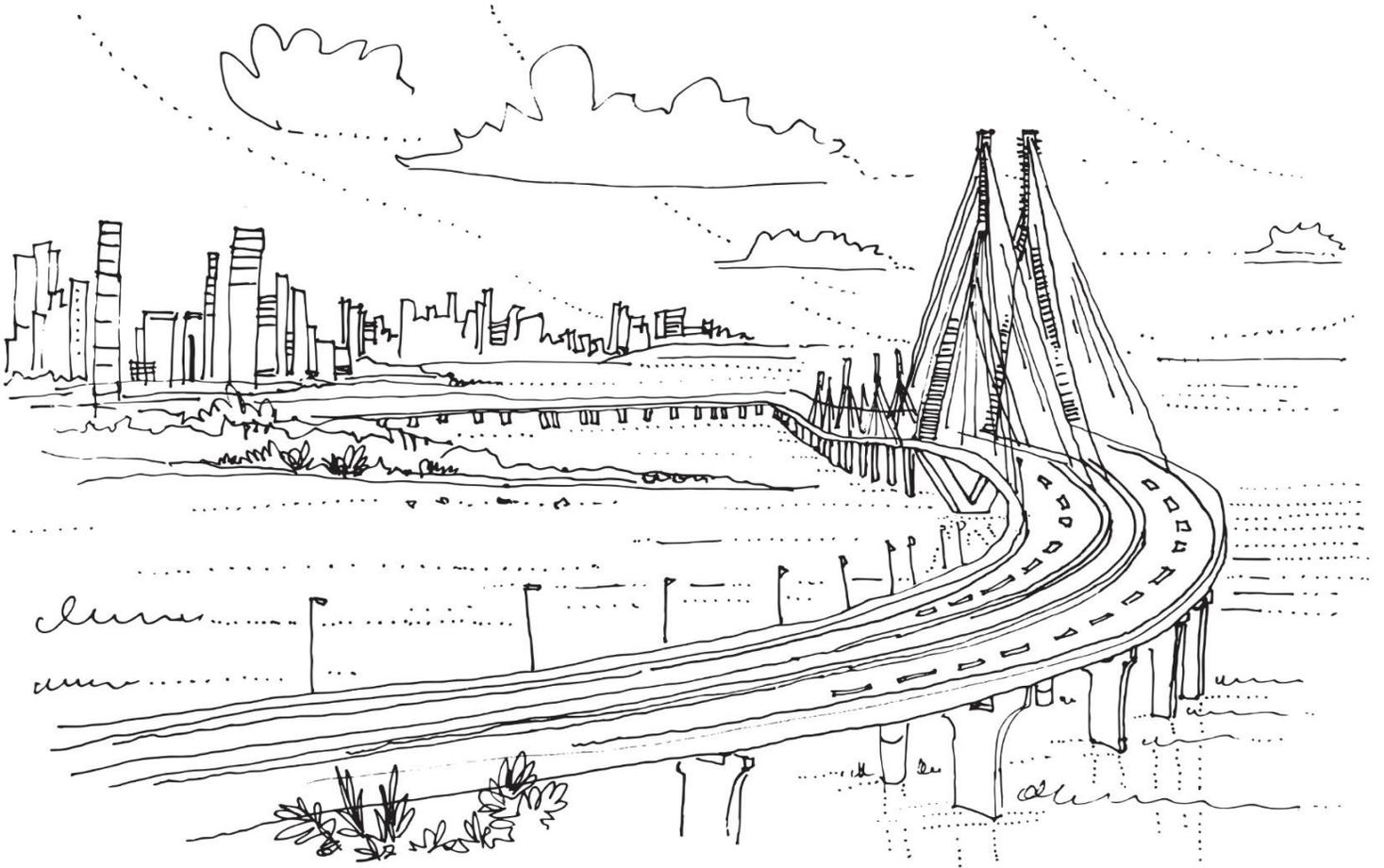




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Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

December 2019

INFRASTRUCTURE



NHAI authorized to set up an Infrastructure Investment Fund and monetize National Highway projects

What is the rationale of such authorizing the Fund?

In October 2017, the Government of India launched the Bharatmala Pariyojana, the flagship highway development program of the Government of India for development of 24,800 km of roads for a total investment of INR 5,35,000 crore. Given the magnitude of this program, the Nation Highways Authority of India (**NHAI**) would need adequate funds to complete the projects within the prescribed timelines. Accordingly, the Union Cabinet proposed that national highway assets be monetized to unlock their value and attractive schemes be offered for investment by private players in construction of National Highways.

What was the authorization granted by the Cabinet?

- The Union Cabinet gave its approval to the Ministry of Road Transport and Highways' proposal, which authorized the NHAI to set up Infrastructure Investment Trust(s) (**InvIT**) as per the guidelines issued by the Securities and Exchange Board of India (**SEBI**).
- This move will enable the NHAI to monetize completed national highways that have a toll collection track record of at least one year. NHAI would reserve the right to levy toll on the identified highway.

How is the InvIT proposed to be implemented?

- The Finance Minister, in his budget speech for the year 2018-2019 had indicated that the NHAI must consider organizing its road assets into Special Purpose Vehicles ("**SPV**") and use innovative monetizing structures like Toll, Operate and Transfer model and InvITs.
- Accordingly, NHAI has been actively working on setting up an InvIT to monetize its completed and operational national highways projects with the objective of mobilizing additional resources through capital markets.
- The InvIT would be a Trust established by NHAI under the Indian Trust Act, 1882 and the Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014.
- The InvIT would be formed with an objective of investment primarily in infrastructure projects (as such term is defined by the Ministry of Finance).
- The InvITs can hold assets either directly or through an SPV or a holding company.

Our view: As highlighted by the Cabinet, it was inevitable that new and innovative financing vehicles would be required to be used for organizations like the NHAI, that which have limited existing sources of funds. The proposal to set up InvITs should provide greater flexibility to investors. The move is expected to create many opportunities like:

- Providing greater flexibility to investors and attracting patient capital (maybe 25-30 years) to the Indian highway market. This is good news for risk averse investors who are looking at long term returns.
- Generation of specialized O&M Concessionaires;
- Attracting patient capital (for say 20-30 years) to the Indian highway market; and
- Retail domestic savings and corpus of special institutions (such as mutual funds, PFRDA, etc.) to be invested in the infrastructure sector through InvIT.
- The monetization of highways will have a multiplier effect for other sectors of the economy.

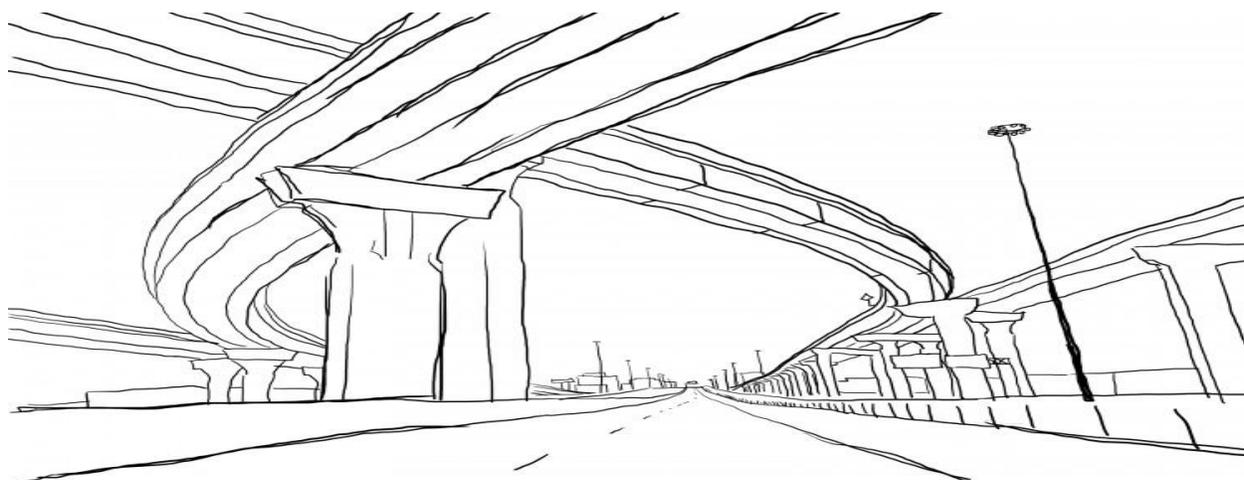
Supreme Court (SC) stays Bombay High Court's (HC) decision for the Coastal Road Project

On July 16, 2019, the High Court of Bombay (HC), in its response to public interest litigations filed by various citizen's groups, stayed the development of the proposed Mumbai Coastal Road Project (MCRP) that aimed to connect Marine Drive in the south of Mumbai to Kandivali in the north via a road along the western coast of the city (we had analyzed the decision of the HC in our Infrastructure and Energy Digest for July 2019). The petitions filed before the HC prayed for the quashing of the MCRP on numerous grounds pertaining to the environmental risk of the MCRP, the discrepancies in the approvals (or lack thereof) granted for the MCRP by the relevant authorities, and the effect of the MCRP on the livelihoods of various communities, amongst others. The judgment of the HC was appealed before the Supreme Court of India (SC) by the Municipal Corporation of Greater Mumbai (MCGM) (the lead promoter of the MCRP) and the related project developers and authorities. On December 17, 2019, the SC partially stayed the HC's judgment and allowed the construction of the road. The matter still pending before the SC and is now to be heard on April 4, 2019.

What was the holding of the SC?

The SC passed an interim order staying the judgment of the HC in consideration of the factors of balance of convenience; prima facie case and irreparable damage / injury. The SC held that the petitioners (the MCGM and others) were free to reclaim the land and build and secure the road thereon. However, the SC stated that the petitioners were barred from carrying out any other developmental work until the further orders of the SC.

Our view: It appears that the SC has divided the operations of the MCRP into the construction of the road itself and the ancillary development of the reclaimed area while deciding to allow the construction of the road. The SC appears to have considered the pleas of the project developers and the costs incurred by them due to the operations having been shut down by the order of the HC. The SC, therefore, has allowed the continuation of the at least the 'road' aspect of the MCRP. It remains to be seen what the approach of the SC will be regarding the granting of the CRZ clearance by the MoEF and the status of the EC. This is no doubt a welcome relief to the BMC and the contractors involved in the project who have claimed a loss of INR 10 crore a day (also machinery worth Rs 150 crore is lying unused, while 1,150 workers are sitting idle at the site, according to the plea).



ENERGY



Methodology for Coal Linkage without Power Purchase Agreements

On May 22, 2017, the Ministry of Power (**MoP**) issued the Scheme for Harnessing and Allocating Koyala (**Coal**) Transparently in India (**SHAKTI**). Under the SHAKTI policy, the state owned Coal India Limited and Singareni Collieries Company Limited (together the Coal Companies) were to grant coal linkages on an auction basis to independent power producers (**IPPs**) on a notified price. The bidding parameter was to be the discount that the IPPs were willing to offer on the existing price contained in the executed power purchase agreements (**PPAs**). The SHAKTI policy was expected to contribute towards the resolution of stressed assets. However, it did not contain a provision for the grant of coal linkage to those IPPs that did not have PPAs.

What were the amendments to the policy?

In March, 2019, the MoP relaxed the criteria for the grant of coal linkages to include IPPs without PPAs. The amendment to the SHAKTI policy allowed the coal linkage to IPPs without PPAs for a period ranging from a minimum of 3 months to the maximum of 1 year. It was further provided that the power generated through the linkage is to be sold in Day Ahead Market (**DAM**) (the DAM is the electricity trading market for delivery power the following day, with the prices and quantum of electricity to be transacted is determined through a closed auction-bidding process that is carried out in defined windows), or through Discovery of Efficient Energy Price (**DEEP**) portal in the short term (the DEEP portal is an initiative by the MoP developed as an online platform for the transparent procurement of short term power by state distribution companies through an e-bidding and e-reverse auction process).

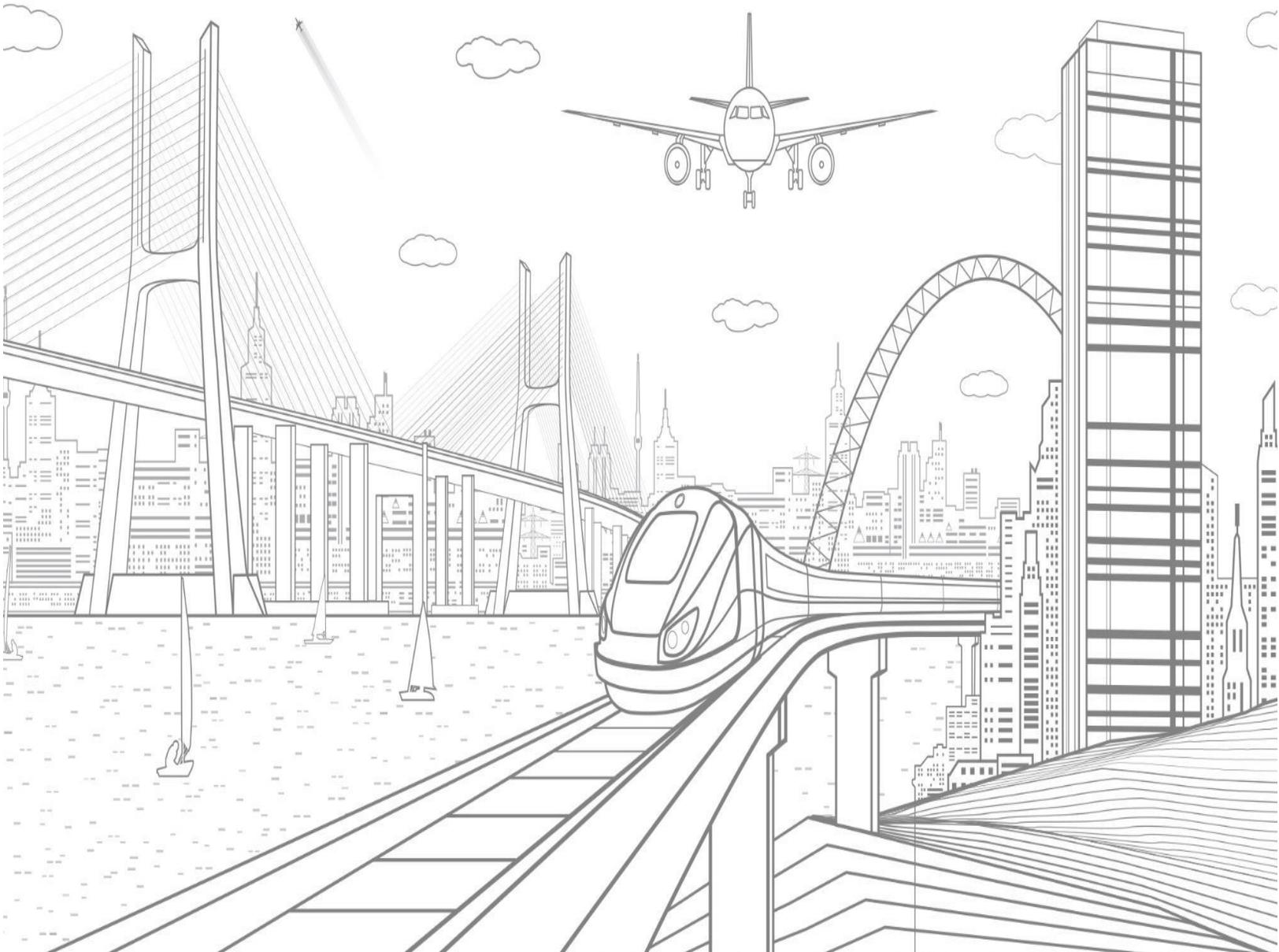
The March amendments to the SHAKTI policy provided that the MoP would, in consultation with the Ministry of Coal, issue a methodology for coal linkage to IPPs without PPAs in the short term. Pursuant to this provision, the MoP on December 2, 2019 issued the said methodology.

What are the key features of the methodology?

- Auction: The auction of the coal linkages would be carried out through a separate window for auction.
- Identification of coal: The coal companies will earmark areas/mines within their subsidiaries (as per the SHAKTI policy) within 45 days of the order (i.e. 45 days from December 2, 2019). The details of the identified areas mines are to be published on the Coal Companies' website and are to include quality of the coal, quantum of coal available, the period for which such coal shall be available, and the schedule for the start of the supply of coal.
- Period for auction: Auctions are to be carried out every fiscal quarter. The annual calendar is to be published on the Coal Companies' websites showing the months in which these auctions are to take place.
- Eligibility: Power plants (excluding captive power plants) which have power capacity without a PPA (untied power capacity) of more than 50% would be eligible to participate for auction of coal linkage for short term period.
- Minimum quantity, duration, allocation:
 - The quantity of the coal would be decided by the heat rate of the coal (measured in kCal/kWhr) and the heat rate is capped at 2600 kCal/kWhr for the untied capacity of the plant.
 - The duration of the coal linkage would be based on the consumption of coal by the power plant for its running in a period of 3 months, and the coal companies would decide the duration of the supply accordingly.
 - The coal linkage will be allocated based on the quantum of power already commissioned but untied (without a PPA).
- Methodology for bidding: Power producers/IPPs may participate and bid for a premium that is above the price notified by the relevant coal company. As the coal linkage is allocated for the short term and for sale of power on the DAM in the power exchange, the base price for the bidding would be the price notified by the coal companies.
- Restriction on use of power: The power generated through the use of coal through the aforementioned linkages is to be used in only the following ways:
 - For the DAM through power exchanges set up as per the relevant regulations issued by the Central Electricity Regulatory Commission, or

- In the short term through transparent bidding process as per the relevant guidelines issued by the MoP through the DEEP portal. The distribution licensees are to follow the guidelines issued by the MoP for the procurement of power through tariff-based bidding process using the National e-bidding portal.

Our view: The relaxation of the criteria to include those IPPs without medium and long term PPAs aims to provide a solution for the lack of coal supply and revival of stressed power plants by providing a structured method for the procurement of coal in the short term. This move aims to address the fluctuating demand of power exchanges in DAMs and cater to short term coal needs.



RENEWABLE ENERGY

Amendment to Dispute Resolution Mechanism for solar/wind power developers

The Ministry of New & Renewable Energy (**MNRE**) had issued an order on June 18, 2019 for 'setting up of a Dispute Resolution Mechanism to consider the unforeseen disputes between solar/wind power developers and Solar Energy Corporation of India (**SECI**)/NTPC Limited (**NTPC**), beyond contractual agreements (**Order**)¹.

What are the key amendments introduced by the Amendment Orders?

The following are the key amendments introduced by the Amendment Orders:

Subject	Amendment
Application Procedure	<ul style="list-style-type: none"> ▪ The Amendment Orders require an application to be submitted SECI/NTCP in case of all the disputes, whether or not covered by the power purchase agreements (PPAs). ▪ To further the aim of setting up renewable projects, SECI/NTPC are required to pass speaking order to give a just solution to the developers. ▪ The applicant would have the right to appeal to the dispute resolution committee (DRC) if it is not satisfied with the orders given by SECI/NTPC.
Disputes to be considered by the DRC	<ul style="list-style-type: none"> ▪ The DRC would consider all appeals against decisions made by the SECI/NTPC on disputes concerning the following: <ul style="list-style-type: none"> - all requests for extension of time (EOT) due to recognized force majeure events - all requests for EOT not covered under the terms of the contract - all disputes other than those pertaining to EOT between SECI/NTPC and developers ▪ For each kind of dispute, the Amendment Orders specify the timelines within which the application and the appeal are to be made to the SECI/NTCP and the DRC respectively. ▪ Further, an EOT would not be granted for overlapping periods of effect as a result of two or more causes (whether on account of Force Majeure Events or for items not covered under the contractual arrangements).
Fees Payable for making Applications	<ul style="list-style-type: none"> ▪ In case of EOT disputes, the fee payable is 5% of the impact of SECI/NTPC's decision being challenged, with the impact being limited to the Performance Bank Guarantee (PBG) submitted for the project concerned. Such fee would be a minimum of INR 1,00,000 and could go upto a maximum of INR 1,00,00,000. ▪ In case of disputes other than EOT disputes with a PBG, the fees payable was the same as those for EOT disputes. ▪ For disputes other than EOT disputes and without a PBG, the fees payable was 5% of the total impact of the dispute, which was to be a minimum of INR 1,00,000 and a maximum of INR 1,00,00,000. ▪ Further, the fees are to be deposited into the appropriate payment security fund maintained by SECI/NTPC.

¹ The Order and guidelines issued for its implementation have been covered in our Infrastructure and Energy Digests for June 2019 and September 2019 respectively.

Our view: Considering the application process and the timelines which have been detailed out vide the Amendment Orders, one hopes for efficient and effective resolution of disputes concerning solar and wind power developers. Further, stipulation of a threshold of INR 1,00,00,000 for applications before the DRC pertaining to EOT disputes will eliminate ambiguity on the maximum fee leviable. This step by the MNRE of setting up a transparent, unbiased speedy dispute resolution mechanism, is significant in view of India's ambitious target of having 175 GW of renewable energy by 2022.

CERC rejects Review Petition by SECI

What were the facts of the case?

- On August 4, 2015, Ministry of New and Renewable Energy (**MNRE**) issued a Scheme for setting up 2000 (**two thousand**) MW Grid connected Solar PV Projects.
- Being the nodal agency for the Scheme, Solar Energy Corporation of India Limited (**SECI**) issued the Request for Selection (**RfS**), in order to select developers for the development of 500 (**five hundred**) MW Grid connected Solar PV Projects on Build, Own and Operate basis in the State of Maharashtra.
- Welspun Energy Private Limited (**Welspun**) was awarded 100 (one hundred) MW project and signed a power purchase agreement (**PPA**) with SECI on April 10, 2016.
- During the course of implementation of the project, disputes arose between Welspun and SECI. Pursuant to this, Welspun filed a petition for resolution of disputes arising out of the PPA.
- The Central Electricity Regulatory Commission (**CERC**) passed an order granting an extension for fulfilment of the condition subsequent activities related to financial closure and grid connectivity was granted and the delay in condition subsequent activity related to clear possession and title of land was condoned and the scheduled commercial operation date (**SCoD**) was extended up to 90 days from the date of issue of the order, subject to payment of a penalty.
- Aggrieved by the order, SECI filed a review petition before the CERC.

What were the grounds for review?

- The extension of the SCoD was contrary to the PPA, whereby it was stated that the extension of time in order to satisfy the conditions subsequent must be done without having any impact on the scheduled commissioning date.
- The PPA did not permit any extension of time for fulfilment of the conditions subsequent on account of “force majeure like” events. Accordingly, the SCoD could not be extended due to “force majeure like” events.
- The SCoD could be extended beyond 25 months from the Effective Date of the PPA. This included non-achievement of SCoD due to force majeure or force majeure like events.
- Welspun was obligated to maintain the controlling shareholding on the company, for a period of one year from the Commercial Operation Date. The agreement was not permitted to be assigned as per the PPA, unless it was carried out by mutual consent.
- The de-merger, as carried out by the National Company Law Tribunal (**NCLT**) could not over-ride the specific contractual obligation as contained in the PPA, whereby assignment of the PPA was prohibited.

What was the CERCs decision?

CERC was of the view that:

- The contention that non-recognition of “force majeure like events” in PPA and consequent extension of SCoD had already been given due consideration in the order and that SECI was seeking re-agitation on the same issues which was not permissible under review jurisdiction. The decision to extend time was taken after duly considering the PPA, the submissions made by the parties and the legal principles. Accordingly, the CERC held that there was no error apparent on the face of the record and accordingly rejected the review on this aspect.
- As regards the contention regarding change in the shareholding pattern and substitution of Welspun with Giriraj Renewable Private Limited (and the de-merger), the CERC held that the SECI was re-agitating issues that have already been decided by CERC in the order. Hence, this contention of SECI was also rejected.
- As regards the subsequent developments, the CERC noted the provisions of Order 47 of Rule 1 of the Code of Civil Procedure, 1908 which state that the only additional evidence that could be considered is material existing at the time of the original proceedings, which after due diligence was not within the knowledge or could not be produced at that time. Accordingly, the CERC observed that it cannot be concerned with nor take cognizance of any subsequent developments.

Our view: The decision reinstates the fundamental principles of the powers of an authority when exercising review jurisdiction over a matter and should come as a relief to power developers.

Guidelines for development of decentralized solar power plants

The Ministry of New and Renewable Energy (**MNRE**) has vide its Office Memorandum dated December 13, 2019 issued “Guidelines for development of Decentralized Solar Power Plants (**Guidelines**).

What is the objective?

The Guidelines were framed with the objective of providing a facilitative framework for development of decentralized solar power plants near distribution sub-stations in India and fulfilment of solar renewable purchase obligations.

What are the criteria for applicability of the Guidelines?

The Guidelines are applicable for procurement of solar power by distribution companies (**DISCOMS**) from decentralized solar power plants satisfying the following criteria:

- Plants with capacity more than 2 MW
- Plants connected to distribution sub-stations of rating 66/11 KV and higher
- Plants with up to 2 MW capacity and being connected to distribution sub-stations of any DISCOM of rating 33/11 KV and below where the sanctions given to the DISCOM under PM-KUSUM have been exhausted.

What are the salient features of the Guidelines?

Some salient features of the Guidelines are set out below:

Implementation Arrangements envisaged under the Guidelines	Responsibility	Particulars of Implementation
Request for Selection (RFS) for development of solar power plants on build own and operate basis	DISCOM	<ul style="list-style-type: none"> ▪ The DISCOM is to assess and notify on its website solar power capacity that can be injected in to identified distribution sub-stations. ▪ The DISCOM is to invite bidders (either itself or through an authorized agency such as power trading agencies) to participate in the open competitive bidding process against the RFS and to be connected to the identified distribution sub-station.
Submission of technical and financial bids	Bidders	<ul style="list-style-type: none"> ▪ The bidders are to submit financial and technical bids. ▪ The financial bids are to indicate the tariff offered against total capacity for which the bid is submitted
Selection of developer	DISCOM	<ul style="list-style-type: none"> ▪ The developer would be selected by the DISCOM on the basis of the lowest tariff offered by the bidders in the closed bid or e-reverse auction as the case may be.
Land Acquisition	DISCOM / Developer	<ul style="list-style-type: none"> ▪ The DISCOM may provide land, take responsibility of evacuation of solar power from the plants and may charge fee for such facilitation. ▪ Alternatively, the developer may be responsible for procuring land on its own and providing connectivity from the power plant to the sub-station.
Connectivity with the sub-station	DISCOM	<ul style="list-style-type: none"> ▪ The DISCOM would be responsible for laying down a dedicated 11kV line from the plant to sub-station, construction of bay and related switchgear including metering arrangements at sub-station where the plant is connected to the grid.
Clearances required from State Government and other local bodies	Solar Power Generator (SPG)	<ul style="list-style-type: none"> ▪ The SPG would be responsible for procuring all necessary clearances for setting up the Plant.
Execution of Power Purchase Agreement (PPA)	DISCOM and SPG	<ul style="list-style-type: none"> ▪ The PPA is to be executed by the DISCOM and SPG, within 2 months of the date of issue of the letter of award. ▪ The PPA would be for a period of 25 years from the Commercial Operation Date. ▪ The DISCOM will be obliged to buy the entire power from SPG within the contract capacity. ▪ The SPG would be required to achieve a minimum CUF of 15% on annual basis during the PPA period. However, in case of low Solar radiation zones, lower minimum CUF may be specified by the concerned DISCOM. ▪ The SPG will be free to operate the plant after expiry of the 25 years of PPA period if other conditions like land lease, etc., permit.

		<ul style="list-style-type: none"> As a payment security measure, DISCOM will have to maintain letter of credit and escrow arrangement as required in the PPA.
Providing bank guarantees to DISCOM	SPG	<ul style="list-style-type: none"> The SPG is to provide the following bank guarantees to the DISCOM: <ul style="list-style-type: none"> Earnest Money Deposit (EMD) of INR 1,00,000/MW in the form of Bank Guarantee along with Expression of Interest. Performance Bank Guarantee (PBG) of INR 5 00,000/MW within 30 days from date of issue of the letter of award. The DISCOM can prescribe higher PBG amount where land and evacuation facilities are being provided by DISCOM.
Validity of PBGs	-	<ul style="list-style-type: none"> The PBGs shall be valid for a period of 12 months from the date of issue of the letter of award for the plant.
Encashment of bank guarantees / Release of EMD	DISCOM	<ul style="list-style-type: none"> The DISCOM can encash the bank guarantee equivalent to EMD as penalty in case of failure by SPG to execute the PPA within the stipulated time period. The DISCOM is to release the EMD within 15 days of the date of issue of the letter of award to selected SPG(s).
Commissioning and COD	SPG	<ul style="list-style-type: none"> The SPG is to commission the plant within 9 months from date of issuance of the letter of award in cases where land and connectivity is being provided by the DISCOM. In other cases, the plant is to be commissioned within 12 months of issuance of the letter of award. A delay by the SPG in commissioning the plant would entitle the DISCOM to encash the PBG.

Our view: By laying down a framework for DISCOMs to procure solar power from decentralized renewable energy power plants, the MNRE has reinforced the importance of (i) energy efficiency and the decentralized use of solar energy; and (ii) easy accessibility of affordable and reliable solar power in the rural areas. Considering that land acquisition has been a major deterrent for solar developers, the provision of the Guidelines enabling the DISCOMs to acquire land should be a boost for the sector and hopefully attract interest and competitive rates from bidders.



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