

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 114/MP/2022
Petition No. 115/MP/2022**

Coram:

**Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P.K. Singh, Member**

Date of Order: 07.03.2023

Petition No. 114/MP/2022

In the matter of

Petition under Section 79(1)(f) read with Section 79(1)(b) of the Electricity Act, 2003 filed by Green Infra Renewable Energy Limited seeking to install additional 5% capacity for its 249.90 MW Wind Power Project located in Tuticorin District, Tamil Nadu in accordance with the Scheme for setting up of 1000 MW ISTS - connected Wind Power Projects dated 22.10.2016 issued by the Ministry of New & Renewable Energy and Request for Selection Document for Scheme for setting up of 1000 MW ISTS - connected Wind Power Projects dated 28.10.2016.

And

In the matter of:

1. Green Infra Renewable Energy Limited (GIREL)
5th Floor, Tower C, Building No. 8,
DLF Cybercity, Gurugram 122 002
Haryana, India.
2. Green Infra Wind Energy Limited (GIWEL)
5th Floor, Tower C, Building No. 8,
DLF Cybercity, Gurugram 122 002
Haryana, India

.....Petitioners

Vs

1. Solar Energy Corporation of India Limited (SECI)
1st Floor, D-3, A Wing, Prius Platinum
Building District Centre, Saket, New Delhi – 110 017



2. PTC India Limited (PTCIL)
2nd Floor, NBCC Tower, 15,
Bhikaji Cama Place, New Delhi-110 066
3. BSES Rajdhani Power Limited (BRPL)
BSES Bhawan,
Nehru Place, 3 New Delhi -110 019
4. Uttar Pradesh Power Corporation Limited (UPPCL)
Shakti Bhawan, 14, Ashok Marg,
Lucknow, UP – 226 001
5. Jharkhand Bijli Vitran Nigam Limited (JBVNL)
Engineering Building, H.E.C, Dhurwa,
Ranchi-834 004, Jharkhand
6. North Bihar Power Distribution Company Limited (NBPDCCL)
Vidyut Bhawan, Bailey Road,
Patna, Bihar – 800 021

.....Respondents

Petition No. 115/MP/2022

In the matter of:

Petition under Section 79(1)(f) read with Section 79(1)(b) of the Electricity Act, 2003 filed by Green Infra Wind Energy Limited seeking to install additional 5% capacity for its 250 MW Wind Power Project located in Gujarat in accordance with the Guidelines for Transparent Bidding Process for Implementation of Scheme for setting up of 1000 MW ISTS-connected Wind Power Projects, dated 4.5.2017 issued by the Ministry of New & Renewable Energy and Request for Selection Document for Scheme for setting up of 1000 MW ISTS - connected Wind Power Projects dated 31.05.2017

And

In the matter of:

Green Infra Wind Energy Limited (GIWEL)
5th Floor, Tower C,
Building No. 8, DLF Cybercity, Gurugram 122002,
Haryana, India

Petitioner

Vs



1. Solar Energy Corporation of India Limited (SECI)
1st Floor, D-3, A Wing, Prius Platinum
Building District Centre, Saket, New Delhi – 110 017
2. Assam Power Distribution Company Limited (APDCL)
4th Floor, Bijulee Bhawan, Paltan Bazaar,
Guwahati, Assam 781 001
3. GRIDCO Limited (GRIDCO)
Gridco Colony
Janpath, Bhoi Nagar, Bhubaneswar,
Odisha 751 022
4. Jharkhand Bijli Vitran Nigam Limited (JBVNL)
Engineering Building
H.E.C, Dhurwa, Ranchi-834 004, Jharkhand

....**Respondents**

For Petitioners:

Shri Vishrov Mukerjee, Advocate, Green Infra
Shri Pratyush Singh, Advocate, Green Infra
Ms. Anamika Rana, Advocate, Green Infra
Shri Vikrant Nagpal, Advocate, Green Infra

For Respondents:

Shri M.G. Ramachandran, Senior Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Surbhi Kapoor, Advocate, SECI
Ms. Srishti Khindaria, Advocate, SECI
Shri Ravi Kishore, Advocate, PTC
Shri Keshav Singh Advocate, PTC
Ms. Neha Singh, SECI
Shri Shubham Mishra, SECI
Ms. Aditee Nitnavare, SECI
Shri Dhruv Tripathi, PTC

ORDER

The present petitions have been filed the Petitioners, Green Infra Renewable Energy Limited (GIREL) and Green Infra Wind Energy Limited (GIWEL) under Section 79(1)(f) read with Section 79(1)(b) of the Electricity Act, 2003 seeking to install additional 5% capacity to



their 249.9 MW and 250 MW Wind Power Projects located in the districts of Tuticorin (Tamil Nadu) and Kutch (Gujrat) respectively in accordance with the Scheme for setting up of 1000 MW ISTS connected Wind Power Projects.

Brief facts in Petition No. 114/MP/2022 and Petition No. 115/MP/2022

2. Petition No.114/MP/2022 has been filed by Green Infra Renewable Energy Limited (hereinafter referred to as “GIREL”) and Green Infra Wind Energy Limited (hereinafter referred to as “GIWEL”) seeking to install additional 5% capacity to its 249.9 MW wind power project located in Tuticorin District, Tamil Nadu. Petition No.115/MP/2022 has been filed by GIWEL seeking to install additional 5% capacity in its 250 MW wind power project located in Kutch district, Gujrat.

3. GIREL, a subsidiary company of GIWEL, is a power generating company under Section 2(28) of the Electricity Act, 2003.

4. GIREL and GIWEL have made the following prayers in the Petition No. 114/MP/2022:

- a) *Declare that the Petitioner is entitled to install and operationalize 5% additional capacity;*
- b) *Set aside the Respondent No. 1’s letter dated 18.3.2021; and*
- c) *Pass any order or direction as this Hon’ble Commission may deem fit in light of the facts and circumstances of the present Petition.”*

5. GIWEL has made the following prayers in the Petition No. 115/MP/2022:

- a) *Declare that the Petitioner is entitled to install and operationalize 5% additional capacity;*
- b) *Set aside the Respondent No. 1’s letter dated 27.11.2020 and 18.3.2021; and*
- c) *Pass any order or direction as this Hon’ble Commission may deem fit in light of the facts and circumstances of the present Petition.”*

6. The submissions made by the Petitioners and the relief sought are identical in Petition No. 114/MP/2022 and Petition No. 115/MP/2022 and hence both are taken up together in this order.



Submissions of the Petitioners in Petition No. 114/MP/2022 and Petition No. 115/MP/2022:

7. The Petitioners in Petition No. 114/MP/2022 and 115/MP/2022 have made the following submissions:

a) Ministry of New and Renewable Energy (“MNRE”), on 22.10.2016 and 4.5.2017, issued the guidelines (hereinafter to be called “MNRE guidelines” or “guidelines”) for setting up of 1000 MW ISTS - connected wind power projects. The clause 3.5 of the MNRE guidelines allow project developers to install wind turbine generators of total rated capacity not more than 105% of project capacity allotted to them. The Request for Selection (“RfS”) was issued on 28.10.2016 by SECI, the nodal agency to implement the MNRE project in this regard. SECI also selected PTC as the trading agency for sale of wind power and enter into the PPAs with the successful bidders.

b) GIWEL, the parent company of GIREL, participated in the bidding process and, on being successful, was issued with the Letter of Award (LoA) to develop the wind power project.

c) In order to develop the project at Tuticorin District, Tamil Nadu, GIWEL incorporated GIREL as its subsidiary. GIWEL has developed following 800 MW of wind power projects either by itself or through its subsidiaries under different SECI schemes:

i) 249.9 MW power project located in Tuticorin District, Tamil Nadu (hereinafter referred to as “Project-I”) was developed by GIREL and commissioned on 8.10.2018.



- ii) 250 MW power project located in Gujarat (hereinafter referred to as “Project-II”) was developed by GIWEL and commissioned in phases from 23.6.2019 to 6.2.2020.
 - iii) 300 MW power plant located in Gujarat (hereinafter referred to as “Project-III”) was commissioned from 6.7.2019 to 20.6.2020
- d) GIREL, on 21.7.2017, entered into 4 Power Purchase Agreements (PPA), with respect to Project-I, with PTC for onward sale to distribution licensees in Delhi, Bihar, Jharkhand and UP. PTC also entered into the following Power Sale Agreements (PSA):
- i) PSA dated 21.7.2017 with BSES Rajdhani Power Limited
 - ii) PSA dated 13.7.2017 with Uttar Pradesh Power Corporation Limited
 - iii) PSA dated 23.6.2017 with Jharkhand Bijli Vitran Nigam Limited
 - iv) PSA dated 27.6.2017 with North Bihar Distribution Company Limited
- e) GIWEL and SECI, on 2.2.2018, entered into a Power Purchase Agreement (“PPA”) for sale of the power with respect to Project-II.
- f) Project I was commissioned on 8.10.2018 and Project II was commissioned in 4 phases during 2019-20. The commissioning certificates were issued by SECI on 24.6.2019, 21.10.2019, 3.1.2020 and 6.2.2020 in respect of the Project II.
- g) The RfS provisions specifically provide time limit wherever required. Clause 3.9(A) of the RfS states that the wind power developer will declare the annual Capacity Utilization Factor (CUF) of their Project at the time of signing of PPAs and will be allowed to revise the same once within first year of COD. However, unlike Clause 3.9(A) of the RfS, Clause 3.9(C) does not place any restriction on when the right of additional capacity of 5% can be exercised by the wind power developer.
- h) GIREL wrote to SECI on 4.10.2019 seeking to revise its CUF to 33.12% from 32.60%, in respect of Project I which will be applicable from April 2020; and GIWEL



also wrote to SECI on 27.1.2021, seeking to revise its CUF to 34.54% (from 36% as communicated at the time of bid submission, (inadvertently mentioned as 35% in the PPA), in respect of Project II which will be effective from April, 2021. In terms of Clause 3.9A of the RfS, developers were required to declare the annual CUF of the Project at the time of signing the PPA and were allowed to revise the same once within the first year of COD. The total generation corresponding to this CUF is 756.523 million kWh. GIWEL also assured that the projects will in no case be injecting more energy than the capacity allocated.

i) GIWEL wrote to SECI on 4.1.2019 and 3.3.2021 in respect of Project I and Project II respectively, regarding installation of additional 5% capacity in the Project in accordance with the following:

- i) Clause 3.5 of MNRE guidelines dated 22.10.2016 and 4.5.2017
 - ii) Clause 3.9(C) of Request for Selection (RfS) inviting proposals for setting up of wind power projects for an aggregate capacity of 1000 MW issued by SECI bearing RfS No. SECI/C&P/WPD/RfS/1000MW/102016 dated 28.10.2016 ("RFS") RfS No. SECI/C&P/WPD/1000MW/T2/RfS/052017 dated 31.5.2017;
 - iii) Guidelines for tariff based competitive bidding Process for Procurement of Power from Grid connected wind power projects dated 8.12.2017
- j) The Petitioners have submitted that power injection would not be more than the capacity already allotted.
- k) SECI, on 27.11.2020 and 18.3.2021, rejected the request of the GIWEL for installation of additional capacity in Project I and Project II respectively, stating that the clause 3.9 of the RfS allows the installation of 105% capacity at the time of installation and commissioning of the power project in the initial stage; and after 100%



capacity has already been installed, any extra increase in the capacity will tantamount to wind power developer taking advantage of the change in the equipment cost etc. thereby gaining the tariff advantage.

l) In response to SECI's letter of 8.3.2021, GIWEL, vide letter dated 27.11.2020, stated that the capacity addition would benefit the overall efficiency of the project and clarified that MNRE Guidelines and the RfS permits 5% additional capacity at the option of the wind power developer. Clause 3.14.6 of the RfS permits the wind power developer to reconfigure the plant from time to time during the term of the PPAs. Neither the MNRE Guidelines nor the RfS limit or restrict exercising this right before COD or the time period within which such right may be exercised. The only restriction on enhancing the capacity by 5% is that in no case will the project developer be allowed to inject power more than capacity allotted, which the Petitioners have undertaken to comply with. GIWEL would not be gaining any tariff advantage, since the installation and commissioning of additional 5% capacity will not result in injecting more power than the capacity allotted.

m) On 18.3.2021, SECI again wrote to the GIWEL rejecting the Petitioners claim and reiterated its position.

n) The Petitioners are entitled to additional 5% capacity as per MNRE guidelines and RfS. MNRE guidelines is binding and have statutory force as observed by the Supreme Court in *Energy Watchdog v. Central Electricity Regulatory Commission* case thereby stipulating that guidelines issued by the Central Government would have the force of law. Further, MNRE Guidelines and the RfS permit additional 5% capacity at the option of the wind power developer.



- o) As per the RfS, the Petitioner is permitted to reconfigure the project from time to time during the term of the PPAs.
- p) In view of the abovesaid stipulations, there is no prohibition in the MNRE guidelines or the RfS regarding the additional 5% capacity, post commissioning of the projects and the Petitioner has right to install and operate additional 5% capacity to the projects.
- q) The additional 5% capacity would not result in injecting more power thereby making no further financial impact on the distribution licensees since as per clause 4.4.1. of the PPAs, the distribution licensees, in any contract year, shall not be obliged to purchase any additional energy beyond the allotted capacity.
- r) By not allowing the Petitioners from installing and commissioning additional capacity of 5%, SECI is acting contrary to the objectives of the Electricity Act, 2003, National Electricity Policy and National Tariff Policy which have been formulated in exercise of the power vested with the Government under section 3 of the Electricity Act, 2003, to promote the generation from renewable energy sources.
- s) The average auxiliary consumption and transmission losses in respect of Project I and Project II from commissioning to December 2020 has been 4.15% and 4.72% respectively. Hence, the additional capacity is required solely to meet the auxiliary consumption and transmission losses without impacting the financial burden of the distribution licensees.
- t) SECI's consent is not required for installation of 5% additional capacity.



8. The matter was admitted on 22.8.2022 and the notice was issued to the Respondents to file their reply and the Petitioner to file its rejoinder, if any, thereafter. Pursuant to the above, the Respondents and the Petitioner have filed their respective reply and rejoinder in the matter.

Reply of SECI, Respondent No. 1

9. SECI, Respondent No. 1, vide affidavit dated 31.10.2022, in Petition No.114/MP/2022 and Petition No.115/MP/2022 has made the following submissions:

a) The claim of the Petitioners is not sustainable under the PPA, PSA and RfS documents based on which the Petitioners were selected for the wind power generation. The Petitioners were given an option for installation of 105% of contracted capacity at the time of the commissioning and commercial operation of the project, to meet the auxiliary consumption requirement and losses up to the inter connection/delivery point, if they choose to do so at the time of the commissioning and achieving the commercial operation. Accordingly, in Project-I when the Petitioners proceeded to install 249.90 MW capacity without exercising the option to install the additional capacity, SECI issued the commissioning cum COD certificate in favor of GIWEL on 8.10.2018.

b) The Petitioners in Project-I, however, raised issue of additional capacity requirement on 2.11.2020 followed by 8.3.2021. These requests were rejected by the SECI on 27.11.2020 and 18.3.2021 respectively.

c) In Project II, the Petitioner installed 252 MW (as against the awarded capacity of 250 MW), i.e. partly exercising the option to install additional capacity of 5% of 250



MW. The Petitioner has concealed the above fact and the same was neither disclosed in the petition nor during the hearing before the Commission. The Petitioner commissioned its project in stages from 25.6.2019 to 7.2.2020 and started generating and injecting wind power to SECI after meeting its auxiliary power requirements. The Petitioner sought consent from SECI to install additional capacity of 5% on 3.3.2021 as per clause 3.9 and 3.14.6 of RfS document and it was rejected by SECI.

d) The 105% contracted capacity, as indicated in the clause 3.5 of the guidelines and clause 3.9C of RfS documents and referred to by the Petitioners in the petitions is with reference to the capacity to be installed up to the commissioning and commercial operation of the project and not thereafter. After the commercial operation, only 'repowering' and 'reconfiguring' of the existing capacity is allowed. The "Project Capacity' has been defined in the PPA as the maximum AC capacity of the project in respect of which PPA has been signed. The commissioning procedure defines the term 'Maximum AC Capacity' as equal to Contracted Capacity as per the PPA.

e) The Petitioners have claimed that SECI's permission is not required for installation of any capacity in the project as per the terms of the bidding documents, PPA and commissioning procedure. However, as per the provisions, this claim of the Petitioners is not correct. The COD has been defined in the PPA as the actual date of commercial operation of the project as declared by SECI or any entity authorized by SECI/ State nodal agency. The capacity can be declared as 'Commissioning Capacity' (as defined in 'commissioning procedure') only by SECI or any other entity authorized by SECI/ State nodal agency. In view of this, it is wrong to say that SECI's consent is not required.



f) The provisions in the contractual document have to be read harmoniously so that the interpretation of one particular clause does not violate the other part of the contract. The contract should also be read as whole and with reference to its objective and intention of the parties even though the immediate object of inquiry is the meaning of an isolated clause. The Supreme Court has set the principles in this regard in its rulings in various cases (*viz. Nabha Power Ltd. -v- Punjab State Power Corporation Limited, (2018)11 SCC 508; Shin Satellite Public Co. Ltd.-v- Jain Studios Ltd. (2002) SCC 628; Bangalore Electricity Supply Co. Ltd. V. E S Solar Power (P) Ltd.*)

g) The harmonious reading of the provisions of the PPA, commissioning procedure makes it clear that capacity proposed to be installed has to be a definitive capacity and the installation of the Wind Turbine Generators was to be undertaken by the commissioning date. Thereafter, no additional capacity in terms of MW is permitted. The Petitioner elected to install capacity of only 249.90 MW and 252 MW though there was an option to elect to install up to 262.49 MW on the date of commissioning.

h) The increase in the capacity cannot be done in the name of the auxiliary consumption since this would amount to installation after the date of commissioning which is not allowed for the reason that it may lead to the project developers taking advantages of falling prices in the capital cost as well as higher tariff discovered earlier in the competitive bidding.

i) With reference to the Petitioners claim that as per clauses 3.14.6 of the RfS the wind power developers are allowed to reconfigure and repower their project from time to time during the PPA, repowering and reconfiguring is to deal with the degradation



or loss in the already installed capacity after the commercial operation date. Therefore, repowering and reconfiguring is with reference to the already commissioned capacity.

Rejoinder of the Petitioners in Petition No. 114/MP/2022 and Petition No. 115/MP/2022:

10. The Petitioners have filed their rejoinder to the reply filed by SECI vide affidavits dated 7.11.2022 and 12.1.2023 in the Petition No. 114/MP/2022 and Petition No. 115/MP/2022 respectively. The gist of the submissions made by the Petitioners are as follows:

a) SECI's plea that after the commercial operation, the wind power developer is allowed only the repowering and reconfiguring of the existing capacity in terms of the clause 3.5 of guidelines and 3.9C of the RfS document is incorrect as the wind power developer can install the additional capacity at any point of time as per the said clauses. SECI's interpretation of the said clauses is against the set principles by the Supreme Court in the cases namely, *Adani Power (Mundra) Ltd. v. GERC & Ors, 2019 SCC; Nabha Power Ltd. v. PSPCL, (2018) 11 SCC 508; Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193* wherein the Supreme Court has given clear directions for strict/literal interpretation of the provisions for not to interpolate or imply terms into the same. Besides, there is no prohibition in the said clauses on the Petitioners to install additional capacity after the COD. In this regard, Supreme Court has clearly stipulated in *Assistant Collector of Central Excise Calcutta Division Vs. National Tobacco Company of India Limited* that the rule of prohibition by necessary implication could be applied only where there is an express prohibition.



b) SECI has itself stated that clause 3.5 of the guidelines and clause 3.9C of RfS have to be read in harmony with other provisions. A harmonious reading of both the clauses does not expressly state that additional 5% cannot be installed after COD.

c) SECI has further relied on the definitions of “Project Capacity” and “Installed Capacity” as provided under the PPAs. “Project Capacity” as defined in the PPA as the maximum AC capacity at the point of injection on which the PPA shall be signed. Even after installation of additional 5% capacity, the Petitioners will not supply power more than the capacity of allotted to them. Thus, the project capacity as recorded in the PPA remains the same even after installation of additional 5% capacity. Similarly, “Installed Capacity” is defined in the PPA as the name plate capacity of the units of the power project or the capacity of the power project. Evidently, installed capacity of the projects is not restricted to the capacity of the project existing at the time of commissioning or COD. This, implies that installed capacity of the project can be increased to the permissible limit under the RfS even after COD of the projects. As per the abovementioned provisions, additional 5% capacity can be installed even after commissioning and commercial operation of the project. Hence, SECI’s reliance on the abovementioned provisions to contend otherwise is wrong, misplaced and illegal.

d) It is wrong for SECI to say its consent is required for installation of the additional capacity. Clause 1.3 of MNRE guidelines stipulate that SECI has been appointed as a nodal agency.

e) MNRE had issued an advisory with regard to solar plants wherein it is stated that (i) the requirement of designing and installation of additional capacity may emanate from the contractual need to supply the committed energy. (ii) The procurer,



without getting into the design and installation of project capacity on the DC side, should only ensure that AC capacity of the power plant set up by the developer corresponds with the contracted AC capacity. (iii) As long as the power plant is in accordance with the contracted (AC) capacity and meets the range of energy supply based on CUF requirements, the design and installation of project capacity on the DC side should be left to the discretion of the generator / developer. (iv) As per law, setting up of generation capacity is an unlicensed activity and therefore any person is entitled to set up any capacity which he desires to set up and sell power to any entity which may want to buy it.

f) Although MNRE's advisory/ Clarification dated 5.11.2019 has been issued in respect of solar plants, its rationale, which is based on the statutory mandate of Electricity Act, 2003, is equally applicable to wind power plants also. Similarly, APTEL in its judgment dated 16.11.2021 in Appeal Nos. 163 & 171 of 2020 titled *Nisagra Renewable Energy Private Limited v. MERC & Anr ("Nisagra Judgment")* held that it is the prerogative of the developer to finalize the optimal DC capacity for its project in a manner that can deliver the contracted capacity and achieve the declared CUF.

g) Therefore, SECI's consent is not required for installation of additional 5% capacity in the Project.

h) SECI's contention that the developer would take cost and tariff benefit after installation of the additional capacity is not correct since the said additional installation is on account for auxiliary consumption and losses and since injection cannot be done more than contracted capacity, there cannot be any profitability.



11. After hearing the parties, the order in both the matters was reserved on 17.1.2023 and the parties were directed to file written submissions. The Petitioners have filed their written submissions on 3.2.2023. However, no written submissions have been filed by any of the Respondents.

12. The gist of the submissions made by the Petitioners in their written submissions are as follows:

a) SECI by contending that additional 5% capacity can be installed by the Petitioners only up to the commissioning and commercial operation of the project is trying to introduce extraneous conditions in the contract which does not exist. Hon'ble Supreme Court in *Delhi Development Authority v. Joint Action Committee, Allottee of SFS Flats, (2008) 2 SCC 672 (Para 62)* has held that a party to the contract cannot at a later stage impose terms and conditions which were not part of the offer.

b) As regards SECI's contention that GIWEL has installed 252 MW capacity in place of the allotted 250 MW in Project II, the wind turbines procured by GIWEL for installation in its Project were of 2.1 MW capacity each thereby requiring installation of 120 wind turbines to meet the 250 MW requirement resulting in installation of 252 MW. GIWEL could have installed 119 wind turbines, but it would not have been able to meet the contracted capacity of 250 MW as the installed capacity with 119 number of wind turbine would have been only 249.9 MW. Therefore, GIWEL was constrained to install 120 wind turbines, which resulted in installed capacity of 252 MW.

c) There is no restriction of limitation under the RfS, PPA and MNRE Guidelines with respect to installation and commissioning of additional 5% capacity. The



Petitioner is free to install capacity up to 262.50 MW in its project. Hence, even if GIWEL has installed 252 MW capacity before commissioning, it does not preclude GIWEL to install the remaining capacity up to 262.50 MW post commissioning.

Analysis and decision

13. We have considered the submissions made by the Petitioners and SECI in both the petitions. As stated earlier in this order, the issues raised and the contentions of both the parties are similar in both the petitions are also identical in nature.

14. Project I has been developed by GIREL in the district of Tuticorin, Tamil Nadu and a certificate regarding its COD has been issued by SECI on 10.10.2018 indicating therein that its commercial operation date was 8.10.2018 and the installed capacity is 249.9 MW. The Project II is developed by GIWEL in Kutch District, Gujrat and was commissioned in 4 phases. The certificate with regard to the project having achieved its COD have been issued by SECI on 24.6.2019, 21.10.2019, 3.1.2020 and 6.2.2020 for installed capacity of 126 MW, 54.6 MW, 50.4 MW and 21 MW respectively for a combined capacity of 252 MW.

15. The Petitioners have contended that the MNRE guidelines and the RfS issued by SECI provide for installation of total rated capacity of not more than 105% of the project capacity and there is no stipulation that the rated capacity of 105% should be installed at one go at the time of commissioning and COD of the Project. The Petitioners have further contended that the MNRE guidelines and the RfS does not prohibit the Petitioners from part commissioning the total rated capacity of 105% of the project capacity. In support of its claim for installation of 105% of the project capacity, the Petitioners have submitted that the



additional 5% capacity proposed to be installed is to meet the auxiliary power consumption and the losses and that the Petitioners are permitted to reconfigure the project from time to time and the Petitioners would not inject more than the approved project capacity. The Petitioners have further contended that MNRE's advisory in case of solar plants giving certain freedom regarding the designing and installation of additional capacity is applicable to the wind power developers as well. The Petitioners have also contended that the Petitioners are not required to obtain the SECI's permission for installation capacity of 5%.

16. Per contra, SECI has contended that as per the MNRE guidelines and the SECI's RfS, the Petitioners had the option to declare their installed capacity at the time of commissioning and COD of the Project and having done so, the Petitioners cannot claim to install the additional capacity of 5% after their COD. SECI has further contended that repowering and reconfiguring is allowed to deal with the degradation or loss in the already installed capacity and not for installation of additional capacity. The Petitioners are required to obtain the consent of SECI and increasing the project capacity in the name of auxiliary power consumption would amount to project developer taking advantage of lower capital cost and higher tariff. SECI has also contended that GIWEL has concealed the fact that it has installed 252 MW in Project II, against the approved project capacity of 250 MW.

17. On the basis of the submissions of the Petitioners and SECI, the first issue that draws our attention is whether the Petitioners can install 105% of the allotted capacity in their projects. This aspect was not disputed by SECI. But, we feel it appropriate to discuss the same before we go into the main issue of the Petitioners eligibility to install additional capacity



of 5% after the COD, for a proper understanding of the provisions of MNRE guidelines and the RfS issued by SECI in this regard.

18. It is observed that Project I and Project II are awarded to the Petitioners by SECI vide Letter of Award (LoA) dated 5.4.2017 and 3.11.2017 respectively for a capacity of 249.9 MW and 250 MW respectively. As per Clause 1.2 of the LoA, the award of the project to the Petitioners is subject to the guidelines issued by MNRE and terms and conditions of the RfS issued by SECI. The Clause 1.2 of the LoA provides as follows:

“1.2 The award of the above project is subject to the Guidelines including amendments/ clarifications issued by MNRE (Government of India) and terms and conditions of the RfS document including its clarifications/ amendment/ elaborations/notifications issued by SECI.”

19. The Clause 3.5 of the MNRE guidelines provides for installation of total rated capacity of not more than 105% of the project capacity allotted to them as follows:

*“3.5 Number of Applications by a Company and Capacity limit of allocation Under the Scheme minimum bid capacity shall be 50 MW at one project site. A maximum capacity of 250 MW Wind Power Projects shall be allotted to one company including its Parent, Affiliate or Ultimate Parent-or any Group Company. The bidder, including its Parent, Affiliate or Ultimate Parent-or any Group Company, shall submit one single application in the prescribed format detailing all projects for which the bidder is submitting the application. **Project developers will be allowed to install wind turbine generators of total rated capacity not more than 105% of project capacity allotted to them.** The additional 5% will take care for auxiliary consumption and losses up to interconnection point. Further, the project developers will be allowed to repower the project, at a later stage, if required. However, in no case the project developer will be allowed to inject power more than capacity allotted.”*

20. The “commissioning capacity” is defined in the “commissioning procedure” for the Wind Power Project. According to which the “commissioning capacity” is permitted to exceed the AC capacity as provided for in the RfS. The “commissioning capacity” is defined as follows:

“Commissioning procedure:

Commissioning Capacity: Commissioning Capacity will mean the cumulative capacity of wind turbines installed, which shall be declared as per the commissioning procedure. In case of



part commissioning of the Project, the WPD shall be required to have installed the cumulative wind turbine capacity not less than the proposed part commissioning capacity. Commissioning capacity is permitted to exceed the maximum AC capacity upto the limits as per the RfS.”

21. The Clause 3.9(C) of the RfS issued by SECI provides for maximum rated capacity of 105% of the project capacity and it is as follows:

“3.9. Power Generation by Wind Power Developer

C. Excess generation

The WPD would be free to install wind turbine generator of total rated capacity not more than 105% of project capacity allotted to them. The additional 5% will take care for auxiliary consumption and losses up to interconnection point. Further, the project developer will be allowed to repower the project at a later stage, if required. However, in no case the project developer will be allowed to inject power more than capacity allotted. The WPD will not be allowed to sell any excess power to any other entity other than PTC (unless refused by PTC) In case at any point of time, the peak of capacity reached is higher than the rated capacity and causes disturbance in the system at the point where power is injected, the WPD will have to forego the excess generation and reduce the output to the rated capacity to ensure compliance with grid requirement.”

22. As per the above provisions, a wind power developer is allowed to install 105% of the allotted capacity and this additional capacity of 5% is for the purpose of auxiliary power consumption and to take care of the losses up to the interconnection point and the same is not allowed to be injected into the power system.

23. Now the main issue before us is whether the additional capacity of 5% can be installed by the Petitioners after the commissioning and COD of the Projects, where 100% of the Project capacity has already been installed.

24. The Petitioners in Petition No.114/MP/202, GIREL and GIWEL, have achieved the COD of their 249.9 MW (Project I) in Tuticorin on 8.10.2018. GIWEL, the Petitioner in Petition No.115/MP/202, has achieved the commercial operation of its 252 MW (Project II) in Kutch in 4 phases from 2019 to 2020. The Petitioners have now prayed to allow the additional



capacity of 5% in their respective projects. SECI has contended that the option for installation of the additional capacity of 5% was open only until the commissioning and COD of the Project and rejected the Petitioners plea on the ground that it cannot be done after initial installation, commissioning and COD of the Project. The relevant portion of the SECI's letters dated 27.11.2020 and 18.3.2021 to the Petitioners is extracted hereunder:

“4. Accordingly, the capacity allotted and commissioned in the first stage i.e. before the commencement of the supply of power is sacrosanct. The repowering is restricted to the said capacity. It is in the above context, the opening part of clause 3.9 (C) of the RfS Documents is seen, the Wind Power Developer is allowed to install 105% of the project capacity allotted to them. This means that at the time of installation and commissioning of the power project itself in the initial stage, the project developer is to plan that whether it would install 100% of the capacity allotted and supply electricity net of the auxiliary consumption or 105 % of the capacity allotted and supply electricity to SECI net of Auxiliary Consumption. It cannot be that after the installation and commissioning the power project to the extent of 100% of the capacity allotted and subsequently the wind power developer increases the capacity to the extent of 5%. The Wind Power Developer in such an event having already decided only to install only 100% of the capacity allotted and availing auxiliary within the 100% of such capacity, he cannot thereafter increase the capacity to 105% in the name of requirement of auxiliary. Such a course would be allowing the Wind Power Developer to take advantage of change in the equipment cost etc. to gain the tariff advantage and not with the real purpose of the requirement of auxiliary.”

25. SECI has further contended that after the COD has been declared, only 'repowering'/ 'reconfiguring' of the existing capacity is allowed. The Petitioners on the other hand have contended that the MNRE guidelines and the RfS allow the Petitioners to install the additional capacity any time subject to the condition that it will not go beyond 105% of the allotted capacity and the said documents do not prohibit installation of additional capacity of 5% after the declaration of the COD. As per the Petitioners, the additional capacity is sought towards the auxiliary consumption and losses till the inter connection point and will not be used for injection of more power than the allotted capacity.

26. In this regard, we deem it necessary to see whether the MNRE guidelines and the RfS issued by SECI permit/ prohibit installation of part of the allotted capacity after the



commissioning and COD of the Project. In this regard, clause 3.17 of the RfS issued by SECI provides as follows:

“3.17. Commissioning:

The Commissioning of the Projects shall be carried out by the WPDs in line with the Procedure elaborated in the PPA document (Commissioning Procedure at Annexure-A and Appendix-A1 are for reference). SECI may authorize any individual, committee, or organization to witness and validate the commissioning procedure on site. Commissioning certificates shall be issued by the State Nodal Agency or SECI after successful commissioning.

A. Part Commissioning

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

- i) The minimum capacity for acceptance of part commissioning shall be 50 MW or 50% of the allocated Project Capacity, whichever is higher and*
- ii) Balance capacity thereafter in batches of capacity not less than 50 MW or in one go.*

The PPA will remain in force for a period of 25 years from the date of acceptance of the first part commissioning of the Project.

Note: In case the Project is split into multiple projects as specified in clause 3.4, the above conditions will be applicable for each split project capacity. The PPA will remain in force for a period of 25 years from the date of as per the provisions of PPA.”

27. As regards the COD, the MNRE guidelines enables the wind power developer to develop the project in phases. The MNRE guidelines defines the COD as follows:

“3.16 Commercial Operation Date (COD):

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

28. It is pertinent to out here that SECI has approved the COD of Project II in 4 phases on 24.6.2019, 21.10.2019, 3.1.2020 and 6.2.2020 for installed capacity of 126 MW, 54.6 MW, 50.4 MW and 21 MW respectively for a combined capacity of 252 MW. Moreover, as per the RfS issued by SECI, the minimum capacity for acceptance of part commissioning shall be 50



MW or 50% of the allocated Project Capacity. However, it is observed that SECI has approved COD of 21 MW in the 4th phase of Project II.

29. The criteria for power generation by the wind power developer is provided for in the RfS issued by SECI, which is as follows:

“3.9. Power Generation by Wind Power Developer

A. Criteria for generation

The WPDs will declare the annual CUF of their Project at the time of signing of PPA and will be allowed to revise the same once within first year of COD. The declared annual CUF shall in no case be less than 20% yearly. WPD shall maintain generation so as to achieve annual CUF not less than 90 % of the declared value during PPA duration of 25 years. The lower limit will, however, be relaxable by SECI to the extent of non-availability of grid for evacuation which is beyond the control of the WPD. The annual CUF will be calculated every year from 1st April of the year to 31st March next year.

B. Shortfall in minimum generation

During PPA, if for any year, it is found that the developer has not been able to generate minimum energy corresponding to the lower limit of CUF declared by the developer, such shortfall in performance shall make developer liable to pay the compensation provided in the PSA as payable to Buying Entities and shall duly pay such compensation to trading company to enable remitting the amount to the Buying Entities. This will, however be relaxable by SECI to the extent of grid non-availability for evacuation, which is beyond the control of the developer. The amount of compensation shall be equal to the compensation payable by the Buying Entities towards non - meeting of RPOs, if such compensation is ordered by the respective SERC. This compensation shall be applied to the amount of shortfall in generation during the year. However, this compensation shall not be applicable in events of Force Majeure identified under PPA with trading company affecting supply of wind power by WPD.

C. Excess generation

The WPD would be free to install wind turbine generator of total rated capacity not more than 105% of project capacity allotted to them. The additional 5% will take care for auxiliary consumption and losses up to interconnection point. Further, the project developer will be allowed to repower the project at a later stage, if required. However, in no case the project developer will be allowed to inject power more than capacity allotted. The WPD will not be allowed to sell any excess power to any other entity other than PTC (unless refused by PTC) In case at any point of time, the peak of capacity reached is higher than the rated capacity and causes disturbance in the system at the point where power is injected, the WPD will have to forego the excess generation and reduce the output to the rated capacity to ensure compliance with grid requirement.”



30. In this regard, Clause 3.5 of the MNRE guidelines provides as follows:

“3.5 Number of Applications by a Company and Capacity limit of allocation Under the Scheme minimum bid capacity shall be 50 MW at one project site. A maximum capacity of 250 MW Wind Power Projects shall be allotted to one company including its Parent, Affiliate or Ultimate Parent-or any Group Company. The bidder, including its Parent, Affiliate or Ultimate Parent-or any Group Company, shall submit one single application in the prescribed format detailing all projects for which the bidder is submitting the application. Project developers will be allowed to install wind turbine generators of total rated capacity not more than 105% of project capacity allotted to them. The additional 5% will take care for auxiliary consumption and losses up to interconnection point. Further, the project developers will be allowed to repower the project, at a later stage, if required. However, in no case the project developer will be allowed to inject power more than capacity allotted.”

31. We have perused the various provisions regarding commissioning, COD and installation of additional 5% of the project capacity in the MNRE guidelines and the RfS issued by SECI. The provisions, referred to hereinabove, do not prohibit the Petitioners from installing additional capacity after the commissioning and COD of the Project has been declared. If SECI and MNRE had envisaged that the entire project capacity, including the 5% additional capacity to meet the requirement of auxiliary power consumption, should be installed before the commissioning or the COD of the Project, the same would have been specifically mentioned by MNRE in its guidelines and by SECI in the RfS. In the instant cases, we have not come across any provision, either in the MNRE guidelines or the RfS issued by SECI, which prohibits installation of additional capacity by the Petitioners after the commissioning and COD of the Project. If there is any such prohibition, it should have been laid down clearly in those documents as observed by the Hon’ble Supreme Court in *Assistant Collector Of Central Exercise, Calcutta Division vs National Tobacco Co. Of India Ltd* on 9.8.1972:

“Moreover the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for the performance of a duty”



32. Moreover, SECI's contention that no additional capacity can be installed after the commissioning and COD of the Project amounts to imposition of new condition after the original contract has already been set in motion. In this regard, the Petitioner has relied upon the judgment by the Supreme Court reported as Delhi Development Authority v. Joint Action Committee, Allottee of SFS Flats, (2008) 2 SCC 672, wherein it is held that a party to a contract cannot at a later stage set out new terms and conditions which were not there in the original contract. The relevant portion of the said judgement is as follows:

"62. It is well-known principle of law that a person would be bound by the terms of the contract subject of course to its validity. A contract in certain situations may also be avoided. With a view to make novation of a contract binding and in particular some of the terms and conditions thereof, the offeree must be made known thereabout. A party to the contract cannot at a later stage, while the contract was being performed, impose terms and conditions which were not part of the offer and which were based upon unilateral issuance of office orders, but not communicated to the other party to the contract and which were not even the subject-matter of a public notice"

33. Accordingly, once the terms of contract have been set in the contract documents, no change in the terms are allowed and no new terms can be added to the contract by either of the parties. We have considered the SECI's contention that the Petitioners cannot install additional capacity after the commissioning and COD of the Project amounts to imposition of new condition. It is submitted that Section 62 of the Indian Contract Act mandates that any novation, alteration or rescission in the contract has to be made only with mutual agreement of the parties.

34. Therefore, we are of the considered view as discussed in para 27 to 31 and concluded in para 32 that the Petitioners herein are entitled to add to the capacity even after the commissioning and COD of the Project has been achieved subject to the ceiling of 105% of the allotted capacity. This additional capacity, however, is subject to the condition that 5%



of the allotted capacity shall be used to meet the auxiliary power consumption and losses up to inter connection point. Further, the Petitioners shall neither be allowed to inject nor sell more power than the permissible capacity in accordance with in PPA and the RfS issued by SECI.

35. Since we have concluded that the Petitioners are free to install the additional capacity of 5% of the allotted capacity after the commissioning and COD of the Project, we do not consider it necessary to go into the SECI's contention that the Petitioners can only 'repower' or 'reconfigure' the project after the commissioning and COD of the Project.

36. The Petitioners have claimed that SECI's permission is not required for installation of any capacity in the project as per the terms of the bidding documents, PPA and commissioning procedure. Per contra, SECI has submitted that MNRE has designated SECI as the nodal agency for implementation and developing grid connected wind power capacity in the country and therefore it is mandatory for the Petitioners to take its permission for installation of additional capacity.

37. The role of SECI has been defined by MNRE in its guidelines as follows:

"4.1 Role of State Nodal Agencies (SNAs)

It is envisaged that the State Government shall appoint any Agency as a State Nodal Agency, which will provide necessary support to facilitate the required approvals and sanctions in a time bound manner so as to achieve commissioning of the Projects within the scheduled Timeline. This may include facilitation in the following areas:

- Coordination among various State and Central agencies for speedy implementation of projects*
- Support during commissioning of projects and issue of commissioning certificates."*

38. The RfS issued by SECI also designates SECI as the nodal agency for implementation of the MNRE schemes. The relevant portion of the RfS is as follows:



“1.1.2. SECI has been designated as the nodal agency for implementation of MNRE schemes for developing grid connected wind power capacity in the country. MNRE has recently issued the Guidelines for the scheme for setting up of 1000 MW ISTS connected Wind Power Projects vide F. No. 53/14/2016-WE dated 22.10.2016 Under this scheme, the projects shall be developed only in the 8 States of India classified as “Windy States”, namely Andhra Pradesh, Gujarat, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan, Tamil Nadu and Telangana. This Request for Selection document (hereinafter called RfS) has been prepared in line with the guidelines issued by MNRE.”

39. The above stipulations clearly mark SECI as the nodal agency for implementation of MNRE schemes for developing grid connected wind power project and it is mandated to provide necessary support to facilitate the required approvals and sanctions, timely implementation and to approve commissioning of the Projects. We also note that SECI is the authority to approve the commissioning and COD of the Project and its capacity, which include the additional capacity of 5%. We therefore reject the Petitioners claim that SECI's permission is not required for installation of additional capacity.

40. SECI has submitted that GIWEL has installed 252 MW in its Project II as against the allotted capacity of 250 MW which has been concealed by it from the Commission. GIWEL has contended that installation of 252 MW capacity is towards achieving the 105% of the allotted capacity allowed in the MNRE guidelines and the RfS issued by SECI. GIWEL has further submitted that the wind turbines procured by GIWEL were of 2.1 MW capacity each thereby requiring 120 number to meet the 250 MW requirement resulting in installation of 252 MW.

41. GIWEL has installed 252 MW capacity in Project II, which is within the permissible limit of 262.5 MW (250 MW of allotted capacity plus additional 5% of the allotted capacity to meet the auxiliary power consumption and the losses), and the same appears to be due to



technical compulsions. GIWEL in this case, in order to match up to the allotted capacity of 250 MW, was bound to install 120 turbines of 2.1 MW each. Any lesser number of turbines would have brought down the installed capacity from the allotted capacity. Therefore, we find that it is in order. SECI's contention is GIWEL has concealed this fact from the Commission. We have taken cognizance of the capacity installed by GIWEL in Project II on perusal of the four COD certificates issued by SECI. Moreover, it does not have any bearing on the issue at hand. Therefore, we are of the view that there is no need for us to dwell on this issue any further.

42. As regards SECI's contention that allowing the Petitioners to install additional capacity of 5% of the allotted capacity would result in the Petitioners taking advantage of the reduced capital cost and the higher tariff discovered earlier in the competitive bidding, we have already come to the conclusion that the Petitioners are not prohibited from installing additional capacity after the commissioning and COD of the Project. Therefore, we are of the view that there should not be any prohibition on the Petitioners from taking advantage of the present capital cost and the tariff earlier discovered through competitive bidding.

43. In view of the above, SECI is directed to allow the Petitioners to install 5% additional capacity of the allotted capacity to meet its auxiliary power requirements and transmission losses subject to the condition that the Petitioners shall not be allowed to inject nor sell more power than the maximum permitted capacity in accordance with the PPA and the RfS issued by SECI.



44. Petition No. 114/MP/2022 and Petition No.115/MP/2022 are disposed of in terms of the above.

sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I. S. Jha)
Member

