



नई दिल्ली  
NEW DELHI

याचिका संख्या./ Petition No. 227/MP/2020 along with I.A. No. 7 of 2022

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson  
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: 03<sup>rd</sup> of January, 2024

**IN THE MATTER OF:**

Petition under Section 79(1)(f) read with Section 79(1)(k) of the Electricity Act, 2003 along with Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking issuance of appropriate orders/directions to Solar Energy Corporation of India Limited pursuant to issues arising out of the Power Purchase Agreement dated 04.09.2018 and seeking consequent relief for releasing the bank guarantee issued by the petitioner in favour of Solar Energy Corporation of India Limited.

**AND IN THE MATTER OF:**

**Mytrah Vayu (Brahamputra) Private Limited**  
8001, Survey No. 109,  
Q City, Nanakramguda, Gachibowli,  
Hyderabad-500032

.....Petitioner

**Versus**

- M/s Solar Energy Corporation of India Limited,**  
1st Floor, A Wing, D-3, District Centre,  
Saket, New Delhi- 110017
- Uttar Pradesh Power Corporation Limited,**

Shakti Bhawan, 14,  
Ashok Marg, Lucknow, UP

3. **Tata Power Delhi Distribution Limited,**  
NDPL House, Hudson Lines,  
Kingsway Camp, Delhi – 110009
4. **BSES Yamuna Power Limited,**  
BSES Corporate Annexe,  
CBD-III Grid, ground floor,  
Opposite Agarwal Fun City Mall,  
Karkardooma, Delhi-110032.

.....**Respondents**

**Parties Present :** Shri Venkatesh, Advocate, MVBPL  
Shri Vineet Kumar, Advocate, MVBPL  
Shri Nikunj Bhatnagar, Advocate, MVBPL  
Shri Debashish Das, MVBPL  
Shri Anand Kumar Shrivastava, Advocate, TPDDL  
Ms. Ishita Jain, Advocate, TPDDL  
Shri Hasan Murtaza, Advocate, BYPL  
Shri Sameer Sharma, Advocate, BYPL  
Ms. Anushree Bardhan, Advocate, SECI  
Ms. Tanya Sareen, Advocate, SECI  
Ms. Surbhi Kapoor, Advocate, SECI

### **आदेश/ ORDER**

The Petitioner, M/s. Mytrah Vayu (Brahmaputra) Private Limited is a generating company and is engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for the generation of solar power. In terms of the Request for Selection (RfS) dated 05.02.2018, *Mytrah Energy India Private Limited* (MEIPL holding company of the Petitioner) submitted its bid on 05.04.2018 and at the end of the e-Reverse auction conducted on TCIL portal, MEIPL was declared the successful bidder for development of 300 MW of power project having quoted a tariff of Rs. 2.52 per kWh. Subsequently, MEIPL was issued the Letter of Award (LOA) dated 01.06.2018 for the development of the 300MW Project. MEIPL formed a project company, M/s Mytrah Vayu (Brahmaputra) Private Limited (the Petitioner), within the provisions of RfS for the development of the Wind Power Project, generation and sale of wind power. The Petitioner is seeking a declaration that termination of the Power Purchase Agreement dated 04.09.2018

vide Petitioner's letter dated 25.02.2020 is legally and contractually valid and also seeking consequent relief for releasing the bank guarantee.

2. Respondent No. 1, Solar Energy Corporation of India Limited (SECI), under the administrative control of the Ministry of New and Renewable Energy (MNRE), was set up on 20.09.2011 to facilitate the implementation of the Jawaharlal Nehru National Solar Mission (NSM) for the development, promotion, and commercialization of solar energy technologies in the country and to achieve targets set out in the NSM
3. Respondent No.2, Uttar Pradesh Power Corporation Limited (UPPCL), is responsible for electricity transmission and distribution within the State of Uttar Pradesh.
4. Respondent No.3, Tata Power Delhi Distribution Limited (TPDDL), is a joint venture between Tata Power and the Government of NCT of Delhi, with a majority stake being held by Tata Power Company (51%). It distributes electricity in the North & North-West parts of Delhi.
5. Respondent No.4, BSES Yamuna Power Limited (BYPL), is a distribution company in Delhi and is engaged in power distribution in areas of Eastern and Central Delhi.
6. The Petitioner has made the following prayers in the Petition:
  - a) *Declare and hold that Termination of the Power Purchase Agreement dated 04.09.2018 vide Petitioner's letter dated 25.02.2020 is legally and contractually valid;*
  - b) *Direct Respondent – Solar Energy Corporation of India Limited to return/release forthwith the Performance Bank Guarantee dated 06.07.2018 [bearing no. 0006GM07181870001] of Rs. 60 Crores issued in its favour by the Petitioner pursuant to the terms of the Letter of Intent and Power Purchase Agreement dated 04.09.2018;*
  - c) *Pass any such further/other orders that this Hon'ble Commission may deem fit in the interest of equity and justice.*

**In I.A. No. 7 of 2022:**

- a) *Allow the present Application;*

- b) *Allow the amendment of the present Petition, thereby taking on record the aforementioned Additional Facts, Grounds and Amended Prayer;*
- c) *Permit the Applicant to file the Amended Petition;*  
*And/or*
- d) *Pass any other orders as deemed fit and appropriate by this Hon'ble Commission.*

**Factual Matrix:**

7. The brief facts of the case are as under:

Location of the project	Sokkanur Village, Pollachi, Tehsil, Coimbatore District, Tamil Nadu
Scheme	Setting up of 2000MW ISTS-Connected Wind Power Projects (Tranche-IV) in India of “Build Own Operate” basis
Capacity	300 MW
Tariff	Rs. 2.52/kWh
Request for Selection (RfS) was issued on	05.02.2018
RfS was amended on	06.03.2018
Bid submitted on	14.03.2018
E-Reverse conducted on	05.04.2018
LOA was issued on	01.06.2018
DERC granted in-principle approval to BYPL for power procurement	01.06.2018
A power Sale Agreement (PSA) was executed between SECI BYPL for the procurement of 100 MW on	26.06.2018
PSA was executed between SECI and TPDDL for the procurement of 50 MW on	17.07.2018
PSA was executed between SECI and UPPCL for the procurement of 150 MW on	23.08.2018
The effective date of the PPA	30.08.2018
Power Purchase Agreement (PPA) executed between Petitioner and SECI on	04.09.2018
The government of Tamil Nadu issued Tamil Nadu Combined Development and Building Rules, 2019 on	04.02.2019
Tata Power Delhi Distribution Limited (TPDDL) filed Petition No. 162/AT/2019 for the Adoption of a Tariff on	04.05.2019
The letter issued by the Ministry of New and Renewable Energy (MNRE) to SECI regarding the grant of extension to wind power projects under tranche I to tranche V on	22.10.2019
The tariff was adopted by this Commission (vide order in Petition No. 162/AT/2019) on	19.02.2020
Petitioner issued 1 <sup>st</sup> termination notice to SECI on	25.02.2020
Scheduled commissioning date (SCoD) of the project	29.02.2020

Extended timeline of Financial closure and conditions subsequent	28.08.2020
Petitioner entered into Termination of Agreement with GE India Industrial Private Limited terminating the Wind Turbine Generator (WTG) agreements, contract for installation and commissioning of WTG etc.	05.03.2020
IA No. 16 of 2020 was disposed of on	05.03.2020
SCOD revised by SECI vide letter dated 14.01.2020	28.08.2020
Petitioner issued 2 <sup>nd</sup> termination notice on account of change in Tamil Nadu Land Policy and outbreak of Covid-19	05.03.2021
Dispute Resolution Committee (DRC) rejected the application filed by MVBPL on account of being time-barred	08.05.2021
IA No. 7 of 2022 was filed by the Petitioner on	10.02.2022
Petitioner placed on record relevant correspondences qua Additional Affidavit	24.05.2022

8. The Petition was filed on 26.02.2020 and admitted on 05.03.2020. The Petitioner also filed I.A. 16 of 2022 for restraining the Respondent, SECI, from invoking/encashing the Performance Bank Guarantee (PBG) of Rs. 60 Crores furnished in terms of PPA till the final disposal of the Petition. The Commission directed the Respondent, SECI, not to take any coercive action against the Petitioner till further orders and the Petitioner was directed to keep the PBG furnished under the PPA valid. Accordingly, the Commission disposed of the IA No. 16/2020 on 05.03.2020. The Petition was heard on 28.04.2022, 05.08.2022, 16.05.2023 and 30.5.2023, after which the matter was reserved for orders.
9. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records. The pleadings and the rival submissions of the parties is captured in the following manner:-
10. The Petitioner has submitted as under:
- a) Despite the PPA being executed on 04.09.2018 (effective dated 30.08.2018), SECI did not approach the Appropriate Commission seeking adoption of tariff until November 2019, i.e. until after the passage of almost 15 months from the Effective Date. Such delayed action of SECI to obtain the adoption of the tariff has affected the underlying economic and financial viability. In the absence of such consent/clarity by SERCs, the lenders are reluctant to apprise the project proposals, ultimately prejudicing the investments made by the Petitioner, without any of its fault. On account of the delay in approval of the PPA and the consequential non-achievement

of Financial Closure, the Applicant failed to comply with the Payment Obligations towards GE India Industrial Private Limited (GE) under the WTG Supply Agreement dated 29.03.2019. Against this backdrop, the Applicant was constrained to enter into a Termination Agreement dated 05.03.2020 with GE on account of the termination of the Wind Turbine Generator (WTG) Supply Agreement dated 29.03.2019. As a direct consequence of delayed action by SECI to promptly and in a reasonable time period apply for and obtain the tariff adoption order from the Appropriate Commission, the cost of the project increased due to an increase in the land cost by 100 per cent and wind turbines by 30 per cent.

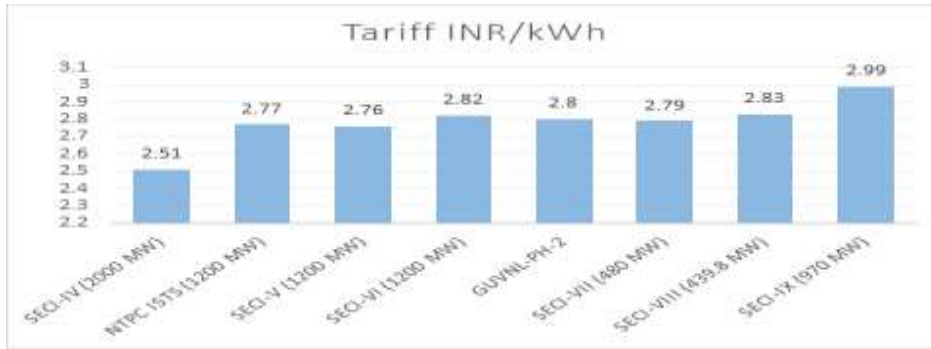
- b) The Petitioner has suffered at the hands of SECI since, due to a delay in obtaining necessary orders by SECI, which resulted in lenders withholding disbursement of funds for no fault of the Petitioner, the agreements executed for the supply of equipment could not be honoured by the Petitioner leading to cancellation of such agreements. Even if the Petitioner is allowed the extension of 18 months (prescribed timeline for SCOD) i.e. SCOD being revised to August 2021, the project has become unviable to be executed.
- c) The Project was required to be executed within 18 months from the effective date i.e. by February 2020, and Petitioner would have an option to commence its recovery from such date. However, due to a delay in obtaining an adoption order by SECI, the Project timelines were affected, thereby rendering the implementation of the project economically unviable and unfeasible. SECI must return the performance Bank Guarantee in terms of the provisions of the PPA immediately. SECI is restricted in law to invoke or encash the said Performance Bank Guarantee.
- d) While the PPA was executed on 04.09.2018, the same did not come into force until 19.02.2020, i.e. the date on which the tariff adoption order was passed. The delay in approval of PPA is squarely an event of Force Majeure as it was beyond the control of the Petitioner.
- e) In February 2019, the Govt. of Tamil Nadu vide G.O.(Ms) No.18 dated 04.02.2019 made critical changes/introduced in the Tamil Nadu Combined Development and Building Rules 2019 Rules (TN Land Allocation Policy), which had a direct impact on the land acquisition process for the Project. Resultantly, the entire land procurement process went haywire, requiring additional land procurement and additional approvals from competent authorities, which delayed the process of land

procurement. Under the TN Land Allocation Policy, the following material changes were brought into force:

- i. The minimum required land size was revised to 150 mtr x 150 mtr requiring revision of micro siting, negotiation with land owners, additional land purchase, etc.;
  - ii. Minimum width of access way/passage was required to be not less than 7 mtr leading to additional land procurement at each location;
  - iii. The procedure for conversion of agricultural land to non-agricultural was changed substantially, and there was a lack of clarity amongst the officials of the Revenue Department of GoTN with respect to the procedure to be followed;
  - iv. During due diligence of the lands identified for the Project to procure additional land parcels, it was found that the ownership of the said lands was defective and incomplete. Further, in certain cases, the owners of the said lands were untraceable.
- f) MVBPL requested for a change of location of the Project to the State of Karnataka due to challenges faced on account of TN Land Allocation Policy vide letter dated 19.09.2019. However, the same was denied by SECI *vide* letter dated 30.10.2019. The introduction of the TN Land Allocation Policy is an executive action, which cannot be contemplated by any party. This delay in the process of land procurement was entirely beyond the control of the Petitioner. If SECI was able to obtain the adoption order in a commercially acceptable timeline i.e. 2 months from the execution of the PPA, the Petitioner could have commenced land procurement much in advance without being subjected to the change in land allocation policy. Such impairment and difficulty in the implementation of the Project have been induced by SECI's non-fulfilment of its material obligation under the PPA.
- g) Article 4.5.3 was invoked as a Force Majeure event for one reason or the other and had continued for more than 9 months. Hence, the PPA dated 04.09.2018 was liable to be terminated.
- h) The subsequent event of the COVID-19 Pandemic is covered under the inclusive definition of 'Force Majeure' as provided under Article 11.3.1 (a) of the PPA, which is evident from a bare perusal of Article 11.3.1. The Force Majeure Events subsequent to the filing of the instant Petition have a direct bearing on the principal issue raised in the instant Petition.

- i) In order to assess the overall adverse impact of the Covid-19 Pandemic on the Indian energy industry/ sector as well as the delay in approval of the PPA, the following falls for consideration by the Commission: -
- i. Market data depicts that on account of the halt in operations due to the COVID-19 Pandemic, the market share of Indian Wind Turbine manufacturers has gradually reduced from 80% in 2017 to less than 30% in the year 2020.*
  - ii. Further, the major turbine manufacturers, such as Siemens Gamesa, Vestas, GE and Inox Wind, have been forced to suspend the production of the products.*
  - iii. Due to the severe halt in operations and business activities, many developers are facing major financial and operational challenges*
  - iv. The Indian Turbine Manufacturers are facing an ever-growing threat of being pushed into insolvency due to non-payment of their debt. The same has been further aggravated by the increased cost of the WTGs since the said increase is drastic and, in the majority of the cases, hinders not only the delivery schedule but also the overall performance of the obligations entered into by the WTGs.*
  - v. In the event of such uncertainty of the operations and the execution of the Agreements, the lenders in the market have become dubious to provide financial assistance or investments for the Projects; and*
  - vi. The said reservation by the lenders is primarily on account of a visible lack of commitment by WTGs on the delivery schedules under the Agreements.*
- j) There has been a visible increase in tariff due to the rise in overall WTG cost. Reliance is placed on the fact that the tariff for SECI IV (the instant case) was Rs. 2.52/kWh, pursuant to which there was an increase in the Tariff from Rs. 2.77/kWh to Rs. 2.99/kWh. The primary factors leading to such a steep rise in the tariff are attributable to the halt in the production operations by the Original Equipment Manufacturers (**OEMs**) due to the prevailing regulatory uncertainty.
- k) A chart depicting the increase in the Tariff across the RE Sector is provided hereunder:





- l) In view of the ongoing Covid-19 Pandemic, at this stage, for the Petitioner to continue with the project has become unviable as there has been a substantive increase in the tariff and the associated cost due to the above compelling reasons and submissions.
- m) The MoF, GoI, *vide* OM dated 19.02.2020, had directed that Covid-19 is a natural calamity and allowed invocation of the *Force Majeure* clause in appropriate cases.
- n) The conditions that were supposed to be fulfilled by 30.03.2019 included the following:
  - (i) *Make Project Financing arrangements and provide necessary certificates to SECI*
  - (ii) *Produce documentary evidence of possession of 100% of the land acquired for the Project*
- o) However, the Petitioner could not achieve the financing arrangements due to the delay in the adoption of the tariff nor produce the documentary evidence of possession of land due to the unforeseen challenges, including the introduction of the T.N. Land Allocation Policy.
- p) The performance of PPA had become impracticable and useless from the point of view of the object and purpose with which it was entered. The untoward events and the change of circumstances have totally upset the very foundation upon which the parties entered into the PPA.
- q) In so far as the contention of non-issuance of force majeure notice by MVBPL is concerned, it is submitted that the underlying purpose of a 'notice', which is issued by one party to another under any contract, is to place the receiving party in the knowledge of the fact of a certain event which is the subject matter of the said notice. There is no requirement for formal notice when SECI is already in the knowledge of the circumstances which led to Force Majeure. The need to put SECI in specific knowledge of the challenges arising on account of Covid-19 is fulfilled as the severity

of the impact of Covid-19 was in public knowledge, and hence, knowledge of the same was imputed to SECI by way of implied notice.

**Submissions of SECI:**

11. SECI has submitted as under:

- a) The Petitioner is wrong in proceeding on the basis that the order for adoption of tariff is a condition subsequent for the Petitioner to implement the obligations under the PPA including the fulfilment of conditions subsequent in Article 3 to be fulfilled by the Petitioner. However, there is no such provision. The Petitioner was fully aware that the proceedings before the Appropriate Commission on the aspect of tariff adoption would take some time. The Petitioner did not raise any objection with regard to the PPA being not consistent with the Guidelines prior to or at the time of execution of the PPA. The PPA provisions have become final and binding on the Petitioner and SECI.
- b) The Petitioner had raised the issue of time taken for the 'Adoption of tariff by Appropriate Commission' as one of the challenges being faced by the Petitioner in achieving the Financial Closure of the Project, for the first time only by its letter dated 07.08.2019 i.e. after almost 11 months from the date of execution of the PPA. Clearly, it is an afterthought.
- c) When SECI filed Petition No.162/AT/2019, the Petitioner herein chose not to appear before the Commission in the proceedings for adoption of tariff for Tranche-IV scheme under Section 63 of the Electricity Act.
- d) The Petitioner has proceeded to purportedly terminate the PPA after having secured one extension after the other i.e. the extension granted by SECI from 30.03.2019 to 30.06.2019 for compliance of conditions subsequent and financial closure by letter dated 29.03.2019, extension up to 28.02.2020 by letter dated 24.04.2019 for compliance of conditions subsequent and financial closure and further extension up to 28.08.2020 by letter dated 14.01.2020 for compliance of the condition subsequent, financial closure and scheduled commissioning date.
- e) Contrary to its own conduct and requests for extension in Conditions Subsequent, Financial Closure and SCoD made vide its letters dated 04.03.2019, 14.03.2019, 28.03.2019, 07.08.2019, 19.09.2019 and 07.12.2019, at a belated stage, the Petitioner had proceeded to purportedly terminate the PPA by its letter dated 25.02.2020 on account of non-performance of material obligations by SECI (delay in obtaining tariff

adoption order) i.e. after the issuance of the tariff adoption order on 19.02.2020 by this Commission.

- f) The Petitioner's lackadaisical attitude to implement the project is demonstrated by the fact that the Petitioner kept on seeking various concessions repeatedly, viz. an extension in Financial Closure and fulfilment of Conditions Subsequent, change in location of the State for setting up the project for the first time by its letter dated 07.08.2019 (despite having knowledge of the fact the same is prohibited in terms of the express provision of Clause 3.14 in the RfS ) without any intention of implementing the power project.
- g) The Petitioner has proceeded to purportedly terminate the PPA after having secured one extension after the other i.e. the extension granted by SECI from 30.03.2019 to 30.06.2019 for compliance of conditions subsequent and financial closure by letter dated 29.03.2019, extension up to 28.02.2020 by letter dated 24.04.2019 for compliance of conditions subsequent and financial closure and further extension up to 28.08.2020 by letter dated 14.01.2020 for compliance of the condition subsequent, financial closure and scheduled commissioning date.
- h) The termination of PPA by the Petitioner for setting up the 300 MW Wind Power project is not in the national interest and defeats the primary object of the Electricity Act, 2003, as well as the schemes and policies of the Government of India, which envisage promotion of renewable power including wind power.
- i) The Petitioner group, having aggressively bid for the project, being selected for establishing the power project for generation and supply of power, and having executed a binding agreement for the sale and purchase of power with SECI, should not now be permitted to bail out at this stage at its own convenience.
- j) With regard to the allegation of the Petitioner that delays on the part of SECI in obtaining the tariff adoption from this Commission resulted in the withholding of disbursement of funds by the lenders, it is submitted that Article 3.1 of the PPA does not provide for any condition to be performed by SECI to enable the Petitioner to fulfil the stipulated Conditions Subsequent and Financial Closure.
- k) In terms of Article 11.5 of the PPA, it was incumbent on the Petitioner to issue a Notification of a Force Majeure Event '*as soon as practicable, but not later than fifteen (15 days) after the date on which such party knew or should reasonably have known of the commencement of the event of Force Majeure*' as a pre-condition for

claiming relief under Article 11. However, no notice of Force Majeure was issued at the relevant time.

- l) The pleas sought to be raised by the Petitioner that the unviability of the project is on account of delay in obtaining the tariff adoption order by SECI is completely an after-thought and an attempt to avoid liability under the contract and to undermine the sanctity of the PPA. The Petitioner is attempting to cover its own defaults and delays by holding SECI responsible for the non-implementation of the project.
- m) The Petitioner filed an appeal before the Dispute Resolution Committee (DRC) challenging the decision of SECI communicated vide letter dated 14.01.2020. The said appeal was filed after a delay of 12 months from the stipulated time limit (21 days from the date of the decision of SECI for filing a case before DRC against the decision of SECI).
- n) IA. No. 7/2022 is liable to be rejected for the following reasons:
  - i. In the I.A. No.07/2022, the Petitioner is seeking to place on record the Office Memorandum dated 19.02.2020 of the Ministry of Finance with regard to Covid-19. The said Office Memorandum was in force at the time when the Petitioner purported to terminate the PPA vide its letter dated 25.02.2020 and filed the present Petition on 26.02.2020. The Petitioner did not raise the issue of Covid-19 either in its letter dated 25.02.2020 (purported notice of termination of PPA) or in the Petition.
  - ii. On 05.03.2020, the Petitioner entered into a 'Termination of Agreement' with GE India Industrial Private Limited (Manufacturer) terminating the WTG supply agreements, and contract for installation and commissioning of WTG with GE. The Petitioner has placed on record the said agreement vide I.A. No.07/2022 only.
  - iii. The Office Memorandum of MNRE dated 20.03.2020, 17.04.2020, 30.06.2020, 13.08.2020 relied upon by the Petitioner in the Application No.07/2022 were in force at the time of filing of the rejoinder dated 02.12.2020 by the Petitioner to the reply of SECI and also when the Petitioner approached the Dispute Resolution Committee (DRC) on 04.02.2021. The Petitioner did not raise the ground of Covid 19 being a Force Majeure event at that time and is now raising the ground at a belated stage.

- iv. The Petitioner raised the issue of Covid-19 as a force majeure for the first time only on 05.03.2021 i.e. after almost 12 months from the first Notification dated 20.03.2020 of MNRE granting extension of time to Power Developers on account of Covid-19.
- v. The Petitioner would have given notice of Force Majeure as required under Article 11.5 of the PPA and raised the same in the letters, and pleadings before the Hon'ble Commission and before Dispute Resolution Committee. The very fact that the Petitioner has not done so at the relevant time and had proceeded to terminate the PPA on other purported grounds belies the claim of the Petitioner that it was affected by COVID-19, a ground now sought to be added belatedly.
- vi. The Petitioner has filed I.A.No.07/2022, seeking to add additional facts and grounds in respect of Covid-19 for claiming termination of PPA, on 09.02.2022, i.e. after 691 days from the first Notification dated 20.03.2020 of MNRE.
- o) The Petitioner is raising the issue of Covid 19, hindering the progress of the project and making the project commercially unviable clearly as an afterthought. The Petitioner was granted suitable extensions as per the notifications and requests of the Petitioner, yet the Petitioner chose not to perform its contractual obligation.
- p) The reliance placed by the Petitioner on the Office Memorandum dated 20.03.2020 is misplaced. Before the issuance of this Notification, the Petitioner had already terminated the PPA on 25.02.2020. The Petitioner has not submitted the requisite documents in support of the claim of disruption of the supply chain due to the spread of Covid-19 in terms of the Office Memorandum dated 20.03.2020 of MNRE. Reliance placed on the Office Memorandum dated 13.08.2020 is misplaced as the Petitioner had already terminated the PPA on 25.02.2020.
- q) The period of 85 days beyond 68 days (period of lockdown-25.03.2020 to 31.05.2020) provided in the Office Memorandum dated 13.08.2020 of MNRE for extension of time is not to be treated as a Force Majeure event. It is for enabling the Renewable Developers to implement the project.
- r) With regard to the claim for the impact of the second surge of Covid-19, it is submitted that in terms of the Office Memorandum dated 12.05.2021 and 29.06.2021, the Petitioner was required to submit an Undertaking to SECI to be eligible to claim time extension for the period from 01.04.2021 to 15.06.2021. The Petitioner did not

apply for an extension in time in terms of MNRE Office Memorandums dealing with the extension of time for Covid-19.

- s) The reliance placed by the Petitioner on Article 4.5.3 of the PPA to claim that force majeure events continued for more than 9 months, entitling it to terminate the PPAs, is wrong and misconceived. The Petitioner itself had sought for extension of time. The extension of SCoD to 28.08.2020 was granted in terms of the Notification dated 22.10.2019 of MNRE and not in terms of the existence of a Force Majeure event as per Article 11 in the PPA. The extension having been granted till 28.08.2020 for commissioning the project on account of reasons other than force majeure, there cannot be any inclusion of the said period for the purposes of deciding on sustained force majeure for 9 months as provided for in Article 4.5.3 of PPA.
- t) Besides the remedies provided under the PPA of Liquidated Damages, SECI is also entitled to specifically enforce the PPA and require the Petitioner to fulfil its obligations of setting up the power project and commencing the supply of electricity from the wind power project to SECI.

**Submissions on behalf of BYPL & TPDDL:**

12. BYPL has submitted as under:

- a) The contention of the Petitioner with respect to the extension sought qua alleged Force Majeure events are not only untenable but an attempt on the part of the Petitioner to wriggle out of its contractual obligations. The Petitioner was party to Petition No. 162/AT/2019, which finally resulted in the adoption of tariff rates vide order dated 19.02.2020. None of the contentions as mentioned in the Petition under reply were brought to the notice of this Commission at the time of adoption of tariff rates. In fact, just 6 (six) days after the passing of the order dated 19.02.2020, the Petitioner terminated the PPA.
- b) No tangible delay or reason of delay directly attributable to the change in land policy has been demonstrated in the petition under reply, and the contention of the Petitioner that the change in land policy hampered them from acquiring the land is a completely vague submission. The change in land policy took place in February 2019, and if it had rendered the project unviable, it would have affected the direct procurement of land purportedly in the time span of 6 months or less. However, the PPA was only

terminated by the Petitioner on 25.02.2020, which was after the conclusion of the entire process of tariff adoption before the Commission.

- c) The Petitioner is mute about the tangible extent to which the viability of the project has been affected due to delay in acquiring the adoption order or due to the change in land policy that took place as far back as February 2019. Without any irreversible factor that has affected the viability of the project, the Petitioner cannot be allowed to wriggle out of its responsibilities while being in the know-how regarding the entire process of applying and finally procuring the adoption order. The Petitioner has not demonstrated exactly how it is impossible and impractical for the Petitioner to execute the project at the bid-out tariff.
- d) The Petitioner has alleged that force majeure beyond the period of 12 months entitles the Petitioner to seek recourse to termination. However, neither the purported action of the Tamil Nadu Government relating to the change in land policy nor the delay in acquiring adoption orders can constitute force majeure as the Commission was apprised of all timelines regarding the project at the time of the adoption of the tariff order.
- e) No factor/variable/cause/change has rendered the project unviable or impossible to be performed. The Petitioner has grossly failed to demonstrate how the abovementioned factors have affected its ability to perform its obligations under the PPA.
- f) Looking at a potential shortfall, and that too for no fault of its own, the Respondent expects the following potential outcomes:
  - i. DERC may impose penalties upon the Respondent for non-fulfilment of its RPO obligations. While the exact amount is not yet fully known, it is expected to be about Rs. 3.0 Crores.
  - ii. The Respondent would have to arrange for alternative power and would have to potentially pay a higher price. The financial impact on account of the same is expected to be around Rs. 134.0 crore per year @Rs.4.50/kwh under a Short-term arrangement.
  - iii. The Respondent may also face proceedings under Section 142 of the Electricity Act, 2003, for non-fulfilment of RPO obligations.
- g) The OMs dated 19.02.2020 and 20.03.2020 were in force when the Petitioner issued the letter dated 25.02.2020 attempting to terminate the PPA. However, under the said letter, the Petitioner did not raise Covid-19 as the reason/ ground for termination of



PPA. In fact, the Petitioner did not raise the ground of COVID-19 either at the time of filing of the Petition or rejoinder to the Reply of the Respondents or before the DRC on 04.02.2021. The conduct of the Petitioner shows that it raised the ground of the COVID-19 pandemic to terminate the PPA only as an afterthought and in a futile attempt to justify termination of the PPA. Even for the COVID-19 pandemic, the Petitioner did not give notice of Force Majeure as per Article 11.5 of the PPA, and thus, the COVID-19 pandemic cannot be treated as a force majeure event for termination of PPA.

- h) The Petitioner had already terminated its agreement with GE India Industrial Private Limited for the WTG supply agreements and the contract for installation and commissioning of the WTG with GE India on 05.03.2020. Therefore, the aforesaid acts of the Petitioner demonstrate the clear intention of the Petitioner to not perform its obligations under the PPA even prior to the issuance of the Additional Termination Notice.
- i) Even after the accrual of the right to terminate the PPA under Article 4.5.3 of the PPA, the Petitioner sought an extension of time for implementing the Conditions Subsequent and Financial Closures as well as SCOD. The Petitioner, *vide* its letters dated 30.08.2019 and 20.12.2019, sought an extension of timelines while the alleged right under Article 4.5.3 of the PPA had already been accrued. Further, during the proceedings of Petition No. 162/AT/2019 (tariff adoption petition), the Petitioner neither objected to adopting the tariff nor even whispered about its intention of terminating the PPA. After waiving its right, the Petitioner cannot now seek to enforce the same.

**Hearing dated 28.04.2022:**

13. During the hearing held on 28.04.2022, it was held as under:

*Learned senior counsel for the Petitioner submitted that in Petition No. 227/MP/2020, the Petitioner has filed IA No. 7/IA/2022 seeking amendment to the Petition in order to place on record the events that have transpired after the filing of the said Petition, which may be allowed. In response, learned senior counsel for the Respondent, SECI submitted that the Commission may take on record the additional pleadings but may not formally allow the IA seeking amendment to the Petition at this stage. Such submission of the learned senior counsel for SECI was agreed to by the learned senior counsel for the Petitioners.*

...

*After hearing the learned senior counsel and learned counsel for the parties, the Commission ordered as under:*



...

(d) The Respondents to file their reply to the additional documents placed on record by the Petitioner vide IA No.7/IA/2022 by 13.5.2022 with a copy to the Petitioner, who may file its rejoinder, if any, by 25.5.2022.

(e) The Petitioner to furnish the following details/information on affidavit by 20.5.2022:

(i) Correspondence exchanged indicating that the Petitioner took up the matter with SECI from time to time for getting early adoption of tariff by the Appropriate Commission; and

(ii) Correspondence exchanged with lender(s) whereby the lender(s) expressed their difficulty/inability to finance the Project in the absence of the adoption of tariff by the Appropriate Commission.

14. In compliance with the directions of this Commission, the Petitioner filed its Additional Affidavit on 01.06.2022 and placed on record the relevant correspondences (viz. *Correspondences exchanged between Petitioner and SECI and Correspondence exchanged with lenders*)

**Analysis and Decision:**

15. We have heard the Petitioner and the Respondents and have carefully perused the records.
16. On the basis of the rival submissions of the parties, the following issues arise for adjudication:

**Issue No. I: *Whether the Petitioner is entitled to terminate the PPA on account of force majeure and impossibility in terms of Article 4.5.3 read with Article 13.5 and be relieved from its obligations?***

**Issue No. II: *Whether the PPA stands frustrated on account of force majeure and impossibility of performance in terms of Section 56 of the Indian Contract Act, 1872?***

**Issue No. III: *Whether SECI should be restrained from taking any adverse or coercive action against the Petitioner?***

17. Now, we proceed to discuss the above issues

**Re. Issue No. I & Issue No. II**

***Whether the Petitioner is entitled to terminate the PPA on account of force majeure and impossibility in terms of Article 4.5.3 read with Article 13.5 and be relieved from its obligations? And***

***Whether the PPA stands frustrated on account of force majeure and impossibility of performance in terms of Section 56 of the Indian Contract Act, 1872?***

18. The Petitioner has submitted that it has become impossible to commission the Project within the timelines under PPA due to the following *Force Majeure Events*:
- (i) Delay in tariff adoption by SECI
  - (ii) Enactment of TN Land Allocation Policy
  - (iii) Adverse impact of Covid-19 pandemic
19. The Petitioner has submitted that it is entitled to terminate the PPA dated 04.09.2018 on account of force majeure and impossibility in terms of Article 4.5.3 read with Article 13.5 of the PPA.
20. We observe from the chronological date of events that the Petitioner, M/s. Mytrah Vayu (Brahmaputra) Private Limited is an SPV of M/s Mytrah Energy (India) Private Limited (MEIPL). The Petitioner was to set up a 300 MW Wind Power Plant (WPP) located in Sokkanur Village, Pollachi, Tehsil, Coimbatore District, Tamil Nadu. SECI issued LOA to the Petitioner on 01.06.2018, and the PPA was executed on 04.09.2018 (the effective date of the PPA being 30.08.2018). On 04.02.2019, the Government of Tamil Nadu issued G.O. (Ms) No. 18 and introduced the TN Land Allocation Policy. In terms of the said policy, critical changes were introduced in the procurement and conversion of land for power projects. As per the timelines of the PPA, the Petitioner had to achieve and demonstrate financial closure and Condition subsequent by 30.03.2019 (seven months from the effective date of the PPA) and the entire capacity of 300 MW was scheduled to be commissioned by 29.02.2020. On 04.03.2019, the Petitioner issued the letter to SECI highlighting the unforeseen challenges faced in the procurement of land in the face of TN Land Allocation Policy and sought an extension of six (6) months in timelines for Financial Closure and SCoD. SECI vide letter dated 28.03.2019 extended the timelines for FC and conditions subsequent for a period of 3 months, from 30.03.2019 to 30.06.2019. On 03.05.2019, TPPDL filed a Petition No. 162/AT/2019 before this Commission seeking the adoption of tariff @ Rs. 2.59/kWh in terms of Section 63 of the Act for the purchase of 50 MW wind power from SECI. On 24.05.2019, SECI extended the FC and conditions subsequent up to 28.02.2020. On 07.08.2019, the Petitioner requested SECI to grant an extension of 18 months in the timeline for SCoD from

the date of adoption of the tariff by the Commission. On 03.09.2019 and 19.09.2019, the Petitioner informed SECI that a site for the Project has been identified in the Kushtagi area of Koppal District in the State of Karnataka and proposed/requested for change of location of the Project. On 22.10.2019, MNRE issued a letter granting an extension to wind power projects under SECI Tranche I to V on account of a change in the land policy. On 30.10.2019, SECI rejected the request of the Petitioner regarding the change of location to Koppal District in Karnataka, stating that as per RfS, any change in the State of the project locations is to be intimated within 30 days of the conclusion of the e-reverse auction. On 20.12.2019, the Petitioner informed SECI, that even after the passage of 12 months, there has been no adoption of tariff qua the Project. In the absence of such consent/clarity in this regard, the lenders are reluctant to appraise the project proposals, ultimately prejudicing the investments for no fault of the Petitioner. The tariff was adopted by this Commission (vide order in Petition No. 162/AT/2019) on 19.02.2020. On 14.01.2020, SECI extended SCoD to six months i.e. 28.08.2020, in light of the TN Land Allocation Policy. However, the Petitioner submitted that due to the *Force Majeure Events*, it became impossible to commission the Project within the timelines under PPA and issued 1<sup>st</sup> termination notice to SECI on 25.02.2020. On 04.02.2021, the Petitioner filed an appeal before the Dispute Resolution Committee (DRC) challenging the decision of SECI communicated vide letter dated 14.01.2020. The said appeal was filed after a delay of 12 months from the stipulated time limit (21 days from the date of the decision of SECI for filing a case before DRC against the decision of SECI). Subsequently, the Petitioner issued a 2<sup>nd</sup> termination notice on account of a change in Tamil Nadu land Policy and the outbreak of Covid-19 on 05.03.2021. On 08.05.2021, the DRC rejected the application filed by the Petitioner on account of being time-barred.

21. The Petitioner has submitted that it is entitled to terminate the PPA dated 04.09.2018 on account of force majeure and impossibility (delay in tariff adoption; enactment of TN Land Allocation Policy; adverse impact of Covid-19 pandemic) in terms of Article 4.5.3 read with Article 13.5 of the PPA.
22. We observe that the relevant provisions of the PPA dated 04.09.2018 (the effective date of PPA being 30.08.2018) are as under:

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**ARTICLE 3: CONDITIONS SUBSEQUENT & FINANCIAL CLOSURE**

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### *3.1 Satisfaction of conditions subsequent & financial closure 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 seven (7) months from the Effective Date, i.e. by 30.03.2019 unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by SECI:

a) **The WPD shall make Project financing arrangements and provide necessary certificates to SECI in this regard;**

b) The WPD shall produce the documentary evidence of possession of 100% of the land acquired for the Project;

c) The WPD shall submit plans to fulfil the technical requirements according to criteria mentioned under Clause 3.5.9 of the RfS and produce the documentary evidence of the same.

### **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 SECI or 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 time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 16.

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

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

### **11.3 Force Majeure**

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

- a) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado;
- b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or
- c) radio active contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party.
- d) An event of Force Majeure identified under Buyer-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;
- 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.*

23. Now, we take the issues event-wise as submitted by the Petitioner to analyse whether the events fall under the Force Majeure events as per Article 11.3 of the PPA.

#### **Re. Delay in tariff adoption by SECI**

24. We observe that in terms of the PPA, the Petitioner was to achieve financial closure and condition subsequent within seven (7) months of the effective date i.e. by 30.03.2019, which was later revised by SECI vide letter dated 24.05.2019 till 28.02.2020. It is observed that Petitioner raised the issue of adoption of the tariff for the first time in its letter dated

07.08.2019. TPDDL approached this Commission for the adoption of the tariff on 03.05.2019, and SECI filed a transposition application on 07.10.2019 before this Commission, and the tariff was finally adopted by this Commission vide Order dated 19.02.2020 in Petition No. 162/AT/2019 i.e. before the Scheduled date of Commissioning as per PPA, i.e. 29.02.2020. Thus we find that the plea of the petitioner for non- adoption of tariff is only a pretext. Furthermore, as per Article 3.1 of the PPA, the Petitioner has to make Project financing arrangements at its own risk and cost and provide necessary certificates to SECI. Furthermore, Article 11.4 of the PPA excludes '*Insufficiency of finances or funds or the agreements becoming onerous to perform*' as a Force Majeure event. As such, we are of the view that no relief can be extended to the Petitioner for delay in tariff adoption.

**Re: Change in land policy**

***a) Enactment of TN Land Allocation Policy***

25. The Petitioner has submitted that the introduction of the TN Land Allocation Policy had a negative impact on the land acquisition process for the project, which has resulted in the project being unviable. *Per Contra*, the respondents TPDDL/SECI have submitted that the Petitioner has not taken even a single step to procure the land after the Tariff Adoption order of the Commission, and the Petitioner failed to show any tangible delay which can be directly attributed to the changes made in the TN Land Allocation Policy.

26. We observe the important timelines is as under:

Dates	Events
04.02.2019	The Government of Tamil Nadu issued Tamil Nadu combined Development and Building Rules, 2019.
04.03.2019	The Petitioner sought an extension in time for Financial closure and SCoD on account of the change in TN land allocation policy.
14.03.2019 & 28.03.2019	The Petitioner sought 6 month extension in timelines for financial closure and SCoD to mitigate the delay on account of TN Land allocation policy
29.03.2019	SECI granted interim extension of 3 months from 30.03.2019 to 30.06.2019
24.05.2019	SECI extended the FC and conditions subsequent up to 28.02.2020
07.08.2019	Petitioner, for the first time, intimated SECI about the unforeseen challenges faced by it qua the TN Land Allocation Policy and requested an extension of 18 months in the timeline for SCoD from the date of adoption of tariff by the appropriate commission.
03.09.2019	The Petitioner intimated to SECI that a site project has been identified in



	Koppal district in Karnataka and requested for change in the location of the project
19.09.2019	The Petitioner again requested SECI to accept a request for a change in the location of the land due to the following events: <ul style="list-style-type: none"> <li>a) <i>Difficulty in obtaining Right of Way for the identified WTG land locations and construction of transmission line from the wind farm to PGCIL (now CTUIL) substation at Palakkad.</i></li> <li>b) <i>Non-adoption of tariffs by Electricity Regulatory Commissions.</i></li> <li>c) <i>Unforeseen difficulties arising due to changes in land conversion rules.</i></li> <li>d) <i>Issues in registration under the TN Land Allocation Policy</i></li> </ul>
22.10.2019	MNRE issued a letter granting an extension to wind power projects under SECI Tranche I to V on account of a change in land policy.
30.10.2019	SECI rejected Petitioner's request for a change in location of the project to Koppal district in Karnataka
14.01.2020	SECI issued a letter to Petitioner extending the SCOD to 28.08.2020 on account of the change in TN Land Allocation Policy.
25.02.2020	The petitioner issued a termination notice to SECI and requested SECI to abstain from invoking the Performance Bank Guarantee.
29.02.2020	Scheduled commissioning date (SCoD) of the project
28.08.2020	SCOD revised by SECI vide letter dated 14.01.2020

27. We note that the Petitioner vide letters dated 04.03.2019 and 14.03.2019 brought to the knowledge of SECI the unforeseen challenges faced by it in the procurement of land qua the TN Land Allocation Policy and sought 6 month extension in timelines for financial closure and SCoD to mitigate the delay. The challenges faced by the Petitioner, as stated by them, are as under:

- a) *The minimum required land size has been materially modified;*
- b) *Minimum width of the access passage has been changed;*
- c) *Lack of clarity in the officials of the Revenue Department of GoTN with respect to the procedure to be followed for land conversion;*
- d) *The ownership of lands is defective or incomplete, which was highlighted during the due diligence carried out. In fact, it was brought to light that owners of large parcels of land have migrated and are untraceable*

28. The Petitioner, vide letter dated 07.08.2019, brought to the notice of SECI about the occurrence of an alleged force majeure event, i.e. change in TN Land Allocation Policy and sought an extension of 18 months from the date of adoption of tariff by this Commission. The relevant extract is as under:

“ ....

*The above-mentioned unforeseen challenges happened beyond our control despite the reasonable care taken backing with project experience in managing and operating close to 1800 MW assets are force majeure events as per the above definition.*

*In view of the foregoing submissions, we humbly make the following requests in view of the various unforeseen challenges during execution of project:*

*The unforeseen challenges have affected the overall macro environment in the country which seems to be irretrievable in the near future and estimated to take a very long period beyond a period of 18-24 months, therefore, we request your good offices to grant an extension of 18 months in achievement of SCOD from the date of adoption of tariff by the Appropriate Commission.....”*

29. MNRE vide Office Memorandum (OM) dated 22.10.2019 has granted 6 months extension to wind power projects under SECI tranches I to V on account of modifications in land and building rules in Tamil Nadu. Relevant extracts of the OM are as under:

*In cases where private land acquisition was affected on account of modifications in land and building rules in Tamil Nadu, extension in scheduled commissioning date of the projects may be granted for a period of six months, for all such projects whose PPAs have been signed at dates not more than seven months before 04.02.2019, the date when revised Land and Building Rules were issued.*

30. In terms of the MNRE notification dated 22.10.2019, SECI vide letter dated 14.01.2020 further extended the same till 28.08.2020. Relevant extracts of the letter dated 14.01.2020 are as under:

*“This has reference to your request to grant time extension to Schedule Commissioning Date for 300 MW ISTS connected Wind Power Project awarded to M/s Mytrah Vayu (Brahmaputra) Private Limited under SECI Wind Tranche-IV (Project ID: WPD-ISTS-T4-MEPL-P1-300TN).*

*In this regard it is to inform that on the account of change in land and building rules by Tamil Nadu State Government in Feb’ 2019 affected the land acquisition process, the Scheduled Commissioning Date (SCD) for the said Project has been revised to 28.08.2020....”*

31. We observe that SECI has already provided the extension of SCoD vide letter dated 14.02.2020 on account of a change in land and building rules by the Tamil Nadu State Government in February, 2019. As such, we are of the view that no further relief can be extended to the Petitioner on account of the enactment of the TN Land Allocation Policy.

***b) Re: Change in location of the land beyond the boundaries of the State***



32. The Petitioner, vide letters dated 03.09.2019 and 19.09.2019, requested SECI to grant approval for the change in location of the project to Koppal district in Karnataka. The relevant extract of the letter dated 19.09.2019 is as under:

....  
**In view of the unforeseen challenges faced by us in Tamil Nadu as highlighted above and also brought to your notice vide our letters dated 07 Aug 2019, 09 Aug 2019 and 03 Sep 2019, we request you to consider and approve the setting up of the project in the new site at Kushtagi area of koppal District in Karnataka...**

33. SECI vide letter dated 30.10.2019 rejected the request of Petition for change in the project location. Relevant extracts of the aforesaid letter are reproduced below:

...*In response to the letters by M/s Mytrah Vayu (Brahmaputra) Private Limited (MVBPL) requesting approval for change in location of Project under Tranche IV from Tamil Nadu to Karnataka and also Time Extension in Schedule Commissioning Date (SCD) due to unforeseen challenges we would like to state that **as per RfS, change in the State of the proposed Project locations is to be intimated within 30 days from the date of conclusion of e-RA. After 30 days of e-RA no change in the State of the proposed project location is allowed. Hence we regret to inform that MVBPL's request for a change in state of the project cannot be accepted at this stage...***

34. We observe that Clause 3.14 of the RfS dated 05.02.2018 states as under:

**3.14 Power Purchase Agreement**

.....  
it may be noted that **the Successful Bidder shall be allowed to change the State of the proposed Project locations, within 30 days from the date of conclusion of e-RA.**

35. Clause 1.6 of the LoA dated 01.06.2018 states as under:

....  
it may be noted that **the Successful Bidder shall be allowed to change the State of the proposed Project locations, within 30 days from the date of conclusion of e-RA. The state of the project(s) awarded shall not be permitted subsequent to the above deadline.**

36. From the aforesaid clauses of the RfS and the LoA, we observe that the Petitioner was allowed to change the State of the proposed project location within 30 days of the conclusion of the e-reverse auction, i.e. by 04.04.2018. However, the Petitioner vide letters dated 03.09.2019 & 19.09.2019 requested SECI to change the State of the proposed project location after the deadline of thirty (30) days as enshrined in RfS dated 05.02.2018 and LoA dated 01.06.2018. In our view, SECI has acted in accordance with the existing framework as contained in the RfS and LOI and therefore, the Petitioner cannot be allowed to take this plea.

Hence, we hold that no further relief can be extended to the Petitioner for a change in the location of the land beyond the boundaries of the State.

**Re: Adverse impact of Covid-19 pandemic**

37. The Petitioner had filed IA No. 7 of 2022 on 09.02.2022 seeking to amend the Petition in respect of the Covid-19 pandemic and sought for termination of PPA. *Per contra*, SECI has submitted that MNRE's OM's dated 20.03.2020, 17.04.2020, 30.06.2020, 13.08.2021 relied upon by the Petitioner were in force at the time of filing of rejoinder by the Petitioner to the reply of SECI and the Petitioner is raising the ground of Covid-19 as a Force Majeure event at a belated stage with a *mala fide* intention. The Respondent TPDDL also submitted that the OM's were in force when the Petitioner issued the 1<sup>st</sup> termination notice dated 25.02.2020, and the Petitioner did not raise the issue there. Further, it was submitted that the OM's relied on by the Petitioner were misplaced as the Petitioner failed to produce documents evidencing the disruption of the supply chain impacting the Petitioner.

38. MNRE vide OM dated 19.02.2020 stated as under:

**"A doubt has arisen if the disruption of the supply chains due to *spread of corona virus in China or any other country* will be covered in the Force Majeure clause (FMC). In this regard it is clarified that *it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate following the due process as above.*"**

39. We note that the Petitioner issued the 1<sup>st</sup> termination notice on 25.02.2020 (on account of the delay in the adoption of the tariff and change in TN Land Allocation Policy). The aforesaid OM was already existing prior to the issuance of the termination notice dated 25.02.2020. The Petitioner should have mentioned this event in the 1<sup>st</sup> termination notice itself. SECI has submitted that the Petitioner has not submitted requisite documents in terms of MNRE OM dated 20.03.2020. Relevant extracts of the OM dated 20.03.2020 are as follows:

(a) **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.**

(b) *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.

40. MNRE vide OM dated 13.08.2020 stated as under:

“In suppression of this Ministry’s earlier O.M.s of even no. dated 17<sup>th</sup> April, 2020 and 30<sup>th</sup> June, 2020 on the subject issue, the following is hereby conveyed:

.....

(2). Subsequently, RE developers had represented to this Ministry that they may be granted a general time extension on account of lock down (due to COVID-19) and additional time required for normalization after such lockdown.

(3). This issue has been examined by the Ministry and it has been decided that:

a) All Renewable Energy (RE) implementing agencies of the Ministry of New and Renewable Energy (MNRE) will treat lock down (due to COVID-19), as Force Majeure.

**b) All RE projects under implementation as on the date of lockdown, i.e. 25<sup>th</sup> 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<sup>th</sup> March 2020 to 24<sup>th</sup> 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.**

**d) The Developers, of the projects covered under para 3(b) above, may also pass on the benefit of such time-extension, by way of granting similar time-extensions, to the other stakeholders down the value chain like Engineering Procurement Construction (EPC) contractors, material, equipment suppliers, Original Equipment Manufactures (OEMs), etc.**

41. We note that the Petitioner vide 2<sup>nd</sup> termination notice dated 05.03.2021 has stated as under:

3.

.....

**(b) Outbreak of Covid-19 in India and abroad**

**Ministry of New and Renewable Energy (MNRE) by its office memorandum dated 13.08.2020 has provided a blanket extension of 5 months to all RE developers that are implanting RE projects. Such extension has been granted on a blanket basis, without the need for any case-to-case examination and no documents/evidence is required to be submitted for availing such extension. This 5-month extension, therefore, further extends the revised SCoD from 28.08.2020 to 28.01.2021.**

42. We note that MNRE, in the interest of renewable power developers, has provided a blanket extension of 5 months (i.e. from 25.03.2020 to 24.08.2020) to those projects which were in the implementation stage. We observe that SECI vide letter dated 14.01.2020 has already extended SCoD till 28.08.2020. Even if we consider the blanket extension of 5 months granted by MNRE vide OM dated 13.08.2020 (to all renewable power developers who were in the implementation stage) i.e. from 25.03.2020 till 24.08.2020, then also *the said extension period falls within the bracket of extension i.e. till 28.08.2020* already granted by SECI vide letter dated 14.01.2020. Hence, we hold that no further relief can be extended to Petitioner for the adverse impact of the Covid-19 pandemic
43. In the given facts and circumstances, the act to be performed by the Petitioner had not become impossible; rather, it might have become difficult to perform the act in a given time frame, which has been duly extended by the SECI.
44. In view of the above facts and circumstances and extensions granted to implement the project, we hold that various events claimed by the Petitioner cannot be treated as force majeure events under Article 11 of the PPA. In view of the above discussions, we find and hold that the Petitioner has wrongly terminated the PPA dated 04.09.2018 under Article 13.5.1.
45. The issues are decided accordingly.

***Re: Issue No. III:***

***Whether SECI should be restrained from taking any adverse or coercive action against the Petitioner?***

46. In view of the findings of the Commission on Issue No. I and Issue No. II, any discussion for issue no III is not required, we find that no relief is made out for the Petitioner under Issue No. III.
47. The Petition No. 227/MP/2020 along with I.A. 7 of 2022 is disposed of in terms of the above.

Sd/-  
पी. के. सिंह  
सदस्य

Sd/-  
अरुण गोयल  
सदस्य

Sd/-  
आई. एस. झा  
सदस्य

Sd/-  
जिष्णु बरुआ  
अध्यक्ष