



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No.133/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: 29th July, 2022

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 read with Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 and the relevant provisions of the PPA, inter alia seeking extension/ deferment of Scheduled Commissioning Date for 45.6 MW out of the total 250 MW wind power project on account of Force Majeure events which delayed the Petitioner in performing its obligations under the Power Purchase Agreement dated 02.01.2018 (“PPA”); declaration that the Petitioner’s Termination Notice dated 20.06.2021 claiming discharge by way of termination of the PPA with respect to the limited un-commissioned capacity of 19.9 MW out of the Project, in accordance with Article 4.5.3 read with Article 13.5 of the PPA is valid and binding; and consequential reliefs in relation thereto.

AND IN THE MATTER OF:

M/s ReNew Power Private Limited
138, Ansal Chambers II,
Bhikaji Cama Place,
New Delhi – 110066

...Petitioner

Versus

1. Solar Energy Corporation of India Limited,
1st Floor, A-Wing D-3,
District Centre Saket,
New Delhi – 110 017
2. Uttar Pradesh Power Corporation Limited,
10th Floor, Shakti Bhawan Extn.,
14 Ashok Marg,
Lucknow – 226 001
3. Punjab State Power Corporation Limited
The Mall, PSEB Head Office,
Baradari, Patiala,
Punjab – 147 001
4. The Electricity Department, Government of Goa,
Vidyut Bhavan, 3rd Floor,
Panaji, Goa – 403 001

... Respondents

Parties present: Shri Sajan Poovayya, Sr. Advocate, RPPL
Shri Aniket Prasoon, Advocate, RPPL
Ms. Raksha Agarwal, Advocate, RPPL
Ms. Shweta Vashist, Advocate, RPPL
Ms. Priya Dhankhar, Advocate, RPPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI
Ms. Srishti Khindaria, Advocate, SECI
Shri Ishan Nagpal, RPPL
Shri Vasav, RPPL
Ms. Neha Singh, SECI
Shri Shubham Mishra, SECI

आदेश/ ORDER

The Petitioner, M/s ReNew Power Private Limited (formerly known as ReNew Power Ventures Private Limited and ReNew Power Limited), is engaged in the business of generation of power and has set up a 250 MW Wind power project located in and around

Villages in Anjar, Mundra and Bhuj Taluka, Kutch District, Gujarat (Project). The Petitioner *inter alia* is seeking extension/ deferment of the Scheduled Commissioning Date (SCoD) for the part capacity of 45.6 MW out of the Petitioner's project on account of various prolonged Force Majeure events which delayed and/or prevented the Petitioner from performing its obligations under the Power Purchase Agreement (PPA) dated 02.01.2018. The Petitioner is also seeking declaration that the Petitioner's Termination Notice dated 20.06.2021 claiming discharge by way of termination of the PPA with respect to the limited un-commissioned capacity of 19.9 MW out of the Project, in accordance with Article 4.5.3 read with Article 13.5 of the PPA, is valid and binding; and consequential reliefs in relation thereto.

2. The Respondent No. 1, Solar Energy Corporation of India (SECI), is a central public sector undertaking under the administrative control of MNRE. SECI is a trading licensee under Section 14 of the Electricity Act, 2003 (the Act) and undertakes trading of power generated. The Petitioner has entered into a PPA with SECI for generation and supply of 250 MW wind power from the Project to SECI.
3. The Respondent No. 2, Uttar Pradesh Power Corporation Limited (UPPCL), is a wholly owned undertaking of the Government of Uttar Pradesh. UPPCL is a distribution licensee and undertakes bulk purchase and sale of electricity primarily on behalf of the State Utilities/Distribution Licensees in the State of Uttar Pradesh to maintain electricity distribution to the public at large.
4. The Respondent No. 3, Punjab State Power Corporation Limited (PSPCL), is a wholly owned undertaking of the Government of Punjab and is a distribution licensee in the State of Punjab.
5. The Respondent No. 4, the Electricity Department, Government of Goa (EDG) was created as a Government Department in the year 1963. EDG is the only licensee in the State of Goa for transmission and distribution of electrical energy.
6. The Petitioner has made the following prayers:
 - a. *Allow the Petition and declare that the unforeseen and uncontrollable events/factors detailed in paragraph 5 of the petition that have occurred on account of the events subsequent to the Initial SCOD, and constitute Force Majeure under Article 11 of the Power Purchase Agreement dated 02.01.2018;*

- b. *Grant an extension in the Scheduled Commissioning Date of the Project (to the extent of the un-commissioned capacity of 45.6 MW) from 12.12.2019 till the date of actual commissioning, without any adverse consequences (including imposition of liquidated damages), on account of various extended and prolonged Force Majeure events detailed in paragraphs 5 above, under Article 11 of the Power Purchase Agreement dated 02.01.2018;*
- c. *Direct the Respondent No. 1 to return/refund to the Petitioner the amount of Rs. 10,98,40,00/- (Rupees Ten Crore Ninety Eight Lakhs Forty Thousand Only) paid by the Petitioner to the Respondent No. 1 on 12.05.2021 without prejudice to rights and remedies under law;*
- d. *Set aside and quash the Respondent No. 1's letter dated 05.05.2021 bearing No. SECI/Wind/T2/RPPL/ regarding encashment of the Petitioner's Performance Bank Guarantee and reduction of the tariff payable to the Petitioner;*
- e. *Set aside and quash the Respondent No. 1's letter dated 07.05.2021 bearing no. SECI/PT/ReNew/WIND T II/2021/WFH6, calling upon the Petitioner to refund alleged excess payment made to the Petitioner;*
- f. *Hold and declare that the Petitioner has been impacted by Force Majeure events detailed in paragraph 99 of the petition for more than 9 months;*
- g. *Consequently, hold and declare that the Petitioner's Termination Notice dated 20.06.2021 claiming discharge by way of termination of the Power Purchase Agreement dated 02.01.2018 with respect to the limited un-commissioned capacity of 19.9 MW out of 250 MW, on account of various prolonged as well continuing Force Majeure events, in accordance with Article 4.5.3 read with Article 13.5 of the Power Purchase Agreement is valid and binding;*
- h. *Restrain the Respondent No. 1, i.e., Solar Energy Corporation of India Limited, from taking any coercive action against the Petitioner in furtherance of such discharge by way of termination of the PPA with respect to the limited un-commissioned capacity of 19.9 MW out of 250 MW;*
- i. *Direct the Respondent No. 1 to return/release the Petitioner's Performance Bank Guarantee dated 06.11.2020 bearing number OGT0005170016380 for an amount of Rs. 13,10,00,000/- (Rupees Thirteen Crores Ten Lakhs Only) issued by IndusInd Bank;*
- j. *Pass such other or further order (s) as this Hon'ble Commission may deem just and equitable in favour of the Petitioner in the facts and circumstances of the present case.*

Submissions of the Petitioner and date of events:

7. The Petitioner has submitted as under:

- (i) On 31.05.2017, SECI issued Request for Selection (RfS) for selection of WPDs for setting up of Inter State Transmission System (ISTS) connected wind power projects in India, on “Build Own Operate” basis for an aggregate capacity of 1000 MW.
- (ii) On 04.10.2017, SECI conducted e-reverse auction and the Petitioner emerged as one of the successful bidders.
- (iii) On 03.11.2017, SECI issued Letter of Award to the Petitioner for development of 250 MW ISTS-connected Wind Power Project, generation and sale of wind power.
- (iv) On 24.11.2017, SECI entered into three separate PSAs with Respondents (UPPCL, PSPCL & EDG) for sale of 200 MW, 150 MW, and 50 MW of wind power respectively, at a tariff of INR 2.72/kWh. The Petitioner furnished a Performance Bank Guarantee (PBG) bearing number OGT0005170016380 for amount of Rs. 50,00,00,000/- (Rupees Fifty Crores) issued by IndusInd Bank in favour of SECI, which was to remain valid till 30.11.2019.
- (v) On 02.01.2018, the Petitioner and SECI entered into a PPA. As per the PPA, the capacity apportioned under each of the aforesaid PSAs is 100 MW, 100 MW and 50 MW to UPPCL, PSPCL and EDG, respectively.
- (vi) The date of SCoD as per PPA to develop and commission the project was 03.05.2019.
- (vii) On 26.02.2018, the Petitioner vide its letter to MNRE submitted its application for grant of the NOC from Ministry of Defence (MoD) since the Project was situated in the vicinity of the Bhuj Air force Base and as such there was a requirement to obtain a NOC for height clearance from MoD for construction of the Project.
- (viii) On 04.04.2018, the Petitioner’s application for grant of NOC was forwarded by MNRE to MoD.
- (ix) On 24.01.2019, NOC was provided by MoD.
- (x) On 07.03.2019 and 30.08.2019, the Petitioner sought extension of the initial SCoD by 12 months, on account of various Force Majeure events viz. law and order situation faced at the Project site on account of Right of Way issue created by local villagers; change in land allocation policy; and delay in issuance of NOC from MoD and requested SECI to approach MNRE for the same as per Section 3.17(B) of the RFS.

- (xi) On 17.05.2019, the Petitioner successfully commissioned 126 MW which is more than 50% (fifty percent) of the Project capacity.
- (xii) During July-November 2019, there were unprecedented rainfall, cyclone, and floods in the State of Gujarat.
- (xiii) On 24.06.2019, UPPCL filed a Petition No. 1480 of 2019 before the Uttar Pradesh Electricity Regulatory Commission (UPERC) seeking adoption of tariff of INR 2.72/kWh for procurement of 200 MW of wind power and approval of the PSA (after a lapse of around 19 months since the date of signing PSA on 24.11.2017).
- (xiv) UPPCL had filed another similar petition before UPERC, being Petition No. 1481 of 2019, seeking adoption of tariff and approval of power procurement cost in context of power being procured under the PSA with PTC India Ltd.
- (xv) On 26.09.2019, UPERC issued show cause notice to UPPCL and the State Load Dispatch Centre (SLDC) for scheduling power from the projects despite the power procurement from such projects not being approved.
- (xvi) On 01.10.2019, UPPCL vide its letter requested SLDC to stop scheduling of power generated from the Petitioner's Project for want of Adoption of Tariff. SECI vide its email of the same date directed the Petitioner to stop scheduling power to UPPCL.
- (xvii) On 25.10.2019, UPERC allowed UPPCL to procure power from the projects under Petition No. 1481 of 2019.
- (xviii) On 01.10.2019, the Petitioner successfully commissioned additional Project capacity of 58.50 MW, thereby increasing the total commissioned Project capacity from 126 MW to 184.50 MW. Accordingly, the value of the PBG was also reduced to Rs. 24,75,00,000/- (Rupees Twenty Four Crores Seventy Five Lakhs) and the validity of the same was extended till 31.05.2020.
- (xix) On 03.10.2019, SECI filed Petition No. 369/AT/2019 before this Commission *inter alia* seeking adoption of tariff discovered under the RfS.
- (xx) On 09.11.2019, the Petitioner informed SECI that since only 110.7 MW out of commissioned capacity of 184.5 MW was being scheduled (due to UPPCL's letter dated 01.10.2019 whereby scheduling of power to it was stopped); and the actual power generation being in the range of 160-165 MW; the Petitioner is suffering generation loss. Accordingly, SECI may facilitate scheduling at least 150 MW, i.e. the entire contracted capacity of PSPCL and EDG. SECI vide its email requested Power System Operation Corporation (POSOCO) to allow scheduling of power to PSPCL and EDG up to the entire contracted capacity of 150 MW.

- (xxi) On 21.11.2019, SECI extended SCoD to 12.12.2019 from 03.05.2019 (initial SCoD) on account of delay in issuance of NOC by MoD.
- (xxii) On 03.12.2019, the Commission in Petition No. 369/AT/2019, *inter alia* adopted the tariff of Rs. 2.64 per unit for 250 MW quantity power to be generated from the Project.
- (xxiii) The Petitioner was delayed and/or prevented from commissioning the balance capacity of the Project by the extended SCoD, i.e., 12.12.2019, on account of the project execution works being hindered by the unprecedented rainfall, cyclone, and floods for a period of 5 months, i.e., from July to November 2019. This is despite the fact that the Petitioner took all reasonable steps to mitigate the effect of the aforesaid Force Majeure event, including deploying additional manpower and machinery to rectify the damaged roads and other waterlogged area for making it favourable for work.
- (xxiv) Therefore, it is the Petitioner's case that the extended SCoD of the Project ought to be further extended for a period of 5 months, i.e., up to May 2020, on account of Force Majeure event, namely unprecedented rainfall delaying and/or preventing the Petitioner's fulfilment of its obligations under the PPA qua commissioning the Project
- (xxv) On 20.12.2019, the Petitioner requested SECI for grant of NOC for selling the excess power to the extent of 34 MW (beyond the allocated power to the other beneficiaries) in the power exchange for the period up to 31.03.2020.
- (xxvi) On 30.12.2019, UPERC vide its order in Petition No. 1480 of 2019 approved the PSA dated 24.11.2017 executed between SECI and UPPCL.
- (xxvii) On 10.01.2020, UPPCL vide its letter to SLDC *inter alia* stated that the Petitioner may be allowed to inject power of 100 MW capacity into the grid with immediate effect. The Petitioner vide its email requested POSOCO to normalize the ratio of power scheduled to UPPCL, PSPCL and EDG in proportion to the contracted capacity, i.e., to schedule 73.8MW to UPPCL (out of 100 MW), 73.8 MW to PSPCL (out of 100 MW) and 36.9 MW to EDG (out of 50 MW).
- (xxviii) The scheduling of power from the Petitioner's Project was stopped by UPPCL in furtherance to the directions of UPERC (due to the delay in seeking tariff adoption and approval of the PSA) for a period of 3 months (i.e., from October 2019 to January 2020). During the aforesaid period, the Petitioner's investors and lenders were apprehensive about the future of the Project which also impacted the pace of

- Project execution works causing delay in commissioning the Project. This delay is not attributable to the Petitioner.
- (xxix) The delay on the part of UPPCL and SECI in filing appropriate petitions before the Appropriate Commission leading to the delay in adoption of tariff and approval of the PPA and PSA, had a huge impact on the commissioning of the Project, as the same created considerable uncertainty and anxiety amongst the Petitioner's lenders, thereby impacting Project execution activities.
- (xxx) The Petitioner's obligation to commission the Project within the stipulated timeline is reciprocal to SECI and/or UPPCL's obligation to obtain adoption of tariff and approval of the PSA. Therefore, in the absence of timely adoption of tariff and approval of the PSA by the Appropriate Commission, the Petitioner was prevented from fulfilling its reciprocal obligation of commissioning the Project within the stipulated timeline.
- (xxxi) Before the Petitioner could overcome the delay caused by unprecedented rainfall in commissioning the Project, an outbreak of COVID-19 was reported in China, to combat which China went into a state of lockdown in January 2020. In this regard, on 27.01.2020 and 29.01.2020, China issued two notifications *inter alia*, extending the lunar holidays till 09.02.2020 and announcing several measures taken by the Government to block the spread of COVID-19, including directing enterprises to submit a written application in advance to the municipal government in order to resume work.
- (xxxii) The Ministry of Finance, Government of India (MoF) *vide* its office memorandum dated 19.02.2020 bearing ref. no. F/18/4/2020-PPD, clarified that disruption of the supply chains due to the spread of COVID-19 in China or any other country should be considered as a case of natural calamity and Force Majeure clauses may be invoked.
- (xxxiii) MNRE *vide* its office memorandum dated 20.03.2020 bearing ref. no. 283/18/2020-GRID SOLAR issued directions to treat delay on account of disruption of the supply chains due to spread of COVID-19.
- (xxxiv) The Ministry of Home Affairs, Government of India (MHA) *vide* its order dated 25.03.2020 imposed country wide lockdown of 21 days from midnight of 25.03.2020, i.e., till 14.04.2020. The lockdown was extended from time to time albeit with some relaxations *vide* its orders dated 14.04.2020, 01.05.2020, 17.05.2020, 30.05.2020, and 29.06.2020.

- (xxxv) On 25.03.2020, the Petitioner informed SECI about the occurrence of a Force Majeure event as per Article 11 of the PPA, namely the COVID-19 pandemic and consequent lockdown, the impact of the same on the Petitioner's ability to fulfill its obligations qua commissioning of the balance capacity of the Project, and accordingly requested SECI that all the obligations and the timelines stipulated under the PPA with respect to SCoD be suspended till the time such Force Majeure event continues and also, SCoD should be proportionally extended upon the cessation of the Force Majeure event.
- (xxxvi) During April-May, 2020, the Petitioner managed to achieve readiness of the part capacity of 27.6 MW of the Project. However, it could not commission the same in view of the requirement to commission minimum 50 MW capacity at a time. Further, it could not even achieve readiness of additional capacity to meet the threshold of 50 MW due to Force Majeure events related to the COVID-19 pandemic.
- (xxxvii) On 08.04.2020, SECI sought details from the Petitioner regarding total WTGs erected which can be offered for commissioning, the date wise capacity addition which can be offered, and details of site along with manpower required for arranging requisite permissions for working during the lockdown imposed by the MHA. The Petitioner informed that it was ready to commission an additional capacity of 27.6 MW.
- (xxxviii) MNRE *vide* its O.M. dated 17.04.2020 bearing F. No. 283/18/2020-GRID SOLAR stated that renewable implementing agencies may grant blanket extension of time for commissioning renewable energy projects equivalent to the period of lockdown and additional 30 (thirty) days for normalization after end of such lockdown, with no requirement of case to case examination.
- (xxxix) In view of the above, the Petitioner was entitled to extension of time for commissioning the balance Project capacity from 25.03.2020 to 30.06.2020.
- (xl) The Petitioner *vide* its letter dated 29.07.2020 to SECI sought further extension of the extended SCoD for commissioning the remaining Project capacity of 65.5 MW on account of the ongoing Force Majeure events, which were beyond the reasonable control of the Petitioner. The Petitioner also requested SECI to allow commissioning of additional 27.6 MW of the Project capacity out of the balance capacity and to declare an interim extension of the SCoD from 12.12.2019 to 30.11.2020.

- (xli) Since the Petitioner had achieved readiness of a further capacity of 27.6 MW of the Project capacity for commissioning, on 15.05.2020, the value of the PBG was reduced from Rs. 24,75,00,000/- (Rupees Twenty Four Crores Seventy Five Lakhs) to Rs. 13,10,00,000/- (Rupees Thirteen Crores Ten Lakhs) and the validity of the same was extended till 31.08.2020.
- (xlii) SECI vide its letter dated 14.08.2020 to the Petitioner, in response to the Petitioner's letter dated 29.07.2020, while denying the existence of any Force Majeure event and its delay in filing the Tariff Adoption Petition, refused to extend the Extended SCoD of the Project and stated that penalty for delay in commencement of supply of power would be calculated as per MNRE's office memorandum dated 13.08.2020.
- (xliii) SECI vide the said letter dated 14.08.2020 also refused to allow the part-commissioning of the Project to the capacity of 27.6 MW.
- (xliv) MNRE vide its letter dated 27.08.2020, after considering the extraordinary situation prevalent due to COVID-19 pandemic, temporarily allowed part commissioning of 10 MW or more capacity in case of wind power projects awarded under SECI Tranche-II to Tranche-VIII and the said dispensation was to be valid till 31.12.2020.
- (xlv) SECI vide its email dated 28.08.2020 permitted the Petitioner to commission 27.6 MW of the Project capacity, out of remaining capacity of 65.5 MW.
- (xlvi) The Petitioner successfully commissioned 27.6 MW of the Project capacity on 02.09.2020.
- (xlvii) On 08.09.2020, SECI in compliance of MNRE's O.M. dated 13.08.2020, conveyed that:
- (a) The penalty period had been extended up to 09.02.2021;
 - (b) No penalty shall be applicable for the period between 25.03.2020 to 24.08.2020; and
 - (c) The revised end date for the performance bank guarantee (PBG) encashment period shall be 10.11.2020 and for the tariff reduction period shall be 09.02.2021.
 - (d) The Petitioner to convey its acceptance to the said letter within 7 (seven) days.
- (xlviii) On 11.09.2020, the Petitioner refuted the position taken by SECI by way of its letter dated 14.08.2020 and once again requested SECI to grant extension of time for

commissioning the balance Project capacity on account of the various Force Majeure events due to which the Petitioner's performance of its obligations was delayed and/or prevented.

- (xlix) On 23.09.2020, the Petitioner submitted its acceptance to the said extension, while stating that it anticipated further delays on account of COVID-19 pandemic and related events, reserved its rights under the RFS, PPA and law in this regard.
- (l) On 09.10.2020, SECI informed the Petitioner that SECI does not agree with the claims made by the Petitioner vide letter dated 11.09.2020 regarding the occurrence of any Force Majeure event.
- (li) On 03.11.2020, the Petitioner was constrained to approach the DRC *inter alia* seeking extension of the SCoD till 30.11.2020 (which was further revised by the Petitioner till 20.12.2020 *vide* email dated 03.12.2020), due to continued and prolonged Force Majeure events.
- (lii) Despite the impacts of the Force Majeure event, the Petitioner was able to achieve readiness of a further capacity of 10 MW on 01.01.2021; however, the Petitioner could not commission the same due to the reason that the relaxation provided by MNRE *vide* its email dated 27.08.2020 allowing part commissioning of 10 MW or more capacity expired on 31.12.2020.
- (liii) MNRE *vide* its email dated 03.02.2021 extended its permission to commission projects in tranches of 10 MW or more till 31.05.2021.
- (liv) Accordingly, the Petitioner successfully commissioned further 18 MW of the Project capacity on 07.02.2021. Thus, till date, the Petitioner has successfully commissioned total 230.1 MW of the Project capacity, i.e., 92.04% of the Project capacity in the following manner:

S. No.	Project Capacity	Commissioning Date
1.	126 MW	18.05.2019
2.	58.5 MW	01.10.2019
3.	27.6 MW	02.09.2020
4.	18 MW	07.02.2021

- (lv) MNRE vide O.M. dated 09.02.2021 bearing F. No. 283/18/2020-GRID SOLAR issued instructions for a blanket extension of 5 months on account of COVID-19 without case-to-case examination and without asking for any documents/evidence *vide* its earlier office memorandums; however, extension beyond 5 months can be

granted by the implementing agencies in exceptional cases, after due diligence and careful consideration of the specific circumstances of the case, and if allowed in terms of the provisions of the relevant contract.

- (lvi) On 05.05.2021, SECI conveyed DRC's decision rejecting Petitioner's claim for extension of time to the Petitioner and stated that SECI would encash the Petitioner's PBG for Rs. 10,98,40,000/- (Rupees Ten Crores Ninety-Eight Lakhs Forty Thousand) towards liquidated damages for alleged delay in commissioning the Project and also reduce the tariff for the Project from Rs. 2.64 per unit to Rs. 2.61 per unit. The said reduction of tariff is in the context of the portion of the Project capacity commissioned beyond 6 months from the Extended SCoD, i.e., 12.12.2019.
- (lvii) SECI in applying the said penalty has effectuated the same on a ***weighted average basis for the entire Project capacity***. Thus, effectively the reduction in tariff has been done for the entire commissioned capacity of the Project (i.e., tariff reduced from Rs. 2.64 per unit to Rs. 2.61 per unit for 230.1 MW commissioned capacity). In addition, SECI also sent a letter to IndusInd Bank on 06.05.2021 invoking the PBG.
- (lviii) The Petitioner informed that it is in the process of arranging funds for making payment of Rs. 10,98,40,000/- to SECI in place of encashment of the PBG and paid the same to SECI on 12.05.2021.
- (lix) On 07.05.2021, SECI requested the Petitioner to remit an amount of Rs 19,78,471/- (Rupees Nineteen Lakh Seventy-Eight Thousand Four Hundred and Seventy-One only) to SECI towards reduction of the tariff from 2.64 per unit to 2.61 per unit for the period 06.02.2021 to 31.03.2021 along with applicable surcharge @ 1.5% per month.
- (lx) Even after commissioning of the fourth tranche of 18 MW of the Project capacity on 07.02.2021, the Petitioner continued to be affected by Force Majeure events, viz. the COVID-19 pandemic (particularly the second wave), the continuing restrictions imposed by the Central and State Government (to control the spread of COVID-19) and the disruption in global and domestic supply chain, thereby preventing the Petitioner from fulfilling its obligations under the PPA qua commissioning the Project. Further, the Petitioner company's representatives involved in undertaking Project execution activities have also tested positive for COVID-19 further hindering the Petitioner's ability to commission the Project.
- (lxi) During the entire construction period of the Project, the Petitioner was prevented from undertaking its obligations under the PPA qua commissioning the Project by the

Initial SCOD on account of the following Force Majeure events:

- (i) Delay in obtaining NOC from MoD, affecting the Project from 26.04.2018 till 24.01.2019 (approximately 9 months);
 - (ii) Unprecedented rainfall, floods and cyclone, affecting the Project from July till November 2019 (approximately 5 months);
 - (iii) Extension of Lunar Holidays in China, affecting the Project from December 2019 till 09.02.2020 (approximately 2 months); and
 - (iv) COVID-19 pandemic, the consequent lockdown, and disruption in global and domestic supply chain, affecting the Project from February 2020 till date (approximately 15 months and continuing);
 - (v) Apprehensions arising out of non-scheduling of power from the Project by UPPCL (for approx. 3 months), in view of the directions of the Hon'ble UPERC, due to the inordinate delay in filing of the tariff adoption petition by SECI (for approx. 21 months) and approval of power procurement by UPPCL (for approx. 19 months).
- (lxii) Despite being adversely affected by several Force Majeure events mentioned hereinabove for a continued period of over 37 months, the Petitioner has taken mitigating steps, due to which the Petitioner could successfully commissioned 230.10 MW of the Project capacity i.e., 92.04% of the total Project capacity.
- (lxiii) However, in light of all the above reasons, beyond the control of the Petitioner, and specifically in view of the continuing Force Majeure events, which have caused cascading adverse implications for the Project, as a mitigating step, the Petitioner has decided to terminate the PPA to the extent of the limited un-commissioned capacity of 19.9 MW.
- (lxiv) On 20.06.2021, the Petitioner has issued a Termination Notice to SECI for the PPA to the extent of the limited un-commissioned capacity of 19.1 MW in accordance with Article 4.5.3 read with Article 13.5 of the PPA on account of prolonged and continuing force majeure events.
- (lxv) The Petitioner by way of the aforesaid Termination Notice has sought discharge from its obligations under the PPA only to the extent of the un-commissioned capacity which is less than 8% of the total Contracted Capacity under the PPA.
- (lxvi) The Petitioner has approached this Hon'ble Commission *inter alia* seeking extension/deferment of the SCOD for the part capacity of 45.6 MW out of the Petitioner's 250 MW Project on account of various prolonged Force Majeure events which delayed

and/or prevented the Petitioner from performing its obligations under the PPA; declaration that the Petitioner's Termination Notice dated 20.06.2021 claiming discharge by way of termination of the PPA with respect to the limited un-commissioned capacity of 19.9 MW out of the Project, in accordance with Article 4.5.3 read with Article 13.5 of the PPA, is valid and binding; and consequential reliefs in relation thereto.

Hearing dated 06.08.2021

8. The Petitioner has filed I.A. 52 of 2021 along with the instant petition, which came for hearing before the Commission on 06.08.2021. As per Records of Proceedings dated 06.08.2021, *inter-alia* it was held as under:

“5. As regards the Petitioner's prayer for interim relief, the Commission observed that reduction in tariff has been claimed to have been arrived at by SECI in accordance with the provisions of the PPA. Accordingly, the Commission declined to grant any interim relief at this stage.”

Reply by Respondent No.1, SECI

9. SECI vide its reply dated 05.10.2021, has submitted as under:

Re: Unprecedented rainfall, floods, cyclone at the project site between July, 2019- Nov,2019

- (a) The Petitioner has not furnished the relevant documents in support of the claim that the alleged unprecedented rainfall, floods and cyclone were declared as a Force Majeure event by a competent authority. The documents from Revenue Department, Gandhi Nagar or Gujarat State Disaster Management Authority furnished by the Petitioner do not state that there was rainfall, cyclone, flood amounting to Force Majeure as alleged by the Petitioner.
- (b) From June 2019 to October 2019, 613 MW of Wind Projects located in Kutch District having agreements with SECI were declared commissioned by various developers including the part capacity of 58.5 MW of the Petitioner's project was also declared during the said period.
- (c) The Petitioner did not furnish any Notice in terms of the Article 11.5.2 of the PPA dealing with Notification of Force Majeure.
- (d) The Petitioner has raised the issue of alleged delay on account of unprecedented rainfall, cyclone, and floods, for the first time, only on 03.11.2020 i.e. in the Application filed for claiming time extension before Dispute Resolution Committee (DRC) constituted by MNRE. The DRC, in its recommendation dated 02.02.2021 regarding the issue of time

extension for 250 MW Wind Power Project of the Petitioner has not granted any extension for the alleged delay on account of unprecedented rainfall, cyclone, and floods.

Re: Apprehensions caused due to non-scheduling of power by UPPCL as a result of delay in Adoption of Tariff and approval of PSA

- (e) The reliance placed by the Petitioner on the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects notified by Government of India on 08.12.2017 is misplaced. The Applicable Guidelines for the present case are the Guidelines dated 04.05.2017.
- (f) 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 Hon'ble Commission or approval of PSA by the State Commission to enable the Petitioner to fulfill the Financial Closure.
- (g) The Commission has passed order on 03.12.2019 in Petition No. 369/AT/2019 filed by SECI under Section 63 of the Electricity Act for the adoption of tariff of the projects of Wind Power Developers including the Petitioner under Tranche-II 1000 MW ISTS Scheme. The Petitioner was a party in the proceedings before the Commission in the above Petition No.369/AT/2019. 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.
- (h) The scheduled Financial Closure date was 03.08.2018 i.e.9 months from date of Letter of Award (03.11.2017) in terms of Article 3 of the PPA. The Petitioner achieved Financial Closure on 03.08.2018. Thereafter, the Petitioner achieved commissioning of part-capacity of 126 MW on 17.05.2019 and part-capacity of 58.5 MW on 29.09.2019 i.e. before the passing of the tariff adoption order by the Commission and approval of power procurement by UPERC.No issue of alleged delay in tariff adoption was raised at the stage of Financial Closure or part-commissioning of the 126 MW and 58.5 MW.
- (i) The Petitioner had raised the issue of delay in tariff adoption as one of the reasons for seeking extension of time to commission balance capacity 65.5 MW, for the first time, only by its letter dated 29.07.2020 i.e. after almost 30 months from the date of execution of the PPA dated 02.01.2018 and after the lapse of the Extended Scheduled Commissioning Date (12.12.2019) of the Project.
- (j) In regard to the above following events are relevant:
 - (i) On 26.06.2019, UPPCL, one of the buying entities had filed Petition being No.1480

- of 2019 for approval of procurement of power before UPERC.
- (ii) On 01.10.2019, SECI received letter from UPPCL whereby UPPCL informed that the injection and scheduling of power from Wind Power Projects including that of the Petitioner (73.8 MW) will not be permitted until the order is passed by this Commission for the adoption of tariff under Section 63 of the Electricity Act, 2003. SECI had duly forwarded the letter dated 01.10.2019 to the Petitioner. At this stage, UPPCL was required to take the approval of UPERC for the procurement of power. SECI was proposing to apply to the Central Commission for the adoption of tariff immediately on UPERC approving the procurement of power.
 - (iii) On 04.10.2019, immediately after the receipt of the letter dated 01.10.2019 of UPPCL, SECI had approached this Commission under Section 63 of the Electricity Act 2003 for the adoption of tariff for 1000 MW wind power projects (Tranche-II) connected to ISTS including Power Project of the Petitioner.
 - (iv) In the meanwhile, SECI had taken appropriate mitigating steps by diverting the power, in terms of Article 6.5.5 of the PSA namely the capacity of 150 MW to other buying entities, mapped with the power project of ReNew Power, i.e. Government of Goa and PSPCL with effect from 02.10.2019 till 11.01.2020.
- (k) The Petitioner had also not given Notice as per Article 11.5 of the PPA, which has been provided as a pre- condition, for claiming the alleged events of delay in adoption of tariff, non-scheduling of power by UPPCL as Force Majeure events within the scope of Article 11 of the PPA.
- (l) DRC, in its recommendation dated 02.02.2021 regarding the issue of time extension for 250 MW Wind Power Project of the Petitioner has not granted any extension for the alleged delay in adoption of tariff and non-scheduling of power by UPPCL.

Re: Delay due to force majeure event pertaining to extension of lunar holidays in China and Covid-19 pandemic

- (m) The Covid-19 pandemic cannot be said to have any impact on the Project timelines of the Petitioner. The Petitioner achieved Financial Closure on 03.08.2018. In terms of the PPA read with the letter dated 21.11.2019 of SECI, the SCoD date was 12.12.2019 i.e. prior to outbreak of Covid-19 and imposition of lockdown with effect from 25.03.2020 by the Government.
- (n) The Petitioner did not submit any document in support of the claim of disruption of the

supply chain due to spread of Covid-19 in terms of O.M. dated 20.03.2020 of MNRE. In the absence of the requisite documents, the alleged delay on account of disruption of supply chain prior to the notification of lockdown by the Government of India is specifically excluded from the scope and ambit of Force Majeure.

- (o) The extended SCoD expired on 12.12.2019, long-stop date for commissioning of the power project as per Article 4.6.2 of the PPA having expired on 09.02.2021, the Petitioner was not entitled to any further extension of time for commissioning the project on account of Covid-19.

Re: Events alleged by the Petitioner do not fall within the scope of force majeure

- (p) The dominant pre-requisite for an event to be considered as Force Majeure is that it should wholly or partly prevent or unavoidably delay the performance of the obligations under the PPA. In Article 11.3, it is again qualified that an event will be Force Majeure only if and to the extent that the event or circumstance is not within the reasonable control of the affected party and could not have been avoided even taking reasonable care and with prudent utility practices. This is specifically provided in the opening part of Article 11.3.
- (q) Article 11.3.1 of the PPA uses the word ‘means’ while enumerating the events or circumstances or combination of events stated therein as amounting to Force Majeure. It is a settled law that the use of the word ‘means’ implies that the definition is restrictive and not exhaustive and no other meaning can be assigned to the expression than is stated in the definition. It is also a settled principle that Force Majeure clauses are to be narrowly construed. In the context of the above, the claim of the Petitioner needs to be considered strictly in terms of Article 11.3.1 of the PPA.
- (r) Events alleged by the Petitioner do not fall under any of the sub-clauses specifically dealt in Article 11.3.1 of the PPA. The Force Majeure is a contractual provision expressly incorporated in the PPA and has to be considered only on the terms contained in the contract. The Petitioner had also not given Notice as per Article 11.5 of the PPA in regard to the alleged force majeure events.

Re: Claim that the Petitioner’s termination notice is valid and binding

- (s) The events alleged by the Petitioner do not qualify as Force Majeure, much less, sustained force majeure entitling the Petitioner to terminate the PPA.

Rejoinder by the Petitioner

10. The Petitioner vide Rejoinder dated 06.12.2021 has reiterated its submissions given in the pleadings and as such the same have not been reproduced for the sake of brevity. Additionally, the Petitioner has submitted as under:

Re: unprecedented rainfall, floods, and cyclones

- (i) The unprecedented rains during the months of July 2019 till November 2019 caused an unexpected and unforeseeable delay in development of the Project site. The unprecedented rain/cyclone/flood being an Act of God was a Force Majeure event in terms of Article 11.3.1(a) of the PPA and the same directly impacted and delayed the construction works of the Project for a period of 5 months. The Petitioner cannot be made liable for the delay in commissioning the Project during the months of July 2019 till November 2019, and as such, the timeline for commissioning of the Project ought to be extended for a period of 5 months from the Extended SCOD, i.e., up to 12.05.2020.

Re: Lunar Holidays in China and the COVID-19 pandemic

- (ii) SECI's contention that Force Majeure events related to the COVID-19 pandemic cannot be a ground for grant of extension of time to the Petitioner since the same occurred after the Extended SCOD is erroneous, unlawful, and wholly untenable. The timeline for commissioning of the Project ought to have been extended till May 2020, on account of the delay caused by the unprecedented rainfall, floods, and cyclones during July-November 2019. Accordingly, Force Majeure events pertaining to the COVID-19 pandemic ought to be considered for granting extension of time to the Petitioner.
- (iii) The Petitioner has also fulfilled its duty to mitigate under Article 11.6 of the PPA. This is evident from the fact that despite having continued to face numerous difficulties, as explained above, the Petitioner commissioned an additional capacity of 45.6 MW in two tranches of 27.6 MW on 01.09.2020 and 18 MW on 07.02.2021.

Re.: Apprehensions caused due to sudden non- scheduling of power by Uttar Pradesh Power Corporation Limited as a result of delay in adoption of tariff and approval of the Power Sale Agreement dated 24.11.2017.

- (iv) The inordinate delay in tariff adoption and approval of the PSA, aggravated by the stoppage of scheduling of power from commissioned capacity, which events were unforeseeable and beyond the control of the Petitioner, have not only caused grave

prejudice to the financial interest of the Petitioner but also materially contributed towards slowing down of the implementation process of the Project as no prudent utility could have continued to implement the Project and create capacity which could possibly be rendered stranded.

- (v) Even when SECI arranged certain diversion of power apportioned originally for UPPCL, to be scheduled to other beneficiaries i.e., PSPCL and EDG, the same did not put the Petitioner in the same economic position as otherwise it would have been under the PPA. Further, the said arrangement was only a short-term interim arrangement, and clearly, the Petitioner could not have been expected to continue, like in the normal scenario, with the implementation of the Project (balance capacity), basis such interim assurance. There was considerable period that went without scheduling of power (apportioned for UPPCL) and SECI's direction for diversion of power to PSPCL and EDG only came subsequently. During this period, the Petitioner suffered a total generation loss to the tune of approximately Rs. 84,00,000/- (Rupees Eighty-Four Lakhs), which was a direct consequence of the delayed tariff adoption. Therefore, all the above incidents being beyond the control of the Petitioner, cumulatively resulted in delay in execution of the Project by the Petitioner.

Re: Entitled to extension of time for commissioning the project beyond the Extended SCOD

- (vi) Article 4.5 of the PPA explicitly provides that in the event the Petitioner is prevented from fulfilling its obligations under Article 4.1 of the PPA, the SCOD is to be deferred for a reasonable period not less than day-to-day basis for the delay. Therefore, the Petitioner is eligible for grant of extension of time due to the occurrence of various prolonged Force Majeure events.
- (vii) Article 4.5.6 of the PPA an outer limit of 27 months from the date of Letter of Award dated 03.11.2017 (LoA), (i.e., 27 months from 03.11.2017, being 02.02.2020), is prescribed for commissioning of the Project. In this regard, it is the Petitioner's case that the said provision is not applicable with respect to the 45.6 MW Project capacity commissioned between the Extended SCOD and 07.02.2021, for the following reasons:
- a. As per Article 11.7.1(a) of the PPA, no party shall be in breach of its obligations pursuant to the PPA to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure event.

- b. As per Article 11.7.1(d) of the PPA, no payments shall be made by either Party affected by a Force Majeure Event for the period of such event on account of its inability to perform its obligations due to such Force Majeure Event.
- c. The outer limit of 27 months stipulated in Article 4.5.6 of the PPA is an obligation of the Petitioner to commission the Project within the stipulated period.
- d. Therefore, upon a harmonious construction of the PPA, it becomes clear that the Petitioner cannot be held responsible or liable for commissioning the Project within 27 months of the date of the LoA, on account of Force Majeure events, which are beyond the reasonable control of the Petitioner.
- e. Rather, the time period of 27 months is applicable or gets attracted in a normal scenario, where the delay in execution of the Project is on account of delay due to reasons solely attributable to the Petitioner.
- f. As such, the Petitioner is entitled for an extension of time for commissioning the Project beyond 27 months from the date of the LoA.

Re: SECI's conduct of imposing liquidated damages on the Petitioner and reduction of tariff is unlawful and untenable

- (viii) From a bare perusal of Article 4.5 read with Article 4.6 of the PPA, it is evident that consequences for delay in commissioning the Project are only applicable in the absence of extension of time under Article 4.5 of the PPA. SECI does not have any basis whatsoever for encashing the Petitioner's Performance Bank Guarantee ("PBG") for an amount of Rs. 10,98,40,000/- (Rupees Ten Crores Ninety Eight Lakhs Forty Thousand) and/or reducing the tariff of the Project.
- (ix) Article 11.7.1(d) of the PPA provides that no payments shall be made by either Party affected by a Force Majeure Event for the period of such event on account of its inability to perform its obligations due to such Force Majeure Event.
- (x) Since the Petitioner was unable to perform its obligation due to a Force Majeure event, the Petitioner cannot be made to incur payments, in the nature of liquidated damages and/or reduction of tariff and/or reimbursement of the same, for the period during which the Petitioner was impacted by Force Majeure event.
- (xi) The tariff discovered through the competitive bidding for the present transaction is one of the most competitive tariffs and therefore, it does not leave any scope for the

Petitioner to absorb any kind of liquidated damages/other financial prejudices, specifically when the delay has been caused on account of reasons beyond the reasonable control of the Petitioner.

Re: The Petitioner's Termination Notice is valid and binding

(xii) The following events were beyond the reasonable control of the Petitioner, that adversely affected the Project:

- a. Delay in obtaining NOC from MoD, affecting the Project from 26.04.2018 till 24.01.2019 (approximately 9 months);
- b. Unprecedented rainfall, floods and cyclone, affecting the Project from July till November 2019 (approximately 5 months);
- c. Extension of Lunar Holidays in China, affecting the Project from December 2019 till 09.02.2020 (approximately 2 months);
- d. COVID 19 pandemic, the consequent lockdown, and disruption in global and domestic supply chain, affecting the Project from February 2020 till date (approximately 15 months and continuing); and
- e. Apprehensions arising out of non-scheduling of power from the Project by UPPCL (for approx. 3 months), in view of the directions of the Hon'ble UPERC, due to the inordinate delay in filing of the tariff adoption petition by SECI (for approx. 21 months) and approval of power procurement by UPPCL (for approx. 19 months).

(xiii) In terms of Article 11.7.1(b) of the PPA, a party is entitled to claim relief in relation to a Force Majeure event including but not limited to those specified in Article 4.5 of the PPA. Article 4.5.3 of the PPA stipulates that 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 9 (nine) months, the parties may choose to terminate the Agreement as per the provisions of Article 13.5 of the PPA. Further, in terms of Article 13.5 of the PPA, either party shall have the right to terminate the PPA if the Force Majeure event or its effects continue beyond a period of 12 (twelve) months. The combination of Force Majeure events had continued for a period much beyond 9 (nine) months i.e., for approximately 37 months and therefore the Petitioner is entitled to terminate the PPA qua the balance un-commissioned capacity of 19.9 MW.

(xiv) The Petitioner was constrained to issue the Termination Notice dated 20.06.2021 to seek discharge by way of termination of the PPA under Article 4.5.3 read with Article

13.5 of the PPA, with respect to the limited un-commissioned capacity of 19.9 MW out of the total capacity of 250 MW.

Re: The recommendations of the Disputes Resolution Committee are baseless, untenable and in any event, the said findings are not binding on either the Petitioner or this Commission

- (xv) The reliance placed by SECI on the recommendations of the DRC in its Reply, is entirely misplaced. The said recommendations of DRC are not binding on this Commission. Rather, the same does not have any bearing, whatsoever, on the present proceedings before this Commission, which pertain to the contractually and legally protected rights of the Petitioner, emanating from the PPA. Therefore, the said recommendations ought to be disregarded by this Commission. The DRC is an internal administrative review procedure only under the aegis of the MNRE (under whom SECI is a nodal agency) and cannot supplant the jurisdiction and adjudicatory functions of this Commission. In any event, it is submitted that the dispute resolution process envisaged under the DRC cannot overrule/modify the process of adjudication set out under the Electricity Act.
- (xvi) Proceedings before DRC are in the nature of conciliation and the decision rendered therein ought not to have any bearing, whatsoever on the present proceedings. It is completely disingenuous on the part of SECI to place reliance upon the DRC proceedings and findings to prejudice the Petitioner's case.

Hearing dated 05.05.2022:

11. As per Records of Proceedings dated 05.05.2022, *inter-alia* it was held as under:
- “2. Learned senior counsel for the Petitioner and the learned senior counsel for the Respondent No.1, SECI referred to their note of arguments and made detailed submissions in the matter.*
- 3. Considering the request of the learned counsel for the Petitioner and the learned senior counsel for the Respondent, SECI, the Commission permitted the Respondent, SECI to file its note of arguments within two days with a copy to the Petitioner, who may file its written submissions within 15 days thereafter.*
- 4. Subject to the above, the Commission reserved the order in the matter.”*

Written Statement filed by SECI:

12. SECI has filed Written Statement 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:

Re: Timeline allowed for commissioning and actual commissioning of project and financial closure

- a) The scheduled Financial Closure date was 03.08.2018 i.e.9 months from date of Letter of Award (03.11.2017) in terms of Article 3 of the PPA. The Petitioner achieved Financial Closure on 03.08.2018. SCoD as defined in Article 1 of the PPA was 03.05.2019 which was revised to 12.12.2019 vide its letter dated 21.11.2019.
- b) Article 4.6 of the PPA provides for the Liquidated Damages for delay in commencement of supply of power to SECI. The timelines for commissioning of the project as per Article 4.6 of the PPA as under:

S. No.	Milestone	Timeline
1	Issuance of LoA	Zero Date (Z)
2	Commissioning of Project (part or full) without Liquidated Damages	Z + 18 Months (SCD of Project)
3	Commissioning of Project (part or full) with encashment of Performance Bank Guarantee on per day basis and proportionate to the capacity not commissioned after SCD	SCD + 06 Months
4	Commissioning of Project (part or full) with encashment of Performance Bank Guarantee for full amount and reduction in tariff at the rate of 0.50 paise/kWh per day of delay proportionate to the capacity commissioned after lapse of the period of PBG encashment (SCD + 06 Months)	SCD + 06 Months + 03 Months

- c) In terms of Office Memorandum dated 13.08.2020 of MNRE dealing with extension of time due to lockdown for Covid-19 and considering the fact that SCoD of the Project (12.12.2019) was prior to Covid-19, SECI vide its letter dated 08.09.2020 has granted relief to Project as under:
- i) Liquidated Damages shall not be levied for the period 25.03.2020 to 24.08.2020 namely the period covered by the MNRE Office Memorandum dated 13.08.2020.
 - ii) The revised end date for the PBG encashment period and Tariff reduction period shall be 10.11.2020 and 09.02.2021 respectively.
 - iii) Accordingly, the commissioning of the Project with levy of liquidated damages was extended up to 09.02.2021.

d) With the revision of SCoD of the Project and relief granted on account of COVID-19 in the period allowed for commissioning with levy of Liquidated Damages, the timeline of commissioning of the 250 MW Power Project of the Petitioner are as under:

S. No.	Milestone	As per PPA	As per SECI letter dated 21.11.2019	As per SECI letter dated 08.09.2020	Remarks
1	Commissioning of Project (part or full) without Liquidated Damages not amounting to penalty	03.05.2019	12.12.2019	12.12.2019	
2	Start Date of PBG Encashment Period	04.05.2019	13.12.2019	13.12.2019	Period from 25.03.2020 to 24.08.2020 was not considered
3	End Date of PBG Encashment Period	31.10.2019	10.06.2020	10.11.2020	
4	Start Date of Tariff Reduction Period	01.11.2019	11.06.2020	11.11.2020	
5	End Date of Tariff Reduction Period	30.01.2020	09.09.2020	09.02.2021	

e) From the above table, it emerges that:

S. No.	Project Capacity	Commissioning Date	Delay (in days)
1.	126 MW	17.05.2019	0
2.	58.5 MW	29.09.2019	0
3.	27.6 MW	01.09.2020	111
4.	18 MW	06.02.2021	268
Total: 230.10 MW			

f) Till 10.11.2020 [end date of PBG Encashment period], the Petitioner had only commissioned 212.1 MW against the awarded capacity of 250 MW.

(i) Till 09.02.2021 [end date of tariff reduction period], the Petitioner had only commissioned 230.1 MW against the awarded capacity of 250 MW.

- (ii) The Petitioner failed to achieve commissioning of the remaining 19.9 MW by 09.02.2021 i.e. the maximum time permissible for commissioning with levy of Liquidated Damages.
- g) As per Article 4.6 of the PPA, SECI has a right to encash the Performance Bank Guarantee for delay up to 6 months from scheduled commissioning date, and reduction in applicable tariff specified in Article 9 (Rs. 2.64/kWh) at the rate of 0.50 paise namely Rs.0.005/kWh (half paise) per day of delay in commissioning of the project beyond 6 months towards payment of the liquidated damages.
- h) As per Article 9.3 of the PPA, the final tariff of the entire Project after commissioning of the balance capacity will be the weighted average of the tariff of the timely commissioned capacity of the Project discovered through Reverse Auction and reduced tariff of the balanced capacity in terms of Article 4.6.2 of the PPA.
- i) Accordingly, the Liquidated Damages have been levied as under:
- i. Encashment of Performance Bank Guarantee for Rs. 10,98,40,000/- [as per Article 4.6.1 of the PPA]
 - ii. Tariff of the Project reduced to Rs. 2.61/kWh [as per Article 4.6.2 read with 9.3 of the PPA]
- j) SECI has suffered a legal injury/loss on account of non-availability of power from the SCoD entitling SECI to the recovery of liquidated damages in terms of Article 4.6 of the PPA. The Liquidated Damages/funds are to be deposited to a separate fund maintained by SECI under the guidance of MNRE. The non-deposit of the Liquidated Damages in the fund is a legal injury in view of the settled principles of law.
- k) In regard to contention made by the Petitioner in Aide-Memoire at Item No.66 that *It is pertinent to highlight that the delay of approximately 5 (five) months in commissioning of the 27.6 MW of the Project capacity from February-March 2020 till 02.09.2020, i.e., the date of actual commissioning, is not attributable to the ReNew as the aforesaid delay is solely due to SECI's refusal to allow commissioning of capacity less than 50 MW*, it is submitted that, Clause 3.14 of the Guidelines, Clause 3.17 A of the RfS Document and Article 1 of the PPA defining Commercial Operation Date provided that the minimum capacity for acceptance of part commissioning shall be 50 MW.
- l) With regard to Petitioner's claim for commissioning of 27.6 MW, SECI vide its letter dated 14.08.2020 informed the Petitioner, inter-alia, that commissioning of 27.6 MW capacity cannot be accepted at this stage.
- m) On 27.08.2020, MNRE issued a Notification temporarily allowing part commissioning of 10 MW or more capacity in case of wind power projects awarded under SECI

Tranche-II to Tranche-VIII. This dispensation was granted in view of COVID-19 pandemic and was valid till 31.12.2020. On 28.08.2020, SECI informed the Wind Power Developers including the Petitioner regarding the Notification dated 27.08.2020 of MNRE. On 01.09.2020, the Petitioner achieved part-commissioning of the capacity of 27.6 MW in terms of Notification dated 27.08.2020 of MNRE. Hence, there was no delay in commissioning of 27.6 MW was for any reasons attributable to SECI as alleged or otherwise.

- n) With regard to part-commissioning of 18 MW, SECI has submitted that, the Notification dated 27.08.2020 issued MNRE temporarily allowing part commissioning of 10 MW was valid till 31.12.2020. The Petitioner was not ready with the commissioning 18 MW by 31.12.2020. Accordingly, the dispensation provided by Notification dated 27.08.2020 of MNRE was not available to Petitioner.
- o) On 03.02.2021, MNRE issued Notification temporarily allowing part commissioning of 10 MW or more capacity in case of wind power projects awarded under SECI Tranche-II to Tranche-VIII. This dispensation was applicable till 31.05.2021. On 03.02.2021 itself, SECI informed the Wind Power Developers including the Petitioner regarding the Notification dated 03.02.2021 of MNRE. On 06.02.2021, the Petitioner achieved Part-commissioning capacity of 27.6 MW in terms of Notification dated 27.08.2020 of MNRE.

Written Submissions filed by the Petitioner:

- 13. The Petitioner has filed Written Statement 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:

Re: Termination of PPA to the tune of part capacity of 19.9MW (out of balance 65.5 MW)

- a) Even after the lapse of more than 1 (one) year, there was no clarity as to when the effects of COVID-19 pandemic will subside, and manufacturing and supply will be restored to pre-COVID levels; and more importantly, after already having suffered Force Majeure for approx. 37 (thirty-seven) months, the Petitioner decided to terminate the PPA with respect to the limited un-commissioned capacity of 19.9 MW of the Project.
- b) Article 4.5.3 read with Article 13.5 of the PPA, provides that if a Force Majeure event and/or effect thereof continues to be present beyond a period of 9 (nine) months, either

party shall have the right to terminate the PPA, without any further liability.

- c) Considering as mentioned above, the Petitioner has been continuously impacted by Force Majeure events since April 2018, i.e., for approx. 37 (thirty-seven) months, the Petitioner submits that it could not continue with the development of the remaining capacity of 19.9 MW of the Project. Accordingly, it was constrained to issue a Termination Notice to SECI on 20.06.2021 as a mitigating step claiming discharge by way of termination of the PPA with respect to the limited un-commissioned capacity of 19.9 MW out of the total Project capacity, in accordance with Article 4.5.3 read with Article 13.5 of the PPA.

Hearing dated 15.07.2022:

14. As per Records of Proceedings dated 15.07.2022, *inter-alia* it was held as under:

“The order in the present petition was reserved on 5.5.2022. However, the order could not be passed prior to the Chairperson Shri P. K. Pujari demitting the office. Accordingly, the matter is listed for hearing today through video conferencing.

2. Learned counsel for the Petitioner and the Respondent submitted that the parties have already made their respective submissions in the matter, which may be considered.

3. After hearing the learned counsel for the parties, the Commission reserved the matter for order.”

Analysis and Decision:

15. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.
16. From the submissions of the contracting parties, following issues emerge for adjudication before the Commission:

***Issue No. 1:** Whether the Petitioner was prevented by unforeseen and uncontrollable events/factors, and the same constitute Force Majeure under Article 11 of the Power Purchase Agreement dated 02.01.2018 and Whether the Scheduled Commissioning Date (to the extent of the un-commissioned capacity of 45.6 MW) needs to be extended from 12.12.2019 till the date of actual commissioning, without any adverse consequences (including imposition of liquidated damages)?*

***Issue No. 2:** Whether the Petitioner’s Termination Notice dated 20.06.2021 claiming discharge by way of termination of the Power Purchase Agreement dated 02.01.2018 with respect to the limited un-commissioned capacity of 19.9 MW out of 250 MW is in accordance*

with Article 4.5.3 read with Article 13.5 of the Power Purchase Agreement and is valid and binding?

Issue No. 3: Whether SECI letter dated 05.05.2021 regarding encashment of the Petitioner's Performance Bank Guarantee and reduction of the tariff payable to the Petitioner needs to be set-aside and Whether SECI letter dated 07.05.2021 calling upon the Petitioner to refund alleged excess payment made to the Petitioner needs to be set-aside?

Issue No. 4: Whether SECI be directed to return/release the Petitioner's Performance Bank Guarantee dated 06.11.2020 for an amount of Rs. 13,10,00,000/- (Rupees Thirteen Crores Ten Lakhs Only) issued by IndusInd Bank?

Issue No. 5: Whether SECI needs to be directed to return/refund to the Petitioner the amount of Rs. 10,98,40,00/- (Rupees Ten Crore Ninety-Eight Lakhs Forty Thousand Only) paid by the Petitioner on 12.05.2021 without prejudice to rights and remedies under law?

17. We will now discuss these issues.

Issue No. 1: Whether the Petitioner was prevented by unforeseen and uncontrollable events/factors, and the same constitute Force Majeure under Article 11 of the Power Purchase Agreement dated 02.01.2018 and Whether the Scheduled Commissioning Date (to the extent of the un-commissioned capacity of 45.6 MW) needs to be extended from 12.12.2019 till the date of actual commissioning, without any adverse consequences (including imposition of liquidated damages)?

And

Issue No. 2: Whether the Petitioner's Termination Notice dated 20.06.2021 claiming discharge by way of termination of the Power Purchase Agreement dated 02.01.2018 with respect to the limited un-commissioned capacity of 19.9 MW out of 250 MW is in accordance with Article 4.5.3 read with Article 13.5 of the Power Purchase Agreement and is valid and binding?

18. Since Issue no.1 and Issue no.2 are interconnected and to be decided on same set of facts and law hence, they are taken up together for discussion.

19. The Petitioner was selected for development of 250 MW ISTS-connected Wind Power Project, generation and sale of wind power. On 02.01.2018, the Petitioner and SECI entered into the PPA. The date of SCoD as per PPA to develop and commission the Project was 03.05.2019. On 17.05.2019, the Petitioner successfully commissioned 126 MW which is more than 50% (fifty percent) of the Project capacity. On 01.10.2019, the Petitioner successfully commissioned additional Project capacity of 58.50 MW, thereby increasing the total commissioned Project capacity to 184.50 MW. On 03.12.2019, the Commission in

Petition No. 369/AT/2019, *inter alia* adopted the tariff of Rs. 2.64 per unit for 250 MW quantity power to be generated from the Project. SECI extended SCoD to 12.12.2019 from 03.05.2019 (initial SCoD) on account of delay in issuance of NOC by MoD.

20. The Petitioner has submitted that some events were beyond the reasonable control of the Petitioner and hence constitute Force Majeure events. The Force Majeure that adversely affected the Project are as under:
- a. Delay in obtaining NOC from MoD, affecting the Project from 26.04.2018 till 24.01.2019 (approximately 9 months);
 - b. Unprecedented rainfall, floods and cyclone, affecting the Project from July till November 2019 (approximately 5 months);
 - c. Extension of Lunar Holidays in China, affecting the Project from December 2019 till 09.02.2020 (approximately 2 months);
 - d. COVID 19 pandemic, the consequent lockdown, and disruption in global and domestic supply chain, affecting the Project from February 2020 till date (approximately 15 months and continuing); and
 - e. Apprehensions arising out of non-scheduling of power from the Project by UPPCL (for approx. 3 months), in view of the directions of the Hon'ble UPERC, due to the inordinate delay in filing of the tariff adoption petition by SECI (for approx. 21 months) and approval of power procurement by UPPCL (for approx. 19 months).
21. MNRE vide its letter dated 27.08.2020, after considering the extraordinary situation prevalent due to COVID-19 pandemic, temporarily allowed part commissioning of 10 MW or more capacity in case of wind power projects awarded under SECI Tranche-II to Tranche-VIII and the said dispensation was to remain valid till 31.12.2020. SECI vide its email dated 28.08.2020 permitted the Petitioner to commission 27.6 MW of the Project capacity, out of remaining capacity of 65.5 MW. The Petitioner commissioned 27.6 MW of the Project capacity on 02.09.2020.
22. On 08.09.2020, SECI in compliance of MNRE's O.M. dated 13.08.2020, conveyed that:
- a. The penalty period had been extended up to 09.02.2021;
 - b. No penalty shall be applicable for the period between 25.03.2020 and 24.08.2020; and
 - c. The revised end date for the performance bank guarantee (PBG) encashment period

shall be 10.11.2020 and for the tariff reduction period shall be 09.02.2021.

23. The Petitioner approached the DRC on 03.11.2020 but the claim was rejected. Thereafter, on 05.05.2021, SECI informed the Petitioner that it would encash the PBG towards liquidated damages for alleged delay in commissioning the Project and also reduce the tariff for the Project from Rs. 2.64 per unit to Rs. 2.61 per unit in the context of the portion of the Project capacity commissioned beyond 6 months from the Extended SCoD, i.e., 12.12.2019.
24. Briefly, the gist is as under:

S. No.	Project Capacity	Extended SCoD	Commissioning Date	Penalty
1.	126 MW	12.12.2019	18.05.2019	No Penalty
2.	58.5 MW	12.12.2019	01.10.2019	No Penalty
3.	27.6 MW	12.12.2019	02.09.2020	<ul style="list-style-type: none"> PBG encashment for delay of 111 days <i>As per the letter dated 08.09.2020, SECI has already given benefit for the period from 25.03.2020 to 24.08.2020 (153 days). Therefore, excluding 153 days, the delay is for 111 days [264 days (12.12.2019 to 02.09.2020) minus 153 days]</i>
4.	18 MW	12.12.2019	07.02.2021	<ul style="list-style-type: none"> PBG encashment for delay of 180 days Tariff reduction for 88 days <i>Excluding 153 days as discussed above.</i>
5.	19.9 MW	Termination notice issued on 20.06.2021		

25. The Petitioner commissioned total 230.1 MW of the Project capacity in four phases till 07.02.2021. The Petitioner has submitted that delay in achieving commissioning was due to various unforeseeable events and circumstances which adversely affected the development and setting up the projects. Therefore, the delay is required to be condoned. *Per contra*, SECI has submitted that it has already granted extension of SCoD till 12.12.2019 and any further extension claimed by the Petitioner under the guise of Force Majeure events is not tenable since the events highlighted by the Petitioner are not Force Majeure events.

26. We observe that the relevant provisions of the PPA stipulate 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.

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 timeperiod 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 not 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:

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.”

“11.3 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) 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).*

11.4. Force Majeure Exclusions

11.4.1 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:

- a. unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the power project;*
- b. Delay in the performance of any contractor, sub-contractor or their agents;*
- c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;*
- d. Strikes at the facilities of the Affected Party;*
- e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and*
- f. Non-performance caused by, or connected with, the Affected Party's:*
 - i. Negligent or intentional acts, errors or omissions;*
 - ii. Failure to comply with an Indian Law; or*
 - iii. Breach of, or default under this Agreement*

... ”

13.5 Termination due to Force Majeure

*13.5.1 If the Force Majeure Event or its effects continue to be present beyond a period of **twelve (12) months**, either Party shall have the right to cause termination of the Agreement. In such an event this Agreement shall terminate on the date of such*

Termination Notice without any further liability to either Party from the date of such termination.

27. We observe that Article 4.5 mandates that on occurrence of force majeure events the SCoD of the project can be deferred. Further, as per Article 4.5.3, in case such Force Majeure Event continues even after a maximum period of nine (9) months the contracting parties may choose to terminate the Agreement as per the provisions of Article 13.5. As per Article 13.5.1, if the Force Majeure Event or its effects continue to be present beyond a period of twelve (12) months, either Party shall have the right to cause termination of the Agreement without any further liability to either Party from the date of such termination. It is observed that Article 4.5.3 read with Article 13.5.1 of the PPA provides that the PPA can be terminated after twelve (12) months if the Force Majeure Events and their effects continue beyond the said period of 12 months. Further, Article 11.3 stipulates that Force Majeure means any event or circumstance or combination of events that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations viz. Act of God, any act of war, Radioactive contamination or ionising radiation, or an event of Force Majeure identified under Buyer- Buying Entity(ies) PSA, thereby affecting delivery of power from WPD to Buying Entity(ies). Further, unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the power project are specifically excluded from the Force Majeure events. Further, Article 4.6 stipulates that in case of delay of SCoD by six months the SECI is entitled to encash the Performance Bank Guarantee (PBG) on per day basis and proportionate to the balance Capacity not commissioned. Further, SECI has the right to reduce the tariff discovered at the rate of 0.50 paise/kWh per day of delay for the delay in such remaining capacity which is not commissioned for the delay beyond six months.
28. In the instant case, the initial SCoD of the project was 03.05.2019 (initial SCoD) which was extended by SECI to 12.12.2019 (extended SCoD) on account of delay in issuance of NOC by MoD. Further, as per the letter dated 08.09.2020, SECI has already given benefit of the period from 25.03.2020 to 24.08.2020 (153 days). SECI has thus calculated the days as under:
- a) For PBG encashment: from 13.12.2019 to 10.11.2020 i.e. (333 days - 153 days = 180 days)
 - b) The Tariff Reduction Period 11.11.2020 to 07.02.2021 i.e. (88 days)

29. Now we take the issues event wise as submitted by the Petitioner to analyse which of the events falls under the force Majeure events as per Article 11.3 of the PPA:

a. Re: Delay in obtaining NOC from MoD, affecting the Project from 26.04.2018 till 24.01.2019

30. We observe that the Petitioner in its plaint has submitted that SECI *vide* its letter dated 21.11.2019 informed the Petitioner that its request for extension of time had been accepted and the Initial SCoD of the Project (i.e., 03.05.2019) was extended up to 12.12.2019, i.e., the Extended SCoD, on account of delay in issuance of NOC by MoD. Since, it's claim for extension of time due to delay in issuance of NOC by MoD was accepted by SECI. As such, there is no dispute between the Petitioner and SECI on this aspect. In view of above, the Commission holds that the event already stands addressed.

b. Re: Unprecedented rainfall, floods and cyclone, affecting the Project from July till Nov. 2019

31. The Petitioner has submitted that the project was delayed and/or prevented from performing its obligations qua commissioning on account of Force Majeure events (Act of God) of unprecedented rainfall, floods and cyclone during the month of July, 2019 till November 2019 and therefore the timeline for commissioning of the project should be extended for a period of 5 months from the Extended SCOD i.e. upto 12.05.2020. ***Per contra***, SECI has submitted that the Petitioner has not furnished the relevant documents in support of the claim that the alleged unprecedented rainfall, floods and cyclone was declared as a Force Majeure event by a competent authority. The documents from Revenue Department, Gandhi Nagar or Gujarat State Disaster Management Authority furnished by the Petitioner do not state that there was rainfall, cyclone, flood amounting to Force Majeure as alleged by the Petitioner. Further, from June 2019 to October 2019, 613 MW of Wind Project located in Kutch District was declared commissioned by various developers having agreements with SECI including the part capacity of 58.5 MW of the Petitioner's project which was also commissioned during the said period.

32. We observe that Article 13.3.1 stipulates that any event or circumstance or combination of events that wholly or partly prevents or unavoidably delays the contracting Party in the performance of its obligations viz. *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* is recognized

under the definition of Force Majeure.

33. We observe that the Petitioner has placed reliance on the data obtained from the State Emergency Operation Centre, Revenue Department, Gandhinagar as well as newspaper articles to show that there was unprecedented rainfall in the area preventing it from executing further works. We note that the Petitioner has neither brought on record, any Notice of Force Majeure issued to SECI in terms of the Article 11.5.2 of the PPA highlighting as to how the Project of the Petitioner was affected nor has placed on record an official document/notification clearly classifying the rainfall as a Force Majeure event. It is a settled position that where a 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, it is a sine qua non for invoking the clause under force majeure. Additionally, there is no official document from an appropriate authority classifying the unprecedented rainfall as a Force Majeure event and the period of such Force Majeure, if any. As such, the Commission holds that no relief can be extended to the Petitioner for the alleged event.

c. Re: Extension of Lunar Holidays in China, affecting the Project from December 2019 till 09.02.2020 (approximately 2 months) and the COVID-19 pandemic, the consequent lockdown, and disruption in global and domestic supply chain

34. The Petitioner has claimed that extension of Lunar Holidays (China issued Notifications dated 27.01.2020 and 29.01.2020 extending Lunar Holidays till 09.02.2020) and Outbreak of Covid-19 (February, 2020 to till date) has affected the import and supply of equipment, logistics, WTG components for the power project and the Petitioner is entitled to extension of time beyond 5 months stipulated for in Office Memorandum dated 13.08.2020 of MNRE. **Per contra**, SECI has submitted that the Lunar Holidays do not constitute Force Majeure within the scope of Article 11 of the PPA. In fact, it falls within the scope of Article 11.4 of the PPA dealing with force majeure exclusion. Additionally, Lunar Holidays and Covid-19 cannot be said to have any impact on the Project timelines of the Petitioner since the Petitioner achieved Financial Closure on 03.08.2018. In terms of the PPA read with letter dated 21.11.2019 of SECI the SCoD was 12.12.2019 i.e. prior to outbreak of Covid-19 and imposition of lockdown with effect from 25.03.2020 by the Government on account of Covid-19.
35. We observe that MNRE O.M. dated 20.03.2020 recognized the disruption in supply chain on account of Covid-19 prior to the Lockdown period and imposition of Lockdown by the Government of India only for the purpose of granting extension of time to the Renewable Power Developers to commission their projects. The relevant extract of the same is as given

below:

36.

“3. ...

- a) *All Renewable Energy implementing agencies of the Ministry of New and Renewable Power (MRE) are **hereby directed to treat delay on account of disruption of the supply chains due to spread of coronavirus in China or any other country.***
- b) *The Renewable Energy implementing agencies may grant suitable extension of time for projects, on account of coronavirus, based on evidences / documents produced by developers in support of their respective claims of such disruption of the supply chains due to spread of coronavirus in China or any other country.*
- c) *Further, all project developers claiming aforesaid disruption and desirous of time extensions, shall make, a formal application to SECI/ NTPC/ other implementing agencies, giving all documentary evidence(s) in support of their claim. SECI/ NTPC/ Implementing agencies shall examine the claim objectively and grant appropriate Extension of Time (EoT) based on facts. While considering the requests for grant of extension of time on account of disruption of the supply chains due to spread of coronavirus in China or any other country, SECI/NTPC/any other implementing agency may fully **satisfy itself that the claimants were actually affected due to disruption of the supply chains due to spread of coronavirus in China or any other country in the period for which extension of time has been claimed.** The implementing agencies shall also ensure that no double relief is granted due to overlapping periods of time extension granted for reasons eligible for such relief.”*

37. MNRE vide another O.M. dated 13.08.2020 bearing No. 283/18/2020-GRID SOLAR directed that all RE projects under implementation as on the date of lockdown i.e., 25th March 2020, through RE Implementing Agencies designated by the MNRE or under various schemes of the MNRE, shall be given a time extension of 5 (five) months from 25.03.2020 to 24.08.2020. The relevant portion is given below:

“(3) ...

- a) *All Renewable Energy (RE) implementing agencies of the Ministry of New & Renewable Energy (MNRE) will treat lockdown due to COVID-19 as Force Majeure*
- b) *All RE projects under implementation as on the date of lockdown i.e. 25th March 2020, through RE Implementing Agencies designated by the MNRE or under various schemes of the MNRE shall be given a time extension of 5 (five) months from 25th March 2020 to 24th August 2020. This blanket extension, if invoked by the RE developers will be given without case to case examination and no documents/evidence will be asked for such extension.*
- c) *The timelines for intermediate milestones of a project may also be extended within the extended time provided for commissioning.*

...”

38. We further observe that SECI vide its letter dated 08.09.2020 had given relief to the Petitioner

consistent with O.M. dated 13.08.2020 of MNRE, Government of India, inter-alia, as under:

“In supersession of this Office letter dated 18.05.2020 (referred above at sl. No. 01) and in compliance to MNRE OM No. 283/18/2020-GRID SOLAR dated 13.08.2020, following is hereby conveyed:

- i. Penalty period has been extended up to 09.02.2021*
- ii. No penalty shall be applicable for the period 25.03.2020 to 24.08.2020.*
- iii. Based on the above points, the revised end date for the PBG encashment period and Tariff reduction shall be 10.11.2020 and 09.02.2021 respectively*

It is requested to convey your acceptance to this letter by counter signing this letter and providing the same to SECI within 07 days of date of issuance of this letter.

This is issued without prejudice to other terms and conditions of the RfS and PPA.”

39. It is observed that Article 11.4.1(a) specifically excludes any event of unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the power project from the ambit of Force Majeure. Nonetheless, in view of MNRE's OM dated 20.03.2020, the Petitioner has to submit the documents in support of claim of disruption of the supply chain due to spread of Covid-19 to be considered the claim under Force Majeure. As per SECI, the Petitioner has not submitted any such documents. Therefore, the Petitioner's claim seeking extension of five months on account of disruption in supply chain due to lunar holidays in China and the lockdown in China due to COVID-19 is not tenable.
40. Further, in consonance with MNRE's OM dated 13.08.2020, the Petitioner has been granted a blanket extension of 5 months (that is, from 25.03.20020 to 24.02.2020) by SECI. As such, the Commission holds that no additional relief can be extended to the Petitioner for the alleged events.

Re: Apprehensions arising out of non-scheduling of power from the Project by UPPCL in view of the directions of the UPERC, due to the inordinate delay in filing of the tariff adoption petition by SECI and approval of power procurement by UPPCL

41. The Petitioner has alleged that inordinate delay in tariff adoption and approval of PSA by the Appropriate Commissions, had caused grave financial prejudice to the Petitioner and contributed to slowing down the implementation of power project. The Petitioner has further alleged that as a consequence of failure of UPPCL to approach UPERC in a time bound manner to obtain order approving the PSA, UPPCL stopped scheduling of power as per direction of UPERC and the same caused apprehensions in the minds of the lenders and

investors regarding the future of the project. *Per contra*, SECI has submitted that the Petitioner was not affected in as much as the power generated from the existing capacity were being sold to other identified Buying Entities i.e. Punjab and Goa at the instance of SECI as well as the Petitioner was allowed to sell the Power in the Power exchange, and hence, the claim is misplaced.

42. We observe that Article 3 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:

- a) Not Used;*
- b) The WPD shall make Project financing arrangements and provide necessary certificates to SECI in this regard;*
- c) Not Used;*
- d) The WPD shall provide grant of connectivity intimation letter issued by CTU within nine (9) months from issuance of LoA;*
- e) The WPD shall also produce the documentary evidence of the clear title and possession of the acquired land for the Project;*
- f) The WPD shall fulfil the technical requirements according to criteria mentioned under Clause 3.5.9 of the RfS and produce the documentary evidence of the same.*

43. From above, we observe that the PPA executed between Petitioner and SECI do not provide for any such condition precedent of Adoption of Tariff or approval of PSA for implementation of the PPA. Article 3 does not stipulate adoption of tariff by this Commission or approval of PSA by the State Commission as a condition for fulfillment of Financial Closure by the Petitioner. It is pertinent to mention here that the Financial Closure date was 03.08.2018 i.e. 9 months from date of Letter of Award (03.11.2017) in terms of Article 3 of the PPA and it is an admitted fact that the Petitioner achieved Financial Closure on 03.08.2018.

44. We observe that on 24.06.2019, UPPCL filed a petition bearing No. 1480 of 2019 UPERC, seeking adoption of tariff at INR 2.72/kWh for procurement of 200 MW of wind power and approval of the PSA, after much delay. On the same date another Petition No. 1481 of 2019 seeking adoption of tariff and approval of power procurement from PTC India Ltd. Further, SECI filed a petition bearing No. 369/AT/2019 before this Commission for adoption of tariff after 21 months from the date of signing PPA i.e. 03.10.2019. Meanwhile, on 09.11.2019, SECI had also requested Power System Operation Corporation (POSOCO) to allow

scheduling of power from Petitioner's Project to beneficiaries (i.e., PSPCL and Goa) up to their complete LTA contracted quantum i.e. total of 150 MW.

45. It is noted that on 03.12.2019, this Commission, adopted the tariff of Rs. 2.64/kWh for the 250 MW being developed by Petitioner, under Section 63 of the Electricity Act, in Petition No. 369/AT/2019. Further, the Original SCOD was extended to 12.12.2019 on account of delay in receiving of NOC from MoD.
46. We observe that the tariff was adopted by the Commission on 03.12.2019 i.e. before the lapse of the Extended SCoD viz. 12.12.2019 of the Project. The Commission is of the view that once the Tariff as per (PPA between the contracting parties) has been adopted and becomes enforceable, it becomes the duty of the Respondents to make arrangement for off-take of power. In the instant case, once the Tariff was adopted by the Commission on 03.12.2019 (before the lapse of extended SCoD i.e. 12.12.2019), it was duty of the SECI to make arrangement/alternate arrangement for the supply of the power, which it complied with.
47. It is further noted that the Petitioner had commissioned 184.5MW as on 01.10.2019. Vide email dated 09.11.2019 i.e. well before 12.12.2019 (Extended SCoD) SECI requested POSOCO, *inter-alia*, as under:

"Subject: Request for opening of LTA ratio to 100% for Goa (50MW) & Punjab (100MW) Discom_SECI-2 (RPL

With reference to subject, as per UPPCL letter no 1961 Dated: 01st Oct 19, our scheduling to UP Discom has been stopped from 2nd Oct 19 owing to non-adoption of PPA tariff by CERC.

Currently CoD declared for 184.5 out of 250 MW for which ratio for each discom is given below:

UP discom: 73.8 MW out of 100 MW LTA (40%)

Punjab Discom: 73.8 MW out of 100 MW LTA (40%)

Goa Discom: 36.9 MW out of 50 MW LTA (20%)

So, currently we are able to do only 110.7 MW out of 184.5 MW scheduling and actual power is going up to 160- 165 MW.

So, we request you to facilitate at least 150MW scheduling which is full capacity of other contracted DISCOMs to avoid generation loss (Punjab up to 100 MW and Goa up to 50 MW).

48. We further observe that on 20.12.2019, the Petitioner requested SECI, for issuance of NOC for selling the excess power (beyond allocation to Goa and Punjab) to the extent of 34 MW in the Power Exchange for the period up to 31.03.2020. SECI has categorically submitted that

on 21.12.2019, the Petitioner was allowed as follows: *'excess energy beyond 150 MW Wind Power scheduling may be scheduled outside till scheduling is allowed by UPPCL (Uttar Pradesh Power Corporation Limited).'*

49. On 30.12.2019, UPERC passed order in Petition No.1480/2019 filed by UPPCL, approving the PPA and PSA and the procurement of power thereunder. By Letter dated 10.01.2020, UPPCL requested Uttar Pradesh Power Transmission Limited that in view of the orders passed by the Commission and UPERC, the Wind Power Generators including the Petitioner may be allowed to inject power with immediate effect. Further, SECI vide email dated 10.01.2020 requested the Petitioner *'....to take necessary steps to start scheduling of 100 MW Wind Power to UPPCL with immediate effect'*.
50. We observe that the Petitioner has raised the issue of delay in tariff adoption as a reason for seeking extension of time to commission balance capacity 65.5 MW, by its letter dated 29.07.2020 i.e. after almost 30 months from the date of execution of the PPA dated 02.01.2018 and after the lapse of the Extended SCoD viz. 12.12.2019 of the Project.
51. We are of the view that since the Commission had adopted the tariff in Petition No. 369/AT/2019 on 12.12.2019 i.e. before lapse of extended SCOD (12.12.2019), there could not be any apprehension for sale of power by the Petitioner to SECI in compliance with PPA dated 02.01.2018. Further, SECI had taken appropriate steps for further supply of power in terms of the PSA (150 MW) to other buying entities, mapped with the project with effect from 02.10.2019 till 11.01.2020. Additionally, SECI also allowed the Petitioner to sell excess energy beyond 150 MW Wind Power to be scheduled outside (Power Exchange) till scheduling is allowed by UPPCL.
52. The Petitioner has alleged apprehensions arising out of non-scheduling of power from the Project by UPPCL in view of the directions of the UPERC, due to the inordinate delay in filing of the tariff adoption petition by SECI and approval of power procurement by UPPCL. It is a well settled law that apprehension cannot form the basis of *'avoidance of contract'*. For avoidance of contract (though partly in the instant petition) by the affected party, there has to be some cause of action that makes performance of the contract terms impossible or inequitable and that releases the parties from their obligations. It cannot be on the basis of apprehensions.

53. It is observed that Article 11.3 stipulates that Force Majeure means any event or circumstance or combination of events that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations viz. Act of God, Any act of war, Radioactive contamination or ionising radiation, or an event of Force Majeure identified under Buyer-Buying Entity(ies) PSA, thereby affecting delivery of power from WPD to Buying Entity(ies). Clearly, the claim of the Petitioner based on ‘apprehensions arising out of non-scheduling of power from the Project by UPPCL’ is not covered under Article 11.3 of the PPA and, therefore, does not constitute Force Majeure event.
54. In the instant case there is a valid PPA between the Petitioner and the Respondents and the contracting parties are bound by the terms and conditions of the impugned PPA. The adoption of tariff qua PPA has taken place well before the lapse of extended SCoD and SECI has made alternate arrangements for supply of power accordingly till the adoption of tariff qua PSA by the appropriate forum. Part commissioning/ termination of the contract was the unilateral decision of the Petitioner based on its own judgment. Hence, in our view the Petitioner has failed to make out its case under this event.
55. In view of the discussions held in preceding paragraphs, we hold that the Petitioner has failed to prove happening of any Force Majeure event under Article 11 of the PPA dated 02.01.2018 and as such the request for extension of SCoD beyond 12.12.2019 cannot be considered. Accordingly, the Petitioner’s Termination Notice dated 20.06.2021 claiming discharge is not in accordance with Article 4.5.3 read with Article 13.5 of the PPA.

Issue No. 3: Whether SECI letter dated 05.05.2021 regarding encashment of the Petitioner’s Performance Bank Guarantee and reduction of the tariff payable to the Petitioner needs to be set-aside and whether SECI letter dated 07.05.2021 calling upon the Petitioner to refund alleged excess payment made to the Petitioner needs to be set-aside?

AND

Issue No. 4: Whether SECI is to be directed to return/release the Petitioner’s Performance Bank Guarantee dated 06.11.2020 for an amount of Rs. 13,10,00,000/- (Rupees Thirteen Crores Ten Lakhs Only) issued by IndusInd Bank?

AND

Issue No. 5: Whether SECI needs to be directed to return/refund to the Petitioner the amount of Rs. 10,98,40,00/- (Rupees Ten Crore Ninety-Eight Lakhs Forty Thousand Only) paid by the Petitioner on 12.05.2021 without prejudice to rights and remedies under law?

56. 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, Issue No.4 and Issue No.5. Accordingly, Issue No.3, Issue No.4 and Issue No.5 are also answered in the negative and against the Petitioner.
57. Accordingly, the Petition No. 133/MP/2021 is disposed of as discussed above

Sd/-
(पी. के. सिंह)
सदस्य

Sd/-
(अरुण गोयल)
सदस्य

Sd/-
(आई. एस. झा)
सदस्य