



केन्द्रीय विद्युत विनियामक आयोग
CENTRAL ELECTRICITY REGULATORY COMMISSION



नई दिल्ली
NEW DELHI

याचिका संख्या. /Petition No.: 125/MP/2019
Alongwith I.A. 63 of 2019

कोरम/Coram:

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

आदेश दिनांक /Date of Order: 13th of January, 2020

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 for seeking extension of time for commissioning of balance capacity of 72 MW (out of 100 MW) Solar PV project in terms of the order dated 17.12.2018 passed by this Commission.

AND IN THE MATTER:

Avaada Energy Private Limited
(formerly Giriraj Renewables Pvt. Ltd. – Demerged
Undertaking of Welspun Energy Pvt. Ltd.)
3rd Floor, PTI Building,
4, Parliament Street,
New Delhi – 110 001

...Petitioner

VERSUS

1. Solar Energy Corporation of India Ltd.

Having its registered office at
1st Floor, A-Wing, D-3
District Centre, Saket
New Delhi- 110017

2. Maharashtra State Electricity Distribution Company Ltd.

Prakashgad, Plot No. G-9,
Anant Kanekar Marg,
Bandra (E),

...Respondents

Parties Present: Shri M. G. Ramachandran, Sr. Advocate, SECI

Shri Prabhas Bajaj, Advocate, SECI

Shri Shubham Arya, Advocate, SECI

Ms. Tanya Sareen, Advocate, SECI

Shri S. Das, SECI

Shri Gopal Jain, Sr. Advocate, Welspun and Avaada Energy

Shri Amit Ojha, Advocate, Welspun and Avaada Energy

Ms. Meha Chanrda, Advocate, Welspun and Avaada Energy

Ms. Shreya Mukerjee, Advocate, Welspun and Avaada Energy

Shri Ashish Bhardwaj, Advocate, Welspun and Avaada Energy

Shri Amit Ojha, Advocate, Welspun and Avaada Energy

आदेश/ ORDER

The Petitioner, Avaada Energy Private Limited, (formerly Giriraj Renewables Pvt. Ltd. – Demerged Undertaking of Welspun Energy Pvt. Ltd.) has filed the petition under Section 79 of the Electricity Act, 2003 seeking implementation of order dated 17.12.2018 passed by this Commission in 95/MP/2017 and further extension of time for commissioning balance capacity of 72 MW out of 100 MW Solar PV project located in district Satara, Maharashtra being developed by the Petitioner.

2. The Respondent No. 1, Solar Energy Corporation of India Limited (hereinafter referred to as 'SECI') has been designated by the Government of India as the nodal agency for facilitation and implementation of Jawaharlal Nehru National Solar Mission ("JNNSM") and achievement of targets set therein. The Respondent No. 1 is also a trading licensee under the provisions of the Electricity Act.
3. The Respondent No. 2, Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as 'MSEDCL'), is a distribution licensee in terms of the Electricity Act and is engaged in distribution of electricity to the consumers in the State of Maharashtra.
4. The Petitioner has made the following prayers in the Petition and I.A.:
 - (i) *Direct the Respondents to implement the order dated 17.12.2018 passed by this Commission in Petition No. 95/MP/2017 in letter and spirit;*
 - (ii) *Allow the similar time period for completion of balance capacity of 72 MW effective from the issuance of written confirmation from the Respondent No. 1 or any period which this Commission deems fit and proper in the interest of fair play, equity and justice and considering the facts and circumstances of the case;*
 - (iii) *Set aside and quash the letter dated 11.04.2019 issued by the Respondent No. 1;*
 - (iv) *Hold and declare the termination of Power Sale Agreement (PSA) by Respondent No. 2 as illegal and direct the Respondent No. 2 to reinstate the same or direct the Respondent No. 1 to enter into a fresh Power Sale Agreement with an alternate buyer including but not limited intra state sale;*
 - (v) *Pass such other relief(s)/ order(s) that this Commission may deem fit.*

Background

5. The Petitioner is a demerged undertaking of Welspun Energy Pvt. Ltd., and has executed Power Purchase Agreement (hereinafter referred to as 'PPA') dated 27.06.2016 having effective date as 10.04.2016 with the Respondent No.1 (SECI) for setting up solar generation facility of contracted capacity of 10MW located in District Satara in the State of Maharashtra. However, certain dispute arose between Petitioner and Respondent No.1 and the Petitioner approached this Commission in Petition No. 95/MP/2017 seeking (i) to restrain SECI from terminating the 'PPA' dated 26.07.2016 (ii) for directing SECI to permit the assignment of the PPA to Giriraj Renewables Private Limited (iii) for direction to SECI to extend Scheduled Commissioning Date (hereinafter referred to as 'SCOD') and the time-period for fulfilment of Conditions Subsequent for the Force Majeure like period; or in the alternative direct SECI to allow extension of time to complete the Conditions Subsequent in terms of Article 3.2.2 of the PPA and consequent extension of SCOD.
6. The Commission vide order dated 17.12.2018 in Petition No. 95/MP/2017 *inter alia* held as under:

“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.”

7. In terms of Order dated 17.12.2018 of the Commission, the Petitioner remitted a sum of Rs. 6,48,00,000/- to SECI on 19.12.2018. The Petitioner contacted the supplier of module and issued the purchase order dated 20.12.2018 and same was accepted by the supplier. The Supplier on 29.12.2018 requested the Petitioner to establish the letter of Credit (hereinafter referred to as 'LC') for remitting funds immediately to commence supply of the modules. It wrote a letter to 'Yes Bank' on 19.12.2018 seeking disbursement of funds for the project. Yes Bank gave "in principle" approval for disbursal of funds and vide letter dated 11.01.2019 requested the Petitioner to furnish a written confirmation from the Respondent No. 1 (SECI) w.r.t. PPA acceptance, SCoD extension and project tariff in order to sanction/disburse the loan for the project. The Petitioner explained the Bank regarding the Commission's decision. However, the Bank insisted upon confirmation. The Petitioner requested SECI vide letter dated 21.01.2019 and 31.01.2019 for appropriate communication.
8. On 05.02.2019, SECI acknowledged the receipt of INR 6,48,00,000/-. SECI also informed that Respondent no. 2 (MSEDCL) vide letter dated 18.01.2019 had cancelled the Power Sales Agreement (hereinafter referred to as 'PSA') for 100 MW. SECI further informed that since, the obligation under the PPA is on a back to back basis, SECI would not be able to honour the PPA. SECI also informed that it has filed a Review Petition No. 2/RP/2019 in Petition No. 95/MP/2017, which is pending adjudication before this Commission.

Submissions of the Petitioner

9. The Petitioner has submitted that even though it had complied with the Order of this Commission and remitted the penalty in order to commission the balance capacity of 72 MW, the Respondent No.1 failed to provide the much necessary support for disbursement of funds for implementation of the Project. Moreover, in order to further delay the implementation of

the order and the project, SECI filed the review petition with the Commission.

10. The Petitioner has submitted that it had sufficient funds for the development of the current project and had already invested more than Rs. 206 Crore. However, due to long standing dispute and uncertainty in the project development, the Petitioner in the intervening period was constrained to use the unutilized fund for other projects under its portfolio.
11. The Petitioner has submitted that the Respondents being the State instrumentality and a nodal agency for the Government of India are duty bound to follow the order and directions of the Courts/ Tribunals of this country. Instead of encouraging the development of solar sector (which is the primary objective of SECI) and complying with the Orders passed by a judicial authority, the Respondents in fact tried to circumvent the order by adopting various unwarranted action such as non-implementation of the order by Respondent No. 1 and cancellation of the 100 MW capacity by Respondent No. 2 despite being a party to the proceedings before the Commission. The Respondents, through its actions, have effectively blocked and prevented implementation of the project by the Petitioner. The Petitioner relied upon Section 67 of the Contract Act, 1972 which is reproduced as under:

67. Effect of neglect of promisee to afford promisor reasonable facilities for performance.—If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

12. The Petitioner has submitted that the execution of the project is being affected due to non-cooperation from the Respondent No. 1 since it has failed to provide requisite confirmation as desired by the lenders. It has approached the Commission with the present petition for directing the Respondents to implement the Order dated 17.12.2018 passed by this Commission in Petition No. 95/MP/2017 in letter and spirit and allow a similar time period for completion of balance capacity of 72 MW effective from the issuance of written confirmation from the Respondent No. 1.

Submission of the Petitioner through I.A. 63 of 2019

13. The Petitioner by ways of the IA 63 of 2019 has added para 31-36 in the petition and stated:
- a. That despite clear findings of the Commission to execute the balance capacity of the Project, the Respondent 1 has vide letter dated 11.04.2019 and 28.05.2019 informed that PPA stands terminated. PPA cannot be terminated by a mere assertion and without following the due procedure prescribed under the PPA and Law. The Respondent No. 1 has time and again taken the plea of “automatic termination” which is unfounded in law and is contrary to the terms of the PPA. The Respondent no.1 being a nodal agency ought to have facilitated the completion of the project.
 - b. That filing of the Review Petition and refusal to confirm its acceptance to go ahead with the project and comply with its obligation under the PPA indicates the refusal of Respondent No.1 to perform its part of the obligation under the PPA.
 - c. That MSEDCL was party in 95/MP/2017 wherein order dated 17.12.2018 has been passed by this Commission. Despite the Commission granting time extension of the SCoD, the Respondent 2 issued the letter dated 18.01.2019 to Respondent No.1 terminating the PSA dated 04.11.2016. Such conduct of the Respondent No. 2 not only circumvents the implementation of the order dated 17.12.2018 but also undermines the authority of the judicial body by disregarding the order passed by this Commission.
14. The Petitioner has submitted that while correcting the letter date 21.02.2018 which was wrongly mentioned as 21.02.2019 has replaced para 25&26 of the petition. It is to mention here that the through replaced paras the Petitioner has reiterated the facts and for sake of brevity same have not been discussed here.

15. The Petitioner submitted that mere filing of review petition would not absolve the Respondent No. 1 of its obligations to comply with this Commission's order.

16. The Petitioner has sought to add the following prayers in the main petition:

“(iii) Set aside and quash the letter dated 11.04.2019 issued by the Respondent No. 1;

(iv) Hold and declare the termination of Power Sale Agreement (PSA) by Respondent No. 2 as illegal and direct the Respondent No. 2 to reinstate the same or direct the Respondent No. 1 to enter into a fresh Power Sale Agreement with an alternate buyer including but not limited intra state sale;”

Reply of the Respondent 1 (SECI)

17. The Respondent No. 1 has submitted that the present petition seeking an extension of time for establishing the Power Project beyond the period allowed in the order dated 17.12.2018 passed by the Commission is misconceived and deserves to be dismissed in limine for the following reasons:

- a. The Petitioner/ Welspun has failed to fulfill its contractual obligations under the PPA within the stipulated time. The 100 MW Solar Power Project was scheduled to be commissioned in May 2017 and the same has not been commissioned even within the time extended by the Commission vide the order dated 17.12.2018.
- b. SECI has duly terminated the PPA with the Petitioner for breach on the part of the Petitioner as well as on account of sustained Force Majeure.
- c. The extension of time now sought for completion of the power project (which was to be commissioned in the year 2017), after enormous delay when the competitive tariff at which the Solar power being quoted now is considerably low, will be against public interest.
- d. 90 days granted by this Commission in its Order dated 17.12.2018 had expired on 16.03.2019. The Petitioner has again failed to commission the 100 MW Project. The

Petitioner did not even seek an extension of time from this Commission before the expiry of the time period granted by this Commission on 16.03.2019.

- e. The Petitioner had contended that it had written a letter dated 29.11.2016 signed by two of its Directors that it had adequate funds and would execute the project entirely through internal resources. This letter was not supported by any Board Resolution. During the hearing before this Commission, it was the contention of the Petitioner that its letter dated 29.11.2016 whereby two Directors of the Petitioner had committed that the company has adequate funds for financing the project (without any supporting Board Resolution), had constituted fulfilment of the Condition Subsequent to make the Project Finance Arrangements.
- f. The Petitioner has made Statement on Oath that *“The Petitioner therefore has committed that the project would be executed from the internal resources.... It is relevant at this stage to submit that Candor Power Private Limited (CPPL) (subsequently, name changed), the largest shareholder of the Petitioner, holds 100% equity shareholder of GRPL that is going to be the resultant company post demerger, CPPL has a net worth of approximately around INR 416 crores (Indian Rupees Four Hundred and Sixteen Crores) and is willing to set up the project through GRPL by way of infusing requisite equity. Thus, this CS Activity could be complied with, once extension of time and assignment of PPA to GRPL are granted by the Respondent*”
- g. Based on the aforesaid submissions of the Petitioner, the Commission, inter alia, held that, *“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.....”*
- h. The claim now made by the Petitioner is contradictory to the earlier pleadings and based on which the Order dated 17.12.2018 was passed granting time till 16.03.2019. The Petitioner cannot now be allowed to go back on the said statement to claim relief for further extension of time on contradictory plea.

18. The Respondent No.1 has submitted that the Petitioner in complete U-turn and started

contending as if SECI is obliged to provide a “letter of confirmation” to the Petitioner for securing external funds – contrary to the commitment of funding the project entirely through internal funds, on the basis of which Petitioner had claimed to have achieved Financial Closure before this Commission. It is impermissible for the Petitioner to now take an entirely new stand that it did not have the internal resources to fund the project (thereby seeking to reopen the very basis of the Order dated 17.12.2018) and that it was now required to secure funds from an external lender for which it was seeking ‘confirmation’ from SECI.

19. The Respondent No.1 has submitted that the Petitioner has claimed that it has been unable to secure funds from the lenders. Thus the claim now made by the Petitioner is contradictory to the earlier pleadings and based on which the Order dated 17.12.2018 was passed granting time till 16.03.2019. It has not been able to secure funds from the lenders for completing the project within the period of 90 days granted by this Commission is a blatant abuse of process of law.
20. The Respondent No.1 has submitted that on 09.01.2019, the Petitioner wrote to SECI to issue a Commissioning Certificate for the 28 MW capacity allegedly set up by the Petitioner (out of the total capacity of 100 MW). On 05.02.2019, SECI duly responded to the letter of the Petitioner that SECI has already filed a Review Petition before the Commission and that any further steps would be taken by SECI as per the final decision in the Review Petition.
21. The Respondent No.1 has submitted that it is specifically denied that the Review Petition has been filed to further delay the completion of the project. In fact, it is the conduct of the Petitioner that has caused irreparable injury and gross prejudice to the public interest by causing enormous delay in the execution of the project and by failing to comply with its contractual obligations at every stage. It is the Petitioner who is seeking to circumvent the Order dated. 17.12.18 passed by this Commission.
22. The Respondent No.1 has submitted that Section 67 of the Contract Act does not have any

applicability to the facts of the present case. All reasonable facilities and those envisaged under the contract have always been available to the Petitioner, despite which the Petitioner has failed to comply with its obligations thereby resulting in wilful and deliberate breach of the contract by the Petitioner.

Reply of the Respondent No. 1 on I.A. 63 of 2019

23. The Respondent No. 1 has submitted that:

- a. The Petitioner had sought an extension of time for completing the project when the time of 90 days granted by this Commission in its order dated 17.12.2018 had already stood expired on 16.03.2019. On account of, inter-alia, failure of the Petitioner to comply with the direction of this Commission to complete the project within the period of 90 days from 17.12.2018, SECI had exercised its right under the PPA to terminate the contract on 11.04.2019.
- b. The Petitioner has wilfully given up the challenge to the termination letter dated 11.04.2019. It would be impermissible for the Petitioner to now seek to enlarge the scope of the present petition by making a substantive challenge to the said termination letter dated 11.04.2019.
- c. The main petition is not maintainable in view of the fact that PPA has been terminated on 11.04.2019 and does not survive any longer. Once there is no PPA in existence, there is no permissibility for the Petitioner to seek any further extension of time. The attempt of the Petitioner to now raise a new substantive challenge by way of the amendment application amounts to altering the very nature of the petition itself and therefore, deserves to be rejected.
- d. For any substantive Force Majeure for a period of more than 3 months (clause 13.5 read with 4.5 of the PPA) as well as for any delay in the SCoD beyond the period of 25 month from the effective date of PPA (clause 4.6.2 of the PPA) SECI has the absolute right to and is entitled to terminate the contract, without issuance of any prior notice to show

cause or otherwise.

24. The Respondent No. 1 has submitted that other facts in the reply are either reiteration or not material and hence not discussed here for sake of brevity.

Submission by way of Rejoinder filed by Petitioner in Reply of the Respondent No.1

25. The Petitioner by way of Rejoinder to the Reply of the Respondent-1(SECI) has reiterated many facts which was already been argued in the main petition. However additionally, it has submitted that:

- a. The Respondent No.1 has sought to re-argue and re-agitate grounds which have been raised by it in Review Petition No. 2/RP/2019 and the same cannot now be argued by the Respondent 1 in its reply to the present Petition wherein the Petitioner is *dominus litis*.
- b. The letter dated 18.01.2019 issued by Respondent no. 2 regarding termination of PSA was responded by Respondent No. 1 by letter dated 01.02.2019 wherein the Respondent No.1 informed that the Respondent No.2 cannot unilaterally proceed to terminate the PSA. This letter was only disclosed on 26.09.2019 as annexure to Reply filed by Respondent No.1 in the present petition after the Petitioner filed an application under the RTI Act, 2005 seeking details of correspondences between the SECI & MSEDCL.
- c. The issues such as the Petitioner has not completed the project within the 90 days granted by this Commission; commissioning of 28 MW out of 100 MW cannot be considered as part commissioning in terms of the PPA and force majeure like situation has already been dealt in Review Petition 02/2019 and 95/MP/2017 respectively and hence is not discussed in this Petition wherein the Petitioner is the *dominus litis* and as such cannot be ground for termination.
- d. Even before the present Petition was filed before this Commission, the Petitioner had filed application dated 16.03.2019 in Petition No. 95/MP/2017 under Regulation 68 and Regulation 111 of the CERC (Conduct of Business) Regulations, 1999 read with Section

151 of the Code of Civil Procedure, 1908. However, the Petitioner was directed to file a miscellaneous petition instead of an interlocutory application and hence, the instant application was referred back. Hence therefore, the contention of the Respondent No. 1 that the Petitioner did not seek extension of time for commissioning of balance capacity of the project before the expiry of the time period granted by this Commission on 16.03.2019 is false and incorrect.

- e. As a part of its prudent utility practices, the Petitioner is responsible to its shareholders and cannot keep its funds earmarked for just one project for an extended period of time. Due to uncertainty occasioned in the development of the project attributable to the Respondent No. 1's actions, the Petitioner was constrained to use the unutilised funds for other projects under its portfolio. Prudent utility practice further dictates that if a company's internal borrowings are greater than its external borrowings, then it makes commercial sense for such company to fund its projects through external sources. The Petitioner was constrained to approach lender (i.e. Yes Bank) vide letter dated 19.12.2018 seeking sanction of debt required for setting up the project.
- f. It was only on account of the increase in project cost due to delay in project development and long-standing dispute occasioned by Respondent No. 1 that the Petitioner wrote to the lender (i.e. YES Bank) on 19.12.2018 seeking disbursement of funds for the project. It is submitted that the lender had already given "in principle" approval for disbursement of funds.

Submission by ways of Rejoinder on Reply to IA

- 26. The Petitioner through Rejoinder to the Reply on I.A. by Respondent No.1 has reiterated many facts which were already argued in the main petition. Additionally, the Petitioner has submitted that as per Article 13.3 of the PPA, upon the occurrence and continuation of any event of default by the Petitioner, the Respondent No.1 has the right to deliver to the Petitioner, a notice stating its intention to terminate the PPA specifying in reasonable detail, the circumstances giving rise to the issue of such notice. Article 13.3 of the PPA provides for a "consultation period" of 60 days or such other longer period as may be agreed by the

parties, commencing from the date of issuance of the aforesaid preliminary default notice, for consultation between the parties to mitigate the consequence of the relevant event. Within a period of 7 days following the expiry of such consultation period, the Respondent No.1 is entitled to terminate the PPA by giving a written termination notice of 30 days to the Petitioner. The aforesaid procedure for termination of PPA was not followed by the Respondent No.1. Hence letter dated 11.04.2019 may not be treated as termination of PPA.

27. The contracting parties were directed to file the written statement by 04.11.2019. The contracting parties have filed written statements on 05.11.2019 which are also taken on record.

Analysis and Decision

28. The Petitioner filed the petition on 03.05.2019 and the I.A. on 15.07.2019. The petition alongwith I.A. came up for hearing on 16.09.2019 and was reserved for Orders on 17.10.2019. We have heard the Petitioner and the Respondent and have carefully perused the records. From the submissions of the parties, the following issues arise for our consideration:

Issue No. 1: Whether there is non-compliance in implementation of the Order dated 17.12.2018 passed by this Commission in Petition No. 95/MP/2017 by Respondents and whether there is need to direct the Respondents to implement the Order dated 17.12.2018 passed by this Commission in Petition No. 95/MP/2017 in letter and spirit as prayed by the Petitioner?

Issue No. 2: Whether the similar time period for completion of balance capacity of 72 MW effective from the issuance of written confirmation from the Respondent No. 1 should be allowed to the Petitioner as was allowed vide Order dated 17.12.2018 passed by this Commission in Petition No. 95/MP/2017?

Issue No. 3: Whether the letter dated 11.04.2019 terminating Power Purchase Agreement dated 27.06.2016 issued by the Respondent No. 1 should be set aside and quashed? And

Issue No. 4: Whether the termination of Power Sale Agreement by Respondent No. 2 is illegal and the Respondent No. 2 should be directed to reinstate the same or direct the Respondent No. 1 to enter into a fresh Power Sale Agreement with an alternate buyer including but not limited intra state sale?

29. No other issue was pressed or claimed.

30. We now discuss the issues one by one:

Issue No. 1: Whether there is non-compliance in implementation of the Order dated 17.12.2018 passed by this Commission in Petition No. 95/MP/2017 by Respondents and whether there is need to direct the Respondents to implement the Order dated 17.12.2018 passed by this Commission in Petition No. 95/MP/2017 in letter and spirit as prayed by the Petitioner?

And

Issue No. 2: Whether the similar time period for completion of balance capacity of 72 MW effective from the issuance of written confirmation from the Respondent No. 1 should be allowed to the Petitioner as was allowed vide Order dated 17.12.2018 passed by this Commission in Petition No. 95/MP/2017?

31. Since issue no. 1 and 2 are interrelated, the same are taken together for discussion. The Petitioner has submitted that even though it has complied with the Order of this Commission and remitted the penalty in order to commission the balance capacity of 72 MW, the Respondent No.1 failed to provide the much necessary support for disbursement of funds for implementation of the Project. It had sufficient funds for the development of the current project and had already invested more than Rs. 206 Cr. However, due to long standing dispute and uncertainty in the project development, the Petitioner in the intervening period was constrained to use the unutilized fund for other projects under its portfolio. It has approached the Commission with the present petition for directing the Respondents to implement the Order dated 17.12.2018 passed by this Commission in Petition No.

95/MP/2017 in letter and spirit and allow a similar time period for completion of balance capacity of 72 MW effective from the issuance of written confirmation from the Respondent No. 1. ***Per Contra***, the Respondent No.1 has submitted that the contention of the Petitioner that SECI has not complied with the Order dated 17.12.2018 or that the same has affected the implementation of the project is misconceived. SECI has submitted that the Petitioner has made Statement on Oath, as indicated in paras 53-54 of its Petition No. 95/MP/2017, that it was willing to set up the project through GRPL by way of infusing requisite equity. Based on the aforesaid submissions it had, inter alia, been held by this Commission in its Order dated 17.12.2018 *“the Petitioner has shown its capacity to fund the project on its own”*. The claim now made by the Petitioner is contradictory to the earlier pleadings and based on which the Order dated 17.12.2018 was passed granting time till 16.03.2019. The Petitioner cannot now be allowed to go back on the said statement to claim relief for further extension of time on contradictory plea. It is impermissible for the Petitioner to now take an entirely new stand that it did not have the internal resources to fund the project (thereby seeking to reopen the very basis of the Order dated 17.12.2018) and that it was now required to secure funds from an external lender for which it was seeking ‘confirmation’ from SECI. The Petitioner has not been able to secure funds from the lenders for completing the project within the period of 90 days granted by this Commission is totally misplaced and a blatant abuse of process of law. Hence, the petition may be dismissed in limine.

32. The Commission observes that it was held in its Order dated 17.12.2018 in Petition No. 95/MP/2017 that:-

“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.”*

33. From the above, the Commission observes that vide Order dated 17.12.2018 in Petition No. 95/MP/2017 it was held that **firstly**, the Conditions Subsequent Activities related to financial closure and grid connectivity stood fulfilled within the extended period from 11.11.2016 to 29.11.2016 i.e. the date on which the Petitioner 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. **Secondly**, delay in achieving the Conditions Subsequent Activities related to clear possession and title of land was condoned as the same was caused due to ‘Government delay akin to Force Majeure’. **Thirdly**, the delay from 05.05.2017 till date of issue of this Order was condoned since the matter was subjudice and was treated as force majeure. **Fourthly**, the substitution of Welspun Energy Private Limited with the Resultant Company, Giriraj Renewable Private Limited was allowed. **Lastly**, for commissioning of balance capacity of 72 MW, the SCoD was 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 Order viz. 17.12.2018. On the issue as to whether there has been non-compliance of the Commission’s Order dated 17.12.2018 in Petition No. 95/MP/2017, by the Respondent No.1, it is observed that only implied direction to the Respondent was not to terminate the PPA till 16.03.2019.

34. The Commission observes that vide termination letter dated 11.04.2019, the Respondent No. 1 has informed the Petitioner as under:

“

b) SECI has received a communication dated 18.01.2019 from MSEDCL where under MSEDCL has terminated and cancelled procurement of 100 MW quantum out of the total capacity of 500 MW vis-à-vis Power Sale Agreement (PSA) dated 04.11.2016 entered into with SECI for procurement of power on a back to back basis, the same quantum of electricity to be supplied by Welspun to SECI under the PPA dated 26.07.2017. The arrangement for procurement of power by SECI from Welspun being on a back to back basis in terms of Recital “F” of the PPA, there can be no continuation of the PPA when the PSA for the same quantum of power has been terminated by MSEDCL. The termination of the PSA by MSEDCL has been duly forwarded by SECI to WEPL / AEPL vide communication dated 05.02.2019. to WEPL / AEPL vide communication dated 05.02.2019.

c) Without prejudice to the above and other contentions of SECI, it is also relevant that Welspun has not undertaken the commissioning of the generating unit as per the PPA within a period of 90 days as stated in the order dated 17.12.2018 passed by the Central Commission. In terms of the order, the period expired on 17.03.2019. Accordingly, the implementation of the PPA is no longer valid or enforceable even as per the order passed by the Central Commission.....

... 4. Without prejudice to the above, even assuming but not admitting that there were any Force Majeure within the scope of Article 11 of the PPA, there has been a sustained continuation of such Force Majeure event for a period of three (3) months which entitles SECI to terminate the PPA with Welspun in terms of Article 13.5 read with Article 4.5 of the PPA. The PPA is therefore not value or binding even on account of the above.

5. Accordingly, as the events are not Force Majeure within the scope of Article 11 of the PPA, the delay in the implementation of the project being more than 25 months which is beyond the maximum time allowed as per terms of Article 4.6.2 of the PPA and the available capacity is admittedly less than 50 MW resulting in there being no commissioning capacity, the PPA stands terminated.....”

35. The Commission is of the view that the Respondent No.1 had terminated the PPA only on 11.04.2019, i.e. after the expiry of the 90 days period granted to the Petitioner, which had come to an end on 16.03.2019. The Commission, therefore, does not find any non-compliance on the part of the Respondent No.1.

36. The Commission further observes that according to the Order dated 17.12.2018 the Petitioner

had to (a) commission the balance capacity of 72 MW in the extended time period of 90 days viz. 16.03.2019 and (b) remit the penalty in terms of clause 3.2.2 of the PPA. In compliance to this the Petitioner remitted Rs. 6,48,00,000/- on 19.12.2018 as the penalty to the Respondent No. 1. However, in so far as the direction relating to commissioning of the balance capacity of 72 MW is concerned, the Commission notes that this has not been complied with by the Petitioner. In defence the Petitioner in the instant petition has submitted that as a part of its prudent utility practices, the Petitioner is responsible to its shareholders and cannot keep its funds earmarked for just one project for an extended period of time. Due to uncertainty occasioned in the development of the project attributable to the Respondent No.1's action, the Petitioner was constrained to use the unutilised funds for other projects under its portfolio. Prudent utility practice further dictates that if a company's internal borrowings are greater than its external borrowings, then it makes commercial sense for such company to fund its projects through external sources. The Petitioner contacted the supplier of module and issued the purchase order dated 20.12.2018 and same was accepted by the supplier. The Supplier on 29.12.2018 requested the Petitioner to establish the letter of Credit for remitting funds immediately to commence supply of the modules. The Petitioner was constrained to approach Yes Bank (lender) vide letter dated 19.12.2018 seeking sanction of debt required for setting up the project. The Petitioner has submitted that it was only on account of the increase in project cost due to delay in project development and long-standing dispute occasioned by Respondent No. 1 that the Petitioner wrote to the lender (i.e. YES Bank) on 19.12.2018 seeking disbursement of funds for the project. The lender had given "in principle" approval for disbursal of funds. Vide letter dated 11.01.2019, the lender has requested the Petitioner to furnish a written confirmation from the Respondent No. 1 (SECI) w.r.t. PPA acceptance, SCoD extension and project tariff in order to sanction/disburse the loan for the project. The Petitioner requested SECI vide letter dated 21.01.2019 and 31.01.2019 for appropriate communication. However, SECI has informed that Respondent no. 2 vide letter dated 18.01.2019 has cancelled the 'PSA' for 100 MW. SECI further informed that since, the obligation under the PPA is on a back to back basis therefore, SECI will not be able to honour the PPA.

37. The Commission observes that it has, inter alia, been held in its Order dated 17.12.2018 that:-

“ ...
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.

“ ...
... ”

38. From the above, the Commission observes that the Petitioner had 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. The Commission observed in the impugned Order that the certificate furnished by the Managing Director and another whole-time Director of the Petitioner to demonstrate the compliance of requirement under 3.1 (c) of the PPA dated 27.06.2016 was sufficient for the purpose of project financing. If a firm wants to execute a project through its own resources and the same is certified by the Managing Director of the firm, there was no reason for the Respondent to insist on Financial Closure. As regards the Conditions Subsequent Activities related to financial closure and grid connectivity, the Commission observed that the same stands fulfilled within the extended period from 11.11.2016 to 29.11.2016 i.e. the date on which the Petitioner 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. Further, for commissioning of balance capacity of 72 MW, the SCoD was extended upto 90 days i.e. 16.03.2019

39. The Commission is of the view that once the Petitioner by way of admission, submits and commits 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 were not required, and also relief was granted inter-alia based on this plea, then it is estopped to take a contra plea that because of non-cooperation of the Respondent No.1, it could not arrange the finances required for commissioning the Project and hence, it could not comply with the direction of the impugned Order dated 17.12.2018.
40. In view of the above mentioned events and circumstances, the Commission cannot allow the similar time period of 90 days again to the Petitioner for completion of balance capacity of 72 MW effective from the issuance of written confirmation from the Respondent No. 1 as was allowed vide Order dated 17.12.2018 passed by this Commission in Petition No. 95/MP/2017. The issue is decided accordingly.

Issue No. 2: Whether the letter dated 11.04.2019 terminating Power Purchase Agreement dated 27.06.2016 issued by the Respondent No. 1 should be set aside and quashed?

And

Issue No. 3: Whether the termination of Power Sale Agreement by Respondent No. 2 is illegal and the Respondent No. 2 should be directed to reinstate the same or direct the Respondent No. 1 to enter into a fresh Power Sale Agreement with an alternate buyer including but not limited intra state sale?

41. Since issue no. 3 and 4 are interrelated the same are taken together for discussion. In view of the findings on the issue no. 1, the Commission observes that the issue no. 2 & 3 become redundant and stand decided accordingly against the Petitioner.
42. Respondent SECI had submitted during hearing that the Review Petition No. 2/RP/2019 in Petition No. 95/MP/2017 filed by it is pending adjudication before this Commission. However, the Review Petition has already been disposed of by the Commission vide Order dated 11.12.2019.
43. Accordingly, the Petition No. 125/MP/2019 alongwith I.A. 63 of 2019 is disposed of.

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