



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 10/MP/2021

कोरम/ Coram:

श्री आई .एस .झा, सदस्य /Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य /Shri Arun Goyal, Member
श्री पी .के .सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 24th August, 2022

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 read with Article 16 of the Power Purchase Agreement dated 29th December 2017 entered into between the Petitioner and the Respondents seeking extension of Scheduled Date of Commissioning of the project without the levy of the penalty.

AND IN THE MATTER OF:

Adani Green Energy (MP) Limited (AGEMPL)

Adani Corporate House, Shantigram,
Near Vaishno Devi Circle, S. G. Highway,
Khodiyar, Ahmedabad – 382421, Gujarat, India.

...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. Punjab State Power Corporation Limited (PSPCL)

The Mall, PSEB Head Office,
Patiala, Punjab – 147001

...Respondents

Parties Present: Shri Sourav Roy, Advocate, AGEMPL
Shri Prabudh Singh, Advocate, AGEMPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Shri Dipak Panchal, AGEMPL
Shri Shreedhar Singh, SECI
Shri Shubham Mishra, SECI
Ms. Neha Singh, SECI

आदेश/ ORDER

The Petitioner, Adani Green Energy (MP) Limited is in the business of generation and sale of renewable energy in the country. The Petitioner has filed the petition under Section 79 of the Electricity Act, 2003 read with Article 16 of the Power Purchase Agreement (PPA) dated 29.12.2017 and is seeking extension of Scheduled Date of Commissioning (SCoD) of the project from 03.01.2020 to 05.03.2020 without levy of Liquidated Damages by the Respondent No.1.

2. The Respondent No.1, Solar Energy Corporation of India Limited (SECI) is a Central Public Sector Undertaking (CPSU) under the administrative control of the Ministry of New and Renewable Energy (MNRE) and is nominated as nodal agency to facilitate the implementation of Jawaharlal Nehru National Solar Mission (JNNSM).
3. The Respondent No.2, Punjab State Power Corporation Limited (PSPCL) is the distribution licensee in Punjab.
4. The Petitioner has made the following prayers:

a. Admit the Petition.

b. Hold and declare that the Petitioner had commissioned the Project on 3rd January 2020 itself and grant consequential reliefs as per the PPA.

In alternative-

Direct that the Scheduled Date of Commissioning of the project be extended to 5th March 2020 without the levy of the Liquidated Damages by the Respondent.

- c. *Direct the Respondent to refund the Liquidated Damages of Rs. 3,44,44,444 (Rs. Three Crores Forty Four Lacs Forty Four Thousand Four Hundred Forty Four Only) imposed upon the Petitioner.*
- d. *Pass such other and further order or orders as this Hon'ble Commission deems appropriate under the facts and circumstances of the present case.*

Background:

5. MNRE vide No. 53/14/2106-WE dated 04.05.2017 issued *Scheme for setting up of 1000MW ISTS connected Power Projects (Guidelines)*. On 31.05.2017, SECI issued Request for Selection (RfS) for setting up 1000 MW ISTS Connected Wind Projects under Tranche – II. The Petitioner was declared successful and issued Letter of Award (LoA) on 03.11.2017 by SECI for development of ISTS Connected 50 MW Wind Power Project at Village Dayapar, District Kutch, Gujarat, generation and sale of wind power under the Guidelines at a tariff of Rs. 2.65/kWh for a period of 25 (twenty-five) years. SECI has agreed to purchase wind power from the Petitioner as an intermediate seller and sell it to PSPCL on back to back basis as per the provisions of the above Guidelines and accordingly executed Power Sale Agreement (PSA) with PSPCL. On 29.12.2017, the Petitioner and SECI entered into PPA for setting up 50 MW Wind Project.

Submissions of the Petitioner:

6. The Petitioner has submitted as under:
- a) As per PPA dated 29.12.2017, the SCoD of the project was 03.05.2019 which was subsequently extended by SECI to 03.01.2020 on account of delay in operationalisation of Long-Term Access (LTA) by the Central Transmission Utility (CTU).
- b) On 03.01.2020, it had fulfilled all parameters for commissioning as the equipment as per rated project capacity had already been installed and power had flown to the Grid by that date. Therefore, there was no delay in commissioning the Project. Under the PPA, physical verification was not required in order to establish that the Project had been commissioned, yet SECI insisted on physical verification of all the Wind Turbine Generators (WTGs).
- c) The physical verification could not take place due to certain Right of way (RoW) issues and the agitation by the local villagers during the first (09.12.2019-12.12.2019) site visit and second (03.01.2020 & 04.01.2020) site visit by SECI.

- d) SECI is taking refuge in the fact that as the site visit could not take place and is refusing to acknowledge that the Petitioner had met all the parameters for commissioning on the 03.01.2020 itself. According to SECI, the Project was commissioned on 05.03.2020 and therefore, levied liquidated damages for the period between 03.01.2020 and 05.03.2020

Re: Developments till 21.11.2019

- e) The LoA was issued on 03.11.2017. As per the LoA, the Petitioner had to meet financial closure within 9 (nine) months of issue of LoA and had to achieve the commissioning of the project within 18 (eighteen) months of issue of LoA. On 19.06.2017, the Petitioner applied for LTA through an application. On 05.03.2018, a No Objection Certificate (NOC) for the same was granted. On 03.08.2018, the Petitioner achieved Financial Closure. On 20.09.2018, PGCIL requested SECI for extension of time in SCoD till PGCIL's transmission system at Bhuj Power Station was ready. The Petitioner intimated that the 50 MW wind power project will be ready for commissioning by 15.12.2019, and requested PGCIL to operationalize the LTA for 50 MW wind project from 15.12.2019.
- f) On 07.11.2019, the Petitioner issued an advance notice of synchronization under Article 5.1.1 of the PPA informing the Respondent No. 1 and the Gujarat Energy Development Agency (GEDA), the State Nodal Agency (SNA), that they intend to commission the project around 27.11.2019. On 15.11.2019, the approval for energisation was granted by Chief Electrical Inspector to the Government (CEIG).
- g) On 21.11.2019, SECI informed the Petitioner that on account of delay in operationalisation of LTA by CTU, the SCoD of the Project has been revised to 03.01.2020 or actual COD, whichever is earlier.

Re: Developments post 21.11.2019

- h) **First site visit of SECI (09.12.2019 and 12.12.2019):** The Petitioner had shown 18 WTGs to SECI. The Petitioner *vide* its email dated 12.12. 2019 informed SECI that it would not be able to show them the remaining WTGs (despite police help) due to Right of Way (RoW) issues and local problems.
- i) **Second site visit of SECI (03.01.2020 to 04.01.2020):** The following events occurred -
- i. According to the Minutes of the meeting of the Commissioning Committee dated 04.01.2020, it is clear that the Commissioning Committee could verify 19 (nineteen) WTGs, i.e. (17 (seventeen) during the first visit and additional 2 (two) WTGs during

the second visit) out of the proposed 26 (twenty-six) WTGs. The power had flown to the Grid from the Project on 03.01.2020.

- ii. The physical verification of all the WTGs could not take place due to local law and order problems-some individuals did not allow the vehicles (which were ferrying the inspecting team) to pass near Paneli village. The Petitioner immediately lodged a formal report with the police as a result.
- j) On 12.02.2020, SECI asked the Petitioner to produce certain documents which would establish if the commissioning parameters were met by the Petitioner.
- k) The Petitioner submitted the documents and answered all the relevant queries raised by SECI between 15.02.2020 and 18.02.2020.
- l) **Third site visit of SECI (19.02.2020):** The Minutes of the meeting of the Commissioning Committee dated 19.02.2020 were placed on record.
- m) On 06.03.2020, the Petitioner notified SECI about data validation of all 25 WTGs by WRLDC. SECI ultimately issued the Commissioning cum COD Certificate to the Petitioner, declaring the Project as being commissioned on 05.03.2020 and COD to be considered from 00:00 hrs of 07.03.2020. On the same day, the Petitioner wrote to SECI stating that they should not be saddled with levy of Liquidated Damages as the physical verification of the WTGs was delayed due to RoW issues and local agitation and these events were beyond control of the Petitioner.
- n) On 13.04.2020, the Petitioner asked SECI not to levy Liquidated Damages on account of the following difficulties faced by the Petitioner during the implementation of the Project:
 - (i) Damage of 220 kV transmission tower by local villagers.
 - (ii) Stoppage of construction work at Project site ordered by the District Collector of Kutch due to Vayu cyclone.
 - (iii) Stoppage of work due to abnormally heavy rainfall at the Project construction site.
 - (iv) Stoppage of construction / commissioning activities due to Right of Way issues.
 - (v) Delay in regulatory approvals of the Project.
- o) On 24.13.2020, SECI imposed Liquidated Damages on the Petitioner for the delay in commissioning from 03.01.2020 to 05.03.2020 [62 (sixty two) days].
- p) On 30.04.2020, SECI confirmed that the applicable penalty amount, as per Article 4.6 of PPA, is, Rs. 3,44,44,444/- (Rs. Three Crores Forty Four Lacs Forty Four Thousands Four Hundred Forty Four). The Petitioner has already paid the said amount (without prejudice to its right to litigate).

q) In the present Petition, the Petitioner is seeking refund on following grounds:

The PPA criteria for 'commissioning' the Project was fulfilled by the Petitioner on 03.01.2020 itself:

- (i) The Petitioner had achieved commissioning of the project on 03.01.2020 in terms of the PPA definition, as on that date both the parameters stated above were met-
 - (a) The Petitioner had installed all equipment as per the rated Project Capacity prior to 03.01.2020 itself.
 - (b) Energy had flown into grid from the Project on 03.01.2020.
- (ii) The Petitioner had completed its compliance on the GEDA front towards Synchronization-
 - (a) The Petitioner had complied with the synchronisation process as mentioned in Article 5.1 of the PPA.
 - (b) On 07.11.2019, the Petitioner issued an advance notice of synchronization under Article 5.1.1 of the PPA intimating SECI and GEDA that it intended to commission the project around 27.11.2019.
 - (c) GEDA provided the GEDA Id (marked on each WTG) as well.
- (iii) The equipment as per rated Project Capacity were installed and energy had flown into the Grid on 03.01.2020 itself. On 15.11.2019, the CEIG granted its Approval for energisation to all 26 (twenty-six) Wind Turbine Generators (WTG), 33 kV USS and Associated 33 kV lines of the Petitioner.
- (iv) Pursuant to this inspection, approval for energization was granted. This approval proves beyond doubt, that equipment as per rated Project Capacity were installed, as the CEIG certified them. Moreover, the Commissioning Committee has admitted in its Minutes of Meeting dated 04.01.2020 that they had recorded energy meter readings at the 33 kV level at Pooling Substation.
- (v) From the aforesaid meter readings, it is clear that energy had flown into the grid from the WTGs of the Petitioner as was the requirement under the PPA to establish that the Project had been commissioned.
- (vi) Pursuant to the prior notice of synchronisation, the Petitioner, in compliance with the Commissioning Procedure had also submitted the following documents to the Respondent *vide* its email dated 22.11. 2019:
 - (a) CEIG Approvals
 - (b) Board Resolution

- (c) Transmission Agreement
 - (d) LTA Approval
 - (e) Financial Closure Achievement Letter
- (vii) Article 17.1 of the PPA states that it can only be amended by a written agreement between the parties which evidently means that any party to the PPA cannot amend it unilaterally. Any other commissioning procedure notified by SECI, without the consent of the Petitioner amounts to unilateral amendment of the terms of the PPA, is therefore not binding. In other words, SECI's insistence on site-visit was not a mandatory requirement under the PPA to establish that commissioning has been achieved as the PPA did not contain a provision that the Project will be taken to have been commissioned only after the Respondent's site visit.

The Petitioner has substantially complied with the terms of the Commissioning Procedure dated 04.05.2018:

- (viii) SECI's refusal to consider that the Project stood commissioned on 03.01.2020 as the physical verification could not be completed is frivolous and nothing but an eye wash. In fact, presently, it is no longer SECI's own policy that a project can be considered commissioned only after a physical site visit.
- (ix) The Petitioner has complied with substantial terms of the Commission Procedure. In the event, the said procedure is considered binding.

Force Majeure:

- (x) The delay in the physical verification of the project occurred due to certain Force Majeure events which were beyond the reasonable control of the Petitioner.
- (xi) On conjoint reading of Articles 11.7.1 (b) and 4.5.1 of the PPA, it is evident that in case the Petitioner is prevented from performing its obligations in relation to the Scheduled Commissioning Date due any Force Majeure event affecting it, the Scheduled Commissioning Date shall be deferred till the said Force Majeure event lasts.
- (xii) The physical verification of the project could not occur because the employees of the Petitioner and the officials of SECI could not reach the project site on account of the RoW issues and the agitation by the local villagers, which were beyond the control of the Petitioner. The Petitioner, to the best of its abilities

(including taking assistance from the local police), tried to show the WTGs to SECI, however it could not show the same due to the events which were beyond its control. Therefore, the Petitioner is entitled to an extension of the SCoD from 03.01.2020 to 05.03.2020.

The Petitioner should be granted time extension for the delay in filing of the Petition for Adoption of Tariff by the Respondent:

- (xiii) The Respondent had delayed in filing Tariff Adoption Petition before this Commission.
- (xiv) SECI had filed the Tariff Adoption Petition being ***Petition No. 369/AT/2019*** under Section 63 of the Act for adoption of tariff for 1000 MW under Tranche-II of Wind Power Projects connected to the ISTS selected through competitive bidding process only in 2019. The said Petition was filed after a delay of almost two years of issuing the RfS, and the LoA to the Petitioner.
- (xv) The aforesaid petition came before this Commission on 03.10.2019 and the final tariff order was passed by this Commission on 03.12.2019, which was just one month prior to the revised SCoD of the project.
- (xvi) In the absence of tariff adoption, no lender is willing to come forward. Despite all the hurdles and delays caused by SECI, PGCIL and the Force Majeure events, the Petitioner completed its work expeditiously. The Petitioner ought to get the benefit of time extension on account of this delay as well.

Hearing dated 28.05.2021:

- 7. After hearing the learned counsel for the Petitioner, the Commission admitted the petition and directed the Petitioner to array PSPCL as party and serve copy of the petition on the Respondents including PSPCL, if not already served and the Respondents, including PSPCL to file their reply, if any, by 25.6.2021 after serving to the Petitioner, who may file its rejoinder, if any, by 16.7.2021.

Submissions of the Respondent No.1 (SECI):

- 8. SECI in its reply dated 06.08.2021 has submitted as under:

Re: Delay in Commissioning from 03.01.2020 to 05.03.2020

- a) SECI had communicated the amended commissioning procedure to WPDs on 16.04.2020 and the same is applicable with effect from date of notification. The said

amended commissioning procedure is not applicable to the Petitioner's power project which was commissioned on 05.03.2020.

b) On receipt of the notice prior to synchronization dated 07.11.2019 from the Petitioner stating that it intended to commission the project around 27.11.2019, SECI vide email dated 18.11.2019 sought for certain documents from the Petitioner before visiting the Project site for inspecting commissioning of the power project:

- i. *CEIG/CEA Certification of Proposed WTGs (as applicable)*
- ii. *CEIG/CEA approval for 33 KV Transmission Line(s) and Feeders*
- iii. *Synchronization details of WTGs for a cumulative capacity of 50+ MW*
- iv. *Letter from SNA with regards to approval of WTGS Locations*
- v. *The readiness of SCADA in all aspects;*
- vi. *Board Resolution for the nomination of GIWEL's representative pertaining to Commissioning*
- vii. *Copy of Transmission Service Agreement along with Permission for LTA/MTOA*
- viii. *Clearance from FC Committee*

c) SECI vide email dated 02.12.2019 informed the Petitioner that SECI officials may witness commissioning of the Petitioner's project on 04-05.12.2019.

d) The Petitioner vide email dated 03.12.2019 requested SECI to postpone their visit to 09.12.2019 due to unforeseen circumstances.

e) Since, the permission for 06 WTGs was issued by GEDA on 06.12.2019, the Petitioner had called the commissioning committee without obtaining necessary land clearance from State Nodal Authority (SNA), GEDA.

f) SECI vide email dated 07.12.2019 informed the Petitioner that SECI's officials will witness the commissioning of the Petitioner's project on 09.12.2019 to 10.12.2019.

g) **First site visit of Commissioning Committee on 09.12.2019:** SECI vide email dated 12.12.2019 stated that the Petitioner has shown only 18 sites of WTGs in three days and the Petitioner informed SECI that on account of some RoW issues, it will not be possible to visit other sites. SECI requested the Petitioner to resolve the RoW issues immediately to enable inspection of other sites. The Petitioner vide email dated 12.12.2019 stated that '*Due to persistence of RoW issues, we are not able to show further turbine locations (inspite of police help).*'

h) **Second site visit of Commissioning Committee on 03.01.2020 & 04.01.2020:**

- (i) The Commissioning Committee visited the Project site on 03.01.2020 and 04.01.2020. The Petitioner showed only 19 nos. of WTGS [17 WTGS on

09.12.2019 and 2 WTGS on 03.01.2020] out of the proposed 26 WTGs, the Commissioning Committee did not declare the Project as commissioned.

- (ii) For a project to be declared commissioned, it is incumbent for the Petitioner to demonstrate that independent turbines are erected, installed in all respects and generating power on a regular basis. This can be ascertained, amongst others, from the meter reading, by way of SCADA reading of individual WTGs, communication of telemetry data with RLDC (as RLDC check in telemetry that whether generation is occurring, the MW capacity, MVR and wind speed for individual WTGs).
 - (iii) The allegation of the Petitioner that it achieved commissioning of the Project on 03.01.2020 is wrong and contrary to the Minutes of Meetings, provisions of the Guidelines, RfS and PPA.
- i) **Third site visit of the Commissioning Committee on 19.02.2020:**
- (i) On 18.02.2020, Western Regional Load Despatch Centre (WRLDC) informed the Petitioner about the documents to be submitted for commencement of scheduling of power from Power Project to be commissioned by the Petitioner. Amongst other documents, WRLDC sought for '*Telemetry Integration of WTGS with WRLDC. Scheduling of any of the commissioned capacity will commence only after data availability ensured at WRLDC and at Backup Control Centre (BCC, NRLDC).*'
 - (ii) On 19.02.2020, the Commissioning Committee visited the Project site and witnessed that 10 of proposed WTGs were not integrated with the SCADA system. Out of these 10 WTGs, WTG with ID DYA 101 was erected in October, 2019.
- j) On 05.03.2020, the telemetry integration was completed and the Petitioner fulfilled the criteria for being declared as commissioned in terms of the Guidelines, RfS, PPA and the Commissioning Procedure.
- k) In view of the submission of all the documents and compliance of all the requirements by the Petitioner as per the Commissioning Procedure, on 06.03.2020, SECI issued the Commissioning cum COD Certificate.
- l) In terms of the applicable provisions, the actual Commissioning date and actual Commercial Operation Date will be the date as indicated in the Commissioning Cum COD Certificate i.e. 05.03.2020 and 07.03.2020 respectively.

- m) The Petitioner in their letters dated 06.03.2020 and dated 13.04.2020 sought for extension of SCoD upto 05.03.2020 without levying Liquidated Damages. On 16.03.2020, SECI sought for certain documents from the Petitioner for processing the request for extension of time. SECI vide letter dated 24.04.2020 had dealt with the claims raised by the Petitioner in their letters dated 06.03.2020 and dated 13.04.2020.

Re: Delay in Tariff Adoption

- n) The Commission has passed an Order on 03.12.2019 in Petition No.369/AT/2019 filed by SECI. At no point of time, the Petitioner raised any issue in the said proceedings that there has been any impact on account of the alleged delay as claimed in the Petition filed. The PPA executed between Petitioner and SECI do not provide for any such condition precedent of Adoption of Tariff for implementation of the PPA. Article 3 of the PPA provides for Financial Closure to be fulfilled by the Petitioner at its own risk and cost. The said provision does not provide for any condition to be performed by SECI, much less the adoption of tariff by the Commission, to enable the Petitioner to fulfill the Financial Closure.
- o) No issue of alleged delay in tariff adoption was raised at the stage of Financial Closure or commissioning.
- p) SECI denies that there is any delay in passing the tariff adoption Order as alleged by the Petitioner or otherwise.

Re: Events alleged by the Petitioner do not fall within the scope of Force Majeure

- q) The claim of the Petitioner needs to be considered strictly in terms of Article 11.3.1 of the PPA. The events alleged by the Petitioner do not fall under any of the sub-clauses specifically dealt in Article 11.3.1 of the PPA. Article 11.4 of the PPA deals with Force Majeure exclusions. Article 11.5.2 of the PPAs provides that an Affected Party is required to give Notice, as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure and such notice is a pre-condition to an affected party's entitlement to claim relief under the PPA. It is settled position of law that where the contract requires issuance of a Notice for invoking the Force Majeure clause, the benefit of Force Majeure cannot be granted in the absence of any such Notice.

- r) The events alleged by the Petitioner for delay in commissioning namely RoW issues, local issues and delay in tariff adoption do not qualify as Force Majeure within the scope of Article 11.3.1 of the PPA. Further, Article 4.5 (Extension of Time) or Article 11.7.1 (b) of the PPA (Available relief for a Force Majeure Event) is not attracted to the facts of the present case.

Re: Liquidated damages payable for delay in commissioning

- s) SECI submitted that it has suffered a legal injury/loss on account of non-availability of power from the scheduled commissioning date entitling SECI to recovery of liquidated damages in terms of Article 4.6 of the PPA. SECI vide letter dated 30.04.2020 informed the Petitioner that the applicable Liquidated Damages in terms of Article 4.6 of the PPA is Rs.3,44,44,444. (Rs. Three Crores Forty Four Lacs Forty Four Thousands Four Hundred Forty Four Only).

Rejoinder by the Petitioner 03.09.2021:

9. The Petitioner has filed Rejoinder dated 03.09.2021 and reiterated its submissions already made in the plaint and as such , the same are not reproduced for the sake of brevity. Additionally, the Petitioner has submitted as under:

Re: Alleged delay in in commissioning the project

- a) SECI's stand is untenable in law.
- b) The Petitioner had issued an advance notice of synchronization under Article 5.1.1 of the PPA on 07.11.2019 intimating SECI and Gujarat Energy Development Agency (GEDA) that it intends to commission the Project around 27.11.2019. GEDA had also provided the GEDA Id that was marked on each Wind Turbine Generators.
- c) The Chief Electrical Inspector to the Government (CEIG) on 05.09.2019 had granted approval for energisation of electrical installations of 220/33 kV SIS near Dayapar /Ratadiya and two (2)-nos. Hybrid GIS Bays(Bay no. 219 and 220) at 7651400/2200 kV Power Grid Corporation of India Limited Bhuj substation of the Petitioner.
- d) On 15.11.2019, CEIG had granted its approval for energisation to all 26 (twenty six) WTGs, 33 kV USS and associated 33 kV lines of the Petitioner after conducting inspection of electrical installation of 52 MW (2.0 MW x 26) WTG (including the 25 Nos of WTGs as considered and declared as commissioned under the project), 33 kV USS and associated 33 kV lines of the Petitioner's Project. The approvals granted by

CEIG clearly establish that the equipments as per rated projectCapacity, were installed, as the CEIG had certified them.

- e) The generated power from all the installed twenty-five (25) WTGs (each of 2 MW capacity) are carried to internal 33/220 kV Pooling sub-station through two dedicated 33 kV feeder lines connected with WTGs in 13:12 proportion. At internal 33/220 kV PSS, generated power is upgraded to 220 kV level through a 33/220 kV Power Transformer at this PSS itself, and then the upgraded power is fed to the 765/400/220 KV Grid S/s of PGCIL at 220 kV level through a dedicated 220 kV line.
- f) The 33kV feeders (bearing nos. 303 and 306) connected to the WTGs of the Project are each installed with the dedicated three (3) nos. of energy meters (Main, Check and Standby) at incoming junction of 33/220 kV PSS for the purpose of recording the energy flown from interconnected WTGs (of this particular project only) to the grid at 33 kV level. In respect of each of these meters, energy flow into the Grid has been recorded on 3rd- 4th January 2020.
- g) The Petitioner had submitted all the requisite documents with SECI with respect to the commissioning of the Project.

Re: WTG SCADA and telemetry data is incorrect-

- h) There are two kinds of SCADA available in the Project:
 - (i) PSS SCADA (33 and 220 kV Systems of the project installed at 33/220 kV pooling substation) and;
 - (ii) WTG SCADA (at each WTG level).
- i) As far as PSS SCADA data validation is concerned, the same was duly obtained *vide* Format-IV approval from the Regional Load Dispatch Centre (RLDC) for charging of 33 kV element. This charging permission dated 26.11.2019 *vide* Format-IV approval is the approval from the appropriate Load Dispatch Centre for charging of project elements. The Format-IV approval for the Project establishes beyond doubt that data communication from PSS SCADA had duly been checked and validated by RLDC. Therefore, there cannot be any dispute with respect to PSS SCADA, as it was already in place much before 03.01.2020.
- j) SECI has stated that without WTG SCADA data validation, it will not be able to consider the Project as commissioned. However, WTG SCADA validation is not a pre-requisite for commissioning at all. Even under the 2018 Commissioning Procedure

which the Respondent No. 1 has heavily relied upon, WTG SCADA validation was to be established post commissioning as per the requirement of power scheduling. Similarly, communication of telemetry data by RLDC was the requirement only for commencing scheduling of power from the Project, and is not a pre-requisite for commissioning the Project even under the 2018 Commissioning Procedure.

- k) In any case, the aforementioned information to the Respondent No. 1 is *vide* email dated 17.02.2020, and the same in any manner does not alter the date of commissioning of the Project, which would be 03.01.2020.
- l) SECI's insistence on WTG SCADA data and telemetry data has nothing to do with the commissioning of the Project even under the 2018 Commissioning Procedure . SECI is conflating the two different technical concepts of "*Commissioning*" versus "*scheduling*".

The Petitioner has substantially complied with the Commissioning Procedure that was notified on 04.05.2018-

- m) Clause A4 of the 2018 Commissioning Procedure states that the WTGs shall be deemed to be synchronized to the grid when the transmission line and the incoming feeder at the Central Transmission Utility substation have been charged and power flows from the turbines into the grid, which shall be reflected through a meter reading at the CTU substation.
- n) The Commissioning Committee in its meeting dated 03-04.01.2020 had stated that it had recorded meter reading at the 33 kV level at pooling substation which makes it evident that the power had flown from the WTGs into the grid and the same was recorded at the pooling substation of PGCIL. The Petitioner had synchronised its total Project capacity of 50 MW with the grid system as per Clause B3 of the 2018 Commissioning Procedure.
- o) As per Clause B6 of the 2018 Commissioning Procedure provided by SECI, the Commissioning Committee comprising of officials of GEDA, CTU and the Petitioner shall visit the Project site to witness the commissioning of the Project. Therefore, as per the said procedure, only the members of the Commissioning Committee were entitled to visit the Project site together and not the officials of SECI. The clause only says that the said Commissioning Committee shall visit the Project site (on their own accord). It nowhere casts an obligation on the Petitioner to arrange for such a visit. SECI's refusal

to consider that the Project was commissioned on 03.01.2020, on account of physical verification not being completed, is therefore frivolous despite the fact that some of WTGs were verified physically but the others could not, on account of the Right of Way issue.

- p) The Commercial Operation Date has been defined in the PPA as the date on which the Project shall be declared as commissioned by State Nodal Agency or any other entity as authorized by SECI. The said provision further provides that the COD shall be the date on which 50 MW capacity or fifty percent (50%) of the allotted Project capacity (whichever is higher) is commissioned. Therefore, the SNA or any other entity appointed by the SECI was not entitled to act as per its discretion but to declare the COD as per the aforesaid provision of the PPA.
- q) Article 5 of the PPA states that the energy flow from the Project into the grid system shall be as a whole, and does not specify the requirement of energy flow from each individual WTG. Therefore, when the energy has flown into the grid system from the Project, as has been recorded by the Commissioning Committee in the Minutes of meeting dated 03–04.01.2020, the Project shall be taken to be commissioned on the date the energy had flown from it into the grid system.

Alternative Plea- Force Majeure-

- r) The provisions of the PPA are not watertight compartments wherein no flexibility can be exercised by this Commission while interpreting the provisions.
- s) This Commission in *Kudgi Transmission Limited vs. Bangalore Electricity Supply Company Limited and Ors., Petition No. 248/MP/2016* had held the delay caused in the completion of project due to RoW and law and order issues as force majeure events.
- t) The RoW issues and the agitation by the local villagers have prevented the Petitioner in performing its aforesaid obligations under the PPA and the said issues were beyond the reasonable control of the Petitioner. The Petitioner had also filed a police complaint regarding the same. However, the Petitioner even with the help of the police was not able to show the WTGs to SECI. It was the duty of SECI to declare the Project as commissioned which, it should have co-ordinated with the Committee itself. Further, if the Commissioning Committee wanted to visit the Project site, they could have visited on their own .

Re: Delay in Tariff Adoption:

- u) SECI had filed the Petition for adoption of tariff only in 2019. The final Order in the said Petition was passed by this Commission on 03.12.2019, which was just one month prior to the revised SCD of the Project. In the absence of the Order of this Commission, no lender was willing to come forward to finance the Project which caused great hardships to the Petitioner in setting up the Project. Despite severe financial hardships faced the Petitioner, it was somehow still able to achieve financial closure on 03.08.2018 i.e. as per the deadline provided in the PPA.

Re: Liquidated Damages:

- v) The Project of the Petitioner was commissioned and the energy had flowed into the grid from the same. SECI was not able to verify the WTGs physically on account of the force majeure events. SECI has not suffered any legal injury or losses. Therefore, SECI is not entitled to the liquidated damages under Article 4.6 of the PPA. Hence, the Petitioner is entitled to the refund of Liquidated Damages of Rs. 3,44,44,444/- (Rupees Three Crores Forty Four Lacs Forty Four Thousands Four Hundred Forty Four Only) imposed upon it by SECI.

Hearing dated 28.06.2022:

10. Learned counsel for the Petitioner and learned senior counsel for the Respondent, SECI made detailed submissions in the matter and reiterated the submissions made in the pleadings. Considering the request of the learned senior counsel and learned counsel for the parties, the Commission permitted the Petitioner and the Respondent to file their written submissions, if any, within period of two weeks with copy to each other.

Written Submissions filed by SECI:

11. SECI has filed Written Statement on 10.07.2020 vide which it has reiterated its submissions already given in the pleadings and as such the same are not reproduced for the sake of brevity. Additionally, SECI has submitted as under:

Proposition I: The Petitioner is wrong in claiming that 50 MW was commissioned on 03.01.2020 or 19.02.2020 and the commissioning could be considered only on 05.03.2020, when the pre-requisites for the issue of commissioning certificate were finally satisfied by petitioner

- a) Prior to seeking SECI to issue commissioning certificate, the Petitioner is required to
- (i) Take steps to synchronize the power project with the Grid with due approval of Chief Electrical Inspector (CEI/CEIG);
 - (ii) Obtain necessary approval from RLDC/SLDC in regard to successful data communication between the plant end and SLDC/RLDC having been established; and
 - (iii) The commissioning of the Project, i.e. the power flow from the Wind Energy Project to the Inter-State Transmission licensee's substation, has been observed, and has been further confirmed by members of the Commissioning Committee and the Central Transmission Utility. The Project Developer's representative is a member of the Commissioning Committee appointed for the purpose.
- b) The Petitioner had not furnished the documents on 03.01.2020 and these documents were furnished only on 06.03.2020. The Petitioner is therefore wrong in proceeding on the basis that it had fulfilled all the requirements for commissioning on 03.01.2020 as per definition of the term 'Commissioning' in the PPA as the equipments as per the rated project capacity had already been installed and power had flown to the Grid on the said date. The Petitioner is also wrong in claiming that WTG SCADA data and Telemetry data is not a pre-require for commissioning and is required for commencement of scheduling of power.

Physical inspection by commissioning committee was specifically provided for and was undertaken for projects prior to 16.04.2020 when the commissioning procedure was amended

- c) The Petitioner is wrongly alleging that at the relevant time i.e. prior to 16.04.2020, SECI's own policy was that a Project can be declared commissioned without physical witnessing of the commissioning. In this regard, SECI had communicated the amended commissioning procedure to WPDs only on 16.04.2020 and the same is applicable with effect from the said date of notification. The said amended commissioning procedure is not applicable for the Petitioner's power project which was commissioned on 05.03.2020. The said allegation of the Petitioner is an after-thought particularly when the Petitioner itself participated in the witnessing of the commissioning on 03.01.2020 and 19.02.2020 as a member of the Commissioning Committee. The Petitioner did not raise any objection about the Commissioning being witnessed.
- d) At the time of commissioning of 50 MW project, the Petitioner had participated the meetings of the Commissioning Committee appointed under the Commissioning Procedure

and signed the minutes of the said meetings. The Petitioner is now raising the issue regarding the applicability of the Commissioning Procedure as an after-thought.

Project site visits

- e) SECI vide email dated 02.12.2019 informed the Petitioner that SECI officials will witness commissioning of the Petitioner's project on 04.12.2019 - 05.12.2019. However, the Petitioner vide e-mail dated 03.12.2019 requested SECI to postpone their visit to 09.12.2019. It is submitted that, the reason for postponement of site visit as unforeseen circumstances, however, it is to be noted that the Developer Permissions for 06 WTGs was issued by GEDA on 06.12.2019 and the same was provided to SECI on 06.12.2019.
- f) The Petitioner had called the Commissioning Committee without obtaining necessary land clearance from the State Nodal Authority (SNA), GEDA. Thereafter, SECI vide email dated 07.12.2019 informed the Petitioner that SECI's officials will witness the commissioning of the Petitioner's project on 09.12.2019 to 10.12.2019.
- g) SECI vide email dated 12.12.2019 to the Petitioner stated that the Petitioner has shown only 18 sites of WTGs (17 WTGs) in three days; the Petitioner informed SECI that it is not possible to visit other sites on account of RoW issues. SECI requested the Petitioner to resolve the RoW issues immediately to enable inspection of other sites.
- h) The Commissioning Committee visited the Project site on 03.01.2020 and 04.01.2020. During the said visit, the Commissioning Committee including the representatives of SECI, GEDA did not find any local people obstructing the witnessing of commissioning of any of the WTGs.
- i) In view of the fact that the Petitioner had shown only 19 nos. of WTGS [17 WTGS on 09.12.2019 and 2 WTGS on 03.01.2020] out of the proposed 26 WTGs, the Commissioning Committee did not declare the Project as commissioned. In this regard, in terms of definition of the term Commercial Operation Date (quoted above), the minimum capacity for commissioning is at least 50 MW.
- j) With regard to the allegation of the Petitioner that energy has flown into the grid on 03.01.2020, it is submitted that it has been clarified in the above minutes of the meeting, that the Commissioning Committee witnessed energy meter reading since energy meters installed at PGCIL substation are common for Wind Power Projects of the Petitioner's Group under various schemes. The energy meter recording did not establish that all the 26 WTGs were in a position to generate and inject electricity to the Grid. In any event, the

Commissioning Committee itself had not certified the witnessing of power generation and injection by all the 26 WTGs of the 50 MW project of Petitioner. The claim made by the Petitioner is contrary to minutes of the meeting.

- k) It is incumbent for the Petitioner to demonstrate that independent turbines are erected, installed in all respects and generating power on a regular basis. The SCADA reading of individual WTGs, communication of telemetry data with RLDC (as RLDC check in telemetry that whether generation is occurring, the MW capacity, MVR and wind speed for individual WTGs) is the evidence of the erection of the individual WTG. The above is essential since in the case of a Wind Power Project, each WTG operates as an individual generating unit which in aggregate forms the entire generation station. There has been no fulfilment of the above requirements during the site visit on 03.01.2020 by the Commissioning Committee. The mere recording of energy in aggregate at sub-station of PGCIL does not evidence that all the generating units have been duly commissioned and the generated power is flowing which is the essence of the commissioning of the generating unit.
- l) The telemetry integration was completed on 05.03.2020. Therefore, it was only on 05.03.2020, that the Petitioner fulfilled the criteria for being declared as commissioned in terms of the Guidelines, RfS, PPA and the Commissioning Procedure.
- m) On submission of all the documents and compliance of all the requirements by the Petitioner as per the Commissioning Procedure, SECI issued the Commissioning cum COD Certificate on 06.03.2020.

Proposition II: The petitioner is wrongly claiming alternative plea of delay in commissioning of the project from 03.01.2020 to 05.03.2020 on account of force majeure

- n) The Petitioner is wrongly claiming extension of SCoD for 50 MW Wind Project of the Petitioner from 03.01.2020 till 05.03.2020 on alleged grounds of force majeure events namely:
 - (i) Delay in physical verification of commissioning during first and second visit by the Commissioning Committee due to factors beyond the control of the Petitioner, namely, Right of Way issues and agitation by the local villagers and
 - (ii) Delay in adoption of Tariff.
- o) The Commissioning Committee which visited site on 03.01.2020 did not witness any RoW issues or otherwise any local protest. The minutes of the Commissioning Committee's visit

on 03.01.2020-04.01.2020 duly signed by the Petitioner's representative and other members of the Committee do not record any such obstruction being faced by them except that the Petitioner did not show the balance 7 WTGs. The Petitioner did not provide any Notice of Force Majeure as required by Article 11.5.2 of the PPA, which is a pre-requisite for Petitioner's entitlement to claim Force Majeure, either on 19.12.2019 or 03.01.2020-04.01.2020 to claim Force Majeure, was given by the Petitioner.

- p) The Petitioner has alleged that SECI has delayed in obtaining Order from Appropriate Commission for adoption of tariff and that in absence of the tariff adoption Order, no lender was willing to come forward. The Commission passed the Order on 03.12.2019 in Petition No.369/AT/2019 filed by SECI, adopting the tariff of the projects of WPDs including the Petitioner under Wind Tranche-II Scheme. The Petitioner was a party in the proceedings in the above Petition. At no point of time, the Petitioner raised any issue in the said proceedings regarding the alleged delay as claimed in the Petition filed. The Petitioner had raised the issue of delay in tariff adoption for seeking extension of time, for the first time, (clearly as an after-thought) only by its letter dated 13.04.2020 i.e. after more than 27 months from the date of execution of the PPA dated 29.12.2017 and after the Petitioner had commissioned the 50 MW Power Project on 05.03.2020. The passing of Tariff Adoption Order on 03.12.2019 did not in any manner affect the implementation of the project by the Petitioner and is therefore not Force Majeure event within the scope of Article 11 of the PPA.

Written Submissions of the Petitioner:

12. The Petitioner has filed Written Statement on 13.07.2020 vide which it has reiterated its submissions already given in the pleadings and as such the same are not reproduced for the sake of brevity. Additionally, the Petitioner has submitted as under:

The Petitioner had complied with the Commissioning Parameters on 03.01.2020 itself and the Project stood Commissioned on 03.01.2020

- a) As per the definition of COD and commissioning provided in the PPA, the following twin test has to be satisfied for the Project is declared as “*Commissioned*”.
- a. Whether all the equipments as per rated capacity have been installed; and
 - b. Whether the energy has flown into the grid.

- b) The Petitioner had issued an advance notice of synchronization under Article 5.1.1 of the PPA that it intends to commission the Project around 27.11. 2019. GEDA had also provided the GEDA Id on 06.12.2019 that was marked on each WTGs.
- c) Central Electricity Authority had granted approval for energisation of Electrical Installations on 05.09.2019 and to all 26 WTGs, 33 kV USS and Associated 33 kV lines on 15.11,2019 after the physical inspection of all the associated electrical system on 03-04.09.2019 and the physical inspection of WTGs on 13.11.2019 as recorded under the said approvals. From the aforesaid approvals granted by the CEA, it is evident that the equipments as per rated Project Capacity, were installed, as the CEA had certified them after duly inspecting the entire project equipments.
- d) Commissioning Committee in the minutes of meeting dated 03-04.01.2020 stated that it had witnessed and recorded energy meter readings at 33 kV Pooling sub-station on 03.01.2020, which clearly established that the energy had flown into the grid from the WTGs of the Petitioner. Therefore, the criteria for Commissioning as per the definition provided in the PPA was met on 03.01.2020 itself.
- e) As far as physical verification of few WTGs is concerned, it has no relevance once the same has been duly examined physically by the competent authority i.e. CEA on 03.09.2019 and 04.09.2019 for the electrical systems and on 13.11.2019 for the WTGs and after being satisfied with the installation, the energisation approval was granted by the CEA.

Alternative Plea – the Petitioner has substantially complied with the Commissioning Procedure dated 04.05.2018

- f) Even if the Commissioning Procedure dated 04.05.2018 unilaterally notified by SECI on 04.05.2018 is to be followed, the Petitioner submits that it has substantially complied with the same as on 03.01.2020 itself.
- g) SECI only has two objections with respect to the Commissioning of the Project on 03.01.2020 that the SCADA was not installed and that the physical verification of the WTGs was not completed.
- h) The definition of the commissioning in Clause A5 and criteria of commissioning in Clause B2 of the 2018 Commissioning Procedure were met on 03.01.2020 as all the necessary equipments had been installed and the energy had flown into the grid.
- i) Clause B6 of the 2018 Commissioning Procedure provides that the Commissioning Committee comprising of the officials of GEDA, CTU and the Petitioner shall visit the

Project site to witness the commissioning of the Project. As per the said procedure, only the members of the Commissioning Committee, comprising of the officials of SECI, GEDA, CTU and the Petitioner, were entitled to visit the Project site together and not the officials of SECI individually as per their whims and fancies.

- j) The said clause is only directory and not mandatory because if the said clause were mandatory, SECI would have insisted on a site visit by the Commissioning Committee in December 2019 instead of just its officials visiting the Project site. Moreover, the clause only says that the said Commissioning Committee shall visit the Project site (on their own accord). It nowhere casts an obligation on the Petitioner to arrange for such a visit. The Petitioner had even complied with the 2018 Commissioning Procedure unilaterally notified by the SECI, except for physical verification of the WTGs, which as per the Petitioner has no relevance once same has been duly examined physically by the competent authority i.e. CEA on 03.09.2019 and 04.09. 2019, for electrical systems and on 13.11.2019 for WTGs and after being satisfied with the installation, energisation approval was granted by the CEA.

SECI's stand on WTG SCADA and Telemetry Data is Incorrect

- k) The WTG SCADA validation is not a pre-requisite for “*Commissioning*” at all. Even under the 2018 Commissioning Procedure, WTG SCADA validation was to be established post commissioning as per the requirement of power scheduling. Similarly, communication of telemetry data by the RLDC was the requirement only for commencing the scheduling of power from the Project and is not a pre-requisite for commissioning of the Project even under the 2018 Commissioning Procedure.

Force Majeure

- l) If there was no force majeure event, as has been claimed by SECI, the officials of SECI could have gone by themselves, without the Petitioner’s assistance, to verify the WTGs physically as they already had the locations of all the WTGs as have been stated by SECI in its Reply. However, since the officials of SECI failed to go to the location where the WTGs were installed shows the occurrence and the persistence of the aforesaid force majeure events. Presently, it is no longer SECI’s own policy that a project can be considered commissioned only after a physical site visit. Therefore, refusal of SECI to consider that the Project stood commissioned on 03.01.2020 as the

physical verification could not be completed is therefore frivolous and nothing but an eye wash.

Delay in Adoption of Tariff

- m) SECI had filed the Petition for adoption of tariff only in the year 2019 when the initial SCoD of the Project was 03.05.2019. The final Order in the said Petition was passed by this Commission on 03.12.2019, which was just one month prior to the revised SCOD of the Project. In the absence of the Order of this Commission, no lender was willing to come forward to finance the Project which caused great hardships to the Petitioner in setting up the Project. However, despite the severe financial hardships faced the Petitioner, it was somehow still able to achieve financial closure on 03.08.2018, i.e. as per the deadline provided in the PPA. Now, instead of appreciating the Petitioner for the same, the SECI is trying to hold the same against it.

Liquidated Damages can be levied only if actual loss is suffered by a party

- n) It is settled law as per the judgments of the Hon'ble Supreme Court that even in case of breach of contract, the courts will award liquidated damages only when a party proves that it has suffered actual loss or damage because of the said breach. Reliance is placed on the Hon'ble Supreme Court judgment in ***Kailash Nath Associates vs. Delhi Development Authority and Anr. (2015) 4 SCC 136***. In the present case, SECI has never contended nor has it been able to prove that it has suffered any loss or damage on account of alleged delay in commissioning of the Project. Therefore, it shall not be entitled to any liquidated damages.

Analysis and Decision

13. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records.

14. The primary issues that arise for consideration before the Commission in the present matter are as under:

Issue No. 1 : Whether the Petitioner had commissioned the Project on 03.01.2020 and the consequential reliefs can be granted?

Issue No. 2: *Whether the Scheduled Date of commissioning of the project needs to be extended to 05.03.2020 without the levy of the Liquidated Damages by SECI, on account of alleged force majeure event(s) by the Petitioner?*

Issue No. 3: *Whether SECI can be directed to refund the Liquidated Damages of Rs. 3,44,44,444 (Rs. Three Crores Forty Four Lacs Forty Four Thousand Four Hundred Forty Four Only) imposed upon the Petitioner?*

15. We now take issues one by one for discussion:

Issue No. 1 : *Whether the Petitioner had commissioned the Project on 03.01.2020 and the consequential reliefs can be granted?*

Issue No. 2: *Whether the Scheduled Date of commissioning of the project needs to be extended to 05.03.2020 without the levy of the Liquidated Damages by SECI, on account of alleged force majeure event(s) by the Petitioner?*

16. Since Issue No. 1 & Issue No. 2 are based on same set of facts hence the same are being taken together for discussion. The Petitioner has submitted that as per PPA dated 29.12.2017, the SCoD of the project was 03.05.2019 which was subsequently extended by the SECI to 03.01.2020 on account of delay in operationalisation of Long-Term Access (LTA) by the Central Transmission Utility (CTU). Briefly, the Petitioner has alleged that:

- (i) it had met all the formalities and parameters required for Commissioning of the Project on 03.01.2020, and that it had achieved the Commissioning of the project in terms of the PPA on the 03.01.2020 itself and accordingly it may be declared that the Project was commissioned on 03.01.2020.
- (ii) *Alternatively*, the delay in the physical verification of the project on account of certain RoW issues, the agitation by the local villagers and delay in Adoption of Tariff constitutes force majeure events covered under Article 11.7.1 (b) of the PPA and accordingly the SCoD of the project may be extended under Article 4.5.1 of the PPA.

17. The Commission notes that the relevant provisions of the *Guidelines* are as under:

'Project Commissioning' *the Project will be considered as commissioned if all equipments as per rated capacity has been installed and energy has flown into grid, in line with the Commissioning procedures defined in the RfS document*

3.14 Commissioning

Commissioning Schedule and Penalty for Delay in Commissioning

*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) manner: ...*

3.16 Commercial Operation Date

The Commercial Operation Date (COD) shall be considered as the actual date of commissioning of the project as declared by the SNA/Committee/individual/any other entity authorized by SECI. COD will be declared only when the project developer has commissioned 50 MW capacity or 50% of the allotted project whichever is higher. PPA tenure will be counted from COD irrespective of the date of commissioning of the balance capacity

The following two milestone dates for commissioning may therefore be observed and may fall on separate dates:

***Inter connection with Grid:** This may be provided by the PGCIL/State Transmission Company on the request of the WPD, to facilitate testing and allow flow of power generated into the grid to avoid wastage of Power.*

***The Commissioning of Project:** This will be on a date, when the Project meets the criteria defined for project commissioning. SECI may authorize any individual or committee or organization to declare the project commissioned on site.....”*

18. The relevant provisions of RfS are as under:

3.17. Commissioning

*The Commissioning of the Projects shall be carried out by the WPDs in line with the Procedure elaborated in the PPA document (Commissioning Procedure at Annexure-A and Appendix-A-1 are for reference). SECI may authorize any individual, committee, or organization to **witness and validate the commissioning procedure on site.***

Commissioning Procedure

*Commissioning Procedure for the Projects selected under the RfS **shall be intimated by SECI in due course of time.***

3.17. Commissioning

The Commissioning of the Projects shall be carried out by the WPDs in line with the Procedure elaborated in the PPA document (Commissioning Procedure at Annexure-A and Appendix-A-1 are for reference). SECI may authorize any individual, committee, or organization to witness and validate the commissioning procedure on site. Commissioning certificates shall be issued by the State Nodal Agency or SECI after successful commissioning.

B. Commissioning Schedule and Liquidated Damages not amounting to Penalty for delay in Commissioning:

The Project shall be fully commissioned within 18 months from date of issuance of Letter of Award.... 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:

19. The relevant provisions of PPA are as under:

‘Commissioning’ The Project will be considered as commissioned if all equipment as per rated Project Capacity has been installed and energy has flown into grid, in line with the Commissioning procedures defined in the Guidelines/PPA. ”

“Commercial Operation Date” shall mean the actual date of commercial operation/commissioning of the project as declared by the State Nodal Agency (SNA)/Committee/individual/any other entity authorized by SECI. COD will be declared only when the project developer has commissioned 50 MW capacity or 50% of the allotted project whichever is higher. PPA tenure will be counted from COD irrespective of the date of commissioning of the balance capacity;

4.6 Liquidated Damages amounting to penalty 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:.....

ARTICLE 5: SYNCHRONISATION, COMMISSIONING AND COMMERCIAL OPERATION

5.1 Synchronisation, Commissioning and Commercial Operation

5.1.1 The WPD shall give the concerned RLDC/SLDC and Buyer at least sixty (60) days advanced preliminary written notice and at least thirty (30) days advanced final written notice, of the date on which it intends to synchronize the Power Project to the Grid System.

5.1.2 Subject to Article 5.1.1, the Power Project may be synchronized by the WPD to the Grid System when it meets all the connection conditions prescribed in applicable Grid Code then in effect and otherwise meets all other Indian legal requirements for synchronization to the Grid System.

5.1.3 The synchronization equipment and all necessary arrangements / equipment including RT, for scheduling of power generated from the Project and transmission of data to the concerned authority as per applicable regulation shall be installed by the WPD at its generation facility of the Power Project at its own cost. **The WPD shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned substation/Grid System and checking/verification is made by the concerned authorities of the Grid System.**

20. From the above, the Commission observes that the ‘Commissioning Procedure’ for the Project was to be intimated by SECI in due course of time. The Project will be considered as commissioned if, (i) All equipment as per rated capacity has been installed and energy has flown into grid, in line with the commissioning procedures; (ii) Project has been physically inspected by duly constituted committee; (iii) the Project has been certified as successful commissioned by the said committee; (iv) Commercial Operation Date will be the actual date of commercial operation/commissioning of the project as declared by the Committee.
21. It is observed that in compliance to Clause 3.17 of the RfS, the Commissioning Procedures were circulated by SECI to the Petitioner vide email dated 04.05.2018, which mandates as under:

B. Commissioning Procedure

1. ***Wind Power Developer (WPD) shall give to PTC (if applicable), PGCIL, State Nodal Agency (SNA), RLDC and SECI at least thirty (30) days' final written notice, of the date on which it intends to synchronize the Project to the Grid System. The WPD shall be solely responsible for any delay or non-receipt of the notice by the concerned agencies, which may in turn affect the commissioning schedule of the Project.***
2. ***Wind Power Developer shall ensure that the Wind Turbine Generators (WTGs) have been installed and completed in all aspects and the Project is synchronized to the grid in order for it to be declared as being commissioned. The Project may be synchronized with the grid on WTG-basis.***
3. ***The Project would be considered for Commissioning only upon synchronization of at least 50 MW or 50% of the Project capacity, whichever is higher, and balance capacity thereof in batches of capacity not less than 50 MW or in one go. It may be noted that energy accounting for the Project shall commence only from the date of commissioning as declared by the State Nodal Agency.***
4. ***Early Commissioning of a Project prior to the SCD is permitted on acceptance of power by PTC (in case of Tranche-I projects) / SECI (in case of Tranche-II projects). In order to facilitate this, WPDs shall inform the concerned agencies and PTC/SECI well in advance regarding the date it intends to synchronize the Power Project to the Grid System.***
5. ***Prior to being declared as being commissioned, the Project shall be inspected by the CEIG/CEI (as applicable) and all the approval for all the components, including the wind turbines, along with all annexures/attachments, such as approval of the CEA under Section 68 and Section 164 of the Electricity Act, shall be obtained by the WPD prior to be declared as fit for synchronization of the Project.***
6. ***Subsequently, a Commissioning Committee constituted under the chairmanship of the State Nodal Agency and comprising officials from CTU and the WPD as other members, shall visit the Project site to witness commissioning of the Project. The WPD shall obtain the Synchronization certificate from the Transmission licensee/RLDC/SLDC/any other competent authority as applicable, as per***

- Annexure-I, certifying the flow of power from the Project upon synchronization.**
7. Finally, the Commissioning Certificate, in line with Annexure-II, shall be issued by the State Nodal Agency, which shall **certify the commissioning of the Project capacity based on the number of turbines commissioned and energy flown into the grid.**

Documents to be submitted to SECI

- “
- ...
- e. Plant Layout along with the SLD, clearly mentioning the details of WTG size and capacity along with the individual WTG Serial Nos., their locations, feeder details, 230/220/33kV Pooling Sub Station and Grid Substation
- ...
- i. Snap shots of the plant from various angles, including but not limited to, WTGs, switchyards\switchgears, Power Transformers, **SCADA (screenshots with time stamped WMS data and Energy generation data)**, metering (Main, Check and Standby Meters as applicable) at delivery point etc.).
- ...
- k. **Relevant documents from SLDC/RLDC acknowledging successful data communication between plant end and SLDC/RLDC.**

Note:

- I. The WPDs may initiate synchronization of individual WTG with the grid, as per their project completion schedule, under intimation to PTC/SECI/SNA. The Commissioning of the Project shall be declared only upon synchronization of minimum cumulative capacity required to declare part commissioning of the Project under the RfS.
- II. It is re-iterated that the date of project commissioning shall be as per the dated indicated on the Commissioning Certificate issued by the SNA. Energy accounting of the Project shall commence from the date based on the declaration COD of the project in line with the provisions of the RfS and PPA.
- III. Wind Power Developers would be required to plan commissioning at least ten days ahead of the last permissible date for commissioning in accordance with MNRE guidelines/RfS. If not done so, whole responsibility for not meeting the deadline for commissioning rests solely with the WPD.

Important: The Commissioning Committee led by the SNA shall visit the Project site within 7 days from the date of intimation of proposed commissioning of the Project by the WPD. Such intimation shall be issued by the WPD only upon achieving required clearances from the concerned authorities for synchronization and commissioning of the Project. In case of the Committee not visiting the Project site within 7 days of the intimation of proposed commissioning of the Project by the WPD, the Project shall be considered as having been commissioned on the date as on 7 days after the issuance of the above intimation by the WPD, which shall be reflected in the Commissioning Committee.

22. From the above, the Commission observes that the ‘Commissioning Procedures’ *inter-alia* mandate that Commissioning Committee has to visit the Project site to witness the commissioning of the Project. The Commissioning Procedures also make it mandatory for the

Committee to visit the Project site within seven (7) days from the date of intimation of proposed commissioning of the Project by the Petitioner. However, the site visit by the Committee is dependent upon the Petitioner achieving required clearances from the concerned authorities for synchronization and commissioning of the Project. The Commissioning Procedures further mandates that in case of the Committee not visiting the Project site within seven (7) days of the intimation of proposed commissioning of the Project by the Petitioner, the Project will be considered as having been commissioned on the date as on seven (7) days after the issuance of the above intimation by the Petitioner.

23. Further, for being declared as commissioned, the Petitioner is required to submit list of documents including e.g. Plant Layout along with the SLD, clearly mentioning the details of WTG size and capacity along with the individual WTG Serial Nos., their locations, feeder details, 230/220/33kV Pooling Sub Station and Grid Substation; Snap shots of the plant from various angles, including but not limited to, WTGs, switchyards\switchgears, Power Transformers, SCADA (screenshots with time stamped WMS data and Energy generation data), metering (Main, Check and Standby Meters as applicable) at delivery point etc.; Relevant documents from SLDC/RLDC acknowledging successful data communication between plant end and SLDC/RLDC.
24. From the above, the Commission is of the view that the Petitioner was duty bound to comply with the Commissioning Procedure circulated by SECI vide email dated 04.08.2018 and the Commissioning Committee was to do the physical inspection of WTGs at site.
25. Further, the extracts of minutes of meeting of the Commissioning Committee regarding site visit on 03.01.2020 and 04.01.2020 (signed by SECI, Petitioner and GEDA) are as under:

The Minutes of Meeting of the Commissioning Committee (signed by officers of SECI, officer of Petitioner and officers of GEDA) recorded on 03.01.2020 and 04.01.2020 at the Project site at Village Ratadiya at Kutch District, State Gujarat, witnessing the Commissioning activities for 52 MW capacity (26 Nos. of WTGs of 2 MW each) of the Wind Project of the Petitioner, inter-alia, stating as under:

.....

6. Initially committee was called for commissioning on 9th December 2019, Committee was physically verified 17 WTG's. The rest of the WTG's were not shown by the WPD. Again the committee was called for inspection on 3rd & 4th January 2020 to witness the remaining WTG's. On 3rd January 2020 only additional two WTG'S were physically verified and rest of 7 WTG's were not shown by the WPD. As on 3rd January only 19

nos. of WTG's were physically verified out of total 26 nos. of WTG's. the details of 19 nos. of WTG's are enclosed as annexure-V.

7. The energy meters installed at PGCIL substation are common for Wind Power Projects of WPD under Tranche-1, 2, 3 & 4 wind schemes of SECI and also common for 75 MW wind power project under MSEDCL scheme. Due to this, the committee witnessed and recorded energy meter reading at 33 kV level at pooling substation. The details are given below:

.....

8. Based on the above, 52 MW (26 Nos. of WTGs of 2 MW Each) Wind Power Project of M/s. Adani Green Energy (MP) Limited (Project ID: WPD-ISTS-T2-AGEMPL-50GJ) may not be declared as commissioned as the committee could only be verified 19 nos. of WTGs out of 26 proposed WTG's as mentioned in para 02 above.

26. Email dated 08.02.2020 of the Petitioner to SECI regarding giving Notice prior to synchronization of 50 MW Wind Power Project of the Petitioner *inter-alia*, reads as under:

With regard to the subject captioned Project, we would like to inform you that we intend to Commission the above Project around 13-Feb-20. Kindly consider this letter as advance notice under Article- 5.1.1 of the PPA.

27. The minutes of meeting of the Commissioning Committee recorded on 19.02.2020 (signed by SECI, Petitioner, GEDA) regarding witnessing of commissioning of 50 MW capacity (25 Nos. WTGs of 2 MW each) Wind Power Project of the Petitioner, *inter-alia*, states as under:

2. Physical verification of the 25 Nos. of WTG's of 2 MW each installed at the Project site has been carried out by the Commissioning Committee on 19th February 2020.....

...

10. The committee on 19/02/2020 witnessed that 07 Nos. machines were in Production, 1 No. in startup, 2 Nos. in service while 5 Nos. in standby on the WTG SCADA at the pooling substation. Refer Annexure -VII.

11. WRLDC have confirmed the data validation of 10 WTGs. Same has been confirmed by WRLDC email dated 19/02/2020.

12. Subsequently, Commissioning cum COD certificate shall be issued upon data validation of all the 25 Nos. WTGs from WRLDC.

...

28. On 19.02.2020 the Petitioner sent an email to WRLDC, *inter-alia*, stating that

"Today we have confirmed SECI-II 10 nos. of WTG's telemetry data with Mr. Bijendar Sir. As on date total SECI-II 10 nos. of WTG's telemetry data is confirmed with WRLDC".

29. On 19.02.2020 itself, WRLDC validated telemetry data of 10WTG's as under:

'MW, MVar and wind speed of following 10 WTGs was validated today: 25,29,30,31,36,37,42,43,45,47'

30. On 27.02.2020 the Petitioner requested to WRLDC as under:

'In continue to trailing mail, Today we have confirmed SECI-II 09 nos. of WTG's telemetry data with Mr.Sardul Sir. As on date total SECI-II 19 nos. of WTGS's telemetry data is confirmed with WRLDC.'

31. On 27.02.2020 (the same day) E-mail from the WRLDC SCADA to the Petitioner, inter-alia, stating that

'Telemetry of 9 WTGs-nos 26,27,28,32,33,35,44,46 & 49 from Ratadiya SS is updating at WRLDC SCADA.'

32. On 05.03.2020 WRLDC SCADA confirmed to the Petitioner as under:

'Telemetry of 6 WTGs from 220/33 kV Ratadiya SS vide WTG no 34,39,40,41,48 & 50 is updating at WRLDC SCADA.'

33. On 06.03.2020 the Petitioner informed SECI regarding WTG data communication at WRLDC SCADA, inter-alia, stating as under:

"Please find the trailing mail received from WRLDC for data communication of balance of the WTGs dated on 5th March 2020 for our Wind Project under Tranche-II. As you are aware 10 WTGs was established on 13th Feb 2020 and balance communications have been established in phased manner. Now, that all the data are confirmed by WRLDC....

This is to kindly inform you that we complied all the requirement for issuance of COD for our Wind Project under Tranche-II.....

We are eagerly waiting for the CoD for power to be scheduled from tonight."

34. On 06.03.2020 itself, SECI issued Commissioning cum COD Certificate, inter-alia, stating as under:

...M/s. Adani Green Energy (MP) Limited (AGEMPL) has successfully commissioned the 50 MW (i.e. 25 Numbers of WTGs of 2.0 MW each) ISTS-connected Wind Power project... on 05.03.2020....

Commercial Operation Date (COD) of 50 MW ISTS- connected Wind Power Project is to be considered from dated 00:00 hrs of 07.03.2020.

This certificate has been issued on the basis of Minutes of Meeting recorded by commissioning committee on 19.02.2020 and M/s. AGEMPL's intimation dated

06.03.2020 regarding confirmation of data communication of all 25Nos. of WTGs from WRLDC.

35. From the various correspondences mentioned above, we observe that as the Commissioning Committee could verify only 19 nos. of WTGs out of 26 proposed WTGs as on 04.01.2020, the Commissioning Committee could not declare the Project as commissioned. It is further observed that the Petitioner had itself given advance notice prior to synchronization of 50 MW Wind Power Project on 08.02.2020 and informed that it intends to commission the Project around 13.02.2020. The Commissioning Committee further recorded on 19.02.2020 that only 07 Nos. WTGs were in production and WRLDC confirmed the data validation of 10 WTGs only. The Commissioning Committee specifically recorded that Commissioning-cum-COD certificate will be issued upon data validation of all the 25 Nos. WTGs from WRLDC. It is further observed from various correspondences exchanged between the Petitioner, WRLDC and SECI that the Telemetry of all WTGs from 220/33 kV Ratadiya SS was updated at WRLDC SCADA from 05.03.2020. The Petitioner on 06.03.2020 requested SECI for issuance of COD. On the same day, SECI issued Commissioning-cum-COD Certificate declaring commissioning of project from 05.03.2020 and Commercial Operation Date (COD) from dated 00:00 hrs of 07.03.2020. The Commission observes that the submission of the Petitioner that energy has flown into the grid on 03.01.2020 also does-not hold good since the telemetry integration was completed on 05.03.2020. Hence, the Commission is of the view that the Petitioner had complied with the Commissioning procedure only on 06.03.2020 and SECI has correctly issued Commissioning-cum-COD Certificate declaring commissioning of project on from 05.03.2020 and Commercial Operation Date (COD) from dated 00:00 hrs of 07.03.2020. Further, the amended commissioning procedure dated 16.04.2020 is not applicable for the Petitioner's power project which was commissioned on 05.03.2020.
36. Another issue raised by the Petitioner is about extension of the SCoD of the project to 05.03.2020 on account of alleged force majeure event(s). The Petitioner has submitted that there was delay in commissioning of the project from 03.01.2020 to 05.03.2020 on account of force majeure viz. delay in physical verification of commissioning during first and second visit by the Commissioning Committee due to Right of Way issues and agitation by the local villagers and delay in adoption of Tariff.

37. Relevant Articles of the PPA dated 29.12.2017 are as under:

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/ Buying Entity(ies), 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 SECI/ Buying Entity(ies) through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the WPD or SECI/Buying Entity(ies), or till such time such Event of Default is rectified by Buyer.

“ARTICLE 11: 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 if and only if it is declared/notified by the competent state/central authority/agency (as applicable);

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 if and only if it is declared/notified by the competent state/central authority/agency (as applicable); or

c) radioactive 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-Buying Entity(ies) PSA, thereby affecting delivery of power from WPD to Buying Entity(ies).

38. The Petitioner has placed on record , complaint letter dated 04.01.2020 addressed to the Police Sub-Inspector, Police Station, Dayapar. The extract of the letter is as under:

“This is to inform you with respect that, our 3 cars of our company were passing near village Paneli on dt. 3-1-2020, except employees of our company, officers of SECI were also present in the said vehicles. Some youngsters not allowed the vehicles of our company after 8.00 o'clock in night near Paneli village on said road and thereafter, said vehicles had to return. Persons who were there in the vehicles do not know about the persons stopped the vehicles. Above fact is for your knowledge.”

39. The Commission observes that SECI has placed on record, its letter dated 24.04.2020 to the Petitioner. The extracts of the letter are as under:

“ With reference to issues highlighted vide letter at Ref no. 1, 2 and 3, it is informed that vide letter dated 21.11.2019, SECI extended the SCD of the said Project till 03.01.2020. Considering all the reasons highlighted by M/s AGEMPL for the grant of extension and basis the guidelines issued by MNRE to grant extension of milestones in Wind Power Projects, an extension of 245 days from the original SCD (03.05.2019) of the Project was granted.

2. With reference to point 04, it is submitted that RoW issues do not qualify as Force Majeure.

3. For commissioning of your WTGs, SECI official was at your plant location from 09.12.2019 to 12.12.2019 and again on 03.01.2020 and 19.02.2020. During these visits, neither vehicle of SECI officials were stopped by any local person nor they had any interaction with any local public regarding the Project. SECI officials during these visits could witness the commissioning of only those projects which were physically shown by M/s AGEMPL. SECI official cannot certify readiness of any WTG or any RoW issues or local issues regarding WTGs which were not shown by M/s AGEMPL during the said visit.

*Also, copy of the FIR filed on 04.01.2020, as quoted in the letter, has not been enclosed in your letter / email dated 13.04.2020. **Document dated 04.01.2020 provided is the copy of the letter written to M/s AGEMPL to local police station is for information only.***

4. Further, as per commissioning procedure, WPDs are required to provide relevant documents from SLDC/ RLDC acknowledging successful data communication between plant end and SLDC/RLDC prior to commissioning. On 19.02.2020, SECI officials had witnessed that only 15 machines (WTGs) were integrated into Project level SCADA (07 in Production, 01 in Startup mode, 02 in service mode and 05 in standby mode). WRLDC also confirmed data validation for 10 WTGs only on 19.02.2020. Data for all the 25 WTGs were validated by WRLDC on 05.03.2020. From this, it can be construed that telemetry integration between Project and WRLDC, which is required for the commissioning of project, was not completed till 19.02.2020.

5. Points highlighted at point no. 05 are not very much attributable to concerned project and mere an observation made by M/s AGEMPL.

In view of the above, we regret to inform that extension in SCD from 03.01.2020 to 05.03.2020 for the said project, based on the documents submitted by M/s. AGEMPL, cannot be allowed.”

40. The Commission observes that Article 4.5 deals with the extension of time of the SCoD of the Project in case of occurrence of any Force Majeure event covered under Article 11.3 of the PPA. The Commission is of the view that the complaint letter dated 04.01.2020 seems to be the information to the Police authorities about some specific incident that occurred in the night (about 8:00 PM) in Paneli Village. However, the same cannot be said to be covered under Article 11 of the PPA. Needless-to-say, the same has been refuted by SECI vide its letter dated

24.04.2020. Hence, the Commission is of the view that no extension under Art. 4.5 of the PPA is admissible on the said ground.

41. The Commission further notes that the Petitioner has submitted that SECI has delayed in obtaining Order from the Commission for adoption of tariff and that in absence of the tariff adoption Order, no lender was willing to come forward to lend money to the Petitioner for the commencement of the Project. The Commission passed the Order on 03.12.2019 in Petition No.369/AT/2019 filed by SECI, adopting the tariff of the projects of WPDs including the Petitioner under Wind Tranche-II Scheme.

42. Article 3.1 of the PPA stipulates as under:

3.1 Satisfaction of conditions subsequent by the WPD

The WPD agrees and undertakes to duly perform and complete all of the following activities at WPD's own risk and cost within nine (9) months from the date of issuance of LoA, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by SECI:

....

b) The WPD shall make Project Financing arrangements and provide necessary certificates to SECI in this regard;

11.3 Force Majeure Exclusions

11.3.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

...

e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and

...

43. From the above, the Commission is of the view that Article 3.1 of the PPA specifically stipulates that the Petitioner has to fulfil the financial closure at its own risk and cost. Further, the said provision does not provide for any condition to be performed by SECI viz. adoption of tariff to enable the Petitioner to fulfil the financial closure. Also, it is pertinent to mention here that insufficiency of finances or funds is specifically excluded from the ambit of a Force Majeure event under Article 11.3 of the PPA. As such, the Commission is of the view that no extension under Art. 4.5 of the PPA is admissible on this ground also.

44. The issues are decided accordingly.

Issue No. 3: Whether SECI can be directed to the Respondent to refund the Liquidated Damages of Rs. 3,44,44,444 (Rs. Three Crores Forty Four Lacs Forty Four Thousand Four Hundred Forty Four Only) imposed upon the Petitioner?

45. In view of the findings of the Commission on Issue No. 1 and Issue No.2, no relief is made out under Issue No.3. Accordingly, Issue No.3 is also answered in the negative and against the Petitioner.

46. Accordingly, Petition no. 10/MP/2021 is disposed of.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
आई. एस. झा
(सदस्य)