacity of the Project.

(viii) The Hon'ble Supreme Court in its judgment in the case of M.P. Power Management Company Ltd. vs. Renew Clean Energy Pvt. Ltd. [(2018) 6 SCC 157] set aside the termination of the PPA on the ground that huge investments have been made in the Project and the Project being at an advance stage of commissioning, the termination of the contract is 'not fair'. The Hon'ble Supreme Court observed that the delay, even though not caused by a force majeure event, was due to unavoidable circumstances and permitted the project to be completed by the developer, subject to levy of penalty charges. The present case is squarely covered by this judgment.

(ix) The Petitioner in support of its contention has also relied upon the MERC order dated 11.6.2018 in Case No. 185 of 2017 and judgment of the Hon'ble Bombay High Court in the case of Mumbai Metropolitan Region Development Authority vs. Unity Infraproject Ltd.

Submissions of Respondent

12. The Respondent has filed Statement of Objection on 20.5.2017 and reply to the I.A.s on 21.12.2017. The Respondent has also filed written submissions on 22.2.2018 and 24.9.2018. The submissions made by the Respondent has been

summarized as under:

- a. The Petitioner has admittedly failed to comply with the most fundamental and crucial condition under the contracts, namely, demonstrating compliance with the Conditions Subsequent. The Petitioner has not only failed to demonstrate the possession of land as required under Clause 3.1 (Conditions Subsequent) of the PPA, but it has also failed to demonstrate the requisite financial closure as required under Clause 3.1 of the PPA.
- b. The Petitioner's claim of "government delay" is not only incorrect and misleading but is also only an afterthought. The Petitioner has never raised the said plea and has, in all its contemporaneous communications, admitted that it has failed to comply with the Conditions Subsequent within the stipulated time and requested for extension of time subject to payment of the compensation charges stipulated in Clause 3.2 of the PPA.
- c. There is no Force Majeure event (as specifically defined in Clause 11 of the PPA). No notice regarding Force Majeure event was given by the Petitioner to the Respondent under Article 11.5 of the PPA.
- d. In any event, the Petitioner's prayer for extension of the SCoD is contrary to the terms of the contracts. The SCoD in the present case was 10.5.2017. The Petitioner had not even complied with the Conditions Subsequent as on that date. Under the PPA, the SCoD can be extended only under Clause 4.5 on, inter alia, the occurrence of a Force Majeure Event.
- e. The Respondent, vide its written submission dated 22.2.2018, has

submitted that clause 3.13.1 of the JNNSM scheme document and Clause 3.16 of the RfS document stipulates that the Petitioner shall: i) report, tie-up Financing Arrangements for the project; ii) establish that the required land for project development is in clear possession; and iii) also provide with the details of the requisite technical criterion within 7 months from the date of signing the PPA. Financial Closure is the most fundamental and crucial condition in the contract which has been breached by the Petitioner. Clause 3.13.3 of the JNNSM scheme document and Clause 3.16 (vii) of the RfS document stipulates that in case of delay, the Respondent shall i) encash Performance Bank Guarantees; and ii) shall remove the project from the list of the selected projects unless the delay is on account of delay in allotment of land in Solar Park or by Government or delay in transmission line or Force Majeure. The Respondent can consider an extension on the request of Petitioner on payment of Rs. 10,000/-per day per MW, but such extension will not have any impact on the Scheduled Commissioning Date.

- f. MPPMCL judgment relied upon by the Petitioner is not applicable in the present case and has distinguished the judgment and the facts of the present case as under:

S.No.	MPPMCL Judgment	Present Case
1.	Project was scheduled to be commissioned on 31.8.2017, ahead of the SCOD being 7.9.2017.	SCoD was 10.5.2017. As on SCoD, the Petitioner had not even complied with Conditions Subsequent (last date for which was 10.11.2016). The Petitioner did not even have possession of the requisite area of land as on the SCoD.
2.	The Solar Power Developer had informed MPPMCL that it is expected to commission the project by 31.8.2017, but the contract was	PPA came to be terminated on issuance of notice under Clause 3.2.1 for failure to comply with Conditions Subsequent. It stood terminated at a stage where the

	terminated on 11.8.2017 – just 20 days before expected date of Commissioning.	Petitioner did not even have possession of requisite area of land or even the Financial Closure.
3.	The Solar Power Developer had undertaken substantial steps for ensuring that the project was commissioned before SCOD.	<p>i. Petitioner had itself (on 5.9.2016) addressed a communication to the Respondent – SECI conveying that it is no longer interested in complying with its contractual obligations.</p> <p>Petitioner has also willfully breached its contractual obligations including the obligation not to change shareholding pattern till atleast 1 year from COD.</p>
4.	PPA did not provide for automatic termination in case of failure to comply with Conditions Subsequent.	PPA, under Clause 3.2.1, provides for automatic termination in case of failure to comply with Conditions Subsequent within 7 days of notice issued by SECI.

g. The PPA has automatically stood terminated with the efflux of time”.

Therefore, the Petition is not maintainable and is also devoid of merits and hence deserves to be rejected.

h. The Petitioner has committed a fundamental breach of another obligation under the contract(s) of maintaining the shareholding pattern of the SPD for a period of atleast one year from the date of COD.

i. Various provisions have been stipulated in the Scheme Guidelines, RfS and the PPA for ensuring that there is no change in the shareholding pattern/ controlling shareholding of the SPD. The Respondent has relied on Clause 3.20 (v) of the RfS, Clause 3.12 of the Scheme Guidelines and Clause 4.1.1 (f) of the PPA. Further, Clause 1.3.7 (iv) of the RfS also makes it abundantly clear that the Project cannot be transferred or sold to a third party during the lock-in period of 1 year as per provision under Clause 3.20 of this RfS.

- j. In the present case, Clause 3.20 (v) of the RfS, Clause 3.12 of the Scheme Guidelines and Clause 4.1.1 (f) of the PPA provide for, inter alia, maintaining the shareholding of the Bidding Company/ SPD. Further, Clause 1.3.7 (iv) of the RfS also makes it abundantly clear that the Project cannot be transferred or sold to a third party during the lock-in period of 1 year as per provision under Clause 3.20 of this RfS.
- k. Perusal of Annexures of the documents submitted by the Respondent during the hearings on 16.1.2018 and 22.2.2018 reveals that at the time of bidding, the Petitioner comprised of 9 promoters (none of the shareholders having not less than 51% of voting rights and paid up share capital). In other words, it was the obligation of the Petitioner under Clause 3.20 (v) of the RfS that the shareholding pattern of the Petitioner as submitted at the time of bidding, shall be maintained for a period of one year after COD. However, in complete disregard of this fundamental obligation under the contract, the Petitioner had, on its own, changed its shareholding pattern on more than one occasion and without any intimation or information to Respondent. The Petitioner under its letter dated 24.3.2017 forwarded the order of NCLT dated 14.3.2017 in relation to a demerger application. The interim order dated 14.3.2017 demonstrated that the Petitioner had changed its shareholding pattern even before approaching the NCLT and was now seeking to transfer its business to third entity, viz. GRPL, which comprised of an entirely different shareholding pattern. In other words, whereas the shareholding pattern submitted by the Petitioner at the time of Bidding comprised of 9 shareholders, its shareholding pattern when it approached the NCLT comprised of 7 shareholders and it was seeking the

transfer of its business to a third-party company comprising of 2 shareholders. Therefore, the Petitioner has committed breach of another fundamental obligation under the contract(s), including of Clause 3.20(v) of the RfS document.

I. The demerger process is not any automatic process or any “change in law” which is beyond the control of the Petitioner. The Petitioner has voluntarily opted to file the demerger application despite being aware that such an action would result in breach of its fundamental obligations, and thereby accepting the consequences of the breach of its fundamental obligations under its contract(s) with the Respondent. The provisions of the Companies Act, 2013, including Section 232 thereof provides for application to be filed by any company for “transfer” of its business to another company, by way of the demerger process.

m. The Petitioner has voluntarily filed the demerger application seeking transfer of its business to third party with different shareholders. The demerger process requires the meeting of the creditors and members of the company. By opting to voluntarily transfer its business to third party company with different shareholders, the Petitioner has voluntarily and willfully breached another fundamental obligation under the contract(s) of maintaining its shareholding pattern for a period of atleast one year from the COD, including under Clause 3.20(v) of the RfS. Even in the case of a Change in Law which is beyond the control of the parties, the Clause 12 of the PPA stipulates that the parties shall approach the Commission for seeking approval of the Change in Law. However, in the present case, the

Petitioner has willfully filed the demerger application for seeking transfer of its business being fully aware that such a transfer would result in breach of its contractual obligations. Therefore, the Petitioner has also committed a fundamental breach of obligation under the contract(s) of maintaining the shareholding pattern of the SPD for a period of atleast 1 year from the date of COD.

n. The submission of the Petitioner that GRPL has “stepped into its shoes” being the Successor of the Petitioner in terms of the identification clause of the PPA is not only misconceived and incorrect but is also contrary to the terms of the Contract. It is a settled position of law that the provisions of a contract have to be read and interpreted as a whole and it is not permissible to interpret any clause of the contract in isolation. In this regard, the Respondent has placed its reliance on the judgments of the Supreme Court in the case of Bank of India & Anr. Vs. K. Mohandas & Ors. [(2009) 5 SCC 313] and Export Credit Guarantee Corporation of India Ltd. Vs. Garg Sons International [(2014) 1 SCC 686].

o. When the term “successors” contained in the identification clause of the PPA is read along with the other terms of the contract(s) including Clause 3.20(v) and Clause 1.3.7(iv) of the RfS, the only permissible/ possible interpretation would be that there can be no successor of the company by change in its shareholding pattern atleast till the completion of 1 year from the date of COD. Any other interpretation given to the term “successor” would result in violation and derogation of other terms of the contract(s), which is impermissible in law. If the interpretation sought to be given by the

Petitioner is accepted, it would result in a situation where the SPD would be enabled to file a demerger application, seek approval of its creditors and shareholders, and transfer its business before the 1 year lock-in period provided under the contract and would make the provision of Clause 3.20(v) and Clause 1.3.7(iv) of the RfS as redundant and otiose. Such an interpretation would not only be contrary to the intention of the parties which is spelt out from the terms of the contract(s) but is also contrary to the express provisions thereof. The expression “successors” is prefixed by the phrase that the successors would not be included in the term “SPD” if such inclusion is repugnant to the context or meaning thereof.

p. By filing the Application for Impleadment and Application for Substitution before this Commission, the Petitioner has sought a relief which is contrary to the terms of the contract and such relief would result in breach of the contract, including Clause 3.20 (v) of the RfS. While exercising its adjudicatory jurisdiction u/s 79 of the Electricity Act, 2003, the Commission would neither permit any party to raise such a plea nor grant any relief which would result in the breach of the contractual provisions. Such a prayer is impermissible in law. The Petition alongwith the accompanying Applications would deserve to be dismissed on this ground as well.

q. The prayers made and reliefs sought by the Petitioner in the present Petition are contrary to the terms of the contract and would result in a breach of the terms of the contract. In any case and without prejudice to the above, once the PPA has stood terminated, the reliefs sought by the Petitioner are neither maintainable nor sustainable. In support of its

contention, the Petitioner has relied upon the judgment of the Hon'ble Supreme Court of India in the case of Gujarat Urja Vikas Nigam Ltd vs Solar Semiconductor Power Company [(2017) 16 SCC 498]. In the aforesaid judgment, the Hon'ble Supreme Court has clearly held that the Commission would give due regard to the sanctity of the contract between the parties, and it would be impermissible to seek any relief contrary to the contract between the parties. The above judgment would squarely apply in the present case.

- r. The documents annexed by GRPL alongwith the Application being I.A. No. 52 of 2018 are addressed in the name of M/s Giriraj Renewables Pvt. Ltd. and not the Petitioner. The PPA had been executed with the Petitioner and the provisions of the PPA when read alongwith the provisions of the RfS make it obligatory for the Petitioner not to change its shareholding pattern at least till 1 year after the Commercial Operation Date. The Respondent has demonstrated before this Commission that the Petitioner had deliberately breached the said condition by voluntarily filing the application for demerger (Transfer) of the company before the NCLT.

Analysis and Decision

13. We have heard the learned senior counsel for the Petitioner and learned counsel for the Respondent and have carefully perused the documents on record. From the submissions of the parties, the following issues arise for our consideration:

(a) Issue No 1: Issues relating to obligations in the form of 'Condition Subsequent' Activities as contained in Article 3 of the PPA:

- i) What were the obligations in the form of 'Condition Subsequent' Activities which were to be complied with by the Petitioner?
- ii) Whether the obligations in the form of 'Condition Subsequent' Activities as mentioned in Article 3 of the PPA has been complied with by the Petitioner within the stipulated time?
- iii) Whether the claim of the petitioner that the 'Condition Subsequent' Activities could not be complied with due to 'Government Delay' or 'Force Majeure like events', is maintainable?

(b) Issue No. 2: Issues relating to 'maintaining of Shareholding' pattern:

- i) Whether the Petitioner violated Clause 3.20 of the Scheme Guidelines, inter alia, which obliges the Petitioner not to change its shareholding pattern for a period of one (1) year from the Commercial Date of Operation?
- ii) Whether M/s GRPL (the Resultant Company pursuant to approval of the demerger by National Company Law Tribunal vide order dated 26.5.2017) should be allowed to be substituted as the successor to the Petitioner and PPA can be assigned in its favour?

(c) Issue No. 3: Whether the Petitioner is entitled for extension of SCoD? or, the Respondent is entitled for termination of the PPA?

The above issues have been dealt with in succeeding paragraphs

14. Issue No. 1: Issues relating to obligations in the form of 'Condition Subsequent' Activities as contained in Article 3 of the PPA:

- i) What were the obligations in the form of 'Condition Subsequent' Activities which were to be complied with by the Petitioner?
- ii) Whether the obligations in the form of 'Condition Subsequent' Activities as mentioned in Article 3 of the PPA has been complied with by the petitioner within the stipulated time?
- iii) Whether the claim of the petitioner that the 'Condition Subsequent' Activities could not be complied with due to 'Government Delay' or 'Force Majeure like events', is maintainable?

15. Article 3 of the PPA provides as under:

“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 Deliver 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 waiving 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./MW before the COD;
- h. The SPD shall fulfill the technical requirements according to criteria mentioned under Clause 3.3 (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.”

16. The Petitioner entered into PPA dated 26.7.2016 with the Respondent with effective date as 10.4.2016. As per the above provision of the PPA, the Petitioner was required to complete the activities, namely obtain or apply for all Consents, Clearances and Permits required for construction, operation and supply of power; execute VGF Securitization Agreement and make Project financing arrangements; make adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at the Delivery Point; sign a Transmission Agreement confirming the evacuation and connectivity of the CTU/STU/ Transmission Utilities system upto the delivery point; produce the documentary evidence for the clear title and possession of the acquired land @ minimum 1.5 hectare/MW in the name of SPD; fulfill the technical requirements and specify plan for meeting the requirement for domestic content within seven months from the effective date of the PPA.

A. Connectivity to the Grid:

17. The Respondent has contended that out of the above, Project financing arrangements, Transmission Agreement confirming the evacuation and connectivity of the CTU/STU/ Transmission Utilities and the documentary evidence for the clear title and possession of the acquired land @ minimum 1.5 hectare/MW in the name of the Petitioner were not complied by the Petitioner within seven months from the effective date of the PPA. However, the Petitioner has stated that it, subsequently, obtained permission for connectivity to the grid from Maharashtra State Electricity Transmission Company Limited (MSETCL) on

28.11.2016 within the extended period (up to 29.11.2016) on payment of extension charges. We note that the Respondent had accepted an amount of Rs.1.90 crore on 7.12.2016 along with interest of Rs. 33,523/- on 9.12.2016 for delay of 19 days in complying with the 'Condition Subsequent' activities. The Respondent having accepted the afore-stated amounts, the date for fulfillment of Condition Subsequent stands extended to 29.11.2016. Therefore, we are of the view that there has been no default on part of the Petitioner as regards obtaining connectivity to the grid from MSETCL that was obtained on 28.11.2016.

B. Clear title and possession of land:

18. The Petitioner has submitted that due to *Force Majeure like events*, i.e. events akin to *Force Majeure*, Condition Subsequent activities could not be completed within the stipulated time-period, The Petitioner has stated that digitization of land records in the Satara district of Maharashtra w.e.f. 4.10.2016 and demonetization on 8.11.2016 are events akin to force majeure. With regard to digitization of land records, the Petitioner has submitted that in November, 2015, the Petitioner had appointed M/s Glacier Dealer Private Ltd. as land aggregator and until 14.9.2016, M/s Glacier Dealer Private Ltd. had registered in its own name approximately 320 acres of land via Sale Deed and the balance 50 acres of land were either in the form of registered Power of Attorney or Agreement to Sale. On 4.10.2016, digitization process commenced and all land registrations were put on hold at the office of Sub-Registrar Dahiwadi, Satara Circle which was duly communicated to the Respondent on various occasions. The Petitioner vide its letter dated 28.2.2017 requested the MNRE to allow transfer of land by "Land use permission agreement" by the land aggregator. Since the digitization of land

records was being done on the basis of sequences of survey numbers of the land in that Circle, this delay continued until June 2017. Only those Sale Deeds were being registered by the Sub-Registrar's Office which had digitized/ online survey numbers. The Petitioner has submitted that with completion of digitization process of survey number, GRPL registered 333 acres of land on 7.6.2017 in one go and the entire 375 acres land registration was completed on 9.6.2017.

19. With regard to demonetization, the Petitioner has submitted that the Respondent had allowed extension to other solar power developers for fulfilling the conditions during the demonetization period of 75 days from 9.11.2016 to 31.01.2017, being akin to a Force Majeure event. The Petitioner has not produced any documents to substantiate this assertion nor has the Respondent denied this claim of the Petitioner. The Petitioner has argued that the event of demonetization was in public domain and hence, no formal notice was required to be issued. The Petitioner had anticipated equal treatment as other solar power developers and had validly assumed that extension would be granted. However, the Petitioner has stated that since demonetization (09.11.2016 to 31.01.2017) was within the period of digitization of land records (04.10.2016 to 09.06.2017), no specific claim is being made for this period as regards force majeure.

20. The Petitioner has submitted that putting on hold the land registration process on account of digitization of land records was a delay due to actions of State Government and was beyond the control of the Petitioner and it was not possible for the Petitioner to avoid it despite taking reasonable care and following prudent utility practices. Therefore, it has requested that the delay caused in registration of land leading to non-fulfillment of Condition Subsequent requirement is not

attributable to it. It has stated that this delay due to Government is an event akin to Force Majeure that started on 4.10.2016 and continued till 9.6.2017. The Petitioner has requested that this delay which is approximately 249 days ought to be allowed by the Commission for fulfillment of Condition Subsequent requirements.

21. *Per Contra*, the Respondent has submitted that the present case does not fall within the ambit of "Government delay" and is not akin to force majeure. Out of the 2000 MW of power projects awarded to various SPDs in the State of Maharashtra under the Batch-III of Phase-II of JNNSM, the other SPDs have demonstrated compliance of 'Conditions Subsequent' including demonstrating title/ possession of adequate area of land. The Respondent has contended that it is only the Petitioner which was seeking to raise the plea of 'Government delay' which in opinion of the Respondent is an afterthought in order to wriggle out of its contractual obligations. It is also for this reason that no such Force Majeure event has ever been notified by the Petitioner to the Respondent as mandatorily required under Clause 11.5 of the PPA.

22. We have considered the submissions of the Petitioner and the Respondent. The question for our consideration is whether the Petitioner was affected by force majeure and if it has complied with the provisions of the PPA with regard to notice.

23. Article 11.3 of the PPA defines 'force majeure' as under:

"11.3.1A '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 of within the reasonable control, directly or indirectly, of the Affected Party and could not have been availed if the Affected Party had taken reasonable care or complied with Prudent Utility Practices: ...”

24. The Petitioner has submitted that Article 3.2.1 of the PPA provides that in case of failure to submit the documents as above, SECI shall encash the Performance Bank Guarantee submitted by the SPD, terminate this Agreement and remove the Project from the list of the selected Projects by giving a notice to the SPD in writing of at least seven (7) days unless the delay is on account of delay by Government or Force Majeure. The termination of the Agreement shall take effect upon the expiry of the 7th day of the above notice. The Petitioner has stated that it purchased 375 acres of land to set up its project. Pursuant to commencement of digitization process from 4.10.2016, Tehsildar vide its letter dated 31.12.2016, informed the Petitioner that registration process of land at sub registrar Dahiwadi, Satara is on hold due to digitization of records. Relevant portion of the said letter dated 31.12.2016 is extracted as under:

“Further, M/s Welspun Energy Private Limited has purchased the 375 Acres of land from M/s Glacier as stated below:

Sale Deed dated 2.11.2016	325 Acres
Agreement to sell 10.11.2016	50 Acres

Further it is also informed that Registration process at sub registrar Dahiwadi, Satara circle is on hold due to digitization of records. In this regard, Circular No. 3118-3142/2016 dated 04/10/2015 from collector office is also enclosed.

Registration of above agreements can be done after the digitization process is completed.”

25. The Petitioner has submitted that the factual matrix of its project as under:

Date	Document relied upon	Sale Deed executed	Agreement to Sell executed	Ownership
14.9.2016	Submissions as in Petition	325 acres	50 acres	M/s Glacier Dealer Pvt. Ltd. (land aggregator of the Petitioner)
4.10.2016	Digitization process commenced			
2.11.2016	Letter of Tehsildar dated 31.12.2016	325 Acres		Petitioner
10.11.2016	Letter of Tehsildar dated 31.12.2016		50 Acres	Petitioner
6.12.2016	Affidavit	375.58 Acres (Total project land)		Petitioner
28.2.2017	Letter to MNRE from the Petitioner	152 Ha (375.6 Acres)		M/s Glacier Dealer Pvt. Ltd. (land aggregator of the Petitioner)
6.5.2017	Letter from Tehsildar Office that digitization process was still continuing.			
10.5.2017	Scheduled date of Commissioning			
7.6.2017	Written submissions filed on 5.3.2018	333 Acres		GRPL
9.6.2017		374 Acres		GRPL
9.6.2017		Completion of Digitization process of survey numbers		
	Written submissions filed on 24.9.2018	375 Acres		GRPL

26. It is noted that as per submissions of the Petitioner, M/s Glacier Dealer

Private Ltd. (land aggregator) had, until 14.09.2016, registered in its own name approximately 320 acres of land via Sale Deed and the balance 50 acres via registered Agreement to Sale. Further, the Petitioner has contended that the digitization process commenced on 4.10.2016 and was completed only on 9.6.2017. However, as per Tehsildar's letter, the 'sale deed' for 325 acres was executed in the name of the Petitioner on 2.11.2016 and 'Agreement to sell' for 50 acres was executed in favour of the Petitioner on 10.11.2016. Further, as per the said letter, Registration process at sub registrar Dahiwadi Satara circle was on hold due to digitization of records as per Circular No. 3118-3142/2016 dated 4.10.2015 from the office of Collector, Satara. The Petitioner vide its affidavit dated 6.12.2016 had submitted to the Respondent that the total area required for the project viz. 375.58 acres was under its possession.

27. In the light of the above discussion, it is noticed that the Petitioner is claiming that due to digitization process, the registration of the sale deed had come to standstill and there was delay due to government in getting the land registered and hence the situation is akin to 'Force Majeure alike'. It is further observed that the Petitioner was in possession of the entire land (375.58 acres) but the sale deed and agreement to sell could not be registered due to digitization of land records. The letter of Tehsildar dated 31.12.2016 stating that land registration process was on hold and letter dated 6.5.2017 stating that the digitization process was still continuing cannot be ignored. Furthermore, the Petitioner has also submitted a letter dated 3.2.2018 of the Under Secretary, Industry, Energy and Labour Department, Government of Maharashtra where the State government has acknowledged the delay caused in land registration

due to ongoing digitization process and has recommended the extension of the SCoD of the Project by twelve months to MNRE. The relevant portion of the said letter dated 3.2.2018 is extracted as under:

“2....As per the report (in Marathi) of Collector Satara, the project work of your company faced several difficulties starting from technical problems in land documents digitalization process, which was undertaken by District revenue authorities from October 2016 onwards for larger public interest...

3.The above mentioned circumstances led to delays in achievement of critical milestones (interim & final SCOD) under the PPA signed with SECI. Based on the report of Collector Satara, we acknowledge that the delay due to Government related procedures and these reasons were beyond the control of GRPL.

4.Accordingly, we acknowledge the delays on account of reasons mentioned above and recommend 12 months' time extension of interim and final milestones under the said PPA i.e. financial closure and Scheduled COD of 100 MW Solar Power Project.”

28. Perusal of the above letters dated 31.12.2016, 6.5.2017 and 3.2.2018 reveals that the land registration process was on hold on account of digitization. The Respondent, on the other hand, has disputed the claim of the Petitioner stating that the arguments related to delay on account of digitization is only an afterthought by the Petitioner. It has stated that when other similarly placed projects of about 2000 MW awarded by the Respondent could fulfil this Condition Subsequent, then why the Petitioner could not do it. In our view, the argument of the Respondent is only a conjecture and it has not produced any documents that refutes the claim of the Petitioner. In light of documents submitted by the Petitioner and afore-mentioned letters of the Tehsildar and the State Government, we hold that inability of the Petitioner in getting the registered sale deeds of land for the project in its name is covered under “*delay by Government*”, It was an event which was beyond the control of the Petitioner and could not have been avoided by the Petitioner, had it taken reasonable care or complied with Prudent Utility Practice. Hence, we declare this event as an event

that is akin to *Force Majeure* Event and, therefore, the period from 4.10.2016 to 9.6.2017 is condoned for fulfillment of Conditions Subsequent activities as regards clear title and possession of land.

C. Financial Arrangement for the Project:

29. The Petitioner has submitted that at the stage of 'Conditions Subsequent' activities, it was confirmed to the Respondent that it had adequate funds for the purpose of equity infusion and would execute the Project entirely through internal sources according to the terms and conditions of the PPA. The details of the available funds were also submitted to the Respondent.

30. *Per Contra*, the Respondent has submitted that the Petitioner has failed to demonstrate that it had adequate funds for the purpose of equity infusion and that the Project can be entirely funded through internal sources.

Clause 3.16 of the RfS provides as under:

"3.16. Financial Closure or Project Financing Arrangements

The Project shall achieve Financial Closure within 7 months from the date of signing Power Purchase Agreement (PPA) (for e.g. if PPA signing date is 07.11.2015, then scheduled Financial Closure date shall be 07.06.2016). At this stage, the SPDs shall report tie-up of Financing Arrangements for the Projects. In this regard the SPD shall submit a certificate from all financing agencies regarding the tie-up of funds and also furnish documentary evidence for demonstration/infusion of actual equity requirement, subject to a minimum of Rs. 0.6Cr./MW/Project (@ 50% of Rs. 1.20 Cr./MW/Project) in addition to Rs. 0.24Cr/MW/Project infused at the time of signing of PPA. Further, the SPDs would furnish within the aforesaid period, the necessary documents to establish that the required land for project development is in clear possession of the SPD (@ 1.5 ha per MW per Project) and provide evidence that the requisite technical criteria have been fulfilled. Additionally, for Projects sanctioned under Part-A (DCR), the SPDs would also specify their plan for meeting the requirement of domestic content. Further, the SPD shall furnish documentary evidence towards the following:

- i) The requisite technical criteria have been fulfilled and orders placed/agreements entered into, for supply of plants and equipment for the project.
- ii) Detailed Project Report for each project
- iii) The details of all planned/proposed Inverters and modules (manufacturer, model number, datasheet, all technical certificates as mentioned at Annexure-A along with the link of the certifying authority with ILAC member accredited lab/NABL accredited lab) for the project at least 14 days prior to the scheduled financial closure date.
- iv) Thereafter, a technical committee constituted by MNRE shall verify the compliance in respect of the technical criteria mentioned at Annexure-A. If the documents submitted by the SPD meet the requirement mentioned in Annexure-A for specific model numbers of a particular manufacturer and is verified by the committee, then the same shall be updated on the Centralized Project Monitoring System (CPM) data base. The SPD will be able to refer and select out of all the models verified by the committee, while entering the details of procured items (inverters/modules etc.) in the CPM prior to commissioning after financial closure. In case the SPD procures inverter/ module of different model number which is not available in the list of verified models in CPM, then the SPD will have to intimate SECI regarding the same and submit/upload the required supporting documents for the model number. However, in this case, SPD shall solely be responsible for the consequences of delay in commissioning due to delay in verification of the documents by the committee or for non-compliance.
- v) Required land for project development (@1.5 ha per MW per Project) is under possession of the SPD. In this regard the SPD shall be required to furnish the following documentary evidences to establish the possession of the required land/lease agreement in the name of the SPD:-
 - a) Ownership rights or lease hold rights or right to use from State / Central agency (for at least 30 years) in the name of the SPD and possession of 100% of the area of land required for the Project. Land can be taken on lease or right to use basis from State /Central agency only. Note: The land used for the project on lease hold basis or right to use basis will be accepted only in the case of State/Central Government land. Certificate by the concerned and competent revenue/registration authority or appropriate Govt., agency for the acquisition/ownership/lease/ right to use/ vesting of the land in the name of the SPD.
 - vi) Sworn affidavit from the Authorized person of the SPD listing the details of the land and certifying total land required for the Project under clear possession of the SPD. In exceptional circumstances change of land within the State could be agreed within 7 months of signing of PPA or at Financial Closure, whichever is earlier, but with prior approval of SECI. In such case the Bidding Company / Project Company has to furnish the revised STU connectivity letter for the new location.
 - vii) In case of delay in achieving above condition as may be applicable, SECI shall encash Performance Bank Guarantees and shall remove the

Project from the list of the selected Projects, An extension can however be considered, on the sole request of SPD, on payment of a penalty of Rs. 10,000/- per day per MW. This amount will go into the Payment Security Fund. This extension will not have any impact on the Scheduled Commercial Operation Date.

viii) Successful bidders will have to submit the required documents to SECI at least 14 days prior to the scheduled Financial Closure date. The same are also required to be uploaded on SECI's Centralized Project Monitoring System within the same time period. In case of delay in submission of documents mentioned above, SECI shall not be liable for delay in verification of documents and subsequent delay in Financial Closure.”

31. The above Clause of the RfS document provides for the Financial Closure/ Project Financing Agreements within the period of seven months from the effective date of the PPA. Further, RfS also provides for the consequences of non-achievement of Financial Closure within the prescribed period in Clauses 3.16 (vii) and (viii). Similarly, Letter of Intent stipulates that acceptance of the project is subject to the Guidelines including amendments/clarifications issued by MNRE and terms and conditions of the RfS and that the SPD shall report Financial Closure within seven months from the effective date of the PPA. Article 3.1 of the PPA also specifically stipulates about '*Conditions Subsequent*' and with the execution of PPA, the SPD agrees to duly perform and complete all of the activities at SPD's own risk and cost within seven months from the effective date.

32. As required under Clause 3.16 of the RfP, the Petitioner was required to demonstrate tie-up of financing arrangements for the Project and was required to submit a certificate from all financing agencies regarding the tie-up of funds and documentary evidence for demonstration/infusion of actual equity requirement, subject to a minimum of Rs. 0.6 crore/MW/Project (@ 50% of Rs.

1.20 crore/MW/Project) in addition to Rs. 0.24crore/MW/Project infused at the time of signing of PPA. The Petitioner vide its consent letter dated 29.11.2016 (Annexure A11) signed by two of its Directors (including the Managing Director) informed the Respondent as under:

“With regards to financial closure requirements, we hereby confirm that company has adequate funds for the purpose of equity infusion and shall execute the project entirely through internal resources as per conditions of PPA terms and conditions.

Details of funds availability as hereby enclosed.

Presently, the company is in the process of filing demerger and therefore we hereby commit the utilization of internal funds for the said purpose. Same shall be placed before the Board and ratified in the ensuing Board Meeting”

33. The Petitioner confirmed this position vide letter dated 8.12.2016 (Annexure A13). However, the Petitioner could not submit the minutes of Board Meeting with a Resolution that the Petitioner had adequate funds for the purpose of equity infusion and that it would execute the project entirely through internal resources since the Petitioner company was undergoing process of demerger. However, upon completion of the demerger process on 26.5.2017, the energy business of the Petitioner stood transferred to M/s GRPL and the Board resolution of GRPL, the entity which had committed funds for the project, was submitted on 9.6.2017.

34. Article 3.2.1 provides as under:

“3.2 Consequences of non-fulfilment of conditions subsequent

3.2.1 In case of a failure to submit the documents as above, SECI shall encash the Performance Bank Guarantee submitted by the SPD, terminate this Agreement and remove the Project from the list of the selected Projects by giving a notice to the SPD in writing of at least seven (7) days unless the delay is on account of delay by Government or Force Majeure. The termination of the Agreement shall take effect upon the expiry of the 7th day of the above notice.

- 3.2.2 An extension without any impact on the Schedule Commissioning Date, can however be considered, on the sole request of SPD on payment of Rs. 10,000/- per day per MW to SECI.
- 3.2.3 For the avoidance of doubt, it is clarified that this Article shall survive the termination of this Agreement.
- 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 the period of such Force Majeure event.
- 3.2.5 Provided that due to the provisions of this Article 3.2.4, any increase in the time period for completion of conditions subsequent mentioned under Article 3.1, shall also lead to an equal extension in the Scheduled Commissioning Date.”

35. As per the above provision, in case of non-compliance of ‘Condition Subsequent’ activities by the Petitioner, the Respondent shall encash the Performance Bank Guarantee, terminate the Agreement and remove the Project from the list of the selected Projects by giving a notice of seven days and the termination of the Agreement shall take effect upon the expiry of the 7th day of the notice.

36. As per the PPA, the Petitioner was required to submit the relevant documents complying with the Conditions Subsequent at its own risk and cost within seven months from the effective date unless such completion is affected by any Force Majeure event. Since, the effective date of the PPA was 10.4.2016, the Petitioner was required to comply with the Conditions Subsequent activities latest by 10.11.2016 subject to occurrence of Force Majeure event. It is also to be noted that the Article 3.1(c) of the PPA requires the Petitioner to make project financing arrangements and provide necessary certificate to the Respondent in this regard but does not prescribe any form or the manner for such certificate.

37. We note that the Petitioner has provided consent letter signed by its

Managing Director and another whole-time Director to the effect that the Petitioner has sufficient internal funds to implement the project. It is not the Respondent's case that the letter is unauthorized or that the funds are not available with the Petitioner as stated.

38. Further, it is noted that the Respondent has also accepted an amount of Rs.1.90 crore on 7.12.2016 along with interest of Rs. 33,523/- on 9.12.2016 for delay of 19 days in complying with the 'Condition Subsequent' activities. Therefore, the period for compliance of the Conditions Subsequent Activities stood extended to 29.11.2016 by which time the Petitioner had already submitted the afore-mentioned consent letter on 29.11.2016. There is also no dispute that the Project has, in fact been developed by the Petitioner and part-capacity of 28 MW is already energized with the consent of the ultimate beneficiary i.e. State of Maharashtra. The conduct of the Petitioner also shows its commitment to complete the Project. Therefore, in our view, there is a good enough ground to allay any concerns with respect to Petitioner's financial ability to implement the Project. It has been stated by the Petitioner that it has already infused approximately Rs. 170 crore of its own funds in the Project. By installing part capacity of 28 MW, the Petitioner has shown its capacity to fund the project on its own. We are rather of the view that SECI should have considered the certificate furnished by the Managing Director and another whole-time Director of the Petitioner to demonstrate the compliance of this requirement under 3.1 (c) of the PPA by 29.11.2016 as sufficient for the purpose of project financing. Concern, if any, should have been raised as regards the details provided with the letter when the letter was submitted. We find no such concern raised by the

Respondent rather it has only spoken of non-achievement of Financial Closure. If a firm wants to execute a project through its own resources and the same is certified by the Managing Director of the firm, we find no reason for the Respondent to insist on Financial Closure. The Respondent not having questioned letter of Managing Director and subsequently, the Petitioner having installed 28 MW capacity and stating that it is willing to install full capacity, does not leave scope as regards capacity of the Petitioner in project financing. We hold that the contention of the Respondent that the Petitioner has not fulfilled Conditions Subsequent as regards Project Financing is not acceptable.

39. Issue No. 2: Issues relating to ‘maintaining of Shareholding’ pattern

- i) Whether the Petitioner violated Clause 3.20 of the Scheme Guidelines, inter alia, which obliges the Petitioner not to change its shareholding pattern for a period of one (1) year from the Commercial Date of Operation? and
- ii) Whether M/s GRPL (the Resultant Company pursuant to approval of the demerger by National Company Law Tribunal vide order dated 26.5.2017) should be allowed to be substituted as the successor to the Petitioner?

A. Maintaining Shareholding pattern:

40. The Respondent has not produced any document that establishes that this issue had been raised in any of the previous correspondences addressed by the Respondent to the Petitioner. On the other hand, the Petitioner has submitted that this issue does not arise for consideration of this Commission since the present petition was filed by the Petitioner inter alia restraining the Respondent from terminating the PPA on account of non-fulfillment of Conditions Subsequent by the Petitioner and seeking extension of time for fulfillment of such Conditions Subsequent Activities. Infact, by letter dated 1.3.2017, the respondent sought further information in this regard as under:

“b)...Further to this as per your letter (Ref No.: x) stating that M/s WEPL is going under demerger, we have not received copy of demerger application admitted by the Court and the copy of latest balance sheet submitted along with the demerger application.”

41. The Petitioner has submitted that unless the foundation of the case is made out in the show-cause notice, the authorities cannot in the Court argue that case. In this regard, the Petitioner has relied upon judgment of Hon'ble Supreme Court in Commissioner of Central Excise, Bhubaneswar vs. M/s. Champdany Industries [(2009) 9 SCC 466]. Relevant portion of the said judgment is extracted as under:

“38. Apart from that, the point on Rule 3 which has been argued by the learned counsel for the Revenue was not part of its case in the show-cause notice. It is well settled that unless the foundation of the case is made out in the show-cause notice, the Revenue cannot in Court argue a case not made out in its show-cause notice. (See Commr. of Customs v. Toyo Engg. India Ltd. [(2006) 7 SCC 592]) Similar view was expressed by this Court in CCE v. Ballarpur Industries Ltd. [(2007) 8 SCC 89] In para 27 of the said Report, learned Judges made it clear that if there is no invocation of the Rules concerned in the show-cause notice, it would not be open to the Commissioner to invoke the said Rules.”

42. The Petitioner has also relied upon the Judgment in Commissioner of Customs, Mumbai vs. Toyo Engineering India Ltd. [(2006) 7 SCC 592)]. Relevant portion of the said judgment is extracted as under:

“16. Learned counsel for the Revenue tried to raise some of the submissions which were not allowed to be raised by the Tribunal before us, as well. We agree with the Tribunal that the Revenue could not be allowed to raise these submissions for the first time in the second appeal before the Tribunal. Neither the adjudicating authority nor the Appellate Authority had denied the facility of the project import to the respondent on any of these grounds. These grounds did not find mention in the show-cause notice as well. The Department cannot travel beyond the show-cause notice. Even in the grounds of appeals these points have not been taken.”

43. The Petitioner has further contended that the entire premise of the Respondent who purported breach on account of change in shareholding arises out of its reliance on Clause 3.20 (v) of the RfS which provides that “In case of companies having multiple promoters (i.e. none of the shareholders having not

less than 51% of voting rights and paid up share capital), it shall be considered as joint control shareholding. In such cases, the shareholding pattern in the company as submitted at the time of bidding shall be maintained for a period of (01) one year after Commercial Date of Operation (COD).”The Petitioner has submitted that the Respondent is wrongly relying on Clause 3.20(v) of RfS and has deliberately not considered Clause 3.20(vi) of the RfS. The Petitioner has submitted that there has been no transfer of shareholding. There has been merely a statutory reorganization/ reconstitution of shareholding of shareholders of the SPD by operation of law. RfS was part of the bid document. The Petitioner has argued that in the present case, the RfS or the restriction related to shareholding pattern have not been included in the PPA. It has argued that once the PPA is signed and the Contract duly entered into, any negotiations or terms discussed prior to the Contract has no relevance thereof. The Petitioner has placed its reliance on the principle laid down by the Hon’ble Supreme Court in the case of Security Printing and Minting Corpn. of India Ltd. v. Gandhi Industrial Corpn. [(2007) 13 SCC 236] and has submitted that the law is settled that the Court while construing a contract has to look into the plain language of the contract itself and cannot rely on any prior discussions or documents exchanged between the parties that do not form part of the contract itself.

44. The Petitioner has argued that the purpose of the clause relating to change of shareholding as provided in Article 3.20 of RfS and Article 4.1.1 (f) of the PPA is to ensure that a company after having won the Project on its own credentials does not sell it to a third party, another group or entity to earn premium. This is to ensure that the company/entity to which the Project has been awarded, does not exit the Project by way of selling its shares in the SPV

before executing the Project and thereby prejudicing the execution of the Project. These restrictions are placed to avoid trading of Projects for a premium and to ensure execution of the Project. The Petitioner has submitted that in the present case, there has only been a re-constitution/ reorganization of shareholding, resulting from internal restructuring of the shareholder and by Court-led demerger process. The original shareholders have between themselves reconstituted/ reorganized the shareholding and no new entity/ party has been inducted into the Company and no transfer to a third entity has taken place. Further, such transaction is not treated as a transfer even under the Income Tax Act and thus is exempted from tax on Capital Gains under Section 45, read with Section 47 [(vi b)].

45. The Petitioner has submitted that at the time of execution of the PPA, the shares of the Petitioner company were held by nine shareholders i.e. Welspun Enterprises Limited, Rank Marketing Pvt. Ltd. Holding, Rank Marketing LLP, Welspun Mercantile Ltd. Holding, Welspun Wintex Ltd. Holding, Mr. B.K. Goenka, Candor Power Pvt. Ltd. However, thereafter, the following events have occurred:

a) Rank Marketing Private Limited was converted into Rank Marketing LLP w.e.f. 30.3.2016 i.e. before the signing of the PPA and the shares held by Rank Marketing Private Limited in the Petitioner Company were vested to Rank Marketing LLP.

b) Vide order of amalgamation passed by the Hon'ble Bombay High Court on 12.8.2016, the shares of the Petitioner Company held by Bhadrawatilspat and Energy Limited stood vested/merged with its affiliate Reliable Record Keepers Pvt. Ltd.

c) Vide the amalgamation order dated 9.9.2016 passed by the Hon'ble Ahmadabad High Court, the shares held by two shareholders, namely Welspun Mercantile Ltd. and Welspun Wintex Limited in the Petitioner Company stood vested to its affiliate MGN Agro Properties Pvt. Ltd.

d) Vide order dated 26.5.2017 of NCLT, the Petitioner company was restructured and the renewable business was de-merged into M/s Giriraj Renewable Pvt. Ltd. (M/s GRPL), the resultant company.

Hence, due to internal re-arrangement/ re-structuring of shareholding of the shareholders there is consolidation of shareholding from nine (9), to seven (7) and thereafter to two. In the present case, 'Change in Shareholding' will not apply as this change in shareholding resulted from re-organization/ reconstitution of shares and not through transfer of shares.

46. *Per Contra*, the Respondent has submitted that various provisions have been stipulated in the Scheme Guidelines, the RfS and also the PPA for ensuring that there is no change in the shareholding pattern/ controlling shareholding of the SPD. The intention behind the said provisions is to secure identity of the SPD for a minimum fixed period of time, which is also necessary in order to secure the interest of the power projects. In order to secure the interest of the project and in order to ensure that there is no change in identity of the selected Bidder, various documents as mentioned above contain provisions for prohibiting such change in identity of the selected Bidder for a fixed period of time. The Respondent has placed its reliance on the judgment passed by the Hon'ble Supreme Court in the case of *Zoroastrian Cooperative Housing Society Ltd. &Anr. Vs. District Registrar, Cooperative Societies (Urban) &Ors.[2005] 5 SCC 632*. This case dealt with restriction on transfer contained in bye-laws of a

cooperative housing society whereby ownership was restricted to the members of Parsi community. Taking note of the special circumstances, the Hon'ble Supreme Court upheld the restriction and the right of the members of a cooperative society to restrict membership within the community so as to preserve the basic character of the society. While this may not be directly relevant in a case of the present nature, the Respondent has relied on this Judgment to submit that the provisions restricting transfer in shareholding in commercial contracts are inserted in order to protect the identity of the contractual relationship.

47. The Respondent has submitted that Clause 3.12 of the Scheme Guidelines and Article 4.1.1 (f) of the PPA provide for, inter alia, maintaining the shareholding of the Bidding Company/ SPD. The Respondent has further submitted that the Clause 1.3.7 (iv) of the RfS document also provides that the Project cannot be transferred or sold to a third party during the “..... *lock-in period of 1 year as per provision under Clause 3.20 of this RfS....*”

48. The Respondent has contended that the shareholding pattern submitted by the Petitioner at the time of Bidding in response to the RfS document demonstrates that at the time of bidding, the Petitioner comprised nine promoters. However, its shareholding pattern when it approached NCLT comprised of seven shareholders and now it was seeking the transfer of its business to a third-party company comprising only two shareholders. Thus, Respondent has contended that the Petitioner has breached the fundamental obligation under the RfS of maintaining the shareholding pattern for a period of one year from the COD and was now seeking to transfer its business to another

third entity, viz. GRPL, which comprised of an entirely different shareholding pattern.

49. We have considered the submissions of the Petitioner and the Respondent. As per clause 3.20 sub-clause (v) of the RfS, in case of companies having multiple promoters (i.e. none of the shareholders having not less than 51% of voting rights and paid up share capital), it shall be considered as joint control shareholding. As per PPA, in such cases, the shareholding pattern in the company as submitted at the time of bidding shall be maintained for a period of one year after Commercial Date of Operation (COD).

50. The shareholding pattern as maintained by the Petitioner at the time of bid submission, while applying for demerger with NCLT and post-demerger is as under:

S. No.	Name of the Share Holder At the time of Bidding		Name of the Share Holder At the time of applying for de-merger %		M/s GRPL (Post De-Merger) %
1	Welspun Enterprises Limited	15.49	Welspun Enterprises Limited	15.49	
2	Rank Marketing Pvt. Ltd. Holding	11.02	Rank Marketing LLP	35.79	
3	Rank Marketing LLP	24.77			
4	Welspun Mercantile Ltd. Holding	0.64	MGM Agro Properties Pvt. Ltd.	1.23	
5	Welspun Wintex Ltd. Holding	0.59			
6	Mr. B.K. Goenka	0.15	Mr. B.K. Goenka	0.15	
7	Candor Power Pvt. Ltd.	27.70	Avaada Power Pvt. Ltd. (Formerly known as Candor Power Pvt. Ltd.)	27.70	99.99

8	Mr. Vineet Mittal	3.33	Mr. Vineet Mittal	3.33	0.01(One share)
9	Bhadrawati Ispat and Energy Ltd.	16.31	Reliable Record Keepers Pvt. Ltd.	16.31	
	Total		Total	100	100

51. It is noticed that the demerger process has been carried out in terms of Section 230-232 of the Companies Act, 2013 under the supervision and guidance of NCLT, Ahmadabad which is a judicial authority created under the Companies Act,2013. The demerger, therefore, has been sanctioned and approved by the NCLT, Ahmadabad under the provisions of law.

52. From the records, we find that the Petitioner intimated the Respondent of the demerger vide various letters dated 29.11.2016, 28.2.2017, 2.3.2017, 6.3.2017, 24.3.2017 and 15.4.2017. Thus, the Petitioner has not approached the NCLT secretly and has kept the Respondents informed. Except for letter dated 1.3.2017 where the Respondent sought further information and documents, we have not come across any documents where upon being intimated, the Respondent has raised any dispute or raised any objection before the NCLT.

53. The Petitioner has not sought any relief as regards change in shareholding pattern and rather it is the Respondent that has raised this issue. In fact, the issue regarding change of shareholding pattern has been raised by the Respondent for the first time, on 19.5.2017, in the reply to the present petition. The Petitioner has stated that due to internal re-arrangement/ re-structuring of shareholding of the shareholders there is consolidation of shareholding from

nine (9) to seven (7) and thereafter to two (2). In view of the fact that a) the process of demerger has been approved through a judicial process by NCLT; b) the Petitioner has informed the Respondent through various correspondences; c) the erstwhile company that signed the PPA i.e. WEPL is not in existence after demerger; d) this change in shareholding resulted from re-organization/reconstitution of shares and not through transfer of shares; and e) the Resultant Entity i.e. GRPL has been performing functions of erstwhile company subsequent to demerger approved by NCLT and has presently installed 28 MW, we are not convinced with arguments of the Respondent. More so because of the fact that it has not raised this issue before approaching this Commission nor has opposed the matter in NCLT despite being aware of the matter. We decide accordingly.

B. Substitution of Petitioner by M/s GRPL:

54. This Commission notes that during the pendency of the present Petition, two applications bearing I.A. No. 35 of 2017 for impleadment of M/s GRPL in the instant Petition and I.A. No. 93 of 2017 for substitution of M/s. GRPL in place of the Petitioner (WEPL) were filed in the following backgrounds which are pending for our consideration.

55. The Petitioner has submitted that on 29.11.2016, it had informed the Respondent that it intends to file an application for irreversible demerger with the NCLT, Ahmadabad for undertaking restructuring and segregating of its renewable and thermal business and submitted the draft copy of the demerger scheme to the Respondent vide its letter dated 29.11.2016. The scheme deals

with the demerger of the 'Demerged Undertaking' of the Petitioner (WEPL) with Resultant Company i.e. M/s GRPL whereby the EPC and the renewable business was proposed to be transferred by the Petitioner. The Board of the WEPL vide Board Resolution dated 3.12.2016 approved transfer of identified MoUs/LOIs executed between Government Authorities and Nodal Agencies with WEPL to GRPL wherein the present PPA was identified. M/s GRPL being the successor of WEPL was to take over all rights and obligations of the Petitioner (WEPL). Thereafter, the Petitioner filed an irreversible demerger application with NCLT.

56. Upon filing of the Application for demerger with NCLT, the Petitioner vide its letter dated 28.02.2017, *inter-alia*, served a copy of the scheme of demerger to MNRE and the Respondent. It also sought permission for transfer of the PPA to M/s GRPL and undertook that after the transfer of the PPA, M/s GRPL is ready to execute and commission the Project at its own risk and cost. Later on, the Petitioner once again submitted the copy of the scheme of demerger to the Respondent vide its letter dated 06.03.2017 and requested the assignment in favour M/s GRPL.

57. The Petitioner has further submitted that Article 15 of the PPA recognises the rights of a successor and clearly states that the Agreement is binding and inures to the benefit of the respective Successor of the Parties. Further, under Article 15, there is a restriction on assignees and the rights and obligations under the PPA, inure and bind only the permitted assignees. However, there is no such restriction on the Successor. Moreover, under Article 15.1, in case SECI intends to assign the PPA to any of its affiliates, then such

consent shall not be withheld by the SPD. Article 15.1 of the PPA is set out below:

“15.1 Assignments

This Agreement shall be binding upon, and inure to the benefit of the Parties and their respective successors and permitted assigns. This Agreement shall not be assigned by any Party other than by mutual consent between the Parties to be evidenced in writing...

Provided further that any successor(s) or permitted assign(s) identified after mutual agreement between the Parties may be required to execute a new agreement on the same terms and conditions as are included in this Agreement....”

58. Further, in the description of Parties of the PPA, it is stated that:

“This Power Purchase Agreement is made on 26th day of July, 2016 at New Delhi.

Welspun Energy Private Limited (CIN: U51909GJ2002PTC041136), a company incorporated under the Companies Act 1956 or the Companies Act 2013 as applicable, having its registered office at “Welspun City, Village Versamedi, Tal. Anjar, Dist. Kutch, Gujarat-370110, India, (hereinafter referred to as “Solar Power Developer or SPD”, which expression shall, unless repugnant to the context or the meaning thereof, be deemed to include its successors and permitted assignees) as a Party of the First Part; And

Solar Energy Corporation of India Limited, a company incorporated under the Companies Act, 1956, having its registered office at 1st Floor, A-Wing, D-3, District Center, Saket, New Delhi-110017 (hereinafter referred to as “SECI”, which expression shall, unless repugnant to the context or meaning thereof, be deemed to include its successors and assignees) as a Party of the Second Part.”

59. The Petitioner has submitted that the description of parties clearly recognizes that SPD shall mean and include permitted assignees and successors and in case of SECI, it shall include successors and assignees. Thus the PPA itself contemplates that the Respondent can permit an assignment and further the right of a successor to step into the shoes of the Petitioner.

60. The Petitioner has submitted that NCLT vide its Order dated 26.5.2017, sanctioned the scheme of demerger and thereby vested all the

responsibilities of renewable energy business of 'Demerged Undertaking' i.e., the Petitioner to the resultant undertaking i.e. GRPL as per the demerger scheme. M/s GRPL being the successor of WEPL took over all rights and obligations of the WEPL.

61. Also, the Board of WEPL vide board resolution dated 3.12.2016 had approved the transfer of identified MoUs/LOIs executed between Government Authorities and Nodal Agencies with WEPL to GRPL wherein the present PPA was identified. The scheme of demerger sanctioned by NCLT defines 'Demerged Undertaking' as:

means the business on a going concern basis of setting up of projects on EPC contract basis (the "EPC Business"), other EPC related assets and liabilities, inter divisional balances and escrow account related to EPC business and certain identified MoUs and/ Lols with State Government/ nodal agencies for renewable energy projects to the extent available and effective and forming a part of the Demerged Undertaking....."

62. Clause 4.7, Part II of the Scheme clearly stipulated that upon the Scheme becoming effective by virtue of its approval from Hon'ble High Court, the same would come into effect from Appointed date, i.e. 1.4.2016 and all benefits of all letters of intent, requests for proposal, bid acceptances, pre-qualification, bid acceptances, net worth, technical know-how, technical-experience, tenders, contracts, deeds, schemes, arrangements, permits, statutory or other licenses granted in favour of the Demerged Company shall be passed to the Resulting Company without any further act or deed as if the same were originally given by, issued to or executed in favour of the Resulting Company and GRPL would be bound by the same. Clause 4.7 provides as under:

"Upon the Scheme becoming effective, with effect from the Appointed Date, all

benefits (including that of payments, revenues and experience) of all letter of intent, requests for proposal, bid acceptances, prequalification, bid acceptances, net worth, technical know-how, technical experience (including experience in executing projects) tenders, contracts, deeds, memorandum of understanding, bonds, agreements, schemes, arrangements, permits and permissions, any statutory or other licences, approvals, authorities, powers of attorney, consents, leases, capital work in progress, tax registrations, regulatory approvals, track-record, experience, goodwill, certificates of completion, technical parameters, capabilities, eligibility criteria and all other rights, claims and powers and any other instrument of whatsoever nature and wheresoever situated belonging to or in the possession of or granted in favour of or enjoyed by the Demerged Company in connection with or pertaining or relating to the Demerged Undertaking for all intents and purposes and specifically including but not limited to, the track record, technical experience of having undertaken, performed and/or executed such projects or carried such business, turnover, the profitability, performance, and market share and all other rights, claims and powers of whatsoever situated, belonging to or in possession of or granted in favour of or enjoyed by the Demerged Company in connection with or pertaining or relating to the Demerged Undertaking from the commencement of its operation shall be passed on to the Resulting Company and shall become property of the Resulting Company without any further act or deed, as if the same were originally given by, issued to or executed in favour of the Resulting Company, and the Resulting Company shall be bound by the terms thereof, the obligations and duties thereunder, and the rights and benefits under the same shall be available to the Resulting Company and shall, as may be required, be appropriately mutated by the statutory or other authorities concerned therewith in favour of the Resulting Company. The Resulting Company shall make applications to the relevant authorities in this behalf."

63. Further clause 9.1 of the scheme of demerger provides that once the Scheme became effective all suits, appeals, legal, administrative or other proceedings whatsoever nature by or against Demerged Undertaking in any court or before any authority, judicial or quasi-judicial or administrative shall be continued, prosecuted, enforced by or against the Resulting Company, GRPL only to the exclusion of the Demerged Company (the Petitioner herein) in the manner and extent as would have been continued and enforced by or against Demerged Company.

64. The Petitioner has submitted that GRPL is the successor of WEPL by operation of law due to scheme of demerger duly sanctioned by NCLT, Ahmadabad in terms of section 230-232 of the Companies Act, 2013 which has

become final and binding on all parties by virtue of order dated 26.5.2017 and therefore, M/s GRPL being the successor of the Petitioner should be substituted by M/s GRPL and the PPA ought to be assigned in favour of M/s GRPL. Moreover, the Petitioner Company is no longer in existence and cease to exist by virtue of the NCLT orders.

65. The Petitioner further submitted that a huge investment has been made and the project is at an advanced stage. The project land and project assets already stand in name of M/s GRPL. The beneficiary under the PPA i.e. State of Maharashtra is drawing power from the project implemented and operated by M/s GRPL. Any refusal of successor-ship/ assignment at this stage will completely derail the project and run contrary to the court sanctioned demerger.

66. *Per Contra*, the Respondent has submitted that the Petitioner voluntarily filed the Demerger Application before NCLT praying for transfer of its business to a third party, viz. M/s GRPL. The Respondent has argued that demerger process is not any automatic process or any “change in law” event which is beyond the control of the Petitioner. It is the Petitioner which has voluntarily opted to file the demerger application despite being aware that such an action would result in breach of its obligations. The Respondent has also placed reliance on the provisions of the Companies Act, 2013, including Section 232 thereof which provides for the application to be filed by any company for “transfer” of its business to another company, by way of the demerger process. For the purpose of ready reference, the relevant extract of Section 232(1) of the Companies Act, 2013 is reproduced as under:-

“232. Merger and amalgamation of companies.-

Where an application is made to the Tribunal under Section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal-

(a)

That under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies.

the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply mutatis mutandis....”

67. The Respondent has submitted that the demerger process requires the meeting of the creditors and members of the company which admittedly did not include the Respondent. By opting to voluntarily transfer its business to third party company with different shareholders, the Petitioner has voluntarily and willfully breached a fundamental obligation under the contract(s) of maintaining its shareholding pattern for a period of atleast 1 year from the COD, including under Clause 3.20(v) of the RfS. Further, even in the case of a Change in Law which is beyond the control of the parties, the PPA stipulates that the parties shall approach this Commission for seeking approval of the Change in Law.

68. The Respondent has submitted that M/s GRPL has not “stepped into its shoes” being the Successor of the Petitioner in terms of the identification clause of the PPA. The identification clause of the PPA defines the Petitioner to be referred to as the “SPD” in the PPA, “... *which expression shall, unless repugnant to the context or meaning thereof, be deemed to include its successors and permitted assignees*)...” The Respondent has submitted that any

other interpretation given to the term “successor” would result in violation and derogation of other terms of the contract(s), which is impermissible in law. If the interpretation sought to be given by the Petitioner is accepted, it would result in a situation where the SPD would get enabled to file a demerger application, seek approval of its creditors and shareholders, and transfer its business before the one year lock-in period provided under the contract thereby making the provision of Clause 3.20(v) and Clause 1.3.7(iv) of the RfS as redundant and otiose.

69. The Commission observes that the Petitioner has placed on records the Final Order dated 14.3.2017 and 26.5.2017 pronounced by NCLT in C.A. (CAA) No. 4/ 230-232/NCLT/AHM/2017. NCLT vide its Order dated 26.5.2017 sanctioned the scheme of demerger and thereby vested all the responsibilities of renewable energy business of Demerged Undertaking i.e. the Petitioner to the resultant undertaking i.e. GRPL as per the demerger scheme.

70. The Commission observes that in the instant case the Scheme of Arrangement is between M/S WEPL (Demerged Company and Demerged Undertaking) and M/s GRPL (New Resultant Company). The NCLT vide its Order dated 26.5.2017 has already approved the demerger scheme. The Scheme of demerger has not been challenged in the Court of law and has attained finality.

71. It is noted that the Petitioner has requested the Respondent to approve the assignment of the PPA in favour of M/s GRPL, However, no decision in this regard has been communicated by the Respondent to the Petitioner and thus a prayer has been sought in the present petition in this regard. The Commission

also observes that under the PPA, particularly Article 15.1, the PPA can be assigned subject to mutual agreement between the parties. In the present case, pursuant to the demerger scheme sanctioned by NCLT, the Petitioner has already gone out of existence and M/s GRPL has done substantial work to bring the project to an advanced stage of completion.

72. The Commission is of the view the PPA can be assigned under Article 15.1 taking into account relevant factors, including that the renewable business of the Petitioner has been transferred to M/s GRPL by virtue of operation of law through the demerger sanctioned by NCLT. WEPL has ceased to be in existence qua its renewable business and charge of the Project has been vested in M/s GRPL pursuant NCLT orders. Pursuant to demerger, the entire Project land and consents from the concerned authorities are in the name of M/s GRPL; substantial investment has already been made by M/s GRPL; and the Project is at the advance stage of completion and 28 MW of the project is synchronized with the state Grid through the ultimate beneficiary i.e. MSEDCL.

73. In view of the above, the issue qua substitution of the Petitioner by M/s GRPL is decided in the affirmative. Accordingly, both applications bearing No. I.A. 35 of 2017 and I.A. No. 93 of 2017 are disposed of.

Issue No. 3: Whether the Petitioner is entitled for extension of SCoD? Or, the Respondent is entitled to terminate the PPA?

74. The Petitioner has submitted that contention of the Respondent that the PPA stood terminated after 7 days of notice dated 11.11.2016 by efflux of

time in terms of Article 3.2.1 of the PPA, is not correct. Neither the letter dated 11.11.2016 nor letter dated 1.3.2017 was a notice under Article 3.2.1. The Petitioner has submitted that the Respondent for the first time contended that the PPA had purportedly stood terminated by efflux of time vide its letter dated 8.5.2017, namely, after the present petition had been filed. The Respondent had accepted an amount of Rs.1.90 crore on 7.12.2016 along with interest of Rs. 33,523/- on 9.12.2016 for delay of 19 days in complying with the 'Condition Subsequent' activities. The Petitioner vide letter dated 15.4.2016 *bona fide* deposited extension charges vide cheque dated 15.4.2017 bearing no. 036267 drawn on Axis Bank for an amount of Rs 6.5 crore.

75. Per Contra, the Respondent has submitted that it is apparent from the conduct of the Petitioner that it did not possess the desire of performing its obligations under the Contract and was only trying to find a way to wriggle out of its obligations. On 05.09.2016, the Petitioner addressed a letter to the Respondent, inter alia, stating that it is not in a position to execute the project. However, the Respondent informed the Petitioner on 2.11.2016 that it has noted the information provided by the Petitioner and that the same shall be dealt as per the provisions of the PPA signed between SECI and Welspun Energy Private Limited.

76. The Respondent has submitted that it was the contractual obligation of the Petitioner to comply with the Conditions Subsequent latest by 10.11.2016. However, the Petitioner had admittedly taken no steps to comply with its contractual obligations. In view of the aforesaid breach committed by Petitioner, as mentioned above, on 11.11.2016, the Respondent issued the 7 days' notice

to the Petitioner. In terms of Article 3.2 of the PPA, the agreement had automatically stood terminated by efflux of time on the expiry of the stipulated period of 7 days. Subsequently, the Respondent exercising its right under the contract(s) and the terms of the unconditional Bank Guarantees sent a letter on 28.11.2016 to the concerned bank (viz. Central Bank of India) for encashment of the PBGs submitted by the SPD.

77. The Respondent has submitted that the Petitioner on realizing that its PBGs were liable to be en-cashed for committing material breach of its obligations under the contract sent the letter dated 29.11.2016 to the Respondent, inter alia, stating that they could not respond to the Respondent regarding their preparation for Financial Closure “due to some unavoidable circumstances”. The Petitioner also transferred an amount of Rs.1.90 crores to the account of the Respondent on 7.12.2016 and a further sum of Rs.33,523/- to the Respondent on 9.12.2016. The Respondent requested the Bank on 8.12.2016 for keeping on hold the invocation of the PBGs and conveyed to the Petitioner that the documents submitted by them are being examined by the Respondent. However, upon examination of the documents submitted by the Petitioner, the Respondent has informed vide its letter dated 1.3.2017 that the Petitioner had still not fulfilled the Conditions Subsequent in terms of Clause 3.1.

78. The Respondent has submitted that notice under Clause 3.2.1 had been issued by its letter dated 11.11.2016. It had given a period of 7 days in terms of Clause 3.2.1 of the PPA. Without prejudice to the position in law that the agreement had stood terminated by efflux of time, the Respondent had followed up the notice dated 11.11.2016 by addressing a subsequent notice

dated 1.3.2017. Once again, a period of 7 days was mentioned in this notice and on the expiry whereof, as per operation of Clause 3.2.1, the automatic termination of the contract was to take place. Being fully aware of the consequences of termination under the Contract for not complying with the Notice under Clause 3.2.1 of the PPA, the Petitioner addressed a communication dated 2.3.2017 to the Respondent praying for suspension of the Notice dated 1.3.2017.

79. The Respondent has submitted that on 13.4.2017, the Petitioner addressed another letter to the Respondent praying for extension of the date for fulfillment of the Conditions Subsequent up to 25.4.2017. The Petitioner once again addressed a communication dated 15.4.2017 to the Respondent, inter alia, praying for extension of time. Along with this communication, the Petitioner submitted a cheque of Rs. 6.50 crore. However, the Respondent had proceeded to encash the Bank Guarantees on 18.4.2017. In response, the Petitioner filed an application in the Hon'ble High Court of Delhi and obtained a restraining order against the Respondent from invoking the Bank Guarantees on 19.4.2017 and thereafter approached the Commission by way of the present petition. The Respondent returned the cheque of Rs. 6.50 crore dated 14.4.2017 to the Petitioner vide its letter dated 8.5.2017.

80. We have examined the matter. Article 3.2.4 and 3.2.5 of the PPA provide as under:

“3.2.4 In case of inability of the SPD to fulfill any one or more of the conditions specified in Article 3.1 due to any Force Majeure event, the time period for fulfillment of the Conditions Subsequent as mentioned in Article 3.1, shall be extended for the period of such Force Majeure event.

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

As per the above provision, in case the SPD is not able to fulfill any one or more of the conditions specified in Article 3.1 due to any Force Majeure event, the time period for fulfillment of the Conditions Subsequent, shall be extended for the period of such Force Majeure event. The Respondent has made detailed submissions in this proceeding to the effect that the PPA stood terminated from 11.11.2016 or at the latest on 1.3.2017, whereas the Petitioner has been seeking permission to continue and comply with the PPA for implementing the Project. The Petitioner has based its claims on delay caused due to digitization of land records stating that the event is akin to force majeure. On the other hand, the Respondent has stated that the Petitioner has not complied with Condition Subsequent activities in stipulated time and that the PPA has been terminated with efflux of time.

81. We have already decided that the Petitioner has, during extended time up to 29.11.2016, complied with two (financial closure and grid connectivity) of the three Conditions Subsequent activities. As regards the third Condition Subsequent activity i.e. clear possession and title of land, we have held that due to events akin to force majeure (government delay), the Petitioner has not been able to fulfill this Condition Subsequent activity.

82. According to the Petitioner, when it is willing and is committed towards execution of the Project and that the delay caused is beyond its control, the Respondent should not be permitted to back out of its contractual obligations by

raising capricious grounds. The Petitioner has submitted that the Appellate Tribunal for Electricity in *Appeal No. 115 of 2011(Reliance Infrastructure vs. MERC &Anr.)* has observed that contracts are entered into by the parties to be executed in good faith and for mutual benefits and not for terminating them on one ground or the other. The Petitioner has further submitted that its case is squarely covered by the judgment of Hon'ble Supreme Court in the case of *M.P. Power Management Company Ltd. vs. Renew Clean Energy Pvt. Ltd. [(2018) 6 SCC 151]* in which the Hon'ble Supreme court held that the termination of the contract is 'not fair'. The Petitioner has also placed its reliance on the order dated 11.06.2018 passed by the *Maharashtra Electricity Regulatory Commission in Case No. 185 of 2017*, wherein in somewhat similar circumstances, the Respondent had initially proceeded to take precipitative action against a solar power developer on account of delay in completing the solar power project. The SPD approached the MERC by filing a petition, which was contested by SECI. Subsequently, the Respondent amicably resolved the dispute/ issue with the SPD by entering into a settlement agreement. The Petitioner has also placed reliance on the judgment given by the Bombay High Court in *Mumbai Metropolitan Region Development Authority vs. Unity Infraproject Ltd.*, in which it was observed that law is not divorced from business realities nor can the vision of the Judge who interprets the law be disjointed from the modern necessities to make business sense to business dealings. The Petitioner has submitted that the Commission may allow the present petition and grant additional time of 3 months to commission the balance capacity of the Project.

83. The Petitioner has relied on judgment of Hon'ble Supreme Court in the case of *M.P. Power Management Company Ltd. vs. Renew Clean Energy Pvt.*

Ltd. [(2018) 6 SCC 15], The Respondent argued that this judgment of Hon'ble Supreme Court is not squarely applicable in the present case and differentiated the two cases as stated at paragraph 12(f) of this Order. The relevant portion of the judgment is as under:

“....These circumstances, though not a Force Majeure event, time taken by respondent No.1 in change of location and construction of the plant have to be kept in view for counting the delay. Having invested huge amount in purchasing the land and development of the project at Ashok Nagar district and when the project is in the final stage of commissioning, the termination of the contract is not fair.....”

84. We are of the view that the two basic grounds of this judgment of the Hon'ble Supreme Court are applicable in the present case i.e. a) huge investment has been made in the project and b) it is at an advanced stage of commissioning.

85. We have already decided that the period of 249 days i.e. from 4.10.2016 to 9.6.2017 is the delay due to 'Government delay akin to Force Majeure' and has been condoned for purposes of complying with Conditions Subsequent activities. We also note that the parties have been before this Commission since 5.5.2017 in order to adjudicate upon the status of the PPA. In the circumstances, the Commission deems it appropriate to direct that the benefit of period when the issue was pending before this Commission should also be extended to the Petitioner to fulfill the Conditions Subsequent requirements.

86. It is an admitted fact that 28 MW capacity of the Project has been synchronized with the grid w.e.f. 16.4.2018 while balance 72 MW is yet to be commissioned. In fact, w.e.f. 16.4.2018 and till the date when Order in this petition has been reserved, the situation of injecting 28 MW into the grid

remained unaltered. Having already commissioned 28 MW, we are satisfied that the Petitioner intends to continue with installation of the balance 72 MW.

87. Taking into account the fact that the Petitioner has acquired land, taken grid connectivity and made other arrangements for the purpose of setting up 100 MW capacity of which 28 MW is already installed and synchronized with the grid, the Commission deems it fit to allow the completion of the balance capacity of the Project with extension of the SCOD to 90 days from the date of issue of this Order. This extension of SCOD is subject to the condition that the Petitioner shall pay, within one week of this Order, an amount as provided in clause 3.2.2 of the PPA for the extended period of 90 days for balance capacity of 72 MW. Since 28 MW of capacity has been commissioned during pendency of this petition and that we have condoned delay period up to date of issue of this Order, the SCOD for this capacity of 28 MW shall be as per provisions of the PPA assuming that the total period of delay in commissioning is condoned.

Summary of Decisions:

88. Based on the above, the summary of our decision is as under:

- (i) As regards the Conditions Subsequent Activities related to financial closure and grid connectivity, the same stand fulfilled within the extended period from 11.11.2016 to 29.11.2016.
- (ii) As regards the delay in fulfillment of Conditions Subsequent activity related to clear possession and title of land, it is decided that fulfillment of this condition was beyond the control of the Petitioner, and was caused

due to 'Government delay akin to Force Majeure'. Accordingly, the delay from 4.10.2016 to 9.6.2017 is condoned.

(iii) Delay from 5.5.2017 till date of issue of this Order is also condoned since the matter was *sub-judice* before this Commission. Therefore, in effect the period from 4.10.2016 till issue of this Order is treated as force majeure and is condoned.

(iv) The prayer in the IA to substitute WEPL with the Resultant Company, GRPL is allowed.

(v) 28 MW has already been installed, synchronized and commissioned. For commissioning of balance capacity of 72 MW, the SCoD is extended upto 90 days from date of issue of this Order subject to payment of penalty in terms of clause 3.2.2 of the PPA within one week from the date of issue of this order.

89. Petition No. 95/MP/2017 along with I.A. No. 35 of 2017 and I.A. No. 93 of 2017 is disposed of in terms of the above.

Sd/-
(Dr. M. K. Iyer)
Member

Sd/-
(P. K. Pujari)
Chairperson