



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No.: 226/MP/2020

कोरम/ Coram:

श्री पी. के. पुजारी, अध्यक्ष/ Shri P. K. Pujari, Chairperson

श्री आई. एस. झा, सदस्य/ Shri I.S. Jha, Member

श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member

आदेश दिनांक/ Date of Order: 08th of March, 2021

IN THE MATTER OF:

Petition under section 79 of the Electricity Act, 2003 seeking relief in time extension granted for commissioning of Petitioner's 50 MW wind power project connected to central grid.

AND IN THE MATTER OF:

Wind Four Renergy Pvt. Ltd.

Inox Towers, Plot no. 17

Sector-16A, Film City

Noida- 201301

...Petitioner

Versus

1. Solar Energy Corporation of India Limited (SECI)

1st Floor, D-3, A-Wing,

Prius Platinum Building District Centre,

Saket, New Delhi – 110017

2. Power Trading Company India Limited (PTC)

2nd Floor, NBCC Tower,

15, Bhikaji Cama Place,

New Delhi-110066

...Respondents

Parties Present:

Shri Alok Aggarwal, Advocate, WFRPL

Shri Mayank Bughani, Advocate, WFRPL

Shri M. G. Ramachandran, Advocate, SECI

Ms. Poorva Saigal, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Shri Ravi Kishore, Advocate, PTC
Ms. Rajashree Chaudhary, Advocate, PTC
Shri Bhupesh Juneja, WFRPL
Shri Ravi Sinha, WFRPL
Shri Shreedhar Singh, SECI
Shri Shubham Mishra, SECI
Ms. Aditee Nitnavare, SECI

आदेश/ ORDER

The Petitioner, Wind Four Renergy Pvt. Ltd., (WFRPL) is a wholly owned subsidiary of Inox Wind Infrastructure Services Ltd (IWISL). WFRPL has been incorporated for development & execution of 50 MW ISTS connected wind power project set up at Dayapar and other villages at Bhuj, Gujarat. The Petitioner has filed the instant petition under Section 79 of the Electricity Act, 2003 seeking relief in time extension granted for commissioning of Petitioner's 50 MW wind power project connected to national grid.

2. The Respondent No. 1, Solar Energy Corporation of India limited (SECI) has been designated as the nodal agency for implementation of scheme of Ministry of New and Renewable Energy (MNRE) for setting up '1000 MW ISTS connected Wind Power Projects for developing grid connected wind power capacity', vide Guidelines No. F. No.53/14/2016-WE issued on 22.10.2016 (hereinafter referred to as 'the MNRE Guidelines').
3. The Respondent No. 2, Power Trading Company India Ltd (PTC) was incorporated in 1999 to undertake trading of power. PTC has also tied up the power to be generated from the wind power projects for sale to BSES Rajdhani Power Ltd (BRPL), a distribution licensee in Delhi for fulfilment of its Renewable Purchase Obligation (RPO). The Petitioner has executed Power Purchase Agreements with PTC on 21.07.2017 that was amended on 20.12.2017.
4. The Petitioner has made the following prayers:
 - a. *Condone the period of delay caused in commissioning the project commencing from the date of communication of termination of PPA i.e., from 12.07.2019 till the date on which extension of SCD was communicated to the petitioner i.e. 21.11.2019. Accordingly revise the SCD of 50 MW awarded to the Petitioner from 13.06.2019 to 21.01.2020 adding 60 days additional time from the date of communication of such extension (i.e. 21.11.2019)*

condoning the intervening gap period from 12.07.2019 till 21.11.2019. And any delay beyond this period to be subject to imposition of Penalties for delay in commissioning as envisaged in Clause 3.17.B of the RFS.

- b. Exempt the above period i.e., from 12.07.2019 till 21.11.2019 from imposition of Penalties for delay in commissioning as envisaged in Clause 3.17.B of the RFS.*
- c. Set aside the Claims raised by Respondent No 2 vide letters annexed hereto as (ANNEXURE P-10)*
- d. Pass such other or further orders as the Commission may deem fit and proper in the facts and circumstances of the case.*

Brief facts of the case

- 5. PTC was declared as a successful bidder against RfS issued by SECI dated 24.06.2016, for selection of power trader for purchase and sale of wind power and has been issued Letter of Award dated 26.08.2016 against the same.
- 6. On 28.10.2016, SECI invited proposal vide Request for Selection (RfS) for setting up grid connected wind power projects in India on “Build Own Operate” basis for an aggregate capacity of 1000 MW. Inox Wind Infrastructure Services Ltd. (IWISL) was declared as a successful bidder against RfP dated 28.10.2016 issued by SECI for selection of WPDs for development of cumulative capacity of 1000 MW and was issued Letter of Award dated 05.04.2017 for development of Wind Power Project(s), generation and sale of wind power under the scheme of MNRE in terms of the MNRE Guidelines. Subsequently, the Petitioner was incorporated as 100% subsidiary of the Inox Wind Infrastructure Services Ltd (IWISL) as ‘Special Purpose Vehicle’ (SPV) for setting up this project. The Petitioner signed the Power Purchase Agreement (PPA) with PTC to sell energy generated from the wind power project to PTC for 25 years from the ‘commercial operation date’ (COD) of the project as per the terms and conditions of the PPA.

Submissions of the Petitioner

- 7. The Petitioner has submitted that pursuant to RfS dated 28.10.2016 invited by SECI and selection of IWISL as the successful bidder for 250 MW, PTC tied up the power to be generated from the awarded projects for sale to BSES Rajdhani Power Ltd (BRPL). IWISL was awarded total 250 MW project capacity, under Tranche-I in 5 packets each of 50 MW capacity and same was to be executed under five different SPVs viz. Wind One Renergy Pvt

Ltd (50 MW), Wind Two Renergy Pvt Ltd (50 MW), Wind Three Renergy Pvt Ltd (50 MW), Wind Four Renergy Pvt Ltd (50 MW) and Wind Five Renergy Pvt Ltd (50 MW).

8. The Petitioner has submitted that as per RfS and PPA, SCoD of the project was 04.10.2018 without levy of any Liquidated Damages (hereinafter referred to as 'LD') and with proportionate LD implications till 05.04.2019. Thereafter, the ultimate deadline for commissioning the project was 05.07.2019 with implication of tariff reduction on pro-rata basis.
9. The Petitioner has submitted that there was delay in commissioning the project since there was delay in readiness of evacuation system to be implemented by PGCIL. Evacuation system was charged and commissioned in April 2019 after a delay of more than 9 months. Finally, post the confirmation from PGCIL in April 2019 about readiness of evacuation system, IWISL could successfully commission projects under only 4 (four) SPVs totalling 200 MW up to the project deadline of 05.07.2019 viz. Wind Three Renergy Pvt Ltd (50 MW) on 29.06.2019, Wind One Renergy Pvt Ltd (50 MW) on 02.07.2019 and Wind Two Renergy Pvt Ltd (50 MW) and Wind Five Renergy Pvt Ltd (50 MW) on 04.07.2019. The commissioning activities of 200 MW itself take about two months of time, as each of the 100 wind turbine generators (WTG) have to be individually tested and commissioned. Each WTG is like one power plant. So, commissioning one WTG amounts to commissioning 100 power plants. Further, they were all located in a very scattered manner over a radius of 30-45 km. Meanwhile, the ultimate deadline of 05.07.2019 arrived and 50 MW project of the Petitioner could not be completed and remained un-commissioned even though it was also under execution.
10. The Petitioner has submitted that on 12.07.2019, SECI terminated the PPA on account of delay in commissioning the 50 MW wind power project. Even prior to the issuance of the said termination letter dated 12.07.2019, SECI initiated the process of encashing Performance Bank Guarantee of Rs 10 crores.
11. The Petitioner being aggrieved by the actions of SECI, filed an appeal before the Dispute Resolution Committee of MNRE on 18.10.2019. However, on 21.11.2019, while the Appeal filed by the Petitioner was yet to be heard, SECI granted extension of SCoD till 13.03.2020 acknowledging the fact that such extension was necessitated on account of delay in

operationalisation of Long Term Access (LTA) by Central Transmission Utility (CTU). The extension letter also stipulated that Liquidated Damages shall be levied as per the terms and conditions of RfS. Also, another 60 days was allowed by SECI to commission the projects from the date of LTA operationalization. As the LTA operationalization was effective from 13.04.2019, the SCoD had been revised and shifted to 13.06.2019. In view of this extension letter, the aforesaid Appeal before Dispute Resolution Committee of MNRE has been withdrawn.

12. The Petitioner has submitted that as per the extension granted by SECI, 50 MW project of the Petitioner was allowed to be commissioned within 9 months from revised SCoD of 13.06.2019 i.e. till 13.03.2020 subject to imposition of Liquidated Damages as per RfS/PPA. Pertinently, the RfS/PPA envisages imposition of Liquidated Damages in two parts progressively:

- a) For the period from 13.06.2019 (revised SCoD) to 13.12.2019 (commissioning with pro-rata implication of liquidated damages), the Performance Bank Guarantee of Rs 10 crores submitted for the project was to be encashed on pro-rata basis. In the present case, on 21.11.2019 i.e., the date of communication of extension of SCoD, it was liable to lose most of its Performance Bank Guarantee as per the RfS condition and in no case the Petitioner could commission the project on or before 13.12.2019 in order to save any portion of Performance Bank Guarantee. Necessary action against Performance Bank Guarantee encashment has not been taken by Respondent No 1 so far.
- b) For the period from 13.12.2019 to 13.03.2020 (commissioning with implications of tariff reduction), tariff reduction @0.50 paisa/unit will take place for each day of delay from 13.12.2019. Thus, if project is commissioned on 13.03.2020, around 45 paisa (0.50 paisa x 90 days of delay) will be reduced from agreed and approved tariff of Rs 3.46/unit. Accordingly, net tariff would be Rs 3.01/unit under PPA between the Petitioner and Respondent No. 2 if project is commissioned on 13.03.2020. However, the Petitioner company has resumed the execution of work for this 50 MW project with a target to complete the project as early as possible but it would require more time for execution followed by testing and commissioning of the project.

13. The Petitioner has submitted that in no case the Petitioner will be able to save its Performance Bank Guarantee amount of Rs 10 crores since it has been granted less than a month's time (21.11.2019 to 13.12.2019) to commission the project with implications for liquidated damages since extension has been granted by SECI vide communication dated 21.11.2019. Rather, the project is subject to further tariff reduction thereby resulting in the Petitioner to incur huge losses immediately upon commissioning.
 14. The Petitioner has submitted that it was admittedly prevented from executing the work for commissioning the 50 MW wind power project for reasons beyond its control during the period of 132 days falling between the dates 12.07.2019 (date of termination of PPA) till 21.11.2019 (date of communication of extension of revised SCoD by SECI).
 15. The Petitioner has submitted that non-execution of work during the period of 132 days during intervening period between 12.07.2019 and 21.11.2019 cannot be attributed to any negligence, or any intentional act, or any omission, or any error on the part of the Petitioner as the Petitioner was under a genuine and bonafide belief and impression, that the PPA stood terminated on 12.07.2019. Consequently, no penalty for delay, as envisaged under the provisions of RfS can be imposed for the said period. Imposition of any such penalty during the aforesaid period would be tantamount to unjust enrichment of the Respondent No.1 thereby causing irreparable harm to the Petitioner.
 16. The Petitioner has submitted that the period commencing from 12.07.2019 till 21.11.2019 should be excluded from the imposition of penalty for delay in commissioning as envisaged in Clause 3.17.B of the RfS and further after condoning the aforesaid gap of 132 days, the revised SCoD of 13.06.2019 may be shifted to 21.01.2020, allowing 60 days of time from the date of communication (i.e. 21.11.2019) of project extension as being allowed after LTA operationalization and making it effective from the date of communication.
 17. The Petitioner has submitted that on 26.12.2019, PTC has forwarded to it, a communication dated 23.12.2019 issued by BSES Rajdhani Power Limited (BRPL), i.e. the beneficiary Discom with whom PTC has signed a PSA wherein BRPL has communicated the anticipated losses to PTC and has further reserved its right to claim such anticipated losses. On 03.01.2020, the Petitioner has responded to the aforesaid letter dated 26.12.2019 issued by PTC making it absolutely clear that the claim of BRPL is admittedly imaginary, premature
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and non-existent. The alleged claim of BRPL is also unsustainable in the eyes of law since losses, if any, can only be ascertained once the project is commissioned and power is supplied. At this stage, only CUF is to be assessed and corresponding deviation may be compensated as per PPA. PPA will remain in force for a term of 25 years from COD and, therefore, BRPL is going to enjoy the benefit of compliance with RPO for the entire 25 years from COD. There is no curtailment in the PPA period because of the project delay or because of any reasons whatsoever. The Petitioner has no privity of contract with BRPL. Consequently, there is neither any contractual nor any legal obligation on part of the Petitioner to satisfy the imaginary claims of BRPL. In so far as the Petitioner and PTC are concerned, there is no act or omission of the Petitioner that entitles PTC to claim any losses/damages under any account whatsoever, much less seek reimbursement of any alleged claim from BRPL. PTC cannot be allowed to exploit its dominant position to threaten the Petitioner with arbitrary and whimsical claims in the garb of the said letter dated 26.12.2019 from BRPL.

Reply of Respondent No.1 (SECI)

18. SECI has submitted that the Petition suffers from non-joinder of necessary party namely BSES Rajdhani Power Limited (BRPL), the distribution licensee/ buying entity, that has entered into a PSA dated 21.07.2017 with PTC to purchase, on a back to back basis, the contracted capacity (50 MW) which PTC has agreed to purchase from the Petitioner. Accordingly, the Petitioner may be directed to implead BRPL as a party to the present proceedings.
19. SECI has submitted that on 05.04.2017, it, on behalf of PTC issued Letter of Award to M/s. IWISL (the holding company of the Petitioner) for setting up 50 MW wind power project in Kutch, Gujarat and for generation and sale of power to PTC at a tariff of Rs.3.46/kWh. The PPA between the Petitioner and PTC is for generation and sale of electricity from this wind power project which in turn is to be sold to BRPL under Power Sale Agreement dated 21.02.2017.
20. SECI has submitted that there were delays on the part of the Petitioner in fulfilling the obligations with respect to construction and development of the project as well as in declaring

SCoD in terms of the provisions of the PPA. In this regard, the following provisions of the PPA are relevant:

- a) SCoD as defined in Article 1 of the PPA was 04.10.2018;
- b) Article 4 of the PPA deals with construction and development of the project. Articles 4.1 and 4.2 deal with the Petitioner's obligations with regard to constructing, commissioning the power project, supplying contracted power from the project commissioning date, obtaining Long Term Access (LTA) etc.;
- c) Article 4.5.1 of the PPA deals with extension of time. SCoD can be deferred for a reasonable period only in three cases namely PTC Event of Default, Force Majeure Events affecting the PTC/ Distribution Company and Force Majeure Events affecting the Petitioner. The above extension in SCoD is subject to Article 4.5.6;
- d) Article 4.5.6 of the PPA provides that '*Notwithstanding anything to the contrary, contained in this Agreement, any extension of the Scheduled Commissioning Date arising due to any reason envisaged in this Agreement shall not be allowed beyond 27 months the date of issuance of LOA by SECI to the WPD*';
- e) On 05.07.2019, the twenty-seven (27) months of time period from the date of issuance of Letter of award to the Petitioner expired;
- f) Clause 3.14 of the MNRE Guidelines and Clause 3.17 B of the RfS provides that '*In case of delays of project commissioning due to the reasons beyond the control of the WPD, SECI after having satisfied with documentary evidences produced by the WPD for the purpose, can extend the time for commissioning date by up to 3 months, without any financial implications to the WPD. For any extension beyond the period of 3 months, SECI will approach MNRE, who will be authorized to decide on further extension with the approval of Minister-in-charge, MNRE*';
- g) SCoD was revised by SECI to 13.06.2019 in pursuance of the letter dated 22.10.2019 of MNRE dealing with grant of time to wind power projects under Tranches I to V schemes involving SECI. Further, SECI allowed the Petitioner to commission the 50 MW power project within nine (9) months from the revised scheduled commercial

operation date i.e. by 13.03.2020 subject to levy of Liquidated Damages in terms of the MNRE Guidelines, bidding documents and the PPA.

- h) Clause 3.14 of the MNRE Guidelines, 3.17 B of the RfS, Clause 1.8 of the Letter of Award and Article 4.5.6 of the PPA provides for Liquidated Damages for delay in commencement of supply of power to PTC. In terms of Article 4.5.6, SECI is entitled to encash the Performance Bank Guarantee in case the commissioning of the project is delayed upto six (6) months from the SCoD. After six months, the tariff discovered in e-reverse auction shall be reduced at the rate of 0.50 paise/kWh per day of delay for the delay in such remaining capacity which is not commissioned. The Liquidated Damages provided in Article 4.5.6 of the PPA is a specific ascertained sum of money;
- i) The maximum time period allowed for commissioning the full project capacity with encashment of Performance Bank Guarantee and reduction in the fixed tariff is 27 months from the date of Letter of Award and PTC at its discretion is entitled to terminate the PPA thereafter; and
- j) Article 5.5.2 of the PPA provides that if the Petitioner fails to commence supply of power from the SCoD, SECI shall have the right to encash the Performance Bank Guarantee;

21. SECI has submitted that the Petitioner by its various letters dated 18.12.2018, 13.03.2019, 25.03.2019, 18.04.2019, 22.04.2019, 25.04.2019, 29.05.2019 and 13.06.2019 had clearly stated that it would commission the power project before 05.07.2019 [27 months from the date of Letter of Award (05.04.2017)] i.e. the maximum time limit for commissioning of the entire capacity of the project (50 MW) in terms of Clause 3.14 of the MNRE Guidelines, Clause 3.17B of the RfS and Articles 4.5.6 and 4.6.2 of PPA.

22. As the project was not commissioned by 05.07.2019, SECI issued the letter dated 12.07.2019 to IWISL whereby it stated that action will be taken in terms of Clause 3.14 of MNRE Guidelines, Clause 3.17B of RfS and Article 4.6.2 of PPA dealing with Liquidated Damages. However, on 12.07.2019, on receiving the email from IWISL which stated that delay in commissioning was mainly due to delay in operationalization of LTA i.e. effective from

14.04.2019 and that IWISL will present its case for extension before Dispute Resolution Committee, SECI withheld invocation of the Performance Bank Guarantee.

23. SECI has submitted that by letter dated 09.09.2019, it had duly forwarded the requests received from the Petitioner to MNRE, which was the competent authority to decide on extension of SCoD beyond the period of three (3) months as per Clause 3.14 of the MNRE Guidelines and Clause 3.17 of the RfS Document. SECI had, therefore, taken appropriate steps with regard to consideration of the request of the WPDs including Petitioner for extension in scheduled commissioning date for reasons beyond their control. SECI was not empowered to grant extension in the scheduled commissioning date (being more than 6 months) without the approval of MNRE. In the meantime, the Petitioner was also in the process of approaching the Dispute Resolution Committee for seeking extension of time for commissioning the power project. By letter dated 21.11.2019, SECI had duly revised the scheduled commissioning date/ scheduled commercial operation date to 13.06.2019 (14.04.2019 i.e., date of operationalization of LTA + 60 days) in pursuance of the letter dated 22.10.2019 of MNRE which provided that '*Extension in scheduled commissioning of the project for a period equal to 60 days subsequent to operationalization of LTA (allowing additional time to be provided to the developer to complete the commissioning activities once the ISTS infrastructure is ready) may be considered*'.
24. SECI has submitted that consequent to the above, it allowed the WPDs including the Petitioner, to commission the project by 13.03.2020 i.e. within nine (9) months from 13.06.2019 subject to levy of liquidated damages under the provisions of the MNRE Guidelines, RfS and PPA in consonance with the MNRE letter which provided that '*Further, delay in commissioning beyond the extended SCD will be dealt as per the provisions of RfS and PPA*'
25. SECI has submitted that it has granted extension till 13.03.2020 for commissioning the Project by the Petitioner in larger public interest. The same was done in the form of special dispensation in view of the express stipulation contained in Article 4.5.6 and 4.6.2 of the PPA and the bidding documents namely the maximum time limit for commissioning the full capacity of the project as 27 months from the date of issuance of Letter of Award (05.04.2017) i.e., upto 05.07.2019.

26. SECI has submitted that the Petitioner by letter dated 13.01.2020 had intimated the expected date of commissioning of the power project as February 2020. However, the Petitioner has failed to commission the power project by the said date. Even by 13.03.2020, i.e., the maximum permissible extension granted by SECI for commissioning the power project, the Petitioner did not commission the project. From the above, it is demonstrated that the Petitioner was not committed to commissioning the project within the time stipulated. With effect from 18.12.2019, the Petitioner has been shifting its stand and has been seeking different dates for completion and commissioning the power project. In fact, having failed to commission the project even by 13.03.2020, the Petitioner is clearly in default of the timeline of commissioning the power project. The stand taken by the Petitioner in its letters dated 18.12.2019, 13.03.2019, 25.03.2019, 18.04.2019, 22.04.2019, 25.04.2019, 29.05.2019, 13.06.2019 and 13.01.2020 was false and unfounded. The Petitioner was deliberately giving wrong information regarding the status of commissioning the power project.
27. SECI has submitted that other SPVs (being 4 in number) formed by IWISL under the present scheme (Tranche-I) and who have entered into PPA with PTC for setting up 50 MW project each have commissioned their project by 05.07.2019. However, the Petitioner though placed in a similar position and having been granted similar extension in the SCoD by SECI on the basis of the letter of MNRE has failed to commission the Project even by the maximum permissible time limit of 13.03.2020. Further, in case of Wind Five Renergy Private Limited, one of the said four other projects, there has been delay in scheduling of power from the 50 MW wind power project on account of non-compliance of WRLDC/ CTU requirements. Power scheduling commenced with effect from 26.03.2020 only after obtaining commissioning certificate from SECI of having being commissioned on 04.07.2019.
28. SECI has submitted that the status of the projects being established by IWISL, under other Tranches namely Tranches-II, III and IV wind schemes involving SECI are under:

Sl. No.	Tranche & Project Capacity (MW)	Applicable Tariff (Rs./kWh)	SCoD under PPA	Status
1	Tranche-II (250 MW)	2.65	03.05.2019	Financial Closure for Tranche – II project has already been achieved by IWISL in Aug, 2018 wherein it was shown that IWISL is in possession of 100% of land (125 locations) required for the development of Project. In Jan' 2020, WPD has submitted that out of earlier 125 locations, they now have only 16 executable locations and requested for time extension to SCoD. Thereafter, there were series of communications and meetings between SECI and IWISL. However, IWISL is yet to submit the required documents to process the extension case w.r.t. MNRE letter dated 22.10.2019.
2.	Tranche-III (200 MW)	2.44	24.11.2019	With reference to the MNRE letter dated 22.10.2019 and based on the documents submitted by IWISL, time extension to SCD was granted for 100 MW Projects vide letter dated 08.05.2020. Request for the remaining 100 MW was rejected by SECI.
3.	Tranche-IV (100 MW)	2.51	28.02.2020	With reference to the MNRE letter dated 22.10.2019 and based on the documents submitted by IWISL, time extension to SCD was granted for 100 MW Projects vide letter dated 08.05.2020.

29. SECI has submitted that delay in various projects demonstrate that the IWISL is not undertaking the projects deliberately and the same is not for any Force Majeure reason or for a valid justification. The Petitioner and other SPVs of IWISL are not entitled to abandon the power projects. In the facts and circumstances of the case, the pleas now raised by the Petitioner that the intervening period of delay from 12.07.2019 to 22.11.2019 is for reasons not attributable to the Petitioner are completely an afterthought and an attempt to avoid liability under the contract & sanctity of the PPA. The Petitioner has been consistently shifting its stance with respect to the dates of commissioning. It is settled principle of law that no party can take advantage of its own wrong. In this regard, reliance has been placed on the following decisions of the Hon'ble Supreme Court: Kushweshwar Prasad Singh –v-State of Bihar (2007) 11 SCC 14; U.P. SEB -v- Shiv Mohan Singh, (2004) 8 SCC 402; B. M. Malani–v-Commissioner of Income Tax and Anr. 2008 (10) SCC 617; Nirmala Anand-v-Advent Corporation (P) Ltd (2002) 5 SCC 481.

30. SECI has submitted that the total capacity contracted under the above-mentioned three tranches of 550 MW at a tariff ranging from Rs. 2.44/kWh to Rs. 2.65/kWh is required to be implemented and the power supply to be commenced from such power projects at the earliest.

Rejoinder filed by the Petitioner to the reply filed by SECI

31. The Petitioner has submitted that bare perusal of the prayers of the Petitioner would show and demonstrate that BRPL is neither a necessary nor a proper party for adjudication of the subject matter. BRPL has no privity of contract whatsoever with the Petitioner and none of the reliefs as claimed for in the above Petition either relate to, or concern BRPL.

32. The Petitioner has submitted that as quoted by SECI “*Article 4.5.1 of the PPA deals with extension of time. The Scheduled Commissioning Date is deferred for a reasonable period only in three cases namely PTC Event of Default, Force Majeure Events affecting the PTC/Distribution Company namely BSES Rajdhani Power Limited and Force Majeure Events affecting the Petitioner*”. Force majeure event defined under the PSA dated 13.07.2017 is also part of the Force majeure event defined under the PPA of the Petitioner vide Article 11.3.1 (d) which stipulates that “*d) An event of Force Majeure identified under Buyer-Discom PSA, thereby affecting delivery of power from WPD to Discom. PSA dated 13.07.2017 vide its para 7.3.1.(f) stipulates that : “An event of force majeure affecting the concerned STU/CTU, as the case may be, thereby affecting the evacuation of power from the Delivery Points by the Discom*”. Thus, delay in readiness of transmission elements by PGCIL is a Force Majeure events duly defined under PSA and so included under the PPA as well.

33. Various clauses of the PPA, as well as the MNRE Guidelines, RfS referred to by SECI shall have to be read after taking into consideration the facts and circumstances demonstrated in the Petition, where on one hand, the Petitioner was admittedly prevented from carrying out any work in view of the termination of the PPA on 12.07.2019, while on the other hand, extension of SCoD was granted on 21.11.2019 stating that the revised SCoD of the project is 13.06.2019. In turn, the BG encashment period of 6 month starts from 14.06.2019 and ends on 13.12.2019 as per PPA. Thus, on the date of the communication of the extension of SCoD i.e. on 21.11.2019 itself, most of the period for BG encashment was over and only 22 days

were left (21.11.2019 to 13.12.2019). Accordingly, on the date of communication for extension of SCoD, PBG worth Rs. 10 crores submitted by the Petitioner as the project security were put on risk and which later have been encashed by SECI despite this Commission's caution placed vide order dated 12.03.2020 in IA No.17/2020 of this Petition that *"If the main petition is decided in favour of the Petitioner, it will not only be granted the extended time, but shall also be restored to all consequential reliefs emanating from invoking the bank guarantee. Therefore, we are not inclined to entertain the IA at this stage. It is however clarified that any action taken by the Respondents would be subject to the final decision of the main petition."*

34. The Petitioner had requested SECI not to encash the PBGs citing various reasons including the aforesaid order of the Commission, Covid-19 pandemic effect and poor financial health of the OEMs such as the Petitioner in the wind power industry. However, SECI encashed the PBG severely denting the cash flow during the Covid-19 lock down period. The Petitioner would be staring at a loss of entire PBG worth Rs. 10 crores and would be left with very short period for project execution, with liquidated damages and tariff reduction over and above the aforesaid loss of PBG worth Rs. 10 crores.
35. The Petitioner has submitted that since all the dates have already lapsed, it would be appropriate to allow 132 days of time from the date of the Order of the Commission and SCoD may be revised accordingly accounting for 132 days from the date of the Order. The Petitioner also submitted that the liquidated damages including BG encashment and tariff reduction as per RfS conditions may be applied from 133rd day. Imposition of any such condition/ penalty for the retrospective period shall again deprive the Petitioner from natural justice and would be tantamount to unjust enrichment of the Respondents thereby causing irreparable harm to the Petitioner.
36. The Petitioner has submitted that SECI has made wild allegations qua Wind Five Renergy Private Limited as well as it has claimed to show the status of other projects under Tranche II, III and IV being implemented by IWISL. Neither Wind Five Renergy Private Limited is a party to the proceedings, nor any of the projects under Tranche II, Tranche III or Tranche IV are a subject matter of this Petition. The Petitioner's grievance in the petition is limited to only one wind power project of 50 MW in Tranche I. Each project under each Tranche is

executed subject to different facts and circumstances. Consequently, the alleged failure of IWISL in Tranche II, Tranche III, Tranche IV, even if taken as a gospel truth, has no relevance or bearing on the Petition. Reference to correspondences exchanged with other entities in relation to other projects, as well as to projects under Tranche II, Tranche III and Tranche IV, in no case can be a ground to deny extension of 132 days to the Petitioner and to impose penalties during such period under RfS.

37. The Petitioner has submitted that considering the present disruption in global supply chain and project execution due to outbreak of Covid-19 and imposition of consequential lockdown in India, another event of Force Majeure is triggered which is likely to effect the subject project execution once allowed by Commission.

Hearing dated 11.08.2020

38. The matter was heard on 11.08.2020 through video conferencing. The relevant portion of the Record of Proceedings is reproduced below:

“2.Learned counsel for the Petitioner submitted that the instant Petition has been filed, inter-alia, seeking exclusion of 132 days, intervening between 12.7.2019(date of termination of the Power Purchase Agreement)to 21.11.2019 (date of communication of extension of revised Scheduled Commissioning Date)from the imposition of penalty for delay in commissioning of its 50 MW Wind Power Project. Learned counsel for the Petitioner further submitted as under:

(a)The Petitioner, selected through competitive bidding process conducted by Solar Energy Corporation of Limited(SECI), is setting up a 50 MW Wind Power Project (the Project).On 21.7.2017, the Petitioner and the Respondent No.2, PTC entered into PPA and the Scheduled Commissioning Date(in short ‘SCD’) of the Project was 5.10.2018.The deadline for the commissioning of the Project including implications of liquidated damages was 5.7.2019.

(b) Due to various reasons, particularly the delay in readiness of PGCIL's evacuation system, the Project could not achieve SCD. PGCIL's system was commissioned in April, 2019, i.e. after a delay of more than 9 months. However, while the Petitioner's parent company has successfully commissioned 200 MW (out of 250 MW Projects being executed by its 5 SPVs under Tranche-I bid) of Wind Power Projects within specified time, despite its best efforts, the Petitioner's Project (50 MW) could not be commissioned within the stipulated time.

(d) On12.7.2019, SECI terminated the Petitioner's PPA dated 21.7.2019, leading to suspension of Project works until 21.11.2019.

(e) SECI vide its letter dated 21.11.2019 acknowledging the delay in operationalization of LTA by CTU, revised the SCD for the Project to 13.6.2019 (by 60 days from the operationalization of LTA on 13.4.2019). Moreover, in terms of said letter, the Petitioner was permitted to achieve SCD of the Project within 9 months from the revised SCD i.e. by13.3.2020 subject to imposition of liquidated damages as per RfS and PPA.

(f) By virtue of termination of PPA by SECI on 12.7.2019 until the extension in SCD was granted and communicated on 21.11.2019, the Petitioner was prevented from executing the work of commissioning of the Project for reasons beyond its control. Consequently, the aforesaid intervening period cannot be included in the period of SCD extension granted on 21.11.2019 and also no penalty, as envisaged under RfS/PPA can be imposed for the such period.

(g) Moreover, in terms of the provisions of Clause 3.17B of the RfS and PPA, the Petitioner is permitted to achieve SCD of the Project with delay of six months with implication of proportionate per day liquidated damages. Thus, revised SCD being 13.3.2020, SECI could not have encashed the entire BG furnished by the Petitioner until 13.12.2020. Regardless, SECI has encashed the entire BG.

3. Learned senior counsel for the Respondent, SECI, submitted as under:

(a) Bank Guarantee has been encashed in line with the Commission's order dated 12.3.2020 in IA No.17/2020, wherein the Commission had declined to grant any interim relief to the Petitioner.

(b) Since the Petitioner has failed to achieve SCD of the Project by 5.7.2019 i.e. within the maximum permissible time limit for commissioning of the Project, SECI proceeded with termination of the PPA as per the provisions of RfS/PPA.

(c) Subsequent to the termination, the Petitioner approached Ministry of New and Renewable Energy (MNRE) for extension of time for commissioning of the Project on the ground that since the operationalization of LTA was delayed, SCD of the Project could not be achieved.

(d) MNRE, vide its letter dated 22.10.2019, prescribed the extension in SCD for the wind power projects under tranches I to V for a period equal to 60 days subsequent to operationalization of LTA for allowing the additional time to developers to complete the commissioning activities.

(e) Consequently, SECI, vide its letter dated 21.11.2019, revised the SCD for the Project to 13.6.2019 since the LTA was operationalized on 13.4.2019. The Petitioner was also permitted an additional period of 9 months from the revised SCD (13.6.2019), i.e. upto 13.3.2020, to achieve SCD subject to levy of liquidated damages. Thus, delay in achieving SCD beyond 13.6.2019 was subject to liquidated damages and the Petitioner has wrongly contended that additional six months to achieve SCD as per Clause 3.17B of RfS was from 13.3.2020.

(f) In terms of Clause 3.14 of the Guidelines and Clause 3.17 of RfS, SECI could extend the time for commissioning date, after having satisfied with the documentary evidences, up to 3 months. For any extension beyond 3 months, the MNRE was the competent authority. SECI could have only forwarded the Petitioner's requests for extension in SCD beyond 3 months to MNRE, which were duly forwarded by it.

(g) The Petitioner, in its various letters, ranging from 24.11.2018 to 13.6.2019, had informed SECI that the Project would to be commissioned before 5.7.2019. Even after the operationalization of LTA, the Petitioner had maintained its position that it would complete the Project by 5.7.2019.

(h) The Petition suffers from non-joinder of necessary party. The Petitioner is required to implead BSES Rajdhani Power Limited (BRPL), the distribution licensee who has entered into Power Sale Agreement with PTC to purchase on back-to-back basis, as party to the present proceedings.

4. In response to contention of learned senior counsel of the Respondent that the Petition suffers from non-joinder of necessary party, learned counsel for the Petitioner submitted that BRPL is neither a necessary nor a proper party to the present Petition as none of the reliefs sought for by the Petitioner concerns BRPL.

5. After hearing the learned counsel for the Petitioner and learned senior counsel for the Respondent, SECI, the Commission reserved order in the matter.”

Analysis and Decision

39. We have heard the learned counsels for the Petitioner and the Respondent and have carefully perused the records.

40. We think it appropriate to first deal with preliminary objections raised by SECI. SECI has submitted that the Petition suffers from non-joinder of necessary party i.e., BSES Rajdhani Power Limited (BRPL) since PTC had executed the PSA with BRPL on 21.07.2017 for purchase of 50 MW contracted capacity on back to back basis. The Petitioner has opposed impleading BRPL since stating that BRPL is neither a necessary nor a proper party for the adjudication of the subject matter of the Petition and that BRPL has no privity of contract whatsoever with the Petitioner and none of the reliefs as claimed for either relate to or concern BRPL.

41. We observe that in the matter of *Udit Narayan Malpaharia Vs. Board of Revenue [AIR 1963 SC 786]*, the Hon’ble Supreme Court has explained the concepts of necessary party and proper party to a proceedings as under:

“7. To answer the question raised, it would be convenient at the outset to ascertain, who are necessary and proper parties in a proceeding. The law on the subject is well settled: It is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decisions on the questions involved in the proceedings.”

42. We examine the issue of necessary and proper party in the light of the above judgement. We observe that the relevant Recitals of the PPA dated 21.07.2017 are as under:

*“The WPD and PTC India Limited are individually referred to as 'Party' and collectively referred to as 'Parties'.
Whereas:*

A. The Buyer has been declared as a successful bidder against RfP issued by SECI vide Bid No. SECI/C&P/Wind/01/0620 16 dated 24.06.2016, for selection of Power Trading Company for purchase and sale of Wind Power and has been issued Letter of Award

(LOA No. SECI/C&P/Wind-Trader/LOI/PTC/9200 dated 26.08.2016) against the same. Buyer's main function is, inter alia, to carry on the business of purchase of all forms of electrical power both conventional and non-conventional from Independent Power Producers (IPPs), Captive Power Plants (CPPs), other Generating Companies, State Electricity Boards (SEBs), State Government's Statutory Bodies, Licensees etc. for sale to SEBs, Power Utilities, other organizations and bulk power consumers etc., in India and abroad, and also to supply, import and export or otherwise deal in all forms of electrical energy in all aspects;

B. Solar Energy Corporation of India Limited (SECI) has been designated by the Government of India as the nodal agency for implementation of MNRE Scheme for Setting up of 1000 MW ISTS connected Wind Power Projects for developing grid connected wind power capacity, vide Guidelines No. F. No. 53/14/2016-WE issued on 22.10.2016.

C. The WPD has been declared as a successful bidder against RfP No. SECI/C&P/WPD/RfS/1000MW/102016 dated 28th October, 2016 issued by SECI for selection of WPDs for development of cumulative capacity of 1 000 MW in the windy states and have been issued Letter of Award (LOA No. SECI/C&P/WPD/LOA/IWISL/PS/12364 (Project ID: WPD-ISTS-TI-1WISL-P5-50GJ) dated 05.04.2017) for development of Wind Power Project(s), generation and sale of wind power under the above scheme.

*...
F Buyer has agreed to purchase Wind Power from WPD as an intermediary Seller and sell it to identified Discom as per the Buyer-Discom Power Sale Agreement, accordingly Buyer has signed Power Sale Agreement for 50 MW Contracted Capacity with BSES Rajdhani Power Limited (BRPL), dated 21.07.2017 which is annexed as Shecdule-1 of this Agreement and is the basis of execution of this Agreement.”*

43. From above, the Commission observes that in accordance with the MNRE Guidelines, SECI floated RfS and PTC was selected for purchase and sale of wind power, whereas the Petitioner was selected as Wind Power Developer. The LoA was issued to IWISL, the parent company of the Petitioner on 05.04.2017 with SCoD of 04.10.2018. The ultimate deadline for commissioning of the project was 05.07.2019 (i.e., 27 months from issue of LoA) with implications of liquidated damages and tariff reduction on pro-rata basis. SECI initiated the action as per MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA on 12.07.2019 since the Petitioner was unable to commission the project by 05.07.2019. However, on 21.11.2019, SECI revised the SCoD to 13.06.2019 and granted time till 13.03.2020 (nine months from revised SCoD) for commissioning the project. The provisions related to encashing bank guarantee and reduction in tariff were to be governed in terms of conditions in the RfS, the MNRE Guidelines and the PPA. The Petitioner has prayed for condonation of the period from 12.07.2019 (date of communication of initiation of action as

per MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA) till 21.11.2019 (date of communication of extension of SCoD) and for revision of SCoD from 13.06.2019 to 21.01.2020 (i.e. 60 days from the date of communication by SECI). Thus, the issue is related to condonation of the intervening gap of 132 days from 12.07.2019 till 21.11.2019 and exemption of the aforesaid period of 132 days from imposition of penalties for delay in commissioning. It is noted that the term of the PPA and PSA is twenty five (25) years from the Commercial Operation Date of the project and the tariff is mentioned in Article 9 of the PPA and Article 5 of the PSA. It is observed that the terms of PPA and PSA remain undisputed and none of the reliefs sought in the Petition concern BSES Rajdhani Power Limited. Further, though SECI has objected to BRPL not being impleaded as a party in the Petition and submitted that it is a necessary party for adjudication of disputes, we observe that SECI has not placed on record any documents as regards its (or MNRE's) consultation with BRPL while initiating action as per MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA on 12.07.2019 or extending the SCoD to 13.06.2019 or giving extension in completion of the project till 13.03.2020 (with LD and reduction in tariff) and, therefore, we do not find any merit in its arguments.

44. In the light of the above, we are of the view that BRPL is neither a necessary nor a proper party to the proceedings, since an effective order can be made in its absence and no relief qua BRPL is required to be granted in the present case.

45. It is also pertinent to mention that SECI has submitted that the Petitioner by its various letters dated 18.12.2018, 13.03.2019, 25.03.2019, 18.04.2019, 22.04.2019, 25.04.2019, 29.05.2019 and 13.06.2019 had stated that it would commission the power project before 05.07.2019. SECI has submitted that despite so many assurances, the Petitioner did not commission its project by the stipulated date i.e., 05.07.2019. Further, SECI has submitted that other SPVs (being 4 in number) formed by IWISL under the present scheme (Tranche-I) have commissioned their projects by 05.07.2019. However, the Petitioner though placed in a similar position and having been granted similar extension in the SCoD by SECI on the basis of the letter of MNRE has failed to commission the project even by the maximum permissible time-limit of 13.03.2020. SECI has also submitted that IWISL (the parent company of the Petitioner) has consistently failed to commission projects and commence supply of power in

respect of the PPAs under Tranche- II, III and IV where the SCoD had already expired and that IWISL is not taking steps for implementing the Project despite extensions.

46. We note that other projects referred to by SECI are not being implemented by the Petitioner neither are they the subject matter of this petition. Further, IWISL, the parent company of the Petitioner, is not a party to the petition. Therefore, these submissions of SECI are out of context. Even otherwise, SECI is not entitled to plead its case in a petition filed by the Petitioner. If SECI is aggrieved with actions of the parent company of the Petitioner, it is free to file appropriate petition to seek redressal. In fact, if other SPVs (being 4 in number) formed by IWISL under the present scheme (Tranche-I) have already commissioned their projects by 05.07.2019, it only goes to show the sincerity of the parent company, IWISL.
47. Having dealt with the preliminary issues, the following issues arise before the Commission for adjudication:

Issue No. 1: Whether the period of delay from 12.07.2019 (date of communication of termination of PPA) till 21.11.2019 (date on which extension of SCoD was communicated) in commissioning of the project should be condoned? Accordingly, whether the SCoD of the project is to be revised from 13.06.2019 to 21.01.2020? And whether the period from 12.07.2019 till 21.11.2019 be exempted from imposition of penalties for delay in commissioning as envisaged in Clause 3.17.B of the RFS?

Issue No. 2: Whether the claims raised by PTC vide letters annexed as Annexure P-10 are tenable?

48. No other issue was pressed or claimed. The issues are discussed in the subsequent paragraphs.

Issue No. 1: Whether the period of delay from 12.07.2019 (date of communication of termination of PPA) till 21.11.2019 (date on which extension of SCoD was communicated) in commissioning of the project should be condoned? Accordingly, whether the SCoD of the project is to be revised from 13.06.2019 to 21.01.2020? And whether the period from 12.07.2019 till 21.11.2019 be exempted from imposition of penalties for delay in commissioning as envisaged in Clause 3.17.B of the RFS?

49. We note that LOA was issued on 05.04.2017 to IWISL (parent company of the Petitioner) and the PPA was executed on 21.07.2017 between PTC and the Petitioner. SCoD of the project was on 04.10.2018 and commissioning deadline was 05.07.2019 with liquidated damages and implication of tariff reduction on pro-rata basis. The Petitioner could not complete its project by 05.07.2019. On 12.07.2019, SECI initiated the action under 3.17 (B)

of the RfS and Article 4.6.2 of the PPA. The Petitioner alleged that non-readiness of evacuation system being constructed by PGCIL was responsible for the delay in commissioning of the project and that the evacuation system was charged and commissioned only in April 2019, after a delay of more than 9 months. The Petitioner filed an appeal before the Dispute Resolution Committee (constituted by MNRE) on 18.10.2019 challenging the initiation of action by SECI as per MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA. However, on 21.11.2019, SECI granted extension of SCoD till 13.06.2019 acknowledging the delay in operationalisation of LTA by CTU. Since the LTA operationalization was effective from 13.04.2019, the SCoD was revised to 13.06.2019 and the commissioning deadline became 13.03.2020 (nine months from SCoD) subject to imposition of LD and tariff reduction.

50. The Petitioner has submitted that it was prevented from executing the work for commissioning the 50 MW wind power project since PPA was not in force during the period of 132 days falling between 12.07.2019 (date of action taken by SECI for termination of PPA) and 21.11.2019 (date of communication of extension of revised SCoD). Consequently, no penalty for delay can be imposed for the said period. *Per contra*, SECI has submitted that MNRE was the competent authority to decide on extension of SCoD beyond the period of three (3) months as per Clause 3.14 of the MNRE Guidelines and Clause 3.17 of the RfS Document. MNRE in its letter dated 22.10.2019 advised that “extension in scheduled commissioning of the project for a period equal to 60 days subsequent to operationalisation of LTA (allowing additional time to be provided to the developer to complete the commissioning activities once the ISTS infrastructure is ready) may be considered”. Accordingly, vide letter dated 21.11.2019, SECI had duly revised the SCoD to 13.06.2019 and also granted time till 13.03.2020 to commission the project subject to levy of liquidated damages but the Petitioner has failed to commission the project.

51. The relevant Article 3.17 B of the RfS dated 28.10.2016 stipulates as under:

“3.17. B.

Commissioning Schedule and Penalty for Delay in Commissioning

The Project shall be commissioned within 18 months from date of issuance of Letter of Award (for e.g. if LoA issuance date is 07.10.2016, then scheduled Commissioning date shall be 07.04.2018). 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, SECI shall encash the Performance Bank Guarantee (PBG) in the following manner:

a) Delay up to Six month – the total PBG on per day basis and proportionate to the balance Capacity not commissioned.

b) Delay of more than six months – In case the commissioning of the project is delayed over Six (6) months, the tariff discovered after e-Reverse Auction shall be reduced at the rate of 0.50 paise/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 27 months from the date of issue of LoA. In case, the Commissioning of the Project is delayed beyond 27 months from the date of issue of LoA, the PPA capacity shall stand reduced / amended to the Project Capacity Commissioned, provided that the commissioned capacity is not below 50 MW or 50% of the allocated Project Capacity, whichever is higher, and the PPA for the balance Capacity will stand terminated and shall be reduced from the selected Project Capacity. If the WPD failed to commission project capacity of 50 MW or 50% of the allocated Project Capacity, whichever is higher within a period of 27 months from the date of issue of LoA, apart from imposition of penalties as listed above he shall be blacklisted and will not be allowed to participate in any other scheme of MNRE/SECI for a period to be decided by them.

The funds generated from the encashment of the Bank Guarantees shall be deposited in a separate fund under the guidance of MNRE. In case of delays of project commissioning due to the reasons beyond the control of the WPD, SECI after having satisfied with documentary evidences produced by the WPD for the purpose, can extend the time for commissioning date by up to 3 months, without any financial implications to the WPD. For any extension beyond the period of 3 months, SECI will approach MNRE, who will be authorized to decide on further extension with the approval of Minister-in-charge, MNRE.”

52. The relevant Articles of the PPA dated 21.07.2017 stipulate as under:

“Article 1.1 Definitions:

Scheduled Commissioning Date” shall mean 04.10.2018 [Insert Date that is eighteen (18) months from the date of LOA];”

“4.5 Extensions of Time

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

- a) any Buyer Event of Default; or
- b) Force Majeure Events affecting Buyer/Discom, or
- c) Force Majeure Events affecting the WPD,

the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to Article 4.5.6, for a reasonable period but not less than 'day for day' basis, to permit the WPD or Buyer/Discom through the use of due diligence, to overcome the effects of

the Force Majeure Events affecting the WPD or Buyer/Discom, or till such time such Event of Default is rectified by Buyer.

4.5.2 Void.

4.5.3 In case of extension due to reasons specified in Article 4.5.1 (b) and (c), and if such Force Majeure Event continues even after a maximum period of nine (9) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 13.5.

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

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

4.5.6 Notwithstanding anything to the contrary contained in this Agreement, any extension of the Scheduled Commissioning Date arising due to any reason envisaged in this Agreement shall not be allowed beyond 27 months from the date of issuance of LOA by SECI to WPD.

4.6 Liquidated Damages for delay in commencement of supply of power to Buyer

4.6.1 The selected projects shall be commissioned within 18 months from date of issuance of Letter of Award. A duly constituted Committee will physically inspect and certify successful commissioning of the project. In case of failure to achieve this milestone, SECI shall encash the Performance Bank Guarantee (PBG) in the following manner:

Delay upto six (6) months - Buyer will encash total Performance Bank Guarantee on per day basis and proportionate to the balance Capacity not commissioned.

4.6.2 In case the commissioning of the project is delayed over Six (6) months, the tariff discovered after e-Reverse Auction shall be reduced at the rate of 0.50 paise/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 27 months from the date of LoA. In case, the Commissioning of the Project is delayed beyond 27 months from the date of LoA, the PPA capacity shall stand reduced/amended to the Project Capacity Commissioned, provided that the commissioned capacity is not below 50 MW or 50% of the allocated Project Capacity, whichever is higher, and the PPA for the balance Capacity will stand terminated and shall be reduced from the selected Project Capacity.”

11. ARTICLE 11: FORCE MAJEURE

11.1 Definitions

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

11.2 Affected Party

11.2.1 An affected Party means Buyer or the WPD whose performance has been affected by an event of Force Majeure.

11.3 Force Majeure

11.3.1 A 'Force Majeure' means any event or circumstance or combination of events those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

a) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado;

b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

c) radio active contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party.

d) An event of Force Majeure identified under Buyer-Discom PSA, thereby affecting delivery of power from WPD to Discom.”

53. Article 7.3.1 (f) of the PSA dated 13.07.2017 stipulates that:

“An event of force majeure affecting the concerned STU/CTU, as the case may be, thereby affecting the evacuation of power from the Delivery Points by the Discom”

54. Letter dated 12.07.2019 of SECI stipulates as under:

*“To,
M/s Wind Four Renergy Pvt. Ltd.
Inox Towers, Plot No 17,
Sector 16A, Noida, UP 201301
Kind Attention: Sh. Ravi Sinha, Manager*

Sub: Regarding termination of PPA and encashment of PBG against noncompliance of condition subsequent of PPA (Project ID: WPD-1STS-T1-IWISL-P5-50GJ)

Ref:

- i) Letter of Award issued to M/s Inox Wind Infrastructure Services Ltd Vide Ref No. SECI/C&P/WPD/LOA/IWISL/P5/12363 Dated 05.04.2017*
- ii) PPAs signed between M/s PTC India Limited and IWISL's SPV Namely M/s Wind Four Renergy Pvt. Ltd. for setting up of 50 MW Wind Power Project (Project ID: WPD-ISTS-TMWISL-P5-50GJ) under Tranche-I*
- iii)Your letter vide No. SECI-WEP/50MW/GJ/052 dated 25.03.2019 intimation for proposed commissioning on 31.05.2019 and subsequently rescheduled on 30.06.2019 vide letter no. SECI-WEP/50X5/GJ/059 Dated 13.06.2019*
- iv)Our email dated 23.05.2019 and subsequent reminders regarding submission of prerequisite documents for commissioning*

This has reference to you letter as per above references, intimating for commissioning of 50 MW project being setup under Tranche-I in Bhuj, Gujarat.

In this regard, it is to inform you that you have not submitted any document pertaining to above referred project. Commissioning committee has visited your 50x5 Wind Power Projects allotted under Tranche-I between June 29th to July 4th 2019, However only four out of five projects were considered for witnessing the commissioning activities and Commissioning activities for 5th Project (Project ID: WPD-ISTS-TMWISL-P5-50GJ) could not been witnessed due to non-submission of prerequisite documents and further No request for visiting the subject project had been made by WPD.

As per the provisions of the MNRE Guidelines, RfS and PPA, the maximum timeline allowed for commissioning of the Project is 27 months from issuance of LOAs, i.e. upto 05.07.2019. In view of the failure of the WPD to achieve commissioning of the said Project within the above deadline, SECI is strained to take actions as per MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA for the said Project.”

55. We further observe that as recorded in the ROP dated 11.08.2020, the Respondent SECI has submitted as under:

- “3. Learned senior counsel for the Respondent, SECI, submitted as under:*
- (a)Bank Guarantee has been encashed in line with the Commission's order dated 12.3.2020 in IA No.17/2020, wherein the Commission had declined to grant any interim relief to the Petitioner.*
 - (b)Since the Petitioner has failed to achieve SCD of the Project by 5.7.2019 i.e. within the maximum permissible time limit for commissioning of the Project, SECI proceeded with termination of the PPA as per the provisions of RfS/PPA.*
 - (c)Subsequent to the termination, the Petitioner approached Ministry of New and Renewable Energy (MNRE) for extension of time for commissioning of the Project on the ground that since the operationalization of LTA was delayed, SCD of the Project could not be achieved.....”*

56. We observe in the instant case that the letter of award was issued on 05.04.2017. Accordingly, SCoD of the project was 05.10.2018 (18 months from the date of LoA) and in case the project is not commissioned till 05.07.2019 (27 months from the dated of LoA), PPA

stands terminated. The Petitioner was not able to commission the project by 05.07.2019 and consequently, on 12.07.2019, SECI initiated the action under 3.17 (B) of the RfS and Article 4.6.2 of the PPA for termination the PPA.

57. We observe that Article 4.5.1 of the PPA stipulates that the SCoD can be deferred in three cases, namely: buyer (SECI/PTC) Event of Default, Force Majeure Events affecting the Buyer (SECI/PTC)/ Distribution Company and Force Majeure Events affecting the Petitioner. Article 11.3.1(d) of the PPA stipulates that the event identified under Buyer-Discom PSA, thereby affecting delivery of power from the Petitioner to Discom is covered under Force Majeure events. Also, Article 7.3.1(f) of the PSA stipulates that the event affecting the concerned STU/CTU, as the case may be, thereby affecting the evacuation of power from the Delivery Points by the Discom is covered under Force Majeure events. Thus, the delay in commissioning of transmission system by PGCIL is a Force Majeure event duly defined under Article 7.3.1(f) of the PSA and, therefore, is a Force Majeure event in terms of PPA also under Article 11.3.1(d). It is undisputed that there was delay in construction of transmission system by PGCIL and operationalization of LTA by CTU. It was for this reason only that the SCoD of the project was extended by MNRE/SECI to 13.06.2019 i.e. 60 days from operationalization of LTA by CTU on 13.04.2019.
58. SECI initiated the action as per MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA on 12.07.2019 as the project did not get commissioned by 05.07.2019 that was the deadline of 27 months from date of LoA i.e., 05.04.2017. Later, on the ground that there was delay in the commissioning of the transmission system by PGCIL as the LTA was finally operationalized on 13.04.2019, at the request of the Petitioner, MNRE/SECI granted extension of SCoD till 13.06.2019 and the commissioning deadline became 13.03.2020 subject to implications of LD and pro-rata tariff reduction. However, extension of SCoD till 13.06.2019 was conveyed to the Petitioner only on 21.11.2019, almost five months after the lapse of the extended SCoD of 13.06.2019. We note that it took over 132 days for SECI to grant the said retrospective extension.
59. It is pertinent to note that MNRE/SECI have recognised that the project of the Petitioner was affected due to delay in execution of transmission system by PGCIL. Further, MNRE was the competent authority to decide on extension of SCoD beyond the period of three (3) months as

per Clause 3.14 of the MNRE Guidelines and Clause 3.17 of the RfS Document. We note that the Petitioner vide letter dated 18.04.2019 addressed to SECI had informed SECI that as the system of PGCIL was ready only with effect from 14.04.2019, the LTA of the Petitioner is effective from this date and therefore, from this date of 14.04.2019, the Petitioner has 60 days to commission the projects with revised SCOD of 14.06.2019. In the said letter dated 18.04.2019 addressed to SECI, the Petitioner had informed SECI as under:

“However, PGCIL has now sent us an official intimation as ref 4 above (copy attached) that their system is ready with effect from 14.04.2019 and our LTA is effective from this date.

From this date of 14.04.2019, we now seek 60 days to commission our projects and request that the revised SCOD of 14.06.2019 may be kindly confirmed to us.”

60. We also note that again on 12.07.2019 itself, i.e., immediately upon initiation of action by SECI, the Petitioner once more informed SECI that LTA for its project has been operationalized only on 13.04.2019 and that it was eligible for extension in SCoD in terms of the PPA. However, the request of the Petitioner was taken up by SECI with MNRE on 09.09.2019, after almost two months of request made by the Petitioner. Based upon recommendation of SECI, MNRE conveyed extension of SCoD vide its letter dated 22.10.2019, while SECI took a further full month just to communicate the extension of SCoD to the Petitioner, which was done only on 21.11.2019.

61. The Commission is of the view that the delay in processing and deciding on the request of the Petitioner dated 12.07.2019 by SECI and MNRE and communicating the decision by SECI prevented the Petitioner from performing the contract (PPA between PTC and the Petitioner) during the period from 12.07.2019 till 21.11.2019. As a nodal agency, it was the responsibility of SECI to initiate appropriate action as the project of the Petitioner was eligible for extension in SCoD in terms of the PPA read with the PSA. Had SECI taken diligent and prompt action as expected of it, based on this information submitted by the Petitioner vide letter dated 18.04.2019, the extension in SCoD in terms of the PPA could have been granted in time (possibly even before the date of extended SCoD of 13.06.2019) and the resultant delay could have been avoided, thereby giving the Petitioner certainty of time to implement the project. The Petitioner cannot be held responsible for any inaction during this period when SECI, on one hand, had already intimated that it has initiated the action as per MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA and, on the other hand,

MNRE and SECI were processing the case for the extension of SCoD of the project. The Petitioner could not have anticipated the decision of extension of SCoD from a retrospective date, and acted in the meanwhile.

62. We have observed that during the intervening time period from 12.07.2019 (date of initiation of action by SECI under 3.17 (B) of the RfS and Article 4.6.2 of the PPA) to 21.11.2019 (date on which the extension of SCoD was communicated to the Petitioner), it was not possible for the Petitioner to discharge its obligations under the PPA as the maximum period allowed in the PPA for achieving commercial operation of the project was over and no clarity was available whether SCoD would be extended or not. This is because SECI initiated the action in terms of MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA on 12.07.2019 and not for granting extension of SCoD in terms of Article 4.5.1(c) read with Article 11.3.(d) of the PPA and Article 7.3.1(f) of the PSA on account of delay in operationalisation of LTA.

63. In this context, the letter of SECI dated 06.08.2019 addressed to PTC is relevant, which has the following observations of SECI:

“xxx. In view of this, further actions to be taken by SECI on the 5th project have been kept on hold until final decision to be taken in this regard. xxx. The matter has been considered by SECI’s internal committee, constituted to examine such cases of delay in commissioning of Projects and it has recommended an extension in the DCoD up to 60 days subsequent to LTA operationalisation date , and liquidated damages on the project shall be calculated based on the revised SCD as recommended above. xxx.”

However, this position of SECI does not seem to have been communicated to the Petitioner. In view of the above, it is considered fair and equitable to exclude the period during which the Petitioner was prevented from performing the obligations under the PPA. Hence, the intervening time period from 12.07.2019 to 21.11.2019 should be excluded for the purpose of computing the maximum period provided in the PPA for commercial operation of the project, including the period for encashment of PBG and pro-rata reduction in tariff.

64. The Petitioner has under prayer (a) prayed to *“Condone the period of delay caused in commissioning the project commencing from the date of communication of termination of PPA i.e., from 12.07.2019 till the date on which extension of SCD was communicated to the*

petitioner i.e. 21.11.2019. Accordingly revise the SCD of 50 MW awarded to the Petitioner from 13.06.2019 to 21.01.2020 adding 60 days additional time from the date of communication of such extension (i.e. 21.11.2019) condoning the intervening gap period from 12.07.2019 till 21.11.2019. And any delay beyond this period to be subject to imposition of Penalties for delay in commissioning as envisaged in Clause 3.17.B of the RFS.” Under prayer (b), the Petitioner has request to “Exempt the above period i.e., from 12.07.2019 till 21.11.2019 from imposition of Penalties for delay in commissioning as envisaged in Clause 3.17.B of the RFS.”

65. In the light of our observations in this order that it was not possible for the Petitioner to discharge the obligations under the PPA from 12.07.2019 to 21.11.2019 on account of lack of clarity with regard to extension of SCoD even though operationalisation of LTA was delayed and the letter of SECI dated 12.07.2019 initiating action under MNRE Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA, the said period shall be excluded while computing the maximum period for execution of the project in terms of the RFP and PPA from the date of revised SCoD.
66. MNRE/SECI have already granted the project the extension of SCoD till 13.06.2019 and commissioning deadline till 13.03.2020 subject to implications of LD and pro-rata tariff reduction. We have already condoned the delay of 132 days. Taking into account the condonation of delay of 132 days, the commissioning deadline of the project, with condition of pro-rata encashment of PBG and with consequences of tariff reduction (in terms of the provisions of Article 4.5.3 read with Article 4.6 of the PPA), shall be revised accordingly.
67. The Petitioner has also prayed for additional time of 60 days for SCoD from the date of communication of extension of SCoD (i.e. 21.11.2019). The Petitioner has submitted that after condoning the aforesaid gap period of 132 days, the revised SCD of 13.06.2019 may be shifted to 21.01.2020, allowing 60 days time from the date of communication (i.e. 21.11.2019) of SCoD extension based on LTA operationalization. Thus, the Petitioner has prayed for allowing additional 60 days of time for SCoD, effective from the date of communication of extension of SCoD. There is no basis either in facts or in the letters issued by SECI/MNRE for the claim of the Petitioner to be allowed 60 days time from the date of communication. The Petitioner was informed by PGCIL on 12.04.2019 about the commercial

operation of its transmission system and operationalisation of LTA. The Petitioner was admittedly not ready for commercial operation of the project as on 12.04.2019. Since the Petitioner did not achieve the commercial operation of its project even after a lapse of 27 months from the date of issue of LOI, SECI vide its letter dated 12.07.2019 informed the petitioner about invocation of Para 3.17.B of RFS and Article 4.6.2 of the PPA. Subsequently, based on the decision by MNRE that SCoD of the WPDs would be shifted to 60 days after the operationalisation of LTA, SECI vide its letter dated 21.11.2019 extended the SCoD to 13.06.2019 after allowing a period of 60 days from the date of operationalisation LTA. We note that when the Petitioner received the communication dated 21.11.2019 regarding the extended SCoD, there was still time available up to 13.03.2020 to the Petitioner to complete the project.

68. In this context, the letters of the Petitioner dated 11.11.2019 addressed to PTC and dated 13.01.2020 addressed to SECI are relevant. In the letter dated 11.11.2019 addressed to PTC, the Petitioner had observed that

“xxx it has been given to understand that where delay has happened due to grid, SCD extension is to be allowed. The revised date for SCD shall be counted as grid charging date + 60 days. xxx our request for extension is being favourably considered. We would like to assure you that the project by the name Wind Four Renergy Ltd will be definitely commissioned and you may like to accordingly inform the DISCOM. xxx.”

Similarly, in the letter dated 13.01.2020 addressed to SECI, the Petitioner had indicated the expected commissioning date of the project as February 2020, as SCoD extension has been granted till 13.03.2020.

69. Thus, the prayer of the Petitioner to grant another 60 days of time from the date of issue of the letter dated 21.11.2019 neither flows from the letter of MNRE/SECI nor from the provisions of the RFP and PPA and non-completion of the project by the Petitioner during 21.11.2019 to 13.03.2020 does not justify any consideration of such prayer of further extension of SCoD. We are therefore not inclined to grant another period of 60 days from 21.11.2019 for SCoD, as there is no basis for grant of any such further extension of SCoD.

70. In view of our observations in the above paragraphs, we condone the period of delay of 132 days from 12.07.2019 (date of communication of initiation of action as per MNRE

Guidelines, Clause 3.17(B) of RfS and Article 4.6.2 of PPA) till 21.11.2019 (date of communication of extension of SCoD) and accordingly extend the commissioning deadline of the project by 132 days, with condition of pro-rata encashment of PBG and with consequences of tariff reduction (in terms of the provisions of Article 4.5.3 read with Article 4.6 of the PPA and Clause 3.17.B of the RfS).

71. It is pertinent to mention here that the Petitioner has informed vide rejoinder dated 30.06.2020 that SECI has already encashed the PBG. Any encashment of PBG would be governed by the extended deadline of commissioning (with encashment of PBG) vide this order as mentioned in the paragraph above.

Issue No. 2: Whether the claims raised by PTC vide letters annexed as Annexure P-10 are tenable?

72. In the third prayer, the Petitioner has sought a direction to set aside the claims of PTC raised vide letters at Annexure 10. On perusal of the record, it emerges that Annexure P-10 is a letter dated 26.12.2019 from PTC to the Petitioner forwarding a letter of BRPL dated 23.12.2019 wherein BRPL has sought a compensation for loss/damages suffered by it on account of acts/omissions of the Petitioner which made BRPL to procure power from alternative sources to meet its RPO obligations. It is noticed that neither PTC nor BRPL have initiated any action against the Petitioner for recovery of losses/damages and the letters attached as Annexure P-10 are intimation about the intension to initiate action. Accordingly, this prayer is rejected. It is however clarified that the Petitioner shall not be liable for any damages/losses for the periods which have been condoned in this order.

73. In view of the above, Petition No. 226/MP/2020 is disposed of.

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