



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 340/MP/2020 along with IA No. 01/2021

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 28th of March, 2024

IN THE MATTER OF:

Petition under 79(1)(f) of the Electricity Act, 2003 for adjudicating upon the dispute arising out of the Power Purchase Agreements dated 23.05.2018 executed between Petitioner herein, i.e. M/s Torrent Power Limited and the Respondent, Solar Energy Corporation of India Limited.

AND IN THE MATTER OF:

Torrent Power Limited,
Samanvay, 600 Tapovan,
Ambawadi, Ahmedabad,
Gujarat-380 015

...Petitioner

Versus

1. **M/s Solar Energy Corporation of India Limited,**
1st Floor, A Wing, D-3 District Centre,
Saket, New Delhi- 110017
2. **Madhya Pradesh Power Management Company Limited,**
Shakti Bhawan, Vidyut Nagar
Rampur, Jabalpur Madhya Pradesh- 482 008

3. **North Bihar Power Distribution Company Limited,**
Third Floor, Vidyut Bhawan, Bailey Road,
Patna, Bihar- 800 001
4. **South Bihar Power Distribution Company Limited,**
Second Floor, Vidyut Bhawan, Bailey Road,
Patna, Bihar- 800 001

...Respondents

Parties Present: Shri Basava Prabhu Patil, Sr. Advocate, TPL
Ms. Divya Chaturvedi, Advocate, TPL
Shri Saransh Shaw, Advocate, TPL
Shri Geet Rajan Ahuja, Advocate, TPL
Shri G. Umamathy, Sr. Advocate, MPPMCL
Shri Aditya Singh, Advocate, MPPMCL
Shri M.G. Ramachandran, Senior Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI
Ms. Surbhi Kapoor, Advocate, SECI
Ms. Srishti Khindaria, Advocate, SECI
Shri Aneesh Bajaj, Advocate, SECI

आदेश/ ORDER

The Petitioner, M/s Torrent Power Limited (TPL) is a generating company and is engaged in the business of generating electricity. TPL has been declared as a successful bidder against the Request for Selection (RfS) dated 12.01.2018, issued by SECI for the selection of Wind Power Developers (WPDs) for the development of a cumulative capacity of 2000 megawatts. TPL submitted its bid on 01.02.2018, and the e-Reverse auction was conducted on 13.02.2018. SECI issued a Letter of Awards (LOAs) dated 23.02.2018 in favour of TPL for the development of WPPs generation and sale of wind power under the above scheme. SECI executed Power Sale Agreements (PSAs) with Madhya Pradesh Power Management Company Limited (MPPMCL) on 22.03.2018 and with Bihar Discoms on 06.04.2018. TPL entered into Power Purchase Agreements (PPAs) with SECI for the development and implementation of the projects with a cumulative capacity of 499.8 MW (*Junachay PPA* dated 23.05.2018 for sale of 199.5 MW of power and *Lakhat PPA* dated 23.05.2018 for sale of 300.3 MW of power). As per the PPAs the Scheduled Commissioning Date (SCOD) of the

projects was 24.11.2019. TPL has submitted that there was, *inter-alia*, delay in the delivery of revenue land to TPL, and as such, the same constitutes a force majeure event and/or event akin thereto in terms of Article 11 of the PPAs dated 23.05.2018. Accordingly, TPL has filed the petition for adjudication in the disputes arising out of the Power Purchase Agreements dated 23.05.2018 and the consequences thereof.

2. The Respondent No.1, Solar Energy Corporation of India Limited (SECI), is a Central Public Sector Undertaking under the administrative control of the Ministry of New and Renewable Energy (MNRE). SECI is acting as an intermediary procurer in line with provisions of the Guidelines for Competitive Bidding Process for Procurement of Power from Grid Connected WPPs, issued by the Ministry of Power and holds a power trading license in terms of Section 12 of the Electricity Act.
3. Respondent No.2, Respondent No.3 and Respondent No.4, are the Distribution Companies engaged in the supply of power in the States of Madhya Pradesh and Bihar.
4. TPL has made the following prayers:

In Petition:

- a) *Declare that the delay in delivery of revenue land to the Petitioner, Torrent Power Limited on account of various changes in the policies (as outlined in Table I) were Force Majeure events and/or events akin thereto in terms of Article 11 of the Power Purchase Agreements dated 23.05.2018 entered into between the Petitioner, Torrent Power Limited and Respondent, Solar Energy Corporation of India Limited;*
- b) *Declare that the termination of the Power Purchase Agreements dated 23.05.2018 entered into between the Petitioner, Torrent Power Limited and Respondent, Solar Energy Corporation of India Limited for supply of 199.50 MW and 300.30 MW from the proposed projects of the Petitioner was on account of Force Majeure events and/or events akin thereto under Article 13.5 read with Article 4.5.3 of the aforesaid Agreements;*
- c) *Declare that no damages/compensation are payable to the Respondent, Solar Energy Corporation of India Limited by the Petitioner, Torrent Power Limited on account of the termination of the Power Purchase Agreements due to the Force Majeure events and/or events akin thereto;*
- d) *Declare that there is no liability on Petitioner, Torrent Power Limited for any obligation arising prior to termination of the Power Purchase Agreements dated 23.05.2018 entered into between the Petitioner, Torrent Power Limited and Respondent, Solar Energy Corporation of India Limited; and*

In IA. No. 1/2021:

- a) Take on record the amended memo of parties annexed herewith as Annexure P-2;
- b) Array the Proposed Respondents to the present proceedings as Proforma Respondents without prejudice to the Petitioner/Applicant's submissions/contentions; and
- c) Pass such other order(s) which the Hon'ble Commission deems fit in the facts and circumstances of the instant case.

Brief Background:

5. The brief facts of the case are as under

Guidelines	Guidelines for Tariff based competitive bidding process for procurement of Power from grid connected wind power projects vide gazette resolution dated 08.12.2017 including its subsequent amendments and clarifications issued by Ministry of Power.
Scheme	Setting up of 2000 MW ISTS connected Wind Power Projects
Location of the projects	199.50 MW- at villages Amiya, Dayapar, Ghadani, Haroda etc. Taluka: Lakhpat & Nakhatrana District: Kutch (Junachay Project) in the state of Gujarat; 300.30 MW- at villages Chher Moti, Cheer Nani, Koriyani, Naredi etc Taluka: Lakhpat District: Kutch (Lakhpat Project) in the state of Gujarat.
Tariff	Rs. 2.44/kWh
Request for Selection (RfS) was issued	12.01.2018; Amended RfS- 15.01.2018 and 23.01.2018
Bid submission date (Bid Acknowledgement receipt)	02.02.2018 (for both 300.30 MW and 199.50 MW projects)
E-Reverse auction was conducted	13.02.2018 (for both 300.30 MW and

	199.50 MW projects)
Letter of Award	23.02.2018 (for both 300.30 MW and 199.50 MW projects)
Bank Guarantee (BG) amounting to Rs. 60,06,00,000 and Rs. 39,90,00,000 issued to SECI	21.03.2018
PSAs executed between SECI and MPPMCL	22.03.2018
PSA executed between SECI and Bihar Discoms	06.04.2018
PPAs executed	23.05.2018
Effective Date of the PPAs	24.05.2018
TPL was granted Stage-II connectivity for Lakhpat and Junachay projects by PGCIL	19.07.2018
Date for fulfilment of conditions subsequent and Financial Closure (FC)	24.12.2018 Extended date for achieving FC- 24.02.2019; 24.04.2019; 24.11.2019
Notification regarding directions, as per High-level Committee meeting held on 20.06.2018, the Govt. of Gujarat, that applications of only those bid winners which have been approved by Gujarat Urja Vikas Nigam Limited (GUVNL) shall be approved and the other applications should be held back till the time a policy is decided.	25.07.2018
Transmission agreements for connectivity for Lakhpat Project and the Juanchary project entered into between Petitioner and PGCIL	09.08.2018
Notification regarding modification of earlier notification dated 25.07.2018 to the extent that applications for land allocation of those companies who have won bids invited either by GUVNL or SECI or other agencies of Government of India, supported by a letter from GEDA shall also be processed.	11.09.2018
Government of Gujarat introduced Land Allocation Policy vide Resolution No: JMN-3915-924-A.1 (2019 Land Allocation Policy)	25.01.2019
Scheduled Commissioning Date (SCOD) of the projects	24.11.2019
Termination Notice issued by TPL to SECI on	13.03.2020
SECI issued letter to TPL seeking documentary evidence for providing extension in SCoD and Financial Closure	18.05.2020

6. The instant petition was filed on 18.03.2020. Hearing was conducted on 14.05.2020 and during the course of the hearing, TPL intimated to the Commission that it has filed IA No. 24/2020 restraining SECI from encashing the Bank Guarantee amounting to Rs. 99.96 crores and it has filed IA No. 25/2020 for urgent listing. The Commission, after hearing the submissions of the parties, admitted the petition and directed that the BG shall not be

encashed if TPL renews it on the same terms and in time beyond 24.05.2020 and directed TPL to keep the BGs valid till the next date of hearing. Accordingly, the Commission disposed of IA No. 24/2020 and IA No.25/2020. During the course of the hearing dated 20.10.2022, TPL sought time from the Commission to file an Additional Affidavit to bring on record the additional documents. Pursuant to the directions of the Commission, the Petitioner filed an Additional Affidavit on 08.11.2022. The final hearing was conducted on 06.09.2023 and 10.11.2023 wherein the Commission, after hearing the submissions of the parties, reserved the matter for orders and directed the parties to file their respective written submissions.

Submissions of the Petitioner:

7. TPL has submitted as under:
 - a) TPL has faced several unforeseen events and circumstances while executing/commissioning the projects, which are primarily attributable to the actions of the State Government and consequent delays by the local government instrumentalities. TPL has not been able to mitigate such events and circumstances despite its best efforts.
 - b) There has been a delay in compliance with the obligations of TPL under the PPAs on account of the Force Majeure events and/or events akin thereto, primarily in the change in policy with respect to allotment and reservation of land only for those Wind Power Developers (WPDs) who had won government bids supported by a letter from GEDA and subsequent reversal of the same.
 - c) The delay in the procurement of land has occurred despite the diligent efforts and reasonable care taken by TPL and the prudent utility practices applied by it on account of change in policies by the Government.
 - d) The delay in compliance with financial closure and conditions subsequent by TPL, as well as in commissioning of the projects, has thus been on account of Force Majeure events and/or events akin thereto, and therefore, no damages were payable by TPL to SECI on account of the same. It had become impossible for TPL to comply with the requirement of execution of at least 50% of the projects within 27 months of the effective date of the PPA. The inordinate delay in commissioning the projects by TPL has affected TPL to the extent that it was ultimately constrained to terminate the PPAs.
 - e) Since delay on account of Government entities has not specifically been excluded from the definition of Force Majeure events, the same is presumed to be included under the

definition of the PPAs. It is a well-established principle that any delay in the procurement of land due to reasons beyond the control of the affected party is an event which is akin to a force majeure event and therefore, the relief claimed by the affected party is liable to be granted. Reliance is placed on the Commission's order dated 17.12.2018 in Petition No. 95/MP/2017.

- f) The BGs furnished by TPL under Article 3.3 of the PPAs are liable to be encashed by SECI if TPL fails to commence the supply of power from the SCoD or any further extension granted thereof by SECI, *subject to conditions mentioned in Article 4.5*. No damages are payable for any delay on account of Force Majeure events and/or events akin thereto in terms of Article 4.5 of the PPA. Therefore, in the present case, SECI is not entitled to encashment of the BG when the delay in commissioning of the projects and the consequent termination of the PPAs by TPL has been only on account of the prolonged Force Majeure events and/or events akin thereto faced by it, i.e. more than the period of 12 months. Further, in terms of Article 13.5, if the Force Majeure event continues to be present beyond a period of 12 months, either party shall have the right to cause termination of the Agreement. In such circumstances, the PPAs shall stand terminated from the date of Termination Notice without any further liability to either party from such date of termination.

Submissions on behalf of SECI:

8. SECI has submitted as under:
- a) In terms of the bidding documents, the Wind Power Developers (WPDs), including TPL, were free to install their respective projects anywhere in India based on their choice and decision on land availability. There was no mandate or requirement for TPL to execute the projects only on the revenue lands of the Government. TPL had the option to implement the Power Projects on any type of land whether revenue land, private land or combination of revenue and private land.
- b) If there was a possible delay in the allotment of revenue land, TPL always had the option to choose, install and implement their power projects on other types of land, including private land. TPL itself, vide letter dated 08.10.2018, had highlighted the scarcity of revenue land in Kutch District in the State of Gujarat and stated that they had directed their developer- M/s. Suzlon Wind Park Limited (Suzlon), to acquire private land in lieu of locations which had been identified earlier, for setting up the project.

- c) The claim of TPL needs to be considered strictly in terms of Article 11.3.1 of the PPAs, and further, there can be no such claim that TPL was affected by events akin to force majeure. The land issues raised by TPL do not fall under any of the clauses specifically dealt with in Article 11.3.1 of the PPAs.
- d) Article 11.4 of the PPAs dealing with Force Majeure exclusions includes within its scope, '*Delay in performance of any contractor, sub-contractor or their agents*' and '*...or the agreements becoming onerous to perform*. Accordingly, in any event, on account of such express exclusion, the delay in procurement of land by Suzlon, the contractor of TPL, cannot be claimed as a ground for Force Majeure within the ambit of Article 11 of the PPA.
- e) TPL has also not given Notice as per Article 11.5 of the PPAs, which has been provided as a pre-condition for claiming the events as Force Majeure events. SECI has taken appropriate steps with regard to the consideration of the request of WPDs, including TPL, for an extension in the deadline for the fulfilment of financial closure. SECI has also written letters to the Ministry of New and Renewable Energy (MNRE) for an extension of the deadline for the fulfilment of financial closure conditions and the commissioning date. SECI, on a provisional basis, has extended the timeline of Financial Closure, subject to the final decision of MNRE, Government of India, on the said proposals with the object of facilitating the implementation of the power projects.
- f) Instead of providing the requisite clarifications and documentary evidence as sought by SECI for processing the request for an extension of time, TPL had unilaterally proceeded to issue the notice of termination of the PPAs by its letter dated 13.03.2020 purporting to be under Article 13.5 read with Article 4.5.3 of the PPAs. TPL filed the present Petition soon after sending the termination notice dated 13.03.2020 without waiting for the response from SECI and without attempting to hold any meeting or conciliation with SECI. TPL has proceeded to purportedly terminate the PPA after having secured one extension after another i.e. the extension granted by SECI for compliance of the condition subsequent and financial closure by letters dated 03.01.2019, 25.02.2019 and 26.04.2019 (as detailed hereinabove). TPL has been misleading and misrepresenting SECI and seeking such an extension without any intention of implementing the power project.
- g) The termination of PPAs by TPL to set up the cumulative capacity of 499.8 (300.3 +199.5) MW Wind Power projects 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 envisages the promotion of renewable power, including wind power.

- h) TPL, having failed to perform its obligations under the PPA, is not entitled to claim any relief, including the return of Performance Bank Guarantees. The attempt of TPL to terminate the PPAs at this stage will cause irreparable loss and prejudice to the entire scheme of the Central Government of aggressively promoting the development of wind power projects to achieve the target set by the Government of India.
- i) TPL is in deliberate breach of the fundamental obligations under the PPAs in not pursuing the implementation of the power projects capacity bid for and accepted. For such breach, besides the remedies provided under the PPAs of Liquidated Damages, SECI is also entitled to specifically enforce the PPA and requires TPL to fulfil its obligations of setting up the power projects and commencing the supply of electricity from the wind power projects to SECI.

Rejoinder filed by the Petitioner dated 20.06.2020 against SECI's reply and Written Submissions dated 06.12.2023 (Joint Submissions):

- 9. TPL has reiterated the submissions (made in the Rejoinder as well as the Written Submissions) already made in the plaint, and as such, the same is not being reiterated for the sake of brevity. Additionally, TPL has submitted as under:
 - a) SECI has failed to demonstrate why TPL ought not to have exited the PPAs on account of the Force Majeure events and/or events akin thereto raised by TPL in its Petition. SECI has failed to appreciate that in terms of Article 13.5 of the PPAs signed between TPL and SECI, *inter alia*, the right of TPL to exit the contract signed between the parties in case of prolonged Force Majeure events and/or events akin thereto has been duly recognised and preserved.
 - b) TPL had served the notices for the extension of time on account of Force Majeure events and/or events akin thereto on 08.10.2018, 29.10.2018, 21.12.2018, 31.12.2018, 15.02.2019, 19.03.2019, 08.05.2019, 09.08.2019, 22.08.2019, 30.09.2019, 11.12.2019 and Termination Notice dated 13.03.2020. At every stage of the projects, SECI was notified of the reasons for the delay (which were beyond the control of TPL) as well as the efforts being made by TPL as well as its developer to overcome the same

- c) Once the extension has been granted by SECI, there is a clear acceptance of the underlying reasons given by TPL for seeking a time extension. SECI cannot now alter its stand, to deny the existence of Force Majeure events and/or events akin thereto which led to enormous delay in execution of the Projects and consequential extension of the timeline.
- d) The delay by SECI in getting the tariff adopted by this Commission was inordinate and inexplicable, and in such an event, TPL cannot be coerced to go ahead with the erection and commissioning of the Projects, which required investments of more than Rs 3,300 crore. Such inordinate and inexplicable delay on SECI's part, coupled with the inability of SECI to conclusively respond to the requests for an extension of various timelines by TPL, further worsened the obstacles which were already being faced by TPL and were beyond its control.
- e) Any termination by TPL as per the PPAs cannot be restricted by SECI on the alleged ground that SECI is still willing to negotiate the terms of the PPAs and waive the conditions subsequent to the PPAs. TPL cannot be constrained to continue with the PPAs when the prolonged Force Majeure events and/or events akin thereto have left TPL with no other option but to exercise its right of termination.
- f) For termination of the PPA, there is no requirement for agreement between the parties, and if either party is affected by an event triggering the termination, then such termination is legal and valid. Reliance is placed on the Hon'ble Supreme Court's judgment dated 02.07.2019 in Civil Appeal No.11133 of 2011: *Adani Power (Mundra) Ltd. vs. Gujarat Electricity Regulatory Commission & Ors. (Adani Judgment)*.
- g) SECI has sought to portray that it is open to considering the request of TPL for time extension as a "waiver"; such an intent was never indicated by SECI previously. When there is a specific clause for an extension of time under the PPA, the question of any waiver does not arise. From the record, it is clear that the extension was granted by SECI in terms of the PPAs and not dehors the PPAs. Therefore, any attempt by SECI at such a belated stage to treat its consideration of requests made by TPL as a waiver of its rights is an afterthought.
- h) SECI, at the time of granting extensions to TPL, had never suggested that TPL has the choice of opting for land anywhere else or changing the nature of the land being procured by it. If such a stance being taken by SECI is accepted, then no project

delays (related to land or otherwise) will be covered by the Force Majeure clause. Therefore, the interpretation sought to be given by SECI to the terms and conditions of the PPAs, if accepted, would render the broad definition given to Force Majeure events otiose. Since the terms and conditions regarding the identification of land have been duly crystallised under the PPAs, SECI cannot now refer to the pre-bid documents to argue that the terms and conditions crystallised under the PPAs stand negated on the basis of the RfS.

- i) Unlike solar power projects, WPDs do not have the option to set up their projects in any part of the country and there are only a few locations in the country where the wind power projects can be set-up for efficient generation of electricity. TPL had chosen the location of the Projects based on the wind potential in the Kutch district of Gujarat. Even in the State of Gujarat, the shift was not possible as the change in policies of the State Government affected the entire State and it was not possible for TPL to get allocation of revenue land elsewhere in the State of Gujarat too.
- j) The alternative of acquiring private land was not possible due to the following reasons which were beyond the control of TPL:
 - i. Uncertainty due to mining no-objection certificates and defence no-objection certificates.
 - ii. Scarce availability of private land in the region where the projects were planned.
 - iii. As per prevailing rules and regulations of the State of Gujarat, a company cannot procure private agricultural land (beyond 10 Acres), without obtaining approvals for conversion of land for non-agricultural uses (NA Approvals).
 - iv. Obtaining NA approvals was a time-consuming task and was expected to take about 6 (six) months, which at that time seemed less feasible than acquiring revenue land, which was being identified and allocated by the State Government for wind power projects.
 - v. Pursuant to procurement of the NA Approvals, development permission from GEDA is also required to be obtained for the underlying private land. In case, GEDA could not grant the development permission, the entire process of procurement of private land with NA approval would have resulted in loss of time and resources available
 - vi. Obtaining and securing the right of way (ROW) has turned out to be the highest risk activity in Kutch, Gujarat, in relation to the execution of projects due to

various issues created by land-owners from whom ROW are procured and also by various other parties with no interest in the project's development activities whatsoever. Therefore, even after the acquisition of private land for the WTG location, setting-up the projects could have been more challenging and would have rendered the projects similarly impossible if the private land so acquired became unusable due to severe ROW issues. Therefore, new locations on private lands would come bundled with lots of fresh and unanticipated ROW issues, which have not been considered by SECI while making the suggestions of procuring private land for the Projects.

- k) The question of recovery of liquidated damages through encashment of PBGs under Article 4.6 of the PPA submitted by TPL only comes into the picture if the delay in achieving commissioning of the Projects by SCoD is not on account of a Force Majeure event and/or event akin thereto, which is an exclusion to not just the obligations of TPL under Article 4.5 of the PPA but also, all of its other obligations. In any event, a claim of damages can only be maintained if the party claiming the said damage can prove that a legal injury has been caused to it, which has resulted in some loss.
- l) Since the termination of the PPAs was on account of Force Majeure events and/or events akin thereto, SECI can neither seek recovery of liquidated damages nor the specific performance of a contract.
- m) SECI has erroneously sought specific performance of the PPAs under Article 13.7 of the PPAs, wherein any specific performance can only be sought in cases of breach of a condition of the PPAs and not termination of the agreement. There cannot be any contractual or statutory interpretation which bars TPL from terminating the PPAs in any event.
- n) SECI has failed to satisfy that it has suffered any legal injury or monetary damage and thus, no claim of liquidated damages raised by SECI ought to be adjudicated upon by this Commission. At no stage can the obligations of SECI's contracts with the third-party buyers be transferred to TPL in terms of the present arrangement or otherwise. SECI has failed to bring on record any details or documents regarding the alleged counter claim and has merely based its claim on surmises and conjectures. SECI, without quantifying its claim, has sought to pass off an unsubstantiated claim as a counter claim without even referring to any statutory provisions under which such a

counter claim may be entertained by this Commission. SECI has erroneously referred to certain other projects in the state of Gujarat where the developers were able to commission their projects. SECI has failed to note that there were various other developers as well including a developer in the same SECI Tranche III bidding, who were unable to commission their projects.

Submissions of MPPMCL vide Reply dated 11.12.2021 and Written Submissions dated 01.11.2023:

10. MPPMCL vide its reply dated 11.12.2021 and written submissions dated 01.11.2023, has submitted as under:

- a) Due to the failure of TPL in completing the projects as per PPAs and failure of SECI in commencement of power supply to MPPMCL as per timelines provided as per PSA, MPPMCL is suffering badly by being forced to purchase unplanned and costly replacement power from other sources.
- b) The provisions of Bidding Guidelines, RfS, LoA and PPAs do not allow an extension of time for compliance with conditions subsequent without financial implications and extension charges. However, SECI failed to apply due diligence and institutional wisdom to recognise the evident inconsistencies/ contradictions and hidden intentions behind inappropriate requests of TPL vide letters dated 24.07.2018, 08.10.2018, 29.10.2018 and 16.11.2018 and draw the obvious conclusion that TPL was simply making untenable excuses for its failures to comply with conditions subsequent prescribed under Clause 3.1 by due date, i.e., 24.12.2018 and merely wished to avoid the consequent financial implications as provided in the PPA.
- c) Instead of submitting the requisite documents evidencing compliance with conditions subsequent, TPL continued to make untenable excuses for its evident failure of compliance with SECI and request for time extensions. Further, SECI continued to ignore repeated untenable excuses by TPL.
- d) SECI failed to take appropriate action even after the expiry of the granted extended timeline for compliance with Conditions Subsequent, i.e. on 24.02.2019 and pretended to remain engaged with TPL over irrelevant issues. More surprisingly, SECI vide letter dated 26.04.2019 surrendered to illegal demands of TPL and obliged

the Petitioner by granting time extensions up to the SCoD of the Project, i.e., 24.11.2019.

- e) The Petitioner and SECI remained engaged in some unfruitful exercises and mutual correspondences even after the SCoD of the Project(s) was over on 24.11.2019. Evidently, TPL was not willing to complete the Projects at all but continued to demand more and more time extensions for compliance with the conditions subsequent as well as for SCoD merely to avoid liquidation of Performance Bank Guarantee and other adverse consequences. Surprisingly, SECI also continued to grant extraordinary and extra contractual concessions to the Petitioner and did not liquidate the PBG even after serving notices to the Petitioner and thus caused great harm to the interest of MPPMCL.
- f) TPL did not have any new or further excuses to offer to SECI in response to the aforesaid threatening notice dated 14.02.2020, and it made a request for 15 more days of time to respond to SECI vide letter dated 28.02.2020. However, SECI also failed to take necessary action on the Petitioner on the expiry of the notice period as envisaged in the notice dated 14.02.2020.
- g) It becomes amply evident that as an attempt to avoid liquidation of Performance Bank Guarantee and any further adverse consequence on account of its clearly evident breach, default and defiance of the PPAs, TPL had served the said PPA termination notice dated 13.03.2020 to SECI and had decided to approach and file this Petition before the Commission. The Petition is completely devoid of any merit.
- h) Jurisdiction of the Commission in case of any dispute is also provided in the PPA dated 23.05.2018 itself. None of the prayers made by TPL in the present Petition justify the intervention of the Commission to adjudicate upon the alleged disputes with the SECI under PPAs dated 23.05.2018 under Section 79 (1)(f) of the Act, as none of the matters raised in the Petition is connected with aforesaid clauses (a) to (d) of Section 79 (1) of the Electricity Act, 2003. Further, the provisions in Article 16.3.1 of the PPAs dated 23.05.2018 also do not justify intervention as none of the matters raised in the petition are connected with changes in the Tariff or can have any impact on the tariffs applicable under the PPAs. The matters raised in the petitions are required to be settled between the parties and/ or stakeholders of the PPAs and in terms of provisions made in the PPAs. So, the present petition is liable to be dismissed on the grounds of jurisdiction itself.

- i) TPL had deliberately breached the PPAs by serving the notice of termination dated 13.03.2020 of the PPAs itself. Apparently, TPL is not interested in the implementation of the Projects after entering into PPAs dated 23.05.2018. The termination of PPAs dated 23.05.2018 or abandonment of the projects envisaged under PPAs dated 23.05.2018 by TPL shall have a cascading adverse effect on back to back PSA dated 22.03.2018. In case the unlawful prayers by TPL for termination of the PPA without imposing a financial liability on the Petitioner for its own default is allowed, MPPMCL, on behalf of the innocent retail consumers in the State of Madhya Pradesh, will be the ultimate and most adversely affected stakeholder. TPL cannot be allowed to take any undue/unlawful advantage, benefit and relief as sought through the present petition against its own evident breach, default and failure of performance under the PPAs. MPPMCL cannot be allowed to suffer for any inappropriate action or inaction on the part of either TPL or SECI in the implementation of the projects under the PPAs dated 23.05.2018. Further, the end beneficiary, i.e. retail consumers of the State of MP, will be deprived of cost effective and economical wind power despite having a valid and legally enforceable Power Sale Agreement (PSA) for procurement purposes.
- j) In the absence of any formal intimation or notice of termination of the PSA, SECI is still liable to either supply the contracted power to MPPMCL or provide legitimate compensation to MPPMCL towards failure in fulfilment of the contracted obligations by means of liquidated damages recovered from TPL as laid down under PPAs as well as the PSA. MPPMCL is entitled to receive such compensation from SECI under provisions of clause 13.2 of the Bidding Guidelines, clause 5.1.3 of the PSA 22.03.2018 and clause 3.3.3 of the PPAs dated 23.05.2018.

Rejoinder dated 08.06.2022 against Reply submitted by MPPMCL:

11. Briefly, TPL has submitted as under:

- a) MPPMCL is not the relevant party, and the conduct of MPPMCL in using TPL's petition to wrongly attribute the liability for termination of the PPAs on TPL cannot be sustained. No liability can be imposed on TPL on the basis of any agreement entered into between SECI and its procurers, such as MPPMCL, since TPL was neither party nor privy to such PSAs. In fact, SECI, at the time of signing the PPAs

with TPL, had not disclosed the identified procurers to whom the power procured from TPL was ultimately intended to be supplied.

- b) TPL was not informed of the PSA executed by SECI with MPPMCL at the time of entering into the PPAs and Schedule 3 of the PPAs has, therefore, been left blank. Apart from the aforesaid reference to the PSA in the Recital and Schedule III (that too without any specific reference to the specific PSA executed with MPPMCL), there is no operative term of the PPAs which places any obligation on TPL to issue a force majeure notice to MPPMCL or create any relation between TPL and MPPMCL.
- c) PPAs and the PSAs are 2 (two) separate and distinct contractual arrangements and in the absence of any privity of contract between MPPMCL and TPL, no relief can be claimed by MPPMCL against TPL.

Hearing dated 06.09.2023

12. The Commission vide Record of Proceedings (RoP) dated 06.09.2023 directed TPL to submit certain documents. The relevant extract of the RoP dated 06.09.2023 is as under:

After hearing the learned senior counsels and learned counsel for the parties the Commission directed the Petitioner to furnish its clarification to the following queries on an affidavit within three weeks`

(a) Whether all requisite details/information as per MNRE's letter dated 22.10.2019 were supplied to SECI for processing the request for an extension of time? If not, reasons thereof.

(b) Clarification as to why the Petitioner could not continue with the implementation of the Project(s) when the two other developers selected in the same bid process could set-up the Projects in the same vicinity as the Petitioner's.

The Petitioner's submissions vide Additional Affidavit dated 03.10.2023

13. TPL vide email dated 17.12.2018 submitted the following documents:
 - a) Letter dated 17.12.2018 issued by TPL to SECI, whereby TPL, in response to SECI's email dated 14.12.2018, had submitted the details pertaining to Applications for the Revenue Land / Final Permission Orders (FPOs) for two Projects of TPL, i.e., Lakhpat (300.3 MW) & Junachay (199.5 MW) as per the given format.
 - b) Annexure-I to the letter dated 17.12.2018, which contained a summary of applications for allotment of revenue land applied by the Petitioner through its Developer for the Lakhpat (300.3 MW) and Junachay project (199.5 MW) along with an excel sheet providing comprehensive details namely, Turbine ID, location details, details of the application/developer of TPL and applicant, Area (ha), the status of

applications/allotment, delay in allotment of land in response to each application, etc.
and

- c) Annexure-II to the letter dated 17.12.2018 contained all the Applications for the Revenue Land applied by the Petitioner/its Developer for and the FPO granted till date.

14. TPL has submitted that:

- a) All the details submitted by TPL to SECI vide letter dated 17.12.2018 were brought on record before the Commission vide Affidavit dated 08.11.2022. TPL had already submitted all relevant documents required to establish that the Projects could not be completed in a timely manner on account of Force Majeure events and/or Events akin thereto. Therefore, since TPL, after 2019, became aware that it would not be in a position to set up the Projects, it did not intend to seek any further time extensions by submitting any additional documents/details, and instead, it terminated the PPA on 13.03.2020.

Re: Reasons for non-commissioning of the projects when certain other developers have commissioned their projects:

- b) TPL did not have the option to set up its projects in any part of the country or even in any location of its choice within the State of Gujarat.
- c) In terms of Clause 3.14.1 of the Request for Selection issued by SECI (as amended on 23.01.2018), the State of the proposed project locations could only be changed within 30 days from the date of conclusion of reverse bidding (e-RA), i.e., on or before 15.03.2018.
- d) The location of the projects was duly recognised under the LOA issued on 23.02.2018, and Clause 1.6 of the LOA reiterated the stipulation under Clause 3.14.1 of the RFS, i.e., the State of the proposed project locations could not be changed after 15.03.2018.
- e) The location of the projects was also duly recognised in Clause D and definition of “Project” under the PPAs. There was no provision under the PPAs, which allowed TPL to change the aforesaid location of the projects.
- f) Wind resource availability has to be factored in while choosing the location of the project.

- g) Majority of the successful bidders under SECI Tranche I to IV bids chose to develop their respective projects in the Kutch district of Gujarat on account of wind resource availability and therefore, the problems related to land allotment were not in existence at the time of bidding stage of SECI III tranche.
- h) Availability of adequate transmission and evacuation facilities, which further puts a limitation on the possibility of shifting the location of the projects.
- i) TPL had obtained the connectivity for the Projects at the PGCIL Bhuj pool substation and had already executed all relevant agreements along with the development of design and drawings of the transmission infrastructure; and
- j) TPL had already initiated development works at the site since the month of October 2018, and foundations were being cast on approximately 30 locations pursuant to careful and prudent identification of land by the Petitioner.
- k) SECI has erroneously referred to certain other projects in the State of Gujarat where developers were able to commission their projects.
- l) SECI, while making the foregoing submissions, has failed to note that there were various other developers as well, including a developer in the same SECI Tranche III bidding, who were unable to commission their Project.

Written Submission dated 05.12.2023 filed by SECI:

15. SECI has reiterated the submissions already made in its Reply. Additionally, SECI has submitted as under:
- a) PPAs signed by TPL with SECI do not provide for the adoption of tariff by the Appropriate Commission as a condition precedent for the implementation of the PPA, including for commissioning the power project.
 - b) Once the PPAs stand executed, the provisions of the PPAs become final and binding on the parties. Therefore, the PPA governs the contractual rights and obligations. Delay in adoption of tariff does not fall within the purview of Force Majeure. Reliance is placed on a CERC order dated 29.07.2022 in Petition No. 133/MP/2021 and an order dated 04.05.2023 in Petition No. 580/MP/2020.
 - c) TPL has not given Notice of Force Majeure as per Article 11.5 of the PPA to SECI within fifteen (15) days of the date of the commencement of the alleged events of Force Majeure (delay in the adoption of tariff). Such notice is a pre-condition to an affected party's entitlement to claim relief of Force Majeure under the PPA.

- d) It is incumbent on TPL to follow the process of issuing of notices, consideration of reply and counter-claim by the other party, an attempt to amicably resolve the dispute over a period of 30 days, etc., as a pre-condition before invoking the adjudication process of the Appropriate Commission.
- e) Under the PPA, SECI is required to return/release the Performance Bank Guarantee only after successful commissioning of the projects after taking into account any liquidated damages/penalties due to delays in the commissioning as per provisions in the PPA and further such return/release of the Performance Bank Guarantee is stipulated to be without prejudice to the other rights of SECI under the PPA. TPL, having failed to perform its obligations under the PPA, is not entitled to claim any relief, including the return of Performance Bank Guarantees.

Counter Claim:

- f) The purported action of termination, which, for the reasons mentioned above is patently erroneous and liable to be set aside, is injurious to the public interest, if such action by persons like TPL herein is allowed, it will seriously prejudice the entire policy decision of the Government of India to promote renewable energy sources.
- g) TPL, after having entered into binding and enforceable PPAs in pursuance of the competitive bidding process cannot be allowed to simpliciter terminate the PPAs in the manner mentioned above.
- h) In view of the above, SECI is entitled to compensation for the delay in commencement in supply of power as per the liquidated damages provision contained in Article 4.6 of the PPA and is also further entitled to seek specific performance of the PPA by TPL in terms of Article 13.7 of the PPAs. On this issue, SECI has prayed as under:

- a) *Admit the counter-claim;*
- b) *Declare that the termination of the PPAs dated 23.05.2018 vide communication dated 13.03.2020 or otherwise is void, illegal and will have no effect and that the Petitioner shall continue to be bound by the terms and conditions of such PPAs as before;*
- c) *Hold the Petitioner to be in fundamental breach of the PPAs dated 23.05.2018 and material obligations contained in the PPAs;*
- d) *Direct the Petitioner to specifically perform the obligations under the PPAs dated 23.05.2018 to set up and commission the wind power projects of the capacity of 199.50 MW and 300.30 MW and commencement of supply of wind power to the Petitioner on terms and conditions contained in the PPAs dated 23.05.2018, within such extended time based on the (i) conditions mentioned in PPA which allows extension in time and (ii) course of action issued by Ministry of New and Renewable Energy, Government of India vide letter*

22.10.2019 based on the petitioner providing satisfactory documents in support of extension being sought;

- e) Declare that the SECI shall be entitled to liquidated damages for non-commencement of supply of wind power of contracted capacity by the scheduled commissioning date with such extension as having been given by SECI, in addition to the relief of specific performance as prayed for hereinabove;
- f) Award the cost of this proceedings to SECI; and
- g) Pass any other or further orders which this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case

Analysis and Decision:

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

Issue No. I: Whether this Commission has the jurisdiction under Section 79 of the Electricity Act, 2003, to adjudicate the present matter?

Issue No. II: Whether the Petitioner was prevented by unforeseen and uncontrollable events/factors, and whether the same constitutes Force Majeure under Article 11 of the Power Purchase Agreement dated 23.05.2018 and whether the Petitioner has rightly terminated the Power Purchase Agreement dated 23.05.2018 on 13.03.2020?

Issue No. III: Whether SECI is entitled to release the Bank Guarantees amounting to Rs. 60,06,00,000 and Rs. 39,90,00,000 dated 21.03.2018?

18. Now, we discuss and analyse the issues.

Re: Issue I:

Whether this Commission has the jurisdiction under Section 79 of the Electricity Act, 2003 to adjudicate the present matter?

19. MPPMCL has submitted that this Commission lacks the jurisdiction to entertain the present matter as none of the matters raised in the petition is connected to clauses (a) to (d) of Section

79(1) of the Act, 2003. Also, Article 16.3.1 of the PPAs provides for dispute resolution clauses. So, the issues raised in the present Petition are required to be settled between the parties and/or stakeholders of the PPAs and in terms of provisions made in the PPAs. *Per Contra*, TPL has submitted that this Commission has the jurisdiction to adjudicate the instant matter in terms of Section 79 of the Electricity Act, 2003, as the dispute includes a generating company and a trading licensee, i.e. SECI. Further, the power is to be supplied by TPL to SECI, which was functioning as an intermediary procurer intended for inter-state supply in terms of the RfS issued by SECI.

20. We observe that Article 16.3.1 of the PPA stipulates as under:

“16.3.1 Dispute Resolution by the Appropriate Commission

*(i) Where any Dispute (a) arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any such claims could result in change in the Tariff, or (b) relates to any matter to be agreed to be referred to the **Appropriate Commission**, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.*

(ii) Buyer shall be entitled to co-opt the Buying Entity(ies) as a supporting party in such proceedings before Appropriate Commission.”

21. Relevant provisions of the Electricity Act of 2003 stipulate as under:

Section 2(4)

Appropriate Commission means the Central Regulatory Commission referred to in sub-section (1) of Section 76 or the State Regulatory Commission referred to in section 82 or the Joint Commission referred to in section 83, as the case may be

Section 79. (Functions of Central Commission): --- (1) *The Central Commission shall discharge the following functions, namely:-*

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to

refer any dispute for arbitration;

- (g) to levy fees for the purposes of this Act;
- (h) to specify Grid Code having regard to Grid Standards;
- (i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;
- (j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;
- (k) to discharge such other functions as may be assigned under this Act.

22. From the above, we observe that Article 16.3.1 of the PPAs fastens jurisdiction on the Appropriate Commission for adjudication of disputes relating to the determination of tariff or any matters related to it upon claim of any party. Further, Section 79(1)(b) of the Electricity Act, 2003, fastens jurisdiction on this Commission to adjudicate upon matters having a composite scheme for the purchase and sale of electricity.

23. The Hon'ble Supreme Court vide judgement dated 11.04.2017 in the matter of *Energy Watchdog v. CERC & Ors. (2017) 14 SCC 80* has already clarified the expression *composite scheme* and jurisdiction of this Commission. Hon'ble Supreme Court qua the aforesaid judgment held as under:

“20

....
In either case, the general regulatory power of the Commission Under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.”

24. *The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in clauses (a), (b) and (d), and “intra-State” in clause (c). This being the case, **it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or***

the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. **This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.**

...
26. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that **the expression “composite scheme” does not have some special meaning — it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.**

24. We observe that the Hon’ble Supreme Court has held that the expression “composite scheme” does not mean anything more than a scheme for the generation and sale of electricity in more than one State. The expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that it is enough that generating companies have, in any manner, a scheme for the generation and sale of electricity, which must be in more than one State.
25. In the instant case, Petitioner’s projects are located in the *State of Gujarat*, and power is being sold to SECI in terms of the PPAs dated 23.05.2018. Further, SECI is selling the said power to *MP Discom (i.e. MPPMCL)* and *Bihar Discoms* in terms of the PSAs dated 22.03.2018 and 06.04.2018, respectively. In terms of the above, we hold that as the purchase and sale of electricity is in more than one State, hence, this Commission has the jurisdiction to adjudicate the instant matter.
26. The issue is decided accordingly.

Re: Issue No. II

Whether the Petitioner was prevented by unforeseen and uncontrollable events/factors, and whether the same constitute Force Majeure under Article 11 of the Power Purchase Agreement dated 23.05.2018 and whether the Petitioner has rightly terminated the Power Purchase Agreement dated 23.05.2018 on 13.03.2020?

27. TPL has submitted that as there was delay in the commissioning of the projects due to sustained Force Majeure Events, namely a delay in allotment of revenue land on account of change in land policies by the government/local instrumentalities in the State of Gujarat, they had terminated the PPA. Consequently, they are seeking the return of Performance Bank Guarantees. *Per Contra*, SECI has submitted that the termination of PPA by TPL vide communication dated 13.03.2020 is void and has no effect and TPL is bound by the terms and conditions of the PPAs. Further, TPL should be directed to perform its obligations under the PPAs and commission the projects with capacities of 199.50 MW and 300.30 MW.

Re: Grant of extension in time for fulfilment of conditions subsequent and financial closure

28. We note that TPL was to set up 199.5 MW and 300.3 MW Wind Power Plant (WPP) located in Gujarat. Timelines regarding the extension of date for the fulfilment of conditions subsequent and financial closure on account of allotment of revenue land qua change in land policies are as under:

Date	Events
12.01.2018	Request for Selection (RfS)
15.01.2018 & 23.01.2018	RfS Amended
02.02.2018	Bid submitted
13.02.2018	E-Reverse auction conducted
23.02.2018	Letter of Award issued
12.03.2018	30 days from the date of conclusion of e-RA- as per Clause 1.6 of the LOA
23.05.2018	Power Purchase Agreements (PPAs) executed
24.05.2018	Effective Date of the PPAs
25.07.2018	Notification directing that applications of only those bid winners which have been approved by GUVNL shall be approved, and the other applications should be held back till the time a policy is decided.
11.09.2018	Notification directing that applications for land allocation of those companies who have won bids invited either by GUVNL or SECI or other agencies of the Government of India, supported by a letter from GEDA shall also be processed.
08.10.2018	TPL requested SECI to grant an extension of at least 150 days to comply with the conditions prescribed under Clause 3.1 of the PPAs without any financial implications and without levying any liquidated damages and extension charges.
29.10.2018	TPL requested SECI to grant an extension of at least 180 days to comply with the conditions prescribed under Clause 3.1 of the PPAs without any financial implications and without levying any liquidated damages and extension charges.
29.10.2018	TPL requested SECI to extend the deadline for Financial Closure

24.12.2018	Date for the fulfilment of conditions subsequent and Financial Closure as per PPAs
03.01.2019	In view of TPL's request dated 29.10.2018, SECI extended the deadline for Financial Closure till 24.02.2019
15.02.2019	TPL requested SECI to extend the deadline for Financial Closure since there is continued delay in Land Allotment and Change in the Land Allotment Policy by the Government of Gujarat
24.02.2019	<i>1st Extension for achieving Financial Closure</i>
25.02.2019	In view of TPL's request dated 15.02.2019, SECI extended the deadline for Financial Closure till 24.04.2019
25.01.2019	The Government of Gujarat introduced Land Allocation Policy vide Resolution No: JMN-3915-924-A.1 (2019 Land Allocation Policy) <u>Objectives:</u> <i>It is the goal of this policy to set up Renewable Energy Generation Park in Gujarat, which will be part of Gujarat Government's commitment towards building a stable Renewable Energy Generation Park.</i> <u>7. The issue of land allotment and lease</u> <i>(1) In consultation with specialist agencies such as HPC, NIWE, SECI and GEDA, considering the availability of infrastructure such as roads and power evacuation, the high potential for Renewable Energy Generation should be decided.</i>
10.03.2019	Land allocation was stopped during the operation of the <i>Model Code of Conduct</i>
19.03.2019	Letter from Petitioner to SECI whereby it informed about Government of Gujarat order dated 08.03.2019 and imposition of Model Code of conduct from 10.03.2019 and stated that the processing of land allotment applications shall commence from 23.05.2019.
10.04.2019	TPL again sought an extension for the fulfilment of CS till securing 100% land. An extension of SCoD by an equivalent time was granted to TPL.
24.04.2019	<i>2nd Extension for achieving Financial Closure</i>
26.04.2019	On the request of TPL vide letter dated 10.04.2019, SECI extended the deadline for Financial Closure till SCoD i.e. 24.11.2019
08.05.2019	TPL again wrote to SECI requesting extension for compliance with Financial Closure and Conditions Subsequent until the date of final possession order by the Government of Gujarat and subsequent sub-leasing of land to Petitioner by <i>Suzlon Gujarat Wind Park Limited</i> . Further, Petitioner requested a period of 12 months from the allotment of land to the projects by the Government of Gujarat for achieving commissioning.
22.07.2019	Letter from Petitioner to SECI requesting for an extension of time-limit for land procurement, SCoD and the maximum period allowed for the commissioning of the full project capacity.
09.08.2019	Letter from Petitioner to SECI requesting for an extension of time-limit for land procurement, SCoD and the maximum period allowed for the commissioning of the full project capacity.
22.08.2019	Petitioner wrote a letter to SECI requesting a waiver of the condition stipulated under Article 4.6.2 of the PPAs.
19.09.2019	SECI requested TPL to submit the required documents in support of their

	claim in terms of the delay encountered by them in obtaining approvals/clearances from the authorities.
30.09.2019	TPL requested SECI to grant extensions without any financial implications, including levy of liquidated damages and extensions.
22.10.2019	MNRE issued a letter directing SECI to grant an extension to wind power projects under tranche-I to tranche-V.
23.10.2019	SECI requested TPL to attend the meeting on 05.11.2019 along with supporting documents in support of their claim.
24.10.2019	SECI requested TPL to submit on affidavit the copies of applications submitted to MNRE for issuance of NOC from the Ministry of Defence.
06.11.2019	SECI requested to furnish complete sets of documents in support of their claims.
18.11.2019	Petitioner acknowledged SECI's email and submitted that they will submit the documents for the project.
20.11.2019	Petitioner came to SECI's office and submitted soft copies of the application filed for land allotment.
24.11.2019	<i>3rd extension date of completion of Condition Subsequent & Financial Closure. SCoD of the projects as per PPAs</i>
24.11.2019	<i>Deadline for changing the location and Delivery Point for the projects within the State as per Clause 3.16 of the RfS</i>
11.12.2019	Petitioner requested SECI for an extension in time for procurement of land procurement.
14.01.2020	<i>SECI has submitted that PGCIL has intimated that TPL has relinquished the LTA of 300 MW</i>
14.02.2020	SECI wrote a letter to TPL, it is not clear how many land allotment applications specifically for your projects are pending with the office of DC, Kutch.
28.02.2020	Petitioner sought an additional 15 days' time to provide a response to SECI's letter dated 14.02.2020
12.03.2020	Vide email dated 12.03.2020, SECI allowed the extended time sought by TPL to submit the documents in support of their claim.
13.03.2020	<i>Termination Notice issued by TPL to SECI</i>
13.04.2020	SECI refuted the claims of TPL and termed the termination notice as illegal as Petitioner had failed to comply with the terms of the PPA.
30.04.2020	Petitioner intimated to SECI that on account of the Covid-19 pandemic, it is not in a position to access the documents and will submit the documents after lifting the lockdown.
18.05.2020	SECI issued a letter to TPL seeking documentary evidence for providing an extension in SCoD and Financial Closure
24.08.2020	<i>Long stop date as per Article 4.6 of the PPAs.</i>

29. The relevant provisions of the RfS/Amended RfS stipulate as under:

Clause 3.16 of the RfS:

....

*iii. Sworn affidavit from the authorized signatory of the WPD listing the details of the land and certifying that total land required for the Project is under clear possession of the WPD. **Change of land and Delivery Point for the projects within the State is allowed prior to the deadline of Financial Closure, under prior intimation to SECI.***

Clause 3.14.1 of the Amended RfS, it is stipulated that:

“However, 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.

30. The relevant provisions of LOA stipulate as under:

However, 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

31. The relevant provisions of the PPAs stipulate as under:

Article 3: CONDITIONS SUBSEQUENT AND FINANCIAL CLOSURE

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 24.12.2018 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 the clear title and possession of 100% of the land acquired for the Project;*
- c. The WPD shall submit plans to fulfil the technical requirements according to criterial mentioned under Clause 3.5.9 of the RfS and produce the documentary evidence of the same.*

3.2. Consequences of non-fulfilment of Conditions Subsequent and Financial Closure

.....

3.3 Performance Bank Guarantee

3.1.1 The Performance Bank Guarantee having validity of twenty four (24) months from the Effective Date and of Rs. 29 Lakhs/MW too be furnished this Agreement shall be for guaranteeing the commencement of the supply of power up to the Contracted Capacity within the time specified in this Agreement as per format provided in Schedule 1.

3.3.2 The failure on the part of the WPD to furnish and maintain the Performance Bank Guarantee shall be a material breach of the term of this Agreement on the part of the WPD.

3.3.3 If the WPD fails to commence supply of power from Scheduled Commissioning Date specified in this Agreement or any further extension thereof granted by SECI, subject to conditions mentioned in Article 4.5, SECI shall encash the Performance Bank Guarantee without prejudice to the other rights of SECI under this Agreement.

3.4 Return of Performance Bank Guarantee

3.4.1 Subject to Article 3.3, SECI shall return/release the Performance Bank Guarantee immediately after the successful Commissioning of the Project after taking into account any liquidated damages/penalties due to delays in commissioning as per provisions stipulated in this Agreement.

3.4.2 The return/release of the Performance Bank Guarantee shall be without prejudice to other rights of SECI under this Agreement.

32. We note that TPL qua several communications to SECI requested for extension of Financial Closure and Conditions Subsequent. Petitioner vide letter dated 08.10.2018 submitted as under (Similar stance was reiterated in Petitioner's letters dated 29.10.2018, 16.11.2018, 21.12.2018):

We have appointed one of the reputed developers to carry out the development activities, including acquisition of land for the development of the Project (Developer) through execution of Definitive Agreement, dated 16th August 2018.

.....
*we request your good office to grant an extension of at least 150 days to comply with the conditions prescribed under Clause 3.1 of the PPA without any financial implication without levying any liquidated damages and extension charges. **We would like to assure you that we remain committed to the Scheduled Commissioning Date of the project as agreed under the PPA and we do not foresee any delay in the same, except if the same is due to non-availability of PGCIL evacuation infrastructure.***

Annexure-3

Land Acquisition Details

	<i>Junachay Site (199.50MW)</i>	<i>Lakpat Site (300.30MW)</i>
<i>Number of Locations required</i>	95	143
<i>Details of submission of a request for allocation of land to Kutch Collector</i>	<i>Suzlon has applied for 138 Locations (including 45 Locations for which the final collector land allotment order was received, 53 Locations for which applications are in process and <u>40 Locations which are cancelled by the Geology Department of Government of Gujarat</u>) across various villages of Lakhpata and Nakatrana Taluka of Kutch District.</i>	<i>Suzlon has progressively applied for 132 locations across various villages of Lakhpata Taluka of Kutch District during the period from 2015 till 2018.</i>
<i>Details of Land allocated till date</i>	<i>45 locations in Nakatrana Taluka of Kutch District</i>	<u>Nil as Geology Department of Government of Gujarat has cancelled all applications.</u>
<i>Status of balance</i>	<i>53 locations in Nakatrana and Lakhpata Taluka of Kutch District (expected to get</i>	<u>Since, procurement of revenue land is ruled</u>

land and likely dates of allotment	cleared progressively by February 2019, subject to the matter, related to the allotment of revenue land only to bid winners and not the developers engaged by such bid winner, is cleared by the Revenue Ministry, Government of Gujarat by November 2018).	<u>out, only option available is procurement of Private land. Suzlon has initiated the process of procurement of Private Land which is expected to take 5-6 months to complete.</u>
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33. SECI vide letter dated 03.01.2019 extended the date for compliance with Conditions Subsequent and Financial Closure. The relevant extract of the said letter is as under:

In view on the land allocation policy undergoing certain changes in Gujarat, your request for grant of extension in the deadline for compliance with Financial Closure and Conditions Subsequent for the Project(s) is still under consideration. Pending decision from Competent Authority, as an interim relief, it has been decided to extend the deadline for compliance of Financial Closure and Conditions Subsequent for the above Project(s), without seeking extension charges, for a period of 2 months from 24.12.2018, i.e. upto 24.02.2019, or the date of issuance of Final Possession Order by the Government of Gujarat for the said Project(s), whichever is earlier.

34. Further, TPL vide letter dated 15.02.2019 sought further extensions on account of continued FM events. The relevant extract of the letter is under

In view of the foregoing circumstances, we request your good office to kindly grant us an extension of time until date of issuance of Final Possession Order by Govt. of Gujarat for the said Project and subsequent sub-leasing of the same to us (if so required) by our Developer Suzlon Gujarat Wind Park Limited, without any financial implication including levying of any liquidated damages and extension of charges.

35. We observe that a similar stance was reiterated by TPL in its letters dated 19.03.2019, 10.04.2019, and 08.05.2019, and TPL further sought 12 months' time from the allotment of land by the Government of Gujarat for achieving commissioning)

36. Further, SECI granted a second extension for compliance with the Financial Closure of 199.5 MW and 300.3 MW projects till 24.04.2019 qua letter dated 25.02.2019. The relevant portion of the letter is as under:

Sub: *Compliance of Conditions Subsequent as per PPA signed with SECI for 199.5 MW ISTS-connected Wind Power Projects under Tranche-III reg. (Project ID: WPD-ISTS-T3-TPL-P2-199.5GJ)*

....

*It is to intimate that your request for grant of extension in the deadline for compliance with Financial Closure and Conditions Subsequent for the Project(s) is still under consideration. Pending decision from Competent Authority, **it has therefore been decided to extend the deadline for compliance of Financial Closure and Conditions Subsequent for the above Project(s), without seeking extension charges, for a period of 2 months from 24.02.2019, i.e. upto 24.04.2019, or the date of issuance of Final Possession Order by the Government of Gujarat for the said Project(s), whichever is earlier.***

It may further be noted that the above extension is only an interim relief provided to you, and is not to be treated as a final decision on the above issue. In case your request for extension of deadline for Conditions Subsequent and Financial Closure for the said Project(s) is not accepted by the Competent Authority, necessary actions shall be taken by SECI as per the applicable provisions of the PPA. In such case, extension charges, if required to be paid by the WPD, shall attract an additional interest amount levied on per-day basis, from the original deadline for Financial Closure and Conditions Subsequent as per the RfS and PPA.

37. SECI qua letter dated 26.04.2019 further extended the deadline for compliance of Financial Closure up to SCoD of the projects (24.11.2019). The relevant extract of the letter is as below:

***Sub:** Compliance of Conditions Subsequent as per PPA signed with SECI for 330.3 MW ISTS-connected Wind Power Projects under Tranche-III reg. (Project ID: WPD-ISTST3-TPL-P1-300.3GJ)*

It is to intimate that your request for grant of extension in the deadline for compliance with Financial Closure and Conditions Subsequent for the Project(s) is still under consideration. Pending decision from the Competent Authority, it has therefore, been decided to extend the deadline for compliance of Financial Closure and Conditions Subsequent for the above Project(s), without seeking extension charges, upto the Scheduled Commissioning Date (SCD) of the Project(s), i.e. upto 24.11.2019.

*The above extension aligns with the scheduled deadline for compliance with financial closure with SCD for the Project(s). Accordingly, **in line with the Standard Bidding Guidelines, in case of the Project being commissioned on or before the SCD, only the interest amount on the extension charges (on account of extension of FC deadline), shall be levied on the WPD, upto the date of commissioning of the Project. In case of the Project being commissioned beyond the SCD, FC extension charges shall be levied, with interest, w.e.f. the original FC deadline, i.e. 24.12.2018, until the date of commissioning. Additionally, Liquidated Damages as per the provisions of the PPA will also be levied on account of delay in commissioning of the Project.***

.....

38. From the above, we note that as per the bidding documents viz. RfS/Amended RfS/LOA, TPL is allowed to change the location of the projects by exercising any of the following

options, viz., (i) outside the State of the proposed project locations within 30 days from the date of conclusion of e-RA and (ii) within the State prior to the deadline of Financial Closure. In the instant petition, we observe that TPL submitted its bid on 02.02.2018, an E-Reverse auction was conducted on 13.02.2018, and the Letter of Award was issued on 23.02.2018. We observe that 30 days from the date of conclusion of e-RA (as per Clause 1.6 of the LOA) expired on 12.03.2018. We further observe that the Government of Gujarat published a Notification on 25.07.2018 directing *that applications of only those bid winners which have been approved by GUVNL shall be approved and the other applications should be held back till the time a policy is decided*. Further, on 11.09.2018, the Government of Gujarat again published another Notification, directing that *applications for land allocation of those companies who have won bids invited either by GUVNL or SECI or other agencies of Government of India, supported by a letter from GEDA shall also be processed*. We note that both the notifications, viz. dated 25.07.2018 & 11.09.2018, were published after 12.03.2018. We are of the view that the crucial option of changing the land location within 30 days from the date of the conclusion of the e-RA was extinguished before the publication of the impugned notification. It is pertinent to mention here that TPL has submitted that vide letter dated 07.04.2018 issued by Collector Office Bhuj, the transition to a new mechanism was notified by the State Government for representing data, which would include the coordinates of the desired land and introduction of composite maps. Even in this case, TPL could not exercise the valuable option of changing the location of the land outside the State since the option stood extinguished on 12.03.2018, i.e. before 07.04.2018, leaving the only option of changing the land within the State prior to the deadline of Financial Closure. We observe that TPL could have changed the land within the State prior to the deadline of Financial Closure and after submitting documentary proof to SECI. It is pertinent to mention here that TPL vide letter dated 08.10.2018 has submitted to SECI *to grant an extension of at least 150 days to comply with the conditions prescribed under Clause 3.1 of the PPA without any financial implication without levying any liquidated damages and extension charges*. TPL has further assured that *TPL remains committed to the Scheduled Commissioning Date of the project as agreed under the PPA, and TPL does not foresee any delay in the same, except if the same is due to non-availability of PGCIL evacuation infrastructure*. We observe that upon various requests of TPL, SECI extended the timelines on three different occasions, i.e. up to 24.02.2019 (qua letter dated 03.01.2019); up to 24.04.2019 (qua letter dated 25.02.2019); up to SCoD of the projects, i.e. till 24.11.2019 (qua letter dated 26.04.2019). Therefore, TPL had

sufficient time to change the land within the State i.e. prior to the final deadline of financial closure. It is pertinent to mention here that vide letters dated 30.07.2018 & 07.08.2018, the Geology Department of the Government of Gujarat refused to give NOC to TPL since the limestone was found in the land area for the project. Hence, TPL was aware of the fact that the revenue land was not available as early as 07.08.2018. TPL has further admitted on records that “*Since, procurement of revenue land is ruled out, only option available is procurement of Private land. Suzlon has initiated the process of procurement of Private Land which is expected to take 5-6 months to complete.*” In view of the above, we are of the view that TPL had sufficient time till 24.11.2019 to fulfil the conditions stipulated in the PPAs.

Re: Force Majeure events and Grant of extension in time for procurement of land, SCoD and commissioning the projects

39. We observe that TPL has sought an extension of SCoD due to the following events:

S.No.	Details of the Event
1.	Transition to a new mechanism notified by the State Government for representing data which would include the coordinates of the desired land and introduction of composite maps. (vide letter dated 07.04.2018 issued by Collector Office Bhuj)
2.	Decision to allot and reserve land only for those WPDs who had won government bids supported by a letter from Gujarat Energy Development Agency (GEDA) and subsequent reversal. (vide MNRE Notifications)
3.	Introduction of new format of affidavit to be submitted by bid winner and developer (vide letter dated 07.07.2018 issued by Collector, Kutch)
4.	Refusal to process applications and granting NOCs by the Mines Department due to ambiguity in the land allotment process. (Letters dated 30.07.2018 and 07.08.2018 issued by Geology and Mining Commissioner)
5.	Introduction of the Land Allotment Policy, 2019 (issued by the Government of Gujarat dated 25.01.2019)
6.	Introduction of a new extensive checklist and format for a new undertaking for allotment of revenue land for Wind Power Projects (Letter dated 05.05.2019 issued by the Collector, Kutch)
7.	Imposition of the model code of conduct

40. We observe that the events mentioned from Serial Nos. 1 to 6 above relate to the allotment of revenue land on account of changes in land policies by the government/local instrumentalities in the State of Gujarat and are taken together for discussions.

41. We observe that the relevant provisions of the PPAs are as under:

4.1 WPD Obligations

The WPD undertakes to be responsible at WPD's own cost and risk, for:

- a) *obtaining all Consents, Clearances and Permits as required and maintaining all Consents, Clearances and Permits in full force and effect during the term of this Agreement; and*
- b) *designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the applicable Law, the Grid Code, the terms and conditions of this Agreement and Prudent Utility Practices; and*
- c) *continuance of supply of Contracted Capacity from the Commercial Operation Date/Project Commissioning throughout the term of the agreement ; and*
-
- f) *fulfilling all obligations undertaken by WPD under this Agreement*

4.5 Extension of Time

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

- a) *any Buyer Event of Default; or*
- b) *Force Majeure Events affecting Buyer/Buying Entity(ies), or*
- c) *Force Majeure Events affecting the WPD,*

the Scheduled Commissioning Date and the Expiry Date shall be deferred subject to Article 4.5.6, for a reasonable period but not less than ‘day for day’ basis, to permit the WPD or SECI/Buying Entity(ies) through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the WPD or SECI/Buying Entity(ies), or till such time such Event of Default is rectified by Buyer.

4.5.2 *Void*

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

....

11.3 Force Majeure

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

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

d) An event of Force Majeure identified under Buyer-Buying Entity(ies) PSA, thereby affecting delivery of power from WPD to Buying Entity(ies).

11.4 Force Majeure Exclusion

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

- a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;
- b. Delay in the performance of any contractor, sub-contractor or their agents;
- c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;
- d. Strikes at the facilities of the Affected Party;
- e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and
- f. Non-performance caused by, or connected with, the Affected Parties:
 - 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.

42. From the above, we observe that as per Article 4.1, it was the responsibility of TPL to obtain all Consents, Clearances and Permits as required and maintain all Consents, Clearances and Permits in full force and effect during the term of PPAs. As per Article 11 of the PPAs, 'Force Majeure' are events or circumstances that prevent an Affected Party from performance of its obligations and are not within the reasonable control, directly or indirectly, of the Affected Party. As per Article 4.5 of the PPAs, an extension of time could be granted in case TPL was 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 TPL, and in such event(s) the SCoD and the Expiry Date shall be deferred on 'day for day' basis. Further, as per provisions of Article 4.5.3 of the PPAs, in case of Force Majeure Events continuing after a maximum period of nine (9) months, the Parties may choose to terminate the PPAs as per the provisions of Article 13.5. As per Article 13.5, if the Force Majeure Event or its effects continue to be present beyond a period of twelve (12) months, the parties have the right to cause termination of the PPAs.

43. TPL has submitted that the change in policy regarding allotment of land started from the letter dated 07.04.2018 issued by the Collector Office Bhuj, informing transition to a new mechanism notified by the State Government for representing data which would include the coordinates of the desired land and introduction of composite maps. It was followed by the notifications which informed that a decision was taken to allot and reserve land only for those WPDs who had won government bids supported by a letter from Gujarat Energy Development Agency (GEDA) and subsequent reversal. TPL has submitted that the force majeure events continued till 25.01.2019, i.e. introduction of the Land Allotment Policy, 2019 by the Government of Gujarat and subsequently till 05.05.2019, i.e. date of letter issued by the Collector Kutch, introducing new extensive checklist and format for a new undertaking for allotment of revenue land for Wind Power Projects. Therefore, TPL contended that the period from 07.04.2018 till 05.05.2019 is covered under Force Majeure.

44. We note that the timelines regarding alleged events are as under:

07.04.2018	Letter issued by the Collector Office, Bhuj regarding the <i>Transition to a new mechanism notified by the State Government for representing data which would include the co-ordinates of the desired land and introduction of composite maps.</i>
	Decision to <i>allot and reserve land only for those WPDs who had won government bids supported by a letter from Gujarat Energy Development Agency (GEDA)</i>
25.07.2018	Notification directing that <i>applications of only those bid winners which have been approved by GUVNL shall be approved, and the other applications should be held back till the time a policy is decided.</i>
07.08.2018	MNRE clarified the earlier Office Memorandum dated 12.06.2018 regarding no requirement of mandatory registration with State Nodal Agencies for the implementation of Renewable Energy (“RE”) projects. MNRE noted that the State authorities have stopped processing applications and requested for the State Nodal Agencies to continue supporting all projects being implemented by MNRE through various agencies, including SECI.
11.09.2018	Notification directing that <i>applications for land allocation of those companies who have won bids invited either by GUVNL or SECI or other agencies of the Government of India, supported by a letter from GEDA shall also be processed.</i>

25.01.2019	<p>The Government of Gujarat introduced Land Allocation Policy vide Resolution No: JMN-3915-924-A.1 (2019 Land Allocation Policy)</p> <p><u>Objectives:</u></p> <p><i>It is the goal of this policy to set up a Renewable Energy Generation Park in Gujarat, which will be part of the Gujarat Government's commitment towards building a stable Renewable Energy Generation Park.</i></p> <p><u>7. The issue of land allotment and lease</u></p> <p><i>(1) In consultation with specialist agencies such as HPC, NIWE, SECI and GEDA, considering the availability of infrastructure such as roads and power evacuation, the high potential for Renewable Energy Generation should be decided.</i></p>
08.03.2019	<p>Earlier notifications dated 25.07.2018 and 11.09.2018 were once again modified, wherein an additional clause in addition to the ones mentioned in the foregoing notifications was added, i.e., even the wind turbine manufactures or their 100% subsidiaries or their associate companies appearing in the revised list of models and manufactures of the wind turbine as approved by the National Institute of Wind Energy (“NIWE”) may be allotted land.</p>
10.03.2019	<p>Land allocation was stopped during the operation of the <i>Model Code of Conduct</i></p>
19.03.2019	<p>Letter from Petitioner to SECI whereby it informed about Government of Gujarat order dated 08.03.2019 and imposition of the Model Code of conduct from 10.03.2019 and stated that the processing of land allotment applications shall commence from 23.05.2019.</p>

45. From the above, we note that the event so claimed to be force majeure started on 07.04.2018, i.e. the date from which the decision was taken to *allot and reserve land only for those WPDs who had won government bids supported by a letter from Gujarat Energy Development Agency (GEDA)*, and ended on 11.09.2018, i.e. the date of notification directing that *applications for land allocation of those companies who have won bids invited either by GUVNL or SECI or other agencies of Government of India, supported by a letter from GEDA shall also be processed.*

46. We observe that the Government of Gujarat also introduced the Land Allocation Policy vide Resolution No: JMN-3915-924-A.1 (2019 Land Allocation Policy) on 25.01.2019. However, it is observed that the said policy only relates to the setting up of a Renewable Energy Generation Park in Gujarat. We further note that vide notification dated 08.03.2019, the earlier notifications dated 25.07.2018 and 11.09.2018 of the Government of Gujarat were modified to the extent that *“even the wind turbine manufactures or their 100% subsidiaries or their associate companies appearing in the revised list of models and manufactures of wind*

turbine as approved by the National Institute of Wind Energy (“NIWE”) may be allotted land.”

47. We observe that the changes in land policy of the Government of Gujarat from 07.04.2018 to 11.09.2018 pertained to revenue land. We have already discussed in the previous section that TPL had the option to change the land within the State prior to the deadline of Financial Closure and after submitting documentary proof to SECI. TPL, vide Annexure 3, annexed to a letter dated 08.10.2018, has submitted that the Geology Department of the Government of Gujarat refused to give NOC. Therefore, *“procurement of revenue land is ruled out, and the only option available is procurement of Private land. Suzlon has initiated the process of procurement of Private Land, which is expected to take 5-6 months to complete.”* In view of the above, we are of the view that the change in policy for the allotment of land fails to qualify as a force majeure event as per Article 11 of the PPAs.
48. We further note that as submitted by the Petitioner vide letter dated 19.03.2019 informed SECI about the Government of Gujarat Order dated 08.03.2019 and imposition of the Model Code of Conduct from 10.03.2019 and stated that the processing of land allotment applications shall commence from 23.05.2019. We are of the view that the period from 10.03.2019 to 23.05.2019 (74 days) is also not covered under force majeure events as per Article 11 of the PPAs since TPL had the option to change the land within the State prior to the deadline of Financial Closure.
49. We note that TPL has submitted that it is a well-established principle that any delay in procurement of land due to reasons beyond the control of the affected party is an event which is *akin to a force majeure event* and therefore, the relief claimed by the affected party is liable to be granted. In this regard, TPL has placed its reliance on the Order dated 17.12.2018 (Welspun Order) passed by the Commission in Petition No. 95/MP/2017 in a case titled *Welspun Energy Private Limited vs. SECI*. The Commission has held that delay due to digitisation in getting the registered sale deeds of land for the project is covered under the ambit of *‘government delay akin to force majeure’* and thus is required to be condoned. The relevant extracts of the aforesaid Order are as under:

*“we hold that inability of the Petitioner in getting the registered sale deeds of land for **the project in its name is covered under “delay by Government”**. It was an event which was beyond the control of the Petitioner and could not have been avoided by the Petitioner, had it taken reasonable care or complied with Prudent Utility Practice. Hence, we declare this event as an event that is **akin to Force Majeure Event** and,*

therefore, the period from 04.10.2016 to 09.06.2017 is condoned for fulfilment of Conditions Subsequent activities as regards clear title and possession of land.”

“As regards the delay in fulfilment of Conditions Subsequent activity related to clear possession and title of land, it is decided that fulfilment of this condition was beyond the control of the Petitioner, and was caused due to “Government delay akin to Force Majeure”. Accordingly, the delay from 4.10.2016 to 9.6.2017 is condoned.”

50. TPL has further submitted that Welspun Order has been upheld by the Appellate Tribunal for Electricity (APTEL) vide its Judgment dated 28.10.2022 in *Appeal No.278 of 2021: SECI vs. Welspun Energy Private Limited and batch matters*, as well as the Hon’ble Supreme Court, vide order/judgment dated 03.02.2023 passed in *C.A. No.320-321 of 2023: SECI vs. Avaada Energy Pvt. Ltd. & Ors.*

51. We are of the view that the reliance on the Welspun Order by TPL is misplaced for the following reasons: *Firstly*, in the Welspun case, Article 3.2 specifically recognized *delay by Government* as an exception clause along with Force Majeure, which is not there in the instant case of TPL. Article 3.2 in the Welspun case is reproduced as under:

*“3.2 Consequences of non-fulfilment of conditions subsequent
3.2.1 In case of a failure to submit the documents as above, SECI shall encash the Performance Bank Guarantee submitted by the SPD, terminate this Agreement and remove the Project from the list of selected Projects by giving a notice to the SPD in - writing of at least seven (7) days unless the delay is on account of delay by Government or Force Majeure. The termination of the Agreement shall take effect upon the expiry of the 7th day of the above notice.”*

52. *Secondly*, the Commission has already taken a view in a similar matter vide Order dated 04.05.2023 in Petition No.: 580/MP/2020 & 63/MP/2021 along with IA No. 11 of 2021 in which it was held that:

86. We have already observed that ReNew TN had the knowledge about the changes in allotment of revenue land in the State of Gujarat since 19.04.2018 whereas ReNew TN had the option for allotment of private land and to change the proposed Project location and Delivery Point for the projects within the State. ReNew TN had to produce the documentary evidence of possession of 100% of the land acquired for the Project at its own risk and cost by 30.03.2019. However, ReNew TN preferred not to change its location and instead informed SECI about the status of applications vide letter dated 27.11.2019. SECI in principle extended the timeline of Conditions Subsequent up to the SCoD to facilitate implementation of project. SECI advised ReNew TN to provide alternate plan in case of further delay in allotment of revenue land and provided time up to 30.06.2020 to submit the documentation. However, ReNew TN failed to submit the documents rather terminated the PPA on 26.07.2020.

53. We further note that vide letters dated 22.07.2019 and 09.08.2019, TPL requested SECI to grant an extension in time for procurement of land, SCoD and commissioning the projects.

The relevant extract of the letter is as below:

We would like to inform you that processing of land filed has commenced in Gujarat after the withdrawal of model code of conduct, however the work progress is very slow. You will note that we have lost 14 months of project Activity due to delay in allocation of land by Government of Gujarat till dated (from Effective Date of PPA i.e. 23rd May 2018 till 22nd July 2019) for various reasons.

In view of the above, we request your good office to kindly grant us extension without any financial implication including levying any liquidated damages and extension charges to facilitate project execution;

- i. an extension of time till 30th June 2020 for fulfilling the conditions for financial closure including securing 100% land for the Project.*
- ii. an extension of SCD till 31st January 2021 i.e. 14 months from the current date of SCD to cater for the time lost in Project activity due to non-availability of Land.*
- iii. an extension of maximum period allowed for commissioning of the Project as given in Clause 4.5.6 of the PPA till 31st October 2021 i.e. 9 months beyond such revised SCD (to cater for any unforeseen contingencies).*

54. SECI vide letter dated 19.09.2019 sought relevant documentation from TPL to grant further extensions. SECI vide letter dated 23.10.2019 also requested TPL to attend the meeting on 05.11.2019 along with all the necessary documents Relevant extract of the said letter dated 19.09.2019 is as below:

In Order to take up this issue of delay in project implementation at PRAGATI (Pro-Active Governance And Timely Implementation) level following information is needed to keep ourself well prepared for raising the issues at this platform.

You are therefore requested to submit us a precise and conclusive report for all issues for a specific project (separately for each project) where you have encountered difficulties/delay in obtaining approvals and clearances from various state/central authorities.

You should furnish the complete information along with documentary evidence and summarise in a chronological order. Also submit the standard timelines declared by the deptt. and authorities for specific activity. In absence of no guidelines for time frame then estimation of time based on past experience with documented reference.

Details of effort made by your organisation may also be furnished with documentary evidence at various level to expediate the matter and held personal meetings for flagging your concern and issue. In addition this type of information in a statement

form with specific record of date, officials contacted and their views/reply informed verbally where record/evidence is not available.

- 1. DPR for the Project, estimated/sanctioned cost and Revised cost estimate if any**
- 2. Project implementation schedule/plan**
- 3. Land acquisition status, R&R status**
- 4. Status of approvals/clearances including EC, FC, CRZC, ELC, SPCB consents etc.**
- 5. Any court/tribunal order affecting the Project**
- 6. Status of award/physical progress for Project activities**
- 7. Issues pending with other ministry (min. of defence)**
- 8. Issues pending with State Govt.**
- 9. Latest images of Project site/locations.**

Receipt of above information will enable us to take further necessary action.

55. TPL vide letter dated 11.12.2019 requested SECI to extend the deadline for land procurement, SCoD and commissioning the projects. Against this letter, SECI vide letter dated 14.02.2020, updated the observations of RAC and ADM of Kutch and accordingly sought documentary proofs from TPL to grant further extensions, if any. The relevant extract of the letter is as under:

*It is further informed that keeping in view the fact that Project has less than 9% of the total land required to execute the project, SECI vide letter dated 01.01.2020 requested District Collector, Kutch to communicate the probable timeframe in processing the land applications filed by M/s Torrent Private Limited/Suzlon so that request of time extension to SCD may be processed accordingly. Formal reply against said letter is still awaited. In the meantime, **on 24.01.2020, SECI officials met Sh. Kuldipsinh Jhala, RAC & ADM, Kutch and SECI officials could gather that from 24.02.2017 to 24.01.2020, 310 Ha land was allocated to M/S Suzlon as an OEM for execution of Wind Power Projects awarded under SECI Wind Tranches I to IV As on 24.01.2020, 31 land allotment applications of M/s Suzlon for 189 locations are pending with DC office Kutch. These pending applications may also include locations supposedly offered by M/s Suzlon to other SECI bid winner. Hence, it is not clear how many land allotment applications specifically for your projects are pending with office of DC, Kutch.***

In view of the above, it is requested to provide a detailed clarification with documentary evidence along with the road map/plan regarding how M/s TPL are proposing to execute the Projects on Revenue land with the current state of affairs.

Response to this letter should be made within 15 days i.e. upto 29/02/2020 failing which it will be construed that M/s TPL does not require any extension in the SCD for the projects allocated under Tranches III. SECI will be compelled to take necessary action as per provisions of RfS and PPA.

56. TPL, vide letter dated 28.02.2020, requested SECI for an additional 15 days' time to provide a response to SECI's letter. Against TPL's request, SECI granted 15 days' time i.e. till 15.03.2020 to TPL to submit the necessary documents.

57. Subsequently, TPL issued a Termination Notice dated 13.03.2020 to SECI on account of the alleged Force Majeure events. A relevant extract of the letter dated 13.03.2020 is reproduced below:

We would like to submit that despite facing such unprecedented challenges, we remained committed to complete the Projects and have sought support from all stakeholders like SECI, GoG and respective collectors' offices, on a regular basis, in an effort to mitigate the consequences of force majeure events and / or events akin thereto. We are not surprised from the SECI Letter which states that office of the District Collector, Kutch has failed to clarify the status of pending land allocation applications and is yet to issue a formal reply to the letter sent by SECI to District Collector, Kutch on 1 January 2020. Such delay by the office of the District Collector, Kutch in providing the relevant information to SECI, despite SECI being an instrumentality of government, further highlights the lack of support or assistance from the local authorities even after the GoG circular JMN/3919/UOR- 1524/A-I dated 27 November 2019, about which we have kept your good offices informed through our earlier submissions, from time to time. However, we are surprised that in the absence of such formal reply, SECI has chosen to rely on informal verbal information from the Collectorate, Kutch district for the status of pending land allotment applications of the Project. In this regard, we reiterate that until 11 December 2019 applications for 274 revenue land locations for Project 1 and applications for 155 revenue land locations for Project 2 were filed, details of which were already provided in our letter dated 11 December 2019.

In view of the aforesaid, the unforeseen events and circumstances (for which we have kept you informed from time to time through earlier submissions and discussions we have had in the course of various meetings) are attributable to delay by the government and are force majeure events under the PPA and / or events akin thereto, which have subsisted for a period more than 12 (twelve) months and have prevented Torrent from performing its obligations under the PPAs. Further, such events and circumstances could not have been avoided despite the evident reasonable care exercised by Torrent and were beyond the reasonable control of Torrent. Therefore, we hereby exercise our right under the PPAs to terminate the PPAs due to prolonged continuation of force majeure events and / or events akin thereto and their effects beyond a period of 12 (twelve) months.

Consequent to the termination, we ask you to return the performance bank guarantees issued by Torrent to SECI In respect of the Projects.

58. SECI, vide letter dated 13.04.2020, sought information from TPL on whether they are still willing to execute the projects and submit documentary proof in support of their claim.

Our observations on the above mentioned Force Majeure event quoted by M/s TPL are as under:

1. Under SECI Wind Tranches, Wind Project Developers (WPDs) are required to install and operate the Project on Build Own and Operate Basis. Responsibility of selection / identification and procurement / leasing of land (revenue as well as private) lies with the WPD. As per the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid connected Wind Power Project dated 08.12.2017 issued by Ministry of Power, GoI (Clause no. 5.2(a)), RfS for Wind Tranche – III (Clause no.3.14.7, and 3.16(iii)) and PPAs signed between M/s Torrent Power Limited and SECI (Clause no. 3.1(b)), the bidder had the liberty to erect his WTG anywhere in India on either revenue or private land.

2. It was M/s TPL's proposal/decision to install the Project in villages located in the District Kutch, Gujarat. Further, there is no binding on M/s TPL to execute the Project only on revenue lands. The M/s TPL was free to choose to implement the Project on revenue or private or a combination of revenue and private land.

3. As stated above at sl. no. 2, M/s TPL is still free to choose to implement the Project on revenue or private or combination of revenue and private land. If there was a delay in allotment of revenue land, then M/s TPL always has an option to go for installation of their project on private land.

4. In numerous letters, M/s TPL informed that they had engaged M/s Suzlon as developer and arrangement of land for execution of project is also under the scope of work of M/s Suzlon.

5. Vide letter dated 08.10.2018 M/s TPL highlighted the scarcity of revenue land in Kutch Dist., as large number of Wind Projects are proposed in the region, hence they have proactively directed their developer to acquire private land in lieu of locations which had been identified earlier, for setting up of project. Also, M/s TPL vide their letter dated 29.10.2018 (approx.05 months from signing of PPA) has informed about the cancellation of all the revenue land allotment applications filed by M/s Suzlon (developer) progressively during the period from 2015 till 2018 for 300.3 MW (132 locations) project by Geology Deptt., Govt. of Gujarat. In Annexure – 3 of the said letter, it was clearly stated that 300.3 MW project will now be executed on Private land. Schedule for procurement of Private land was also provided.

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7. During the visit to SECI office on 20.11.2019, M/s TPL had provided soft copies of applications filed by M/s Suzlon for revenue land allotment. However, during the meeting only it was highlighted that the submissions made were in contrary to their previous submissions made by M/s TPL. On reviewing the documents provided, it was also found that M/s TPL was relying on very old applications pending with Office of District Collector, Kutch. There were cases where the locations were not usable even after the grant of Final Possession Orders (FPOs) by District Administration. The main reason for this was competitor's development nearby or rejection by GEDA (as these locations are clashing with Projects of other developers). It was advised that M/s Torrent again jointly review these applications on the usability of these locations with their developer and also advised to submit the detail status of application filed for revenue land allotment, duly endorsed by Office of District Collector, Kutch, for processing the extension to SCD case.

8. *Vide email and letter dated 11.12.2019, M/s TPL wherein it was requested to process the extension case based on the documents provided in the last meeting (20.11.2019). No, additional documents were provided. It is worthy to mention that M/s TPL as on 11.12.2019, did not have even 30% of land required to execute the project and still relying on the very old pending applications whose status was not available. Also, M/s TPL had not provided any backup plan in case revenue land was not allotted.*

9. *Since, M/s TPL has not provided any document in support of their pending land allotment application, SECI took a stand and via vide letter dated 01.01.2020 requested District Collector, Kutch to communicate the probable timeframe in processing the land applications filed by the M/s Torrent Private Limited so that request of time extension to SCD may be processed accordingly. Considering the importance of the situation and in benefit of Project, SECI officials personally met with Sh. Kuldipsinh Jhala, RAC & ADM, Kutch and during the meeting it was informed that no land allotment application was filed by M/s TPL. W.r.t. M/s Suzlon applications, it was informed that from 24.02.2017 to 24.01.2020, 310 Ha land was allocated to M/s Suzlon as an OEM for execution of Wind Power Projects awarded under SECI Wind Tranches I to IV. As on 24.01.2020, 31 land allotment applications of M/s Suzlon for 189 locations are pending with DC office, Kutch. These pending applications may also include the locations supposedly offered by M/s Suzlon to other SECI bid winner. Hence, it is not clear how many land allotment applications specifically for your Projects are pending with the office of DC, Kutch. Considering this SECI vide letter dated 14.02.2020 requested M/s TPL to provide a detailed clarification with documentary evidence. Along with the road map / plan regarding how M/s TPL are proposing to execute the Projects on Revenue land with the current state of affairs. In spite of providing any clarification, M/s TPL vide letter 13.03.2020 sent the PPA termination notice citing delay in revenue land allotment as Force Majeure.*

It is very clear from the letters stated at sl. no. 03 that M/s TPL knows from the very beginning that execution of Project on revenue land was going to be difficult and hence, planning to implement the Project on combination of revenue and private land. However, later on M/s TPL had not shown any evidence which shows their seriousness in acquiring the Private land and not 100% rely on the revenue land. As stated in sl. no. 02 acquisition of land (private or revenue) is under the scope of M/s TPL. M/s TPL can always take a call and go for procurement of private land in case there was a delay in allotment of revenue of land and manage the Project. In fact, most of the Bid winners executing Project under SECI Tranche III have procured private land, Tamil Nadu and Gujarat both, for the development of Project. Hence, delay in allotment of revenue land cannot be considered as Force Majeure event.

11. *Also, vide letter dated 09.08.2019, M/s TPL highlighted the issue of financial crisis of their developer i.e. M/s Suzlon. This could be one of the reasons due to which M/s TPL was not able to acquire private land, as they are completely dependent on their developer. However, Clause no. 11.4.1(b) of the PPA clearly establishes that delay in the performance of any contractor, sub-contractor or their agents cannot be attributed as Force Majeure.*

Central Transmission Utility-PGCIL (CTU-PGCIL) has informed that LTA of 300MW

granted to wind farm of Torrent Power Ltd, Lakhpat and 199.5MW to Torrent Power Limited, Junachay has been relinquished w.e.f 14.01.2020 i.e. within approximately a month time from asking SECI to grant extension. From this, it can be construed that M/s TPL was not serious to execute the Project while asking for extension to SCD.

12. Further, M/s TPL has not issued any formal notice as per clause no. 11.5 of the PPA.

13. It is very evident from the above that Force Majeure Clauses are not applicable here and PPA cannot be terminated by invoking clause no. 13.5.1 of the PPA.

In view of the above, it is requested to provide a response whether M/s TPL is still willing to execute the Project. If yes, then request note along with the documentary evidence and road map / plan regarding how M/s TPL are proposing to execute the Projects on Revenue land with the current state of affairs.

Response to this letter should be made by 30.04.2020 failing which it will be construed that M/s TPL does not require any extension in the SCD for the projects allocated under SECI Wind Tranche - III. SECI will be compelled to take necessary action as per provisions of RfS and PPA.

59. From the above, we note that TPL vide letter dated 28.02.2020 sought an additional fifteen (15) days' time to provide a response to SECI's letter dated 14.02.2020. SECI acceded to the request of TPL and allowed TPL to submit its response by 15.03.2020. However, before the expiry of this period, TPL issued a termination notice to SECI on 13.03.2020 on account of alleged Force Majeure events. In addition TPL has not submitted the required documents as sought by SECI. SECI has submitted on records that PGCIL granted LTA of 300 MW on 19.07.2018 to the wind farm of Torrent Power Ltd, Lakhpat and 199.5MW to Torrent Power Limited, Junachay has been relinquished w.e.f 14.01.2020. From the above, we are of the view that the Petitioner could not establish, based on its conduct, its commitment to commission the projects.

60. In terms of the provisions of the PPA, the projects were required to be commissioned by 24.11.2019. Also, in terms of Article 4.6.2 of the PPAs, the maximum time period for commissioning the projects with encashment of BG and reduction in tariff has been stipulated as 27 months from the effective date of the Agreement (The same provision is mentioned in Clause 3.17 of the RfS). Relevant extracts of the PPAs are reproduced below:

4.6 Liquidated Damages not amounting to Penalty for delay in commencement of supply of power to Buyer

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*In case the commissioning of the project is delayed over Six (6) months beyond the Scheduled Commissioning Date, the pre-fixed tariff as per Article 9.1 shall be reduced at the rate of 0.15 paise/kWh per day of delay for the delay in such remaining capacity which is not commissioned. **The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and reduction in the fixed tariff shall be limited to 27 months from the Effective Date of this Agreement.** In case, the Commissioning of the Project is delayed beyond 27 months from the Effective Date, the PPA capacity shall stand reduced/amended to the Project Capacity Commissioned, provided that the commissioned capacity is not below 50 MW or 50% of the allocated Project Capacity, whichever is higher, and the PPA for the balance Capacity will stand terminated and shall be reduced from the selected Project Capacity.*

61. In the instant case, the effective date of the PPAs was 24.05.2018. In terms of the aforesaid provision, TPL had time till 24.08.2020 (27 months from the effective date of the PPAs) to commission the projects. Despite being aware of this provision of the PPAs, TPL sent a termination notice dated 13.03.2020 to SECI. TPL still had 5 months' time to commission its projects.

62. TPL, vide letter dated 09.08.2019, submitted that its contractor, M/s Suzlon Energy Limited, were unable to acquire private land as they are facing financial crisis. It is pertinent to mention that Article 11.4.1 (b) of the PPAs stipulates that any delay in the performance of contractors/sub-contractors/agents cannot be attributed as Force Majeure. The relevant extract of the aforesaid clause is reproduced herein:

11.4 Force Majeure Exclusion

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:

.....

b. Delay in the performance of any contractor, sub-contractor or their agents;

63. From the aforesaid provisions, we note that Petitioner cannot take the plea of non-performance of its obligations on account of financial hardships faced by its developer M/s. Suzlon Energy Limited. No extension can be granted on this ground alone.

64. The *next issue* raised by TPL vide letter dated 30.04.2020 is that on account of the Covid-19 pandemic, it was not in a position to access the documents and would submit the documents after the lockdown was lifted. We note that the blanket extension of 5 months was 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. The said extension period falls within the bracket of the maximum time allowed for commissioning the projects (within 27 months from the effective date of the PPA, i.e. by 24.08.2020). We note that similar extensions were given by MNRE to facilitate the RE project builders. The intention of MNRE and its Nodal Agency is clear and even if time was the essence of the contract, its essence was being waived as the intention of the parties was to ultimately bring the projects. We note that TPL terminated the PPAs on 13.03.2020 and preferred to file the petition before this Commission on 18.03.2020. Hence, we hold that no relief can be extended to Petitioner on this account.

65. The *next issue* raised by TPL is that on account of the delay in the adoption of the tariff by the Commission, the execution of Petitioner's projects was delayed. *Per Contra*, SECI has submitted that the adoption of tariff by the Appropriate Commission is not a condition precedent for the implementation of the PPA, including the commissioning of the project. SECI has further submitted that it had impleaded all Wind Power Developers, including TPL, in IA.No.85 of 2019 in Petition No. 161/AT/2019 for adoption of tariff, but TPL chose not to appear before the Commission.
66. We observe that SECI issued LOA to TPL (for both the projects) on 23.02.2018, and the PPAs were executed on 23.05.2018 with effective date as 24.05.2018. On 08.05.2019, the Petition No. 161/AT/2019 for Adoption of Tariff was filed and the Tariff was finally adopted by the Commission vide Order dated 28.02.2020. However, in the instant case, TPL would have been affected by the delay in tariff adoption by SECI had it commissioned the projects prior to the Tariff Adoption date and been prevented from selling power from the project. However, in the instant case, TPL has not commissioned the project but issued notice for termination of the contract. Hence, we hold that no further relief can be extended to the Petitioner on this account.
67. In view of the above discussion, we hold that the various events cited by the Petitioner, including the change in land policy, do not qualify under any of the events covered under Force Majeure in terms of Article 11 of the Power Purchase Agreement dated 23.05.2018 and hence the termination of PPAs by the Petitioner is not justified. Consequently, the Petitioner shall not be entitled to any relief on account of the said events.

68. The issue is decided accordingly.

Re. Issue No. III:

Whether SECI is entitled to release the Bank Guarantees amounting to Rs. 60,06,00,000 and Rs. 39,90,00,000 dated 21.03.2018?

69. In view of our findings on Issue No. II, SECI is not required to release the Performance Bank Guarantees, amounting to Rs. 60,06,00,000 and Rs. 39,90,00,000, submitted by TPL.

70. Accordingly, Petition No. 340/MP/2020, along with IA No. 1/2021, is disposed of in terms of the above.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
जिष्णु बरुआ
(अध्यक्ष)