

(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."

(Emphasis Given)

22. In terms of the order, Avaada paid the amount, quantified at Rs. 6.48 crores, to SECI on 19.12.2018 by RTGS, informed SECI about the payment of the amount with a request to co-operate in completion of the balance 72 MW project capacity, additionally, to issue commissioning certificate for 28 MW capacity.

23. However, in response to the request of Avaada, SECI even after receiving the amount of Rs. 6.48 crores, did not reply to any of the letters of Avaada, as submitted by Avaada before us.

24. Contrary to the decision of CERC, extending SCOD by 90 days, MSEDCL, on 18.01.2019, before the expiry of the 90 days period, terminated the PSA to the extent of 100 MW quantum out of 500 MW with SECI without any intimation to Avaada at that point of time.

25. Being aggrieved by CERC order dated 17.12.2018, SECI, on 30.01.2019, filed a review petition assailing the said order and seeking the following reliefs:

- “(a) Admit the Review Petition;*
- (b) Call for the records of the Petition No.95/MP/2017;*
- (c) Review and recall the impugned judgment and order dated 17.12.2018 and dismiss Petition No.95/MP/2017 filed by Welspun Energy Private Limited; and*
- (d) Pass any further order or orders as this Hon’ble Commission may deem just and proper.”*

26. Separately, Avaada also filed an Interlocutory Application (IA) before CERC seeking implementation of the order dt. 17.12.2018, the IA was later converted into and refiled as a fresh petition bearing no. 125/MP/2019, seeking the following reliefs:

- “(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;”*

27. Avaada submitted that, SECI in the review petition, raised various issues that were not placed before the CERC during the course of proceedings in Petition No. 95/MP/2017, in particular:

(a) There is no permissibility for any part commissioning for a capacity less than 50 MW. The recognition of 28 MW as commissioned and paving the way for SPD to claim extension based thereon is contrary to the fundamental terms of the PPA.

(b) This grant of 90 days' time for completion of balance 72 MW capacity is contrary to the express stipulation of the PPA which prohibits any extension of the SCD beyond 10.05.2018.

28. However, SECI vide its letter dated 11.04.2019, informed Avaada regarding termination of the PPA primarily as the 90 days window granted vide order dated 17.12.2018 has expired, stating that Avaada had failed to commission the balance project capacity of 72 MW, being aggrieved by the said termination, Avaada filed an IA No. 63/2019 in Petition No. 125/MP/2019 seeking amendment of the petition to bring on record the subsequent developments and also to introduce the following new reliefs and prayers:

- “(i) Set aside and quash the letter dated 11.04.2019 issued by the Respondent No. 1;*
- (ii) 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;*
- (iii) Pass such other relief(s)/ order(s) that this Commission may deem fit.”*

29. The Central Commission vide common order dated 11.12.2019 in the review petition filed by SECI and Petition No. 125/MP/2019 filed by Avaada, disposed of the review petition without granting any relief to SECI and dismissing the Petition No. 125/MP/2019, relevant extract of the order is as under:

“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.

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.”

30. The para 41 of the above order was amended through a corrigendum to the order, on 16.01.2019, as under:

“Certain inadvertent typographical errors have been corrected in the

(b) In Para No. 41, the second line “that the issue no. 2 & 3 become redundant and stand decided accordingly against the Petitioner” is replaced by “that the issue no. 3 & 4 has become infructuous.”

31. By the two captioned Appeals, the Generator i.e. Avaada challenges the CERC Order dated 13.01.2020 rendered in petition no. 125/MP/2019, whereas SECI filed the second captioned Appeal challenging the original CERC order

dated 17.12.2018 passed in petition no. 95/MP/2017, however, MSEDCL, though a party in all the proceedings before CERC, preferred not to assail any of the orders passed in these proceedings.

32. During the course of proceedings, this Tribunal passed interim orders dated 09.07.2020, 19.08.2020 and 23.10.2020 in I.A. No. 718/2020 filed in appeal no. 23/2020 by Avaada, the relevant extracts are reproduced hereunder:

Order dt. 09.07.2020

*“In the above circumstances, we are of the opinion that in view of the plant being ready to generate of 28 MWs power, if it is not made functional, there would be national waste of the power under investment as the plant is ready for commissioning at least up to 28 MWs. **Therefore, we direct the Respondent authorities including SECI to do the needful immediately by issuing necessary certificates and complete other formalities for commissioning of the plant to an extent of 28 MWs of power by the Applicant/Appellant generator in terms of the PPA and also as per order of the CERC. The generator shall be paid tariff in terms of PPA.**”*

Order dt. 19.08.2020

*“After hearing all the parties at length for the directions application, we are of the opinion that **Applicant/Appellant is at liberty to sell 29 additional solar MW capacity to any DISCOM or party including Respondent/MSEDCL.** The SECI and Respondent/DISCOM shall complete the pleadings in this Appeal i.e. they shall file reply to the main appeal on or before 04.09.2020 with advance copy on the other side and rejoinder, if any, shall be*

filed on or before 14.09.2020 with advance copy on the other side. We direct the Registry to list DFR No. 51 of 2020 filed by SECI with this Appeal and parties are directed to complete pleadings as stated above in this appeal also.”

Order dt. 23.10.2020

“7.16 Having regard to the submissions / arguments of the parties and other various provisions relating to the RE policy of Maharashtra, procedure for grid connectivity / evacuation etc., we opine that Avaada Energy has already been granted grid connectivity for the entire 100 MW by MSETCL out of which 28 MW stand synchronised and the Applicant is seeking synchronisation for the plant’s capacity. We further note that MSETCL by its order dated 08.07.2019 has extended the grid connectivity for entire 100 MW in the name of the Applicant and the connection agreement dated 28.03.2018 executed with MSETCL is also continuing to remain in force. Accordingly, we opine that the requirement of MEDA registration for the Applicant at this stage is not applicable since the purpose of which registration is required has already been achieved and the project is under the stage of completion. Moreover, the project was getting implemented thorough SECI and based on the PPA/PSA executed between the parties, the Applicant was given exemption from MEDA registration and also provided with grid connectivity for the entire capacity of 100 MW after considering the technical aspects relating to system studies required for grid connectivity etc. The same cannot be withdrawn / taken back in lieu of any dispute between the parties i.e. SECI & MSEDCL.

7.17 In view of these facts, we are of the considered opinion that the grid connectivity already granted to the Applicant in

the name of Avaada Energy Pvt. Ltd. should be honoured and the Applicant be facilitated for evacuation of its additional capacity beyond 28 MW to either MSEDCL or any third party. We also clarify that at this stage, we are not inclined to interfere in the legal status of the Applicant and its subsidiary Avaada Satara MH Pvt. Ltd. which is also not a subject matter of the Appeal in hand. With these observations, the instant IA being IA No.718 of 2020 is disposed of.”

(Emphasis Given)

33. During the proceedings, SECI submitted that the Generator has failed to commission the said 100 MW project even by the extended time, as granted by CERC vide its order dated 17.12.2018 and the Generator, accordingly, filed Petition No.125/MP/2019 before the Central Commission praying for further extension of time for commissioning of the project beyond 16.03.2019. Further submitted that the Effective Date as defined under the PPA between SECI and the Avaada was 10.04.2016 and Scheduled Commissioning Date (SCOD) as 10.05.2017, with obligation of Avaada to achieve Financial Closure and comply with the Conditions Subsequent by 10.11.2016, as the timeline for setting up the project was a material and fundamental term of the PPA.

34. The above submission of SECI has already been dealt by the Central Commission and by this Tribunal before passing the various orders in the relevant Petitions and Appeals and stand decided by the Central Commission and this Tribunal, relevant extract of the interim order (as quoted in the foregoing paragraphs) passed by this Tribunal is reproduced again hereunder for further clarity:

Tribunal Order dated 09.07.2020

“Therefore, we direct the Respondent authorities including SECI to do the needful immediately by issuing necessary certificates and complete other formalities for commissioning of the plant to an extent of 28 MWs of power by the Applicant/Appellant generator in terms of the PPA and also as per order of the CERC. The generator shall be paid tariff in terms of PPA.”

Tribunal Order dated 23.10.2020

“In view of these facts, we are of the considered opinion that the grid connectivity already granted to the Applicant in the name of Avaada Energy Pvt. Ltd. should be honoured and the Applicant be facilitated for evacuation of its additional capacity beyond 28 MW to either MSEDCL or any third party.

35. We do not find any merit in the submissions of the SECI especially the submission regarding financial closure and fulfillment of the Conditions Subsequent, we, therefore, are inclined to accept the relief granted by CERC vide order dated 17.12.2018 in Petition No. 95/MP/2017, directing 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.

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.”

(Emphasis given)

36. It was also submitted by SECI that it has issued various letters regarding termination of the contract, which were subsequently stayed by CERC or by this Tribunal. However, it is observed that at the same time, SECI continues to hold the amount of Rs. 6.48 crores furnished by Avaada as “extension charges” under the directions of CERC.

37. We decline to accept such arbitrary behaviour of SECI in dealing with the matter, if SECI was not satisfied with the time extension given to the Avaada, it should not have accepted such payment.

38. It is just to note here that it is a salutary principle that a person who knowingly accepts a benefit under an order is estopped from challenging the same, as upheld by the Hon'ble Supreme Court in **Cauvery Coffee vs. Hornor, (2011) 10 SCC 420**, as under:

“Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order.”

39. Further, the Hon'ble Supreme Court in **R.C. Chandiok vs. Chunilal Sabharwal, 1970 (3) SCC 140**, held that:

“It is true that the appellant could not accept satisfaction of the decree of the trial court and yet prefer an appeal against that decree. That may well have brought them within the principle that when the plaintiff has elected to proceed in some other manner than for specific performance he cannot ask for the latter relief.”

40. It was further submitted by SECI that the request for another extension by Avaada was rejected and on account of failure to comply with the Conditions Subsequent, it has issued the termination letter dated 08.05.2017 stating that the PPA has stood terminated and returning the cheque of Rs. 6.48 crores to Avaada.

41. We fail to understand the reason for cancellation as the matter was sub-judice and also, it has been clearly upheld by CERC that Conditions

Subsequent related to financial closure and grid connectivity, stand fulfilled within the extended period from 11.11.2016 to 29.11.2016.

42. It was also argued by SECI that the PPA had been entered into between SECI and Avaada wherein the role of SECI was to purchase the solar power from the Generator and sell it to the Buying Utilities on back-to-back basis. In this regard, the recitals in the PPA (*Ref-Page.108, Vol-I of Appeal No.23 of 2020*), provide as under:-

- “F. SECI has agreed to purchase such Solar Power from SPD as an intermediary Seller and sell it to Buying Utilities back to back basis as per the provisions of the JNNSM.*
- G. SECI has agreed to sign a Power Sale Agreement with the Buying Utilities to sell such power as per the provisions of the JNNSM.....*
- J. The Parties hereby agree to execute this Power Purchase Agreement setting out the terms and conditions for the sale of power by SPD to SECI.....”*

43. Further, SECI signed the Power Supply Agreement (PSA) dated 04.11.2016 with MSEDCL for sale of the power on back to back basis to MSEDCL. The power was to be supplied with effect from the scheduled commissioning date being 10.05.2017, however, MSEDCL terminated the back-to-back PSA with SECI to the extent of 100 MW which was to be supplied by Avaada.

44. We took strong exception to such an act of MSEDCL, which itself is a contesting party in the ongoing proceedings before CERC at that time, regarding cancellation of PSA with SECI before the extended period of 90 days,

and citing of such an act of MSEDCL by SECI in support of its cancellation of PPA by Avaada. Therefore, the submission of SECI as placed before us is not acceptable.

45. We are constraint to take a serious note of the action taken by MSEDCL in the teeth of the order passed by the Central Commission.

46. We also decline to agree to the notice of SECI regarding termination of the PPA with Avaada, once Conditions Subsequent have been fulfilled and 28 MW of capacity has been successfully commissioned and synchronised.

47. Our attention was again invited to the order dated 13.01.2020 passed by the Central Commission inter-alia, observing that:

“...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 noncompliance 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.....

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

.....

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.

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.....”

48. From the above, it is clear that the Central Commission has only observed commissioning for balance capacity of 72 MW and not for the already commissioned capacity of 28 MW, declining time extension for commissioning of 72 MW, therefore, the capacity of 28 MW which is already commissioned shall continue to be part of the PPA capacity.

49. It is brought to our notice that Avaada has been supplying power generated from 72 MW capacity to third parties under the captive model, accordingly, on being asked during the course of arguments, SECI and MSEDCL submitted that the interim arrangement permitting to sell 72 MW capacity to any third parties through an appropriate legal mechanism may be continued, which is made absolute now.

50. Therefore, the dispute herein is confined to 28 MW capacity including the tariff applicable to such capacity.

51. During the course of further arguments, SECI submitted that as on the date of termination i.e. 11.04.2019, Avaada had not commissioned the complete 100 MW capacity in terms of the PPA and Avaada had synchronised only 28 MW which cannot be considered as commissioned as part commissioning less than 50 MW is not permissible, also in terms of Articles 4.5.3 and 13.5, even if there is any Force Majeure event affecting the project, the SCOD may be extended only for a “maximum period” of 3 (three) months and after that either party may terminate the PPA, whereas Avaada had sought extension of the SCOD on the ground of “Force Majeure akin events” which can have no recognition under the PPA.

52. On the contrary as already observed in the foregoing paragraphs, Avaada submitted that SECI has already enjoyed the benefit of receiving the extension amount of Rs. 6.48 crores from it on 19.12.2018 as per CERC order dated 17.12.2018 and the capacity of 28 MW was completed and synchronized with the Grid on 16.4.2018 during pendency of petition no. 95/MP/2017, balance 72 MW capacity was commissioned between June and November 2020, additionally, the PPA, which is the final binding document between the parties, does not lay down a 50 MW minimum limit for commissioning, whereas clause 4.6.2 & Schedule 6 of PPA make it amply clear that Avaada had the discretion to offer any capacity for commissioning and further that whatever capacity had been completed on expiry of 25 months from the date of the PPA would be treated as commissioned. Further, Avaada submitted that the review order dated 11.12.2019 does not change, modify or clarify the directions issued in the CERC order dated 17.12.2018 regarding commissioning of 28 MW, as also

observed from the fact that SECI itself has sought to challenge the direction for commissioning of 28 MW in its appeal, which would not be required if the direction had been modified in the review order.

53. However, it is important to examine the provisions contained in the PPA and the RfS document regarding the argument as put forth by the SECI and Avaada. The relevant provisions are as under:

RfS Document

“3.17. Commissioning

The Commissioning of the Projects shall be carried out by the SPDs selected based on this RfS, in line with the Procedure elaborated in Annexure-A and Appendix-A-1. SECI may authorize any individual or committee or organization to witness and validate the commissioning procedure on site. Commissioning certificates shall be issued by the Maharashtra Energy Development Agency (MEDA), the State Nodal Agency or SECI after successful commissioning.

A. Part Commissioning

Part commissioning of the Project shall be carried out in two parts as mentioned below:

- i) Minimum 50% of the project capacity in the first part*
- ii) Balance capacity in the second part*
- iii) Part commissioning is not applicable for Projects having a size of 10 MW.*

The PPA will remain in force for a period of 25 years from the date of as per the provisions of PPA.

Commissioning Schedule and Liquidated Damage for Delay in Commissioning

The Project shall be commissioned within 13 months of the date of signing of PPA (for e.g. if PPA signing date is 07.11.2015, then scheduled Financial Closure date shall be 07.12.2016). In this regard, a duly constituted committee will physically inspect and certify successful commissioning of the Project. In case of failure to achieve this milestone, provisions of PPA as mentioned below shall apply: -

SECI shall encash the Performance Bank Guarantee in the following manner. -

a. Delay upto one month — 20% of the PBG amount shall be encashed as penalty for the first month of delay, calculated on per day basis and proportionate to the capacity not commissioned;

e.g. for a Project of 50 MW capacity, if commissioning of MW capacity is delayed by 18 days from the scheduled date, then the penalty shall be: Rs. 1500 lakh X (20/50) X (18/30).

b. Delay of more than one month and upto three months — SECI will encash remaining amount from Performance BG worked out on per day basis and proportionate to the Capacity not commissioned.

c. In case the commissioning of the Project is delayed by more than 3 months, the first year tariff of Rs. 5.43/kWh shall be reduced at the rate of 0.50 paise/kWh (half paise per Kwh) per day of delay for the delay in such remaining capacity which is not

commissioned. The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and reduction in the fixed tariff shall be limited to 25 months from the date of signing of PPA. In case, the Commissioning of the Project is delayed beyond 25 months from the date of signing of PPA, the PPA capacity shall stand reduced / amended to the Project Capacity Commissioned and the PPA for the balance Capacity will stand terminated and shall be reduced from the selected Project Capacity. The funds generated from the encashment of the Bank Guarantees shall be deposited in a separate fund under payment security mechanism to be maintained by SECI under the guidance of MNRE.

d. For the purpose of calculations for penalty, the month shall be considered consisting of 30 days.

Illustration of Liquidated Damages (LD) Calculations:

Consider a SPD has been selected for the implementation of a Project of capacity of 50 MW.

- Total Performance Bank Guarantee Amount to be furnished by the SPD: (30 X50) = Rs.1500 Lakhs.*

b) Consider that the Project commissioning has been achieved in the following manner.

S. No.	Commissioned Capacity (MW)	Capacity remaining. Un-commissioned (MW)	Date of Commissioning of the respective part	Delay from the Scheduled COD (days)
<i>i</i>	0	50	Scheduled COD	0
<i>ii</i>	30	20	Scheduled COD + 20 Days	20
<i>iii</i>	10	10	Scheduled COD + 75 Days	75
<i>iv</i>	10	0	Scheduled COD + 100 Days	100

54. From the above, the argument of the SECI that part commissioning below 50 MW is not tenable under the provisions of RfS document, as the table itself provides commissioning schedule example below 50 MW. Further, the relevant provisions of the PPA also reproduced below:

“4.6.2 The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and reduction in pre-fixed tariff shall be limited to twenty five (25) months from the date of signing of this Agreement. In case, the commissioning of the Power Project is delayed beyond twenty five (25) months from the date of signing of this Agreement, it shall be considered as an SPD Event of Default and provisions of Article 13 shall apply and the Contracted Capacity shall stand

reduced/amended to the Project Capacity Commissioned within twenty five (25) months.”

55. Even otherwise, Article 5 and Schedule 6 of the PPA, which deal with commissioning, make it amply clear that part commissioning is permissible under the PPA at the option of Avaada and do not lay down any restriction with regard to the capacity that can be offered for commissioning. In fact, a perusal of documents required to be submitted for commissioning as laid down in Schedule 6, specifically the Installation Report and the Sample Part Commissioning/ Full Commissioning Certificate of Solar PV Power Project make it clear that the capacity to be offered for part commissioning is at the discretion of Avaada. Clause (xiii) of Schedule 6 of the PPA provides in this behalf that:

“SPD is permitted to schedule the Commissioning of the Project in full or part as per the commissioning procedure elaborated in clause.”

56. Since 28 MW capacity was completed prior to the expiry of 25 months, the same would be deemed to be commissioned as per Clause 4.6.2 of the PPA. Thus, the commissioning of 28 MW part-capacity as directed by the CERC was in terms of the PPA.

57. It is an accepted principle of law that once the final agreement or PPA has been executed, it exclusively governs the rights and obligations of the parties in supersession of any previous terms contained in the bid or other documents. In *Sasan Power vs. CERC*, 2017 ELR (APTEL) 508, it was held that:

“PPA gives express right to an affected party to claim Change in Law. RFP cannot override this right, if an event qualifies as a Change in Law.”

58. Separately, we could not find any reason to accept the contentions of the SECI, and thus, agree with the submissions made by the Avaada regarding commissioning of 28 MW within the four corners of law as also decided by the Central Commission and by this Tribunal vide interlocutory orders as quoted in the foregoing paragraphs.

59. Also, the terms of the PPA which allow part-commissioning of any capacity at the discretion of Avaada, would have precedence over the RfS Document and Guidelines relied on by SECI, reliance on the definition in Clause 1.1 of the PPA is also misplaced as the provision is only intended to provide the meaning of the term ‘Unit’ and is not intended to create any substantive obligations on the parties. In view of the clear provisions in clauses 4.6.2 & 5 read with Schedule 6 of the PPA, we have no doubt that commissioning of 28 MW, as directed by the CERC, is permissible under the PPA.

60. Also, it needs to be appreciated that the object and purpose of the *Force Majeure* provisions in the PPA is to ensure that a renewable energy developer should not suffer due to delays not attributable to it. The delay in land registration is admittedly not attributable to Avaada, as held with reasonable justification by the Central Commission and this has been duly acknowledged by the Government of Maharashtra. In the circumstances, it is not a fit case for SECI and MSEDCL to terminate the PPA and PSA on account of an unavoidable delay that was not in Avaada hands.

61. We find it most unreasonable the action of the SECI and MSEDCL, the State Agencies should support implementation of renewable energy projects in terms of the mandate under Section 61(h) of the Electricity Act, 2003, the termination of PPA on account of delays that are not attributable to and are beyond the control of Avaada would not be justified, especially in light of the specific mandate to support and promote renewable energy generation under the Electricity Act.

62. We, therefore, find the argument of SECI as totally unjust and unreasonable that MSEDCL has terminated the PSA, considering the market rate of about Rs.2.50/kWh - Rs 2.75 /kWh for the solar power as against the tariff rate of Rs.4.43/Kwh under the PPA, it will not be possible for SECI to resell the power if purchased from AEPL. Such an approach can neither be appreciated nor be allowed.

63. On being asked Avaada submitted that the tariff rate of Rs. 4.43 per unit is consistent with the tariff of other projects commissioned on or around 16.04.2018 when 28 MW capacity of the present project was completed, synchronised and commissioned, therefore, there is no undue benefit enjoyed by the Avaada.

64. Regarding the contention of Force Majeure Event and time extension granted by the Central Commission, it is seen that the Central Commission has recognised and laid down that the period during which the issues were pending before it would have to be excluded, thus, the same principle will apply to the period during which the review petition filed by SECI was pending as Avaada could not be expected to continue implementation during this period when MSEDCL had rejected the project capacity by terminating the PSA and SECI

had done the same by filing review petition to challenge CERC's order dated 17.12.2018.

65. With the arguments and records placed before us, the primary issues that rests are of commissioning and synchronization of 28 MW project capacity that was completed by Avaada during the pendency of the proceedings before CERC in petition no. 95/MP/2017, the order dated 17.12.2018 passed by the CERC order clearly holds that:

“(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.”

66. However, it was argued by SECI that the above quoted direction was changed, modified or clarified vide the subsequent order dated 11.12.2019 passed in the review petition filed by SECI, however, both the parties have relied on paragraph 38 of the order dt. 11.12.2019, which is extracted below:

“38. The Commission in the above paras merely took note of the admitted facts i.e. 28 MW capacity of the Project has been synchronized with the grid w.e.f. 16.4.2018 and till the date when the order was reserved, the said position of injecting 28 MW into the grid remained unaltered. This fact has not been contested or controverted even during the course of the present review proceedings. On this basis, the Commission had in the Impugned order observed that “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.” The Impugned order clearly holds that „commissioning“ of 28 MW part capacity shall be as per the PPA. In our view, contention of SECI on this account is based on a misconstrued reading of paras 86 to 88 of the Impugned order.”

67. From a perusal of the aforesaid, we do not find that the order passed in the review petition intended to change, modify or clarify its earlier directions, rather the directions issued earlier were reiterated and it was held that the commissioning directed vide order dt. 17.12.2018 is in terms of the PPA.

68. As regards SECI's contentions with regard to the extension of time for the government related delay based on Clause 4.5.3 and 13.5 of the PPA, a distinction has to be drawn between the existence of a power and the conditions for its exercise. SECI and MSEDCL being State entities are bound by Constitutional norms regarding fairness and reasonableness in their actions. They are also duty bound to conduct themselves in a manner that upholds the aims and objectives enshrined in Section 61(h) of the Electricity Act, 2003.

69. In the present case, the Government of Maharashtra has specifically acknowledged that the delay was caused due to Government related procedures and recommended 12 months' time extension of interim and final milestones under the PPA i.e. financial closure and Scheduled COD of 100 MW Solar Power Project. The delay, therefore, is not attributable to AEPL and was entirely caused by factors outside its control.

70. These special circumstances weighed with the CERC while passing the order dt. 17.12.2018. As a result, the CERC balanced the equities by upholding and applying the underlying principles contained in Clause 11 of the PPA to

exclude and condone the delay from 4.10.2016 to 9.6.2017 and from 5.5.2017 till date of issue of the order.

71. While 28 MW was completed and was to be treated as commissioned as per CERC directions with effect from 16.04.2018, for the balance capacity of 72 MW, the CERC granted a period of 90 days from the date of the order subject to payment of the amount in terms of Article 3.2.2 of the PPA. The directions were issued based on the principles laid down in ***MPPMCL vs. Renew Clean Energy, (2018) 6 SCC 157***, where it was held that:

“The delay in commissioning the project appears to be due to unavoidable circumstances like resistance faced at the allotted site in Rajgarh district and subsequent change of location of the project. 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.”

72. Avaada having made the payment of Rs. 6.48 crores, which the parties agree is the amount due in accordance with directions issued by the Central Commission, was entitled to a period of 90 days to complete the balance 72 MW. MSEDCL being a party to the proceeding was also bound by the directions of the Central Commission and, during this period, was not entitled to terminate the PSA.

73. We are surprised that the Central Commission having once excluded and condoned the period from the date of the order in petition no. 95/MP/2017, a principle that was upheld and applied by us recently in ***Wind Four vs. CERC, Appeal no. 292/2021, order dated 11.01.2022***, adopted a different approach vis-à-vis the review petition and petition no. 125/MP/2019. However, we refrain from delving further into this aspect as we are only concerned with 28 MW project capacity and the parties have agreed that the electricity generated from the balance 72 MW may be sold by AEPL in any manner permissible under law.

74. It was also argued by SECI that in terms of Articles 4.5.3 and 13.5, even if there is any Force Majeure event affecting the project, the Scheduled Commissioning Date may be extended only for a “maximum period” of 3 (three) months and then either party may terminate the PPA, the Avaada had sought extension of the SCOD by relying on “Force Majeure akin events” which can have no recognition under the PPA. The PPA prohibits any extension of the SCOD beyond 10.05.2018 on any ground whatsoever.

75. Further, it was submitted by the SECI that the provisions of the RfS Document (Clause 3.20 (v); Clause 1.3.7 (iv)) as well as the PPA (Article 4.1(f)) strictly prohibit any change in the shareholding pattern of the Solar Power Developer (Welspun) for a period of at least one year from the Commercial Operation Date (COD), however, Avaada voluntarily changed its shareholding pattern and thereafter transferred the renewable energy business to a third entity (M/s Giriraj Renewables Pvt. Ltd., now renamed as M/s Avaada Energy Pvt. Ltd.) and in terms of Section 179 of the Companies Act, 2013, any corporate entity acts through a resolution of its Board of Directors. In the absence of any decision by the Board, two individual directors have no authority to bind the company.

76. In reply, Avaada submitted that the issue of its failure to furnish a board resolution and its reliance on a letter signed by its Managing Director and Whole Time Director, has been dealt in detail by the CERC in order dated 17.12.2018, in fact, Avaada eventually completed the entire 100 MW capacity, and the balance power corresponding to 72 MW capacity is being supplied to third parties as also agreed and upheld by this Tribunal, therefore, we do not find any merit in SECI' contention and uphold CERC's order dated 17.12.2018.

77. With regard to the change in shareholding pattern, a perusal of clause 13.1.1 of the PPA shows that an *SPD Event of Default* is not attracted where the transfer is by operation of Law, including orders of courts/ tribunals. In the present case, the transfer was as per the demerger orders passed by the NCLT. We also find that Avaada had informed SECI through various correspondences regarding the demerger process and had kept it fully informed and SECI never raised any objections to the same. The erstwhile company that signed the PPA, i.e. WEPL, is not in existence after demerger and Avaada (the Resultant Entity) has performed the functions under the PPA.

78. Accordingly, we upheld the observations of the Central Commission vide the Impugned Orders to the extent of above.

79. The stand of MSEDCL was only reiteration of the submissions placed by SECI and also submitted that it has not challenged the said order before any court or authority.

It was additionally pleaded by the Avaada, relying upon to this Tribunal judgment dated 15.09.2022 in ***Parampujya Solar Energy Pvt. Ltd. vs. CERC, Appeal no. 256/2019***, that the regulatory powers of the Central Commission have to be exercised to do complete justice and provide relief of the widest amplitude, granting relief to Avaada after taking into account the present circumstances of the Project and that the condonation and extension granted by

CERC vide order dt. 17.12.2018 should be upheld and the amount of Rs. 1.9 crores paid by Avaada to avail extension ought to be returned.

80. In the light of the above, it is directed that:

- i. The CERC order dated 17.12.2018 passed in Petition No. 95/MP/2017 declaring that the capacity of 28 MW has already been installed, synchronized and commissioned and shall be considered as commissioned with effect from 16.04.2018, i.e the date on which it was synchronised with the Grid and power supply commenced is upheld.
- ii. The SECI and MSEDCL are bound to honour the generated power against the capacity of 28 MW and shall be liable to pay tariff in terms of the PPA with effect from 16.04.2018 after deducting any amounts already received by AEPL for supply of such power, the Appellant, Avaada shall be entitled to all benefits, including VGF, towards commissioning of 28 MW project capacity.
- iii. As regards the balance capacity of 72 MW, the power generated from may be supplied by Avaada in the same manner as is currently being done or any other manner permitted under law.
- iv. The termination of the PPA and PSA are set aside to the extent set out above.
- v. The bank guarantees furnished by Avaada pursuant to the PPA terms, as also the amount of Rs. 6.48 crores paid by Avaada to avail the extension for completion of 72 MW, which issue has now become infructuous, shall be returned by SECI henceforth.

ORDER

For foregoing reasons as stated supra, we are of the considered view that the Appeal No. 23 of 2020 filed by M/s Avaada Energy Private Limited has merit and is allowed, the order dated 13.01.2020 passed by the Central Electricity Regulatory Commission in Petition No. 125/MP/2019 is set aside to the extent as directed above.

The Appeal No. 278 of 2021 filed by M/s Solar Energy Corporation of India Limited is devoid of merit and is dismissed, the order dated 17.12.2018 passed by the Central Electricity Regulatory Commission in Petition No. 95/MP/2017 is upheld.

PRONOUNCED IN THE OPEN COURT ON THIS 28TH DAY OF OCTOBER, 2022.

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice R. K. Gauba)
Officiating Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

pr/mkj