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NEW DELHI

याचिका संख्या./ Petition No. 43/MP/2021

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: 12th of May, 2024

IN THE MATTER OF:

Petition, under Section 79 of the Electricity Act, 2003 read with Articles 11 and 13 of the Power Purchase Agreements dated 28.06.2018 executed between the Petitioner and Solar Energy Corporation of India Ltd, for termination of PPA due to force majeure events leading to delay of more than 12 months from the SCD of the project.

AND IN THE MATTER OF:

Adani Wind Energy Kutchh One Limited

Adani Corporate House,
4th Floor - South Wing, Shantigram
S.G. Highway, Khodiyar,
Ahmedabad

...Petitioner

Versus

- 1. Solar Energy Corporation of India,**
1st Floor, D-3, A Wing Religare Centre,
Saket, New Delhi-110017
- 2. South Bihar Power Distribution Company Limited,**
Second Floor, Vidyut Bhawan,
Bailey Road, Patna 800001
- 3. North Bihar Power Distribution Company Limited,**
Third Floor, Vidyut Bhawan,

Bailey Road, Patna 800001

4. Chhattisgarh State Power Distribution Company Limited,

Vidyut Seva Bhavan,
Danganiya, Raipur (CG) 492013

5. Electricity Department, Government of Goa,

4th Floor, Vidyut Bhavan,
Near main KTC bus stand, Vasco-da-Gama,
Goa -403802

6. Central Transmission Utility,

Plot NO.4, Near, IFFCO Chowk, Sector 29,
Saudamini, Haryana 122001

...Respondents

Parties Present: Shri Amit Kapur, Advocate, AWEKOL
Shri Saunak Rajguru, Advocate, AWEKOL
Shri Subham Bhut, Advocate, AWEKOL
Ms. Anushree Bardhan, Advocate, SECI
Ms. Surbhi Kapoor, Advocate, SECI
Ms. Suparna Srivastava, Advocate, PGCIL
Ms. Aastha Jain, Advocate, PGCIL
Ms. Tejasvita Dhawan, Advocate, PGCIL
Shri Swapnil Verma, PGCIL
Shri Siddharth Sharma, PGCIL
Ms. Muskan Agarwal, Advocate, PGCIL
Shri Akshat Shrivastava, Advocate, CSPDCL

आदेश/ ORDER

The Petitioner, Adani Wind Energy Kutchh One Limited (Adani Wind Energy), formerly known as Adani Green Energy (MP) Limited, is a generating company and was awarded to set up a 250 MW (5 x 50 MW) wind power project located at village Dayapar, District, Bhuj in the State of Gujarat (Project) as part of the 2000 MW ISTS-connected wind power projects (Tranche-III). The Petitioner has submitted that its project has been delayed due to Force Majeure events in terms of the PPAs and that the Petitioner is no longer able to perform its obligations under the PPAs as the delay in the commissioning of the project has increased the

project cost and accordingly the Petitioner may be relieved from performing its obligations under PPAs without any financial implication on the Petitioner.

2. Respondent No.1, SECI is a central public sector undertaking under the administrative control of the Ministry of New and Renewable Energy (MNRE). SECI is responsible for the implementation of various schemes of MNRE. SECI is the Intermediary Procurer of power from the WPDs for further sale to the Buying Entities. For this purpose, SECI has executed PPAs with the Petitioner and PSAs with the Buying Entities.
3. Respondent No. 2 and Respondent No. 3, South Bihar Power Distribution Company Limited (SBPDCL) and North Bihar Power Distribution Company Limited (NBPDCCL) are the distribution licensees in the State of Bihar. SBPDCL and NBPDCCL have jointly executed Power Sale Agreements (PSAs) dated 06.03.2018 with SECI for the supply of 300 MW of wind energy.
4. Respondent No. 4, Chhattisgarh State Power Distribution Company Ltd. (CSPDCL), is a distribution licensee in the State of Chhattisgarh. CSPDDCL is a Buying Entity and has executed a PSA dated 23.03.2018 with SECI for the supply of 150 MW of wind energy.
5. Respondent No. 5, Government of Goa, represents the Electricity Department, Government of Goa. The Electricity Department is the only licensee in the State of Goa for transmission and distribution of Electrical Energy. The Government of Goa is a Buying Entity and had executed a PSA dated 22.05.2018 with SECI for the supply of 50 MW of wind energy.
6. Respondent No. 6, the Central Transmission Utility (CTU), is the deemed transmission licensee as per the Electricity Act, 2003, and is responsible for the development of an efficient, coordinated and economic system of Inter-State transmission lines for the smooth flow of electricity from generating stations to the load centres.
7. The Petitioner has made the following prayers:
 - a) Declare that the Petitioner's Project has been delayed due to Force Majeure events in terms of the PPAs;
 - b) Declare that the Petitioner is no longer able to perform its obligations under the PPAs as the delay in commissioning of the Project has increased the Project cost, and accordingly, the Petitioner is relieved from performing its obligations under PPAs without any financial implication on the Petitioner;

- c) Direct SECI to return the Performance Bank Guarantee bearing No. 007GM07181110001 amounting to Rs 50 Crores issued by Yes Bank Ltd.;
- d) In the interim, restrain and injunct SECI from taking any adverse or coercive action against the Petitioner, including the encashment of the Performance Bank Guarantee;
- e) Pass any such further order as this Hon'ble Commission may deem necessary in the interest of justice.

Factual Matrix:

8. The chronology of the events leading to the petition is as under:

Date	Event												
08.12.2017	The Ministry of Power (MoP) issued Guidelines for Tariff Based Competitive Bidding Process for the Procurement of Power from Grid Connected Wind Power Projects												
12.01.2018	Pursuant to the Guidelines dated 08.12.2017 published by the Ministry of Power, SECI, published the Request for Selection (RfS) document "For Setting Up Of 2000 MW ISTS-Connected Wind Power Projects (Tranche-III)"												
02.02.2018	The Petitioner submitted its bid for setting up the wind Project of 250 MW (5X50 MW).												
23.02.2018	LoA was issued to the Petitioner for the generation and sale of power												
Tariff	Rs. 2.45 per unit												
March 2018 and May 2018	SECI entered into the following PSAs with buying entities for the supply of electricity from the wind power projects under the RfS: <table border="1" style="margin-left: 20px;"> <thead> <tr> <th>Date</th> <th>Buying Entity</th> <th>Contracted Capacity</th> </tr> </thead> <tbody> <tr> <td>06.03.2018</td> <td>North Bihar State Power Distribution Company Limited and South Bihar Power Distribution Company Ltd.</td> <td>300 MW</td> </tr> <tr> <td>23.03.2018</td> <td>Chhattisgarh State Power Distribution Company Limited</td> <td>150 MW</td> </tr> <tr> <td>22.05.2018</td> <td>Government of Goa</td> <td>50 MW</td> </tr> </tbody> </table>	Date	Buying Entity	Contracted Capacity	06.03.2018	North Bihar State Power Distribution Company Limited and South Bihar Power Distribution Company Ltd.	300 MW	23.03.2018	Chhattisgarh State Power Distribution Company Limited	150 MW	22.05.2018	Government of Goa	50 MW
Date	Buying Entity	Contracted Capacity											
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23.03.2018	Chhattisgarh State Power Distribution Company Limited	150 MW											
22.05.2018	Government of Goa	50 MW											
21.04.2018	The Petitioner submitted PBG amounting to Rs 50 Crores (at the rate of Rs. 20 Lakh per MW) to SECI												
02.06.2018	The Petitioner applied to the PGCIL for a grant of Stage II Connectivity to ISTS from 01.11.2019 onwards for a combined capacity of 250 MW, and on 07.08.2019												
28.06.2018	Five PPAs were executed between the Petitioner and SECI with effective date of PPAs as 24.05.2018												

19.07.2018	PGCIL informed the Petitioner that its application for connectivity was discussed in the 28th meeting of the Western Region constituents, and the same was agreed. Accordingly, Petitioner was required to sign a Transmission Agreement for connectivity and submit the requisite Connectivity Bank Guarantee within 30 days. The connectivity approval to the Petitioner was granted at Bhuj substation
07.08.2018	A Transmission Agreement was executed between the Petitioner and PGCIL
24.11.2018	The Petitioner applied to PGCIL for a grant of LTA for a combined capacity of 250 MW from its project for the period 24.11.2019 to 24.11.2044
21.12.2018	The Empowered Committee on Transmission (ECT), during its 3rd meeting, concurred that WRSS-21 Part-A transmission scheme, i.e. "Transmission System strengthening for relieving over loadings observed in Gujarat Intra-state system due to RE injections in Bhuj PS" to be constructed through TBCB route should be constructed by December 2020. This scheme was associated with the evacuation of power from the Petitioner's Project under LTA
24.12.2018	The Petitioner achieved Financial Closure and condition subsequent as per PPAs
02.01.2019	The Petitioner issued a Force Majeure Notice to SECI. The Petitioner informed SECI that some of the parts of the transmission line connecting the wind projects to the Bhuj substation, passed through patches of land whose ownership was not yet established between the Revenue and Forest Departments of the Government of Gujarat. This led to a situation wherein the approving authority was not known, due to which the construction of the transmission line was affected. It was stated that since the situation was beyond the control of the Petitioner, it may lead to a Force Majeure situation.
28.01.2019	PGCIL informed the Petitioner that its application for the grant of LTA for 250 MW capacity had been approved. The intimation of the grant of LTA, issued by PGCIL stated that the LTA is granted from 24.11.2019, or availability of the transmission system.
29.01.2019	The Petitioner informed SECI that there was an expected delay in the commissioning of the Associated Transmission System for the LTA for the Project. Further, PGCIL had advised the Petitioner to explore other modes of open access viz. MTOA and STOA in order to evacuate power from the wind power project. The Petitioner informed SECI that it is expected that the Associated Transmission System will be completed by December 2020 or at the latest by June, 2021.
31.01.2019	SECI acknowledged that the Petitioner had complied with the requirements of financial closure for its Project
01.03.2019	The Petitioner issued a Force Majeure Notice to SECI and informed SECI that it anticipated that its 250 MW LTA may not get operationalised by the SCoD of the Projects, i.e., 24.11.2019. This would delay the commissioning of the wind power projects due to the unavailability of PGCIL's evacuation

	infrastructure. In view thereof, the Petitioner requested SECI to grant an extension of time in the SCoD till the actual operationalization of the LTA granted by CTU
18.04.2019	The PGCIL informed the Petitioner that the tentative timeline for commissioning the transmission elements identified for evacuation of power under LTA from the Petitioner's project is December 2020.
23.04.2019	TSAs were signed between a number of Long-Term Transmission Customers (LTCCs) (including the Petitioner) and the transmission service providers, i.e. WRSS XXI (A) Transco Ltd. and WRSS XXI (B) Transco Limited
30.04.2019	The Petitioner informed SECI that NoC from the CSPDCL for the approval of MTOA from the PGCIL was still awaited.
08.05.2019	The Petitioner issued a Force Majeure Notice to SECI indicating that the Associated Transmission System required for the commencement of the LTA may not be ready by 24.11.2019, leaving the project stranded. It was stated that PGCIL had confirmed that the tentative timeline for the commissioning of the Associated Transmission System was December 2020.
08.05.2019	The Petitioner issued a Force Majeure Notice to SECI indicating that on the night of 05.05.2019, villagers of Jatavira Village severely damaged and fell a transmission tower along with damaging and clipping its conductor. The damage to the tower was so severe that the entire transmission tower would need to be replaced and re-stringing done, and an FIR had been lodged with the appropriate police station.
10.05.2019	Goa SLDC issued NOC required for the issuance of the MTOA
16.05.2019	The Petitioner issued a Force Majeure Notice to SECI, specifically stating that the construction of the transmission system associated with the LTA had not even begun and that the tendering process for the same was yet to be concluded. The Petitioner indicated that under such a situation, the Petitioner's ability to perform its obligations under the PPAs was affected.
15.06.2019	The Petitioner issued a Force Majeure Notice to SECI and informed that on 11.06.2019, Indian Meteorological Department (IMD) had issued a cyclone alert for the Gujarat coast in view of the Vayu cyclone. The District Collector of Kutch District issued orders under the Gujarat State Disaster Management Act, 2003, directing agencies to stop work and maintain a state of high alert.
10.07.2019	PGCIL granted MTOA for 50 MW (against the NOC issued by GOA SLDC), for transfer of power from Bhuj pooling station. It was stated that the MTOA was granted against the already granted LTA on target region basis and shall be subject to commissioning of the identified transmission system strengthening.
23.07.2019	Chhattisgarh SLDC's NOC dated 12.07.2019 required for MTOA was communicated to the Petitioner with the following details: 50 MW: 01.11.2019 to 30.06.2021 100 MW: 01.12.2019 to 30.06.2021
05.08.2019	The Petitioner informed SECI that as per the procedure for making

	application of MTOA, the start date for MTOA could not be earlier than 5 months from the date of making the application for MTOA. Since the application had not been made due to Chhattisgarh SLDC's delay in issuing the NOC, dates mentioned in the NOC, needed to be revised. Further, an MTOA Agreement was executed between PGCIL and the Petitioner for 50 MW power evacuation from Bhuj Substation based on Goa NOC
14.08.2019	The Petitioner issued a Force Majeure Notice to SECI indicating that till 11.08.2019, the Kutch District had experienced excessive rainfall, exceeding 150% of the average all-year rainfall, which has led to the total inundation of the project sites and paralysed the construction activities. In this regard, the Mamlatdar (Chief Revenue Officer), Nakhatrana, Government of Gujarat, issued a notice dated 13.08.2019 to stop all vehicular movements, including construction machinery and tools up to 19.08.2019. Accordingly, the work at the project sites has come to a complete standstill since 10.08.2019.
05.09.2019	SECI informed the Petitioner that the events cited by the Petitioner, i.e., the excessive rainfall and the notice issued by the Mamlatdar, did not qualify as a Force Majeure Event under the provisions of the PPA.
12.09.2019	A Bipartite Connection Agreement was executed between the PGCIL and the Petitioner for the connectivity of 250 MW wind generation of the Petitioner to the PGCIL's Transmission System to transmit electricity to and from the facility through the ISTS.
15.10.2019	The TSP, WRSS XXI (A) Transco Limited, informed the Petitioner that there was an inordinate delay in transfer of the SPV in favour of the successful bidder by the Bid Process Coordinator. Due to the said delay the construction of the transmission project had not started.
24.11.2019	Scheduled Commissioning Date (SCoD) as per PPAs
17.01.2020	PGCIL informed SECI that ICTs with an additional transmission capacity of 1700 MW are expected to be commissioned from February 2020 to June 2020. In view of the same, the Petitioner was requested to indicate its timelines to start power transmission requirements under LTA so that the same can be considered for allocation as and when additional capacity is available. It was clarified that the power transmission from the Petitioner's Project would only be possible after the establishment of Bhuj-II Pooling Station through LILO of Bhuj-Lakadia line and the commissioning of the Lakadia-Vadodara line, which is likely in December 2020. The same was communicated to the Petitioner by SECI on 04.02.2020.
22.01.2020	The Petitioner informed PGCIL that it was informed by WRSS XXI (A) Transco Ltd, that there had been an inordinate delay in acquisition of the SPV from the Bid Process Co-ordinator. As a result, the said transmission infrastructure was likely to get further delayed and was likely to be operationalised by March 2021/April 2021.
03.02.2020	LVTPL informed the Petitioner that there was an inordinate delay in transfer of the SPV in favour of the successful bidder by the Bid Process Coordinator.

	Due to the said delay the construction of the transmission project had been delayed.
04.02.2020	SECI referred to PGCIL's letter dated 19.01.2020 and requested Petitioner to indicate the commissioning schedule as sought by the PGCIL, so that the Petitioner's request for time extension in the SCOD could be processed accordingly.
10.02.2020	The Petitioner informed SECI that the PGCIL had confirmed that the infrastructure associated with the LTA for the Project would be completed by December 2020. And that the entire Transmission Project was delayed by 3 months. The process may get even further delayed and the LTA may only get operationalised by March 2021 to April 2021. The Petitioner also informed SECI that in view of the prolonged delay and the lack of visibility and certainty in the PGCIL's transmission system availability, it would be impracticable to confirm the project execution timelines in alignment with the timelines cited by the PGCIL in its letter dated 17.01.2020.
19.02.2020	The Ministry of Finance, Government of India, issued an Office Memorandum clarifying that the disruption of supply chains due to the spread of Covid-19 in China or any other country will be covered under the Force Majeure Clause of the "Manual for Procurement of Goods 2017", Issued by the Ministry of Finance.
27.02.2020 and 19.03.2020	WRSS 21 Part A Transco Ltd. and LVTPL, respectively, issued Force Majeure notices to the LTTCs (including the Petitioner) on account of the spread of the Covid-19 pandemic. This further delayed the commissioning of the transmission infrastructure for the Projects.
28.02.2020	The Tariff was finally adopted by the Commission vide Order in Petition No. 161/AT/2019.
19.03.2020	LVTPL issued a Force Majeure notice under Article 11.5 of the TSA on account of the spread of the Covid-19 virus and the resultant disruption of supply chains.
20.03.2020	The Ministry of New and Renewable Energy ("MNRE"), issued an OM, inter alia, stating that: (a) All RE implementing agencies of MNRE shall treat deal on account of disruption of the supply chain due to COVID-19 in China or any other Country as Force Majeure. (b) RE implementing agencies may grant a suitable extension of time for the projects on account of Covid-19 based on evidence/documents produced by the developers in support of their respective claims of such disruption of the supply chains due to the spread of Covid-19. (c) All project developers were required to make formal applications to SECI giving all documentary evidence in support of their claim. SECI shall fully satisfy itself that that the claimants were actually affected due to the disruption of supply chains due to spread of Covid-19 in the period for which the extension of time has been claimed.

13.04.2020	SECI informed the Petitioner that power from its Project can be evacuated through the augmented ICTs at the Bhuj PS from September 2020, irrespective of the readiness of the WRSS-21 transmission system. Here it may be noted that as per PGCIL's letter dated 17.01.2020 to SECI [at sub para (k) above], the power transmission from the Petitioners' Project would only be possible after the commissioning of the Bhuj-Lakadia line, which is likely in December 2020. Therefore, in effect, the evacuation of the power from Adani Green's Project was contingent on the commissioning of the Lakadia-Vadodara line, and the augmentation of capacity at the Bhuj pooling station could not be utilised for evacuation of power from Adani Green's project till the readiness of the said line.
01.06.2020	Adani Renewables replied to SECI's letter dated 13.04.2020 and stated that there was an adverse impact on the supplies and construction activities of the Project due to the Force Majeure events. This, along with the uncertainty and lack of visibility regarding the availability of the transmission infrastructure had made the execution of the Project an onerous task. Subsequently, till 24.06.2020 communication was carried out between the Petitioner and the SECI, reiterating their stands. The Petitioner indicated that due to a delay in the evacuation system commissioning, it is not in a position to specify the SCD of its project, while the SECI indicated that the Petitioner was not agreeing to commission their projects when PGCIL was ready to operationalize the LTA by September 2020.
03.07.2020	<p>A meeting was held between SECI, PGCIL, and Petitioner to discuss and resolve the issues anticipated for delaying the operationalization of the LTA awarded to Petitioner, wherein it was decided/ informed as indicated below:</p> <p>(a) The Petitioner will submit their commissioning schedule by 21.07.2020.</p> <p>(b) The Petitioner's OEM i.e. Suzlon Energy is under financial stress, and on 30.06.2020, Suzlon received the lenders' approval for debt resolution.</p> <p>(c) PGCIL informed that the revised date of augmentation of the transformation capacity at Bhuj Pooling Station is progressively by December 2020. However the LTA of the Petitioner may be operationalised on the margins created due to part commissioning of the associated transmission system based on their request. Hence the delay in commissioning of the Project cannot be attributed to the delay in operationalization of the LTA.</p> <p>(d) SECI advised Petitioner to consider the possibility of LTA operationalisation on part system as suggested by PGCIL and accordingly submit the commissioning plan for both the Projects by 21.07.2020.</p>
31.07.2020	Adani Renewables informed PGCIL that it had completed the transmission line from its substation to the Bhuj Pooling Station. However, due to Force Majeure Events/conditions in the implementation of the Project, it was compelled to surrender the LTA connectivity granted to it by PGCIL. Accordingly, since the LTA was being relinquished by Petitioner, the CPGs

	submitted for seeking the LTA by Petitioner may be returned.
05.08.2020	SECI informed the Petitioner that that the revised commissioning schedules of WRSS-21 Part A and WRSS-21 Part B was 31.05.2021 and that SECI may consider the commissioning of the Projects by May, 2021 i.e. the revised SCOD of the WRSS -21 transmission elements.
07.08.2020	PGCIL wrote to Petitioner stating that, based on Petitioner's request, the Stage-II Connectivity granted for the 250 MW project had been revoked, and the request for LTA quantum of 250 MW granted for transfer of power from its wind power project in Bhuj to beneficiaries also stood relinquished.
24.08.2020	The maximum time period allowed for the 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. (Long Stop Date)
27.08.2020	<p>The Petitioner informed SECI of the progress made in the Project and highlighted the following difficulties being faced by it in executing the Project:</p> <p>Delay in the availability of transmission infrastructure required for the evacuation of power.</p> <p>Non-issuance of NOC by Buying Entities for availing the MTOA for transfer of power as an alternate arrangement in the absence of operationalization of the LTA.</p> <p>Delay in the availability of the source components of the wind turbines due to the outbreak of Covid-19.</p> <p>Delay due to damage caused to the transmission tower of Petitioner by villagers in Jatavira.</p> <p>Delay in construction of transmission line from Ratadiya substation to Bhuj pooling station due to delay in land approval.</p> <p>Delay caused due to the occurrence of cyclone Vayu.</p> <p>Delay caused due to the occurrence due to heavy rains in the State of Gujarat.</p> <p>Delay in adoption of tariff by this Commission</p>
23.12.2020	SECI informed Petitioner that the Force Majeure claims of Petitioner could not be accepted. Moreover, considering that Petitioner had surrendered its Stage-II connectivity and relinquished the LTA granted for its Project, no extension of SCoD could be given to Petitioner and that the SCOD for the project shall remain 24.11.2019 for all purposes.
	In view of the imminent threat of invocation of Petitioner's Performance Guarantee by SECI, the Petitioner was constrained to approach the Hon'ble High Court of Delhi by filing Writ Petition (C) No. 340/2021 inter alia seeking directions to SECI to maintain status quo as regards PPAs dated 28.06.2018 and accordingly direct SECI to neither encash nor invoke the PBG, till the time the Petition of the Petitioner under Section 79 of the Electricity Act, 2003 is heard by this Hon'ble Commission. The Petitioner was constrained to approach the Hon'ble High Court as this Hon'ble

	Commission at that time (January 2021) was not undertaking any adjudicatory functions in view of Hon'ble Supreme Court's directions in Contempt Petition (C) No. 429/2020 in C.A. No. 14697/2015.
13.01.2021	Hon'ble Delhi High Court, by its Order, directed SECI to not encash the PBG of the Petitioner till the next date of hearing i.e., 22.01.2021
22.01.2021	Hon'ble High Court of Delhi directed to maintain the status quo with respect to the matter till the next date of hearing, being 03.02.2021
03.02.2021	The Petitioner filed the petition before the Commission.

Submission of the Petitioner

9. The Petitioner has submitted as under:

- a) As per the terms of the PPAs, the Petitioner was required to commission the Project by 24.11.2019, i.e., within 18 months from the Effective Date of 24.05.2018.
- b) As per Article 4.1.1. (g) of the PPA, it was the Petitioner's responsibility to obtain LTA and execute TSA for evacuation of contracted capacity from the Project.
- c) As per the LTA granted by PGCIL to Petitioner on 28.01.2019, the injection point was at 220 kV level through the Dayapar/Ratadia Pooling Station-Bhuj PS 220kV D/c line (with a minimum capacity of 725 MW at nominal voltage) along with associated bays at Bhuj PS & generation switchyard. The date of operationalisation of the LTA was recorded as 24.11.2019 or the date of availability of the transmission system.
- d) The Petitioner applied for connectivity to the inter-state transmission network and LTA on 24.11.2018 well within the time however the transmission system required for the evacuation of power from the Project under LTA is still not ready.
- e) Due to various Force Majeure events, the Petitioner's performance was hindered of its obligations under the PPAs, as a result of which the Project could not be commissioned by the SCoD. Due to the delay the completion and operation of the Project at the tariff of Rs. 2.45/kWh has become unviable.
- f) As per Article 13.5 of the PPAs, if the Force Majeure event or its effects continue to be present beyond a period of 12 months, either party shall have the right to cause termination of the PPAs. Further, once the PPAs are terminated, there shall not be any further liability to either party from the date of such termination.
- g) As per Article 4.5.1 of the PPAs executed between the Petitioner and SECI provides that in case the Petitioner is prevented from fulfilling its obligations under Article 4.1 (which includes supply of power from the commercial operation date of the Project) by the SCD due to Force Majeure event, then the SCoD shall be deferred for a reasonable period but not less than 'day for day' basis to permit the Petitioner to

overcome the effects of the Force Majeure events affecting the Petitioner. Article 4.5.3 of the PPAs provides that in case of extension due to a Force Majeure event, and if such Force Majeure event continues even after a maximum period of nine (9) months, any party may choose to terminate the PPAs as per provisions of Article 13.5. Further, the present case is similar to a situation where the Force Majeure events have subsisted beyond nine (9) months, and SECI has decided to cancel the Petitioner's Project. Therefore, the Petitioner deserves to be relieved of its obligations under the PPAs without any liability.

- h) The term 'Force Majeure' has been given an inclusive definition under Article 11.3 of the PPA. Accordingly, the ambit of the Force Majeure clause under the PPAs is not exhaustive and will include an array of events that are beyond the reasonable control of the Petitioner. This interpretation is supported by the observation of the Hon'ble Supreme Court in *Industrial Finance Corporation of India vs. Cannanore Spinning & Weaving Mills Ltd. (2002) 5 SCC 54*.
- i) The delay in the operationalisation of the transmission system has a cascading effect on the overall financial health of the Project, as in the absence of operationalisation of the transmission system, the Project would be stranded on account of the non-availability of evacuation infrastructure.
- j) Article 11.3.1 (d) of the PPAs, any event of Force Majeure identified under the PSAs with the distribution companies shall qualify as a Force Majeure event under the PPAs as well. In this regard, reliance is placed on Article 7.3.1 (f) of the PSAs with CSPDCL, Bihar Discoms, and Govt. of Goa.
- k) In *Chamundeswari Electricity Supply Co. Ltd. vs. Saisudhir Energy (Chitradurga) Pvt. Ltd. & Anr. 2018 SCC Online APTEL 65*, APTEL has held that the obligations under the PPAs are contingent on the availability of the transmission facilities and non-availability of transmission lines results in a force majeure event.
- l) Even after obtaining Stage-II connectivity and LTA approval in line with its obligations under the PPAs, the Petitioner was compelled to apply for MTOA due to the unavailability of the transmission system associated with the LTA. However, the grant of MTOA to the Petitioners was continuously delayed due to the delay in the issuance of NOCs by the Buying Entities for availing MTOA for the transfer of power.
- m) APTEL, in multiple cases, has allowed delays in obtaining statutory approvals or any other delay on behalf of government instrumentalities that hindered the works in a

project as a force majeure event and revised the SCoD of the projects accordingly. The Petitioner has placed its reliance on the following judgments: *Omega Infraengineers Pvt. Ltd. vs. PSERC & Ors., Appeal 2019 SCC Online APTEL 8*; *Taxus Infrastructure & Power Projects Pvt. Ltd. vs. GERC, SCC Online APTEL 86*; *North Eastern Electric Power Corporation Limited vs. Assam State Electricity Board, Appeal Nos. 159, 162 and 167 of 2005, dated 31.10.2007 reported as 2007 SCC Online APTEL 120.*

- n) The delay of the respective SLDCs in issuing the NOCs required for the MTOA application is a Force Majeure Event, which rendered performance of the Petitioner obligations impossible within the agreed timelines under the PPAs. The Petitioner has not received NOC for MTOA from either CPDCL or the Bihar Discoms.
- o) Ministry of Finance, Govt. of India Office Memorandum dated 19.02.2020 designated Covid-19 as a ‘Natural Calamity’. The MoF OM has been adopted by MNRE in its Notification dated 20.03.2020, which has also treated Covid-19 as a natural calamity. In terms of Article 11.3.1 of the PPA, the designation of an event as a natural calamity suffices for force majeure. Further, MNRE vide Office Memorandum dated 17.04.2020 has directed all renewable energy implementing agencies under MNRE to treat the national lockdown due to Covid-19 as a Force Majeure Event. MNRE by the OM dated 13.08.2020 (in supersession of its OM dated 17.04.2020) directed that “*All RE projects under implementation as on the date of lockdown, i.e. 25th March 2020, through RE Implementing Agencies designated by the MNRE or under various schemes of the MNRE, shall be given a time extension of 5 (five) months from 25th March 2020 to 24th August 2020...*”
- p) The following were the force majeure events that effected the petitioner:
- (i) As per the LTA granted to the Petitioner, the erection of 220 kV level through Dayapar/Ratadia Pooling Station—Bhuj PS 220kV D/c line along with associated bays at Bhuj Pooling Station and generation switchyard was under the scope of the Petitioner for connecting the Project to the Grid. However, the route of the said transmission line passed through certain patches of land, ownership of which was not clearly established between the Revenue Department and Forest Department of Gujarat. This led to delay in obtaining relevant approvals from the Government Authority for constructing the transmission line.

(ii) Certain villagers of village Jatavira severely damaged and fell a transmission tower erected by the Petitioner (including damaging and clipping its conductor) for the 220-kV dedicated transmission line being laid for connection of the Project to the Bhuj Pooling Station. The Petitioner had to rebuild the said tower by procuring the relevant material for the tower again and carrying out the erection activities. This event was beyond the reasonable control of Petitioner and qualified as a force majeure event that further delayed the commissioning of Petitioner's Project by a month, i.e., from 05.05.2019 to 05.06.2019.

(iii) IMD issued a cyclone alert for the Gujarat coast in view of the Vayu cyclone. The District Collector of Kutch District had issued orders under the Gujarat State Disaster Management Act, 2003, directing agencies to stop work and maintain a state of high alert. As a result of the aforesaid Force Majeure event, the construction of the Project was held between 11.06.2019 and 15.06.2019.

(iv) The location of project witnessed very heavy rainfall a force majeure event. The continuous rainfall resulted in inundation of the projects' sites halting the construction activities; damaging the approach roads, bridges etc.

(v) SECI approached this Commission for the adoption of tariff in October 2019, after a period of almost 16 months from the date of execution of the PPA.

- q) On account of the said Force Majeure events, the following obligations, inter alia, were impacted:
- i. Delays in getting finance/debt tied with banks for the Project as the said event also has an adverse impact on the economy of the country.
 - ii. non-availability of manpower and impacted the general course of day-to-day business activities.
 - iii. Major disruptions were caused in the supply chain of imported and domestically sourced components of WTGS.
 - iv. Delays in ordering and delivery schedule of domestically sourced equipment required for the Project.
- r) Obligation of SECI to have the tariff adopted in a timely manner was in the nature of a reciprocal promise, and performance had to be done in terms of Section 52 of the Contract Act, 1872.

- s) When the contract specifies a sequence of performance or the sequence is implied, one party cannot require compliance by the other without performing its own part of the contract. The order of performance depends on the nature of the transaction. The Petitioner has placed its reliance on the judgment of the Hon'ble Supreme Court in *Nathulal v. Phoolchand* : (1969) 3 SCC 120.
- t) The cumulative delay caused due to all Force Majeure Events is at least 14 months without considering the time required to restore normalcy once the force majeure event and its effects cease. Further, due to the non-availability of evacuation facility coupled with other force majeure events, such as disruption of the supply chain due to the outbreak of Covid-19, it has become impossible to complete the Project within the stipulated period of 18 months from the Effective Date.
- u) Impossibility of performance has arisen on account of continued Force Majeure Event beyond the reasonable control of the Petitioner and for reasons not attributable to the Petitioner. Once it is established that the Project has been affected by Force Majeure events, the Petitioner no longer has any liability to make any payments to SECI in accordance with the provisions of the PPAs. In such a case, the invocation of the Bank Guarantees is impermissible.
- v) As such the Petitioner is seeking to be released from performing its obligations under the PPAs on account of the supervening Force Majeure events.

Reply of SECI

10. SECI has submitted as under:

- a) On 23.04.2019, the following two TSAs were executed by the Petitioner:
 - i) WRSS XXI (A) Transco Limited (TSA with WRSS) wherein the scheduled COD of the associated transmission system, namely WRSS-21 (Part-A) was December 2020
 - ii) Lakadia-Vadodara Transmission Project Limited – wherein the scheduled COD of the associated transmission system, namely WRSS-21 (Part-B), was 31.12.2020
- b) At the time of executing the above TSAs, there was no reservation or condition by the Petitioner that the Associated Transmission System should be available from 24.11.2019.
- c) On 08.05.2019, the Petitioner, through its letter, informed SECI that the tentative timeline for the commissioning of the Associated Transmission system required for

commencement of LTA for 250 MW projects of the Petitioner is December 2020. The Petitioner also requested SECI 'to grant an extension of time in Scheduled Commissioning Date till the date of actual operationalization of the LTA.'

- d) SECI submitted representations of the Petitioner to the MNRE, for a decision on an extension of the scheduled commissioning date (SCoD) for Projects under the Tranche-III scheme to be December 2020, which is beyond the 27 months (i.e. beyond 24.08.2020) from the effective date. As per Article 4.5.6 of the PPAs, the outer-limit for a grant of extension of time for CoD expired on 24.08.2020. MNRE, via letter dated 22.10.2019, communicated its recommendation for extension cases falling under the following categories:
- Change in land policy by State Government;
 - Change in land and building rules by respective State Government (Tamil Nadu);
 - Delay in LTA operationalization;
 - Delay in issuance of No Objection Certificate by Ministry of Defence (MoD), Government of India.
- e) The decision of MNRE was duly conveyed to the Petitioner through mail.
- f) The Petitioner via letter dated 14.11.2019, requested SECI to grant an extension of SCD by at least 90 days from the actual date of LTA Operationalization. SECI requested PGCIL for a response in the matter. On 17.01.2020, PGCIL informed that "M/s Adani Green Energy (MP) Ltd. and M/s Adani Renewable Energy (TN) Ltd. may be requested to indicate their timelines to start power transfer requirement under LTA so that the same may be considered for allocation against the transmission margin to be available as indicated above."
- g) On 10.02.2020, the Petitioner again reiterated that it would be impracticable to confirm the project execution timelines in alignment with the timelines of the power transfer capability in the system cited by CTU in its letter dated 17-Jan-20. The Petitioner also indicated that it is closely monitoring the project and is evaluating ways to align the project execution schedule with the timelines cited by CTU in its letter dated 17-January -20.'
- h) On 09.04.2020, SECI informed the Petitioner that ... "ICTs augmentation at Bhuj PS is expected to be completed by September20. Further, a few LTA grantees connected at Bhuj PS have relinquished their LTAs. Accordingly, with the commissioning of the

above ICTs at Bhuj PS, sufficient margin shall be available for transfer of power from AGEMPL'S 250 MW & 300 MW projects.”

- i) Subsequently, the Petitioner maintained the same line of argument that it would be impracticable to confirm the project execution timelines in alignment with the timelines of system augmentation/ power transfer capability as per the existing scenario of work execution by PGCIL and has been providing very vague and non-quantifiable manner.
- j) As per the minutes of the meeting held on 03.07.2020 between SECI, PGCIL, and the Petitioner, it has been noted that:
 - i. With the above submission by Ms. PGCIL, vide letters dated 13.04.2020, 02.06.2020 and 15.06.2020, SECI had requested M/s. AGEL to commission their respective projects according to the proposed date of completion of ICTs augmentation at Bhuj PS, i.e., Sept'20 and intimate M/s. PGCIL to operationalize the LTA accordingly. Till date, M/s. AGEL has not provided the commissioning schedule and, in its letter dated 09.06.2020, stated that they are trying to work out the schedule for the projects and shall come back to SECI promptly.
 - ii. During the meeting, M/s. AGEL informed that they are still assessing the situation. M/s. AGEL informed that their OEM, i.e., M/s. Suzlon is under financial stress and, on 30.06.2020, M/s. Suzlon has received the lender's approval for debt resolution M/s. AGEL further assured that by 21.07.2020, they will submit the commissioning plan for the Project. On the submission of M/s. AGEL, M/s. PGCIL informed that in the 28th Joint Coordination Committee Meeting for Generation Project for Western Region held on 30.06.2020, the representative of M/s. AGEL has submitted the commissioning date for the projects as on 30.05.2021. On this, M/s. AGEL said that they will cross-check the status of the projects and submit their commissioning schedule by 21.07.2020.
 - iii. M/s PGCIL informed that the revised date of completion of augmentation of Transformation Capacity is progressively by Dec/20. However, as mentioned in their previous submissions to SECI, the LTA of M/s. AGEL may be operationalized on the margin created due to part-commissioning of the associated transmission system based on their request. Hence, the delay in the

commissioning of the Project cannot be attributed to the delay in the operationalization of LTA.

- iv. M/s SECI apprised that the Scheduled Commissioning Date for Projects has already lapsed on 24.11.2019 and 29.02.2020, respectively. DISCOMs with whom SECI has signed the PSA are pushing very hard for early commissioning of the Projects, as delay in commissioning is affecting their yearly RPO targets, which could lead to penalties for not meeting the schedule. For the last 06 months, M/s AGEL is not provided the tentative schedule of the Project, which will make it difficult for SECI to provide any tentative commissioning date for the Project. SECI has been continuously informing M/s AGEL since January 2020 that M/s PGCIL is ready to operationalize the LTA on margins created due to part commissioning of the associated transmission system at the request of M/s AGEL. SECI advised M/s AGEL to consider the possibility of LTA operationalisation on part system as suggested by M/s PGCIL and accordingly submit the commissioning plan for both Projects by 21.07.2020.
- k) Vide letter dated 05.08.2020, SECI informed the Petitioner that although delay in commissioning cannot be attributed to the delay in the operationalization of LTA, as PGCIL is ready to operationalization the LTA, SECI may consider the commissioning of the project by May, 2021. SECI requested the Petitioner to give a revised commissioning timeline by 13.08.2020 to process the case for the extension of time.
- l) However, the Petitioner, vide letter dated 31.07.2020, surrendered the LTA connectivity granted by PGCIL and stated that the said transmission system and connectivity would be utilized by the affiliates of the Petitioner, namely Adani Green Energy Three Limited under the Tranche-VI scheme issued by SECI. Vide letter dated 07.08.2020, PGCIL revoked the LTA granted in respect of the Tranche-III project of the Petitioner.
- m) The Petitioner failed to inform SECI about the surrendering of the LTA granted in respect of the Tranche-III project.
- n) On 27.08.2020, the Petitioner, through a letter to SECI, informed that 'Continuous delay and multiple hindrances affecting the project, has made executing of this project mostly unviable for us.' However, the Petitioner had already relinquished the LTA on 31.07.2020, i.e., much prior to the issuance of the letter dated 27.08.2020 without any

intimation to SECI. The said conduct of the Petitioner clearly establishes that the Petitioner had no intention to execute the project or to obtain any extension of time.

- o) On 25.12.2020, the Petitioner submitted an advance notice of synchronization and early part-commissioning of the 250 MW Wind Power Project being implemented under Tranche-VI. Further, on 25.01.2020, the Petitioner submitted that it has obtained the permission from Gujarat Energy Development Agency (GEDA) in respect of Tranche-III & IV Projects as part of documents for processing the commissioning of Tranche-VI Project.
- p) The Petitioner (Tranche – VI Project) has taken the LTA of the same quantum as Tranche – III Project, and that too on the same day of relinquishment of the LTA of Tranche – III Project, but 250 MW capacity has gone out of the system.
- q) The Petitioner, while seeking to implement the Tranche V, VI (planning for early-commissioning), and VII projects located in the same area, using the same transmission elements under the LTA as in the case of Tranche-III and without claiming any Force Majeure event is selectively and wrongly invoking Force Majeure for Tranche-III project. It is important to note that the difference in the tariff admissible to Adani under Tranche VI project is Rs.0.37/kWh (applicable tariff being Rs.2.82/kWh) as compared to the tariff of Rs. 2.45/kWh in Tranche III PPA.
- r) The comparative tabular statement setting out the details of the tariff payable, Connectivity and LTA status, Transmissions elements under the LTA granted, status of LTA, Original/Revised Scheduled Commissioning Date of Power Projects of the Petitioner’s group under Wind Tranches-III, IV, V, VI, VII is as under:

SECI Tranche	Tranche-III	Tranche-IV	Tranche-V	Tranche-VI	Tranche-VII
Tariff (INR/kWh)	2.45	2.51	2.76	2.82	2.83
Connectivity and LTA status	Granted at Bhuj PS	Granted at Bhuj PS	Granted at Bhuj-II PS	Initially Granted at Bhuj-II PS, however, in July 2020, WPD surrender the connectivity and relinquish the LTA and sought for fresh connectivity and LTA at Bhuj-PS. Same was granted at Bhuj PS	Initially Granted at Bhuj-II PS, however, in Dec 2020, WPD surrender the connectivity and relinquish the LTA and sought for fresh connectivity and LTA at Bhuj-PS. Same was granted at Bhuj PS
Transmission elements under LTA granted	1. Establishment of 2x1500 MVA, 765/400 KV Lakadia PS 2. Lakadia- Vadodra 765 KV D/c line 3. Bhuj PS- Lakadia PS 765 KV D/c line 4. LILO of Bhachau - EPGL 400 KV D/c (triple) line at		Transmission system strengthening at Bhuj-II PS: 1. Establishment of 2x1500 MVA (765/400kV), 4x500MVA (400/220kV) Bhuj-II	1. Establishment of 2x1500 MVA, 765/400 KV Lakadia PS 2. Lakadia- Vadodra 765 KV D/c line OR Lakadia – Banaskantha 765 D/c line 3. Bhuj PS- Lakadia PS 765 KV D/c line	1. Establishment of 2x1500 MVA, 765/400 KV Lakadia PS 2. Lakadia- Vadodra 765 KV D/c line OR Lakadia – Banaskantha 765 D/c line

	Lakadia PS		PS (GIS) 2. Reconfiguration of BhujPS-Lakadia PS 765 kV D/c line at Bhuj-II PS so as to establish Bhuj II – Lakadia 765 kV D/c line and Bhuj PS – Bhuj II Ps 765 kV D/c line. Western Region strengthening Scheme-21 (WRSS-21) Part - A 1. Establishment of 2×1500 MVA, 765/400kV Lakadia PS 2. Bhuj Ps – Lakadia PS 765 kV D/c line 3. LILO of Bhachau – EPGL 400 kV D/c (triple) line at Lakadia PS Part – B 4. Lakadia – Vadodara 765 kV D/c line	4. LILO of Bhachau - EPGL 400 KV D/c (triple) line at Lakadia PS	3. Bhuj PS- Lakadia PS 765 KV D/c line 4. LILO of Bhachau - EPGL 400 KV D/c (triple) line at Lakadia PS
Status of LTA operationalization	LTA relinquished by petitioner in July 2020	relinquished by petitioner in Dec 2020	-	Part LTA for 115 MW was operationalized w.e.f. 05.02.2021	-
Original/ Revised SCD of Project	24.11.2019	29.02.2020/ 31.10.2021	22.07.2020/ 31.10.2021	15.03.2021/ 15.08.2021	18.04.2021/ 18.09.2021
Status of Project	Present case	Vide letter dated 31.12.2020The Petitioner has surrendered the connectivity granted for the Project and relinquished the LTA. SECI has issued a notice.	Under Construction	Part commissioned – 145.2 MW	Under Construction

- s) Vide Order dated 10.10.2019 in Petition no. 197/MP/2019, this Commission has, inter-alia, held as under:

60...The Commission is also guided by the principles, as provided under Section 61(d) of the 2003 Act i.e. safeguarding of consumer's interest and at the same time, recovery of the cost of electricity in a reasonable manner. Thus, the Commission has a statutory responsibility to balance the interest of developers and consumers of electricity. Accordingly, the regulatory approval granted above is subject to the condition that the distribution companies and consumers shall be liable for payment of transmission charges after the renewable generating stations achieve the COD. The transmission charges for transmission system approved herein shall be recovered as per CERC (Sharing of inter-state transmission charges and losses) Regulations, 2010 as amended from time to time after the associated generating stations achieves COD. In case of mismatch between the date of commercial

operation of generating station and transmission system, the liability of transmission charges shall be governed by Regulation 6 of CERC (Terms and Conditions of Tariff) Regulations, 2019. The CTU, as far as possible, shall endeavor to match or phase out the construction of transmission systems according to the progress of the RE generating stations, in consultation with MOP and MNRE so as to minimise any financial impact on distribution companies in case the transmission assets remain unutilized due to delay or non-materialization of envisaged generation projects. In case the generating stations as envisaged do not materialize and transmission system is commissioned, CTU may seek appropriate remedies such as grants and/or subsidies from GOI/ State Governments till the associated generating stations achieve COD. CTU may also approach the Commission for appropriate relief and directions”.

- t) PGCIL has been seeking the commissioning plan from the Petitioner since October 2019. Moreover, PGCIL has gone one step ahead and agreed to provide possible alternate power evacuation arrangements. This has been consistent with 100% utilization of existing transmission infrastructure and making investments in new infrastructure accordingly.
- u) The LTA could be operationalized without the elements that the Petitioner is referring to.
- v) If allowed, the act of the Petitioner will lead to a bad precedent as there can be no justification for the developers who got approval to connect their Projects of lower tariff to the under-construction transmission system, upon being awarded subsequently a Project of higher tariff, seek to and is allowed to forgo the Project of lower tariff citing delay in construction of Transmission system as Force Majeure event while using the same system for higher tariff projects when the ISTS is for both the projects.
- w) In terms of the bidding documents and the PPAs, the responsibility of getting Transmission Connectivity and Long-Term Access (LTA) to the transmission system owned by the STU/CTU was entirely of the Wind Power Developer, and the same was at the cost and risk of the Wind Power developer.
- x) The evacuation system availability has not been included within the scope of Force Majeure Event under Article 11.3.1 of the PPAs and, therefore, cannot be considered that there is a Force Majeure Event as stated in Article 11.3.1 affecting the Performance of the obligations of the Petitioner. The expression “those stated below” contained in Article 11.3.1 – opening part is significant in regard to the above. The claim of the Petitioner that the said alleged events of delay in the commissioning of Transmission infrastructure falls within the scope of Article 11.3.1 (d) of the PPAs,

and Article 7.3.1 (f) of the PSAs is misconceived and without any basis for the following reasons:

- (i) The delay or deferment of the Associated Transmission System did not in any manner prevent or delay the construction or commissioning of the Petitioner's Wind power Projects under the PPAs;
 - (ii) The Petitioner had voluntarily agreed and accepted that the Associated Transmission System shall be available only by 31.12.2020 or even later;
 - (iii) Delay in commissioning was not attributable to delay in operationalization of LTA as PGCIL was ready to operationalize the LTA;
 - (iv) The evacuation system is required when the power projects are complete in all respects and are in a position to generate and inject power into the Grid and not before;
 - (v) SECI vide letter dated 05.08.2020 informed the Petitioner that it is willing to consider commissioning of the Wind power projects by May 2021 as the revised commissioning date;
 - (vi) Despite the above, the Petitioner had not chosen to undertake the performance of its obligations under the PPAs, which was within its control and was not affected by the non-availability of the Associated Transmission System.
 - (vii) In the absence of the commissioning of wind power project and commencement of supply of power, there was no event of the delivery of power from the Petitioner to the Buying Entities being affected.
- y) The Petitioner's claim that the period from 24.11.2019 till 31.12.2020 or till May 2021 constitutes a Force Majeure Event is an after-thought and contrary to the records.
- z) The claim of the Petitioner that commissioning of the transmission system in May 2020 is beyond the period of 27 months prescribed under Article 4.5.6 of the PPAs as the outer-limit for grant of extension of time is not tenable as SECI vide letter dated 05.08.2020, i.e., much before the 27 months end period of 24.08.2020 had informed the Petitioner that SECI might consider commissioning of the projects by May 2021. The same was done in the form of special dispensation, consistent with the letter dated 22.10.2019 of the MNRE, in view of the express stipulation contained in Article 4.5.6 and Article 4.6.2 of PPA.
- aa) The commissioning of the transmission system and operationalization of LTA is not a condition precedent within the scope of Article 3 of the PPAs which particularly deals

with Condition Subsequent and Financial Closure. In fact, obtaining LTA, executing the transmission service agreement with PGCIL, and transmission up to the interconnection point is within the scope of the responsibility and obligation of the Petitioner at its own cost and risk in terms of Article 4.1.1 and Article 4.2 of the PPAs. Moreover, in the present case, PGCIL was also ready to operationalize the LTA based on the margin available due to the relinquishment of LTAs by other LTA grantees and the commissioning of additional ICTs.

- bb) The Guidelines, RfS Document, PPAs, and PSAs do not envisage obtaining MTOA and only provide for LTA. The Petitioner was obtaining MTOA at its cost and risk and neither SECI nor the distribution licensees can be held accountable for the same. Accordingly, any delay in obtaining MTOA, as alleged by the Petitioner, does not amount to Force Majeure within the scope of Article 11 of the PPA. Moreover, SECI in order to assist in obtaining the MTOA, was on a best endeavour basis to assist the Petitioner to facilitate the implementation of the power projects and not as a result of any obligation under the PPAs. Further, NOC for MTOA was granted by Goa and Chhattisgarh and an MTOA Agreement was executed between Petitioner and PGCIL for the supply of 50 MW capacity of power to Goa, which provides that SCD for 50 MW to be November 2019. Subsequently, on 05.09.2019, the Petitioner gave advance notice prior to synchronization under Article 5.1.1 of the PPAs in regard to the 50 MW Wind Power Project under Tranche-III, indicating 15.09.2019 to be the possible date for the commission of 50 MW of project (part-capacity) subject to the readiness of PGCIL evacuation infrastructure. Also, the Petitioner vide letter dated 06.09.2019 stated that the Petitioner would commission the project in stages in the next 1 to 3 months and requested SECI to grant NOC for third-party sale from commissioning till COD of the plant. However, the Petitioner failed to provide certain documents as requested by SECI to enable SECI to witness the part commissioning.
- cc) The Petitioner, vide letter dated 16.09.2019, requested PGCIL to defer the start date of MTOA from 01.11.2019 to 01.01.2020, as the construction activities at project sites & movement of equipment and materials to sites have come to a standstill since 10th August, 2019, making it difficult for AGEMPL to commission its 50 projects by 01st November 2019. However, the request of Petitioner was turned down by the PGCIL via a letter dated 01.10.2019, under which the PGCIL indicated that ‘the start date of MTOA cannot be deferred at this stage’

- dd) Vide letter dated 20.09.2019, the Petitioner indicated that the 50 MW Project of the Petitioner (mapped to Goa) is expected to come on 25.09.2019 and requested SECI for issuance of NOC for allowing Third party Sale of power from commissioning till operationalization of MTOA/LTA from 50 MW Wind Project. The Petitioner having obtained MTOA NOC for 50 MW from Goa, there was no need for NOC for third party sale at the relevant time.
- ee) On 01.11.2019, PGCIL revoked the MTOA granted to the Petitioner for the transfer of 50 MW power to the Electricity Department, Goa on account of the failure of the Petitioner to establish the required Payment Security Mechanism and for not having furnished requisite documents for waiver of transmission charges and losses. The reliance placed by the Petitioner on decisions, namely Omega Infraengineers Pvt Ltd –v- PSERC & Ors; Taxus Infrastructure & Power projects Pvt. Ltd. –v- GERC and North Eastern Electric Power Corporation Limited –v- Assam State Electricity Board is misplaced as obtaining of MTOA was not provided for in the bidding documents or the PPAs. Accordingly, any delays associated with MTOA are at risk and cost of the Petitioner.
- ff) The Covid-19 cannot be said to have any impact on the timelines of the Petitioner as in terms of the PPAs, the Conditions Subsequent and financial closure were achieved by the Petitioner on 24.12.2018 and the scheduled commissioning date was to be achieved by 24.11.2019. The SCoD, unless extended in terms of the PPAs or with approval of the competent authority, i.e., MNRE, being the ultimate deadline for completion of all the activities with respect to the Wind Power Project, fell prior to the imposition of lockdown with effect from 25.03.2020 by the Government. Reliance is placed on the order dated 29.05.2020 of the Hon'ble High Court of Delhi in a matter of M/s. Halliburton Offshore Services Inc –v- Vedanta Limited & Anr.
- gg) The Petitioner did not submit any documents in support of the claim of disruption of the supply chain due to the spread of Covid-19 in terms of O.M. dated 20.03.2020 of MNRE. In the absence of submitting the requisite documents, the alleged event of disruption of the supply chain prior to the notification of lockdown by the Government of India is specifically excluded from the scope and ambit of Force Majeure.
- hh) MNRE vide Office Memorandum being F.No.283/18/2020-GRID SOLAR dated 17.04.2020, dealing with time-extension in SCoD of Renewable Energy Projects considering disruption due to lockdown on account of Covid-19, had indicated that

“The Renewable Energy implementing agencies may grant extension of time for RE projects, on account of lockdown due to COVID-19, equivalent to the period of lockdown and additional 30 (thirty) days for normalisation after end of such lockdown. Thus, the extension will be for the period of lockdown plus 30 (thirty) days. This will be a blanket extension - there will be no requirement for case-to-case examination. There will be no need to ask for any evidence for an extension due to lockdown”. In respect of “the extension on account of disruption in the supply of RE equipment prior to lockdown,” the OM has indicated that it shall be dealt with separately for additional Extension of Time as per the provisions provided under the OM. Accordingly, SECI conveyed to the Petitioner that for 250 MW Wind Projects of the Petitioner, for which the scheduled commissioning date was 24.11.2019, no penalty shall be levied for the period of lockdown plus an additional 30 days as per MNRE Office Memorandum dated 17.04.2020. Thus, the Petitioner’s reliance on the said documents for the purpose of terminating the PPAs is wrong.

- ii) The group company of the Petitioner, utilizing the same plant and machinery procured from Suzlon as was envisaged for Tranche-III Projects, has achieved part-commissioning of Tranche-VI project on 11.03.2021 (14.7 MW), 11.03.2021 (100 MW) and 18.03.2021(30.5 MW) in respect of 100 MW and 50 MW Wind Power Projects.
- jj) The Petitioner did not invoke the blanket extension provided for in the Office Memorandum dated 13.08.2020 for extension in SCoD of the wind power projects and, therefore, at this stage, cannot claim that such period of 5 months amounts to force majeure for terminating the PPAs.
- kk) In terms of Clause 18 of the Guidelines, Clause 3.7 of the RfS Document, Clause 4.1.1 g) and Clause 4.2 of the PPAs, the responsibility of arrangement of connectivity through a dedicated transmission line (Dayapar/ Ratadia Pooling Station- Bhuj 220 kV D/c) to the transmission system owned by the STU/CTU was entirely of the Wind Power Developer and the same was at the cost and risk of the developer.
- ll) The claim of 10 days of relief due to heavy rain being considered as a force majeure event does not qualify as an event of heavy rain do not qualify as a force majeure event under Article 11.3.1 a) of the PPA. In fact, after the above event, the Petitioner vide letter dated 06.09.2019 had stated that the Petitioner would commission the wind power projects in stages in the next 1 to 3 months and had also given advance notice

prior to synchronization under Article 5.1.1 of the PPAs in regard to 50 MW Wind Power Project of the Petitioner.

- mm) The allegation of the petitioner that delayed action and failure by SECI to apply for and obtain the tariff adoption order from this Commission within a reasonable time period affected the performance of obligations of the Petitioner under the PPAs is not sustainable. The Article 12 of the Guidelines does not provide adoption of tariff as condition precedent.
- nn) Under Petition No. 161/AT/2019, on 07.10.2019, SECI filed a Transposition Application being IA No.85 of 2019, impleading all the developers, including the Petitioner, under Tranche-III scheme, and notice was issued to all the Wind Power Developers, including the Petitioner. However, during the hearing on the IA the Petitioner chose not to appear before the Commission in the proceedings and did not raise any objections in the said proceedings in regard to the time taken for the Adoption of Tariff. Further, the Petitioner proceeded with the implementation of the PPAs even after 28.02.2020, when the Tariff Adoption Order was passed by the Commission.
- oo) Article 11.3.1 of the PPAs uses the word 'means' while enumerating the events or circumstances or combination of events as amounting to Force Majeure. It is settled law that the use of the word 'means' implies that the definition is restrictive and not exhaustive, and no other meaning can be assigned to the expression than is stated in the definition. It is also a settled principle that Force Majeure clauses are to be narrowly construed. In this regard, reliance is placed on the following decisions: *Energy Watchdog –v- Central Electricity Regulatory Commission (2017) 14 SCC 80*; *NTPC Vidyut Vyapar Nigam Limited –v- Precision Technique 2018SCC OnLine Del 13102*; *Halliburton Offshore Services Inc –v- Vedanta Limited & Ors., Decision dated 29.05.2020 of the Hon'ble High Court of Delhi in O.M.P. (I) (COMM) No.88/2020*; *M/s. Ram Abhoshan –v- M/s. PEC Limited 2018 SCC OnLine Del 10553*.
- pp) As per Article 11.5.2 of the PPA, the Affected Party is required to give Notice as soon as reasonably practicable, but not later than 15 days after the date on which such Party knew or should have reasonably known of the commencement of the event of Force Majeure and such notice is a precondition to an affected party's entitlement to claim relief under the PPA.
- qq) 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

‘Insufficiency of finances or funds or the agreements becoming onerous to perform.’ Therefore, the failure of the original equipment manufacturer of the project, i.e. M/s Suzlon, to perform its obligations cannot be considered as a Force Majeure Event and is in fact a Force Majeure Exclusion under Article 11.4 of the PPAs.

- rr) In terms of Article 11.6 of the PPA, the Petitioner is required perform obligations, to the extent not prevented by force majeure and use its reasonable efforts to mitigate the effect of alleged events of Force Majeure. However, despite of repeated request, the Petitioner has failed to furnish any documents or information to enable SECI to process the case for extension of time.
- ss) The SCoD was 24.11.2019, and the period of 27 months from the Effective Date expired on 24.08.2020. However, vide letter dated 31.07.2020, the Petitioner had already requested the PGCIL for relinquishment of the LTA and surrendering of the connectivity without the knowledge of SECI, and the same was accepted by PGCIL vide letter dated 07.08.2020 before the completion of 27 months duration.
- tt) Article 4.5.3 of the PPAs can be invoked if there was an extension granted in terms of Article 4.5.1 on account of Force Majeure and if such Force Majeure event continued for period of more than 9 months. In the present case, no extension has been granted to the Petitioner in terms of Article 4.5.1 of the PPA.
- uu) Under the PPA, SECI is required to return/release the Performance Bank Guarantee only after successful commissioning of the project after taking into account any liquidated damages/penalties due to delays in commissioning as per provisions in PPA. In terms of the bidding documents, namely Guidelines, RfS Document, and Article 4.6 of the PPAs, SECI is entitled to the payment of liquidated damages if the Petitioner does not commence supply of the power by the stipulated time.

I.A. No. 9 of 2021:

11. The Petitioner also filed IA No.9/2021 for restraining the Respondents from invoking a bank guarantee. Keeping in view the submission of the learned senior counsel for SECI during the hearing on 05.03.2021 that the Petitioner, vide its letter dated 26.12.2020 itself, had proposed to deposit the amount corresponding to PBG with SECI in lieu of encashment, the Commission deemed it appropriate to allow the Petitioner such an alternative and accordingly directed the Petitioner to deposit with SECI the amount equivalent to PBG by 15.5.2023 failing which SECI may take appropriate action(s) towards encashment of PBG in accordance with law. However, the above PBG encashment or deposit of the amount in lieu of PBG shall

be subject to the outcome of the decision on the main Petition. Accordingly, IA No.9/2021 was disposed of.

Reply by PGCIL:

12. PGCIL has also provided the chronology of events leading to the grant of connectivity and the LTA. However, the same is not being reproduced here for the sake of brevity. Additionally, PGCIL has submitted that:

- a) On 18.04.2019, the Petitioner was informed about the decision taken in the 3rd Meeting of the Empowered Committee on Transmission regarding Western Region System Strengthening-XXI Part-A and B Scheme, i.e., '*transmission system strengthening for relieving overloading observed in Gujarat intra-State system due to RE injection in Bhuj PS*', which also included transmission elements of the ATS identified for evacuation of power from the projects of the Petitioner through LTA, and the variation in commissioning schedule of the ATS, vis-a-vis the LTA operationalization date stated under the LTA grant.
- b) Subsequently, the Petitioner, as one of the LTTCs, also signed TSA with WRSSXXI(A) Transco Ltd. and Lakadia-Vadodara Transmission Project Ltd. for procurement of transmission services for the transmission of electricity.
- c) On the request of Petitioner, PGCIL signed an MTOA Agreement dated 05.08.2019 for 50 MW for transfer of power from Bhuj PS under which the Petitioner agreed to pay transmission charges as applicable under the relevant Regulations and also furnish the required letter of credit (LC) as payment security. The MTOA was to be made operational w.e.f. 1.11.2019. However, vide its letter dated 16.09.2019, the Petitioner requested PGCIL to extend the start date of the MTOA to 01.01.2020. Till such time, the Petitioner neither submitted the requisite documents for waiver of transmission charges nor opened the requisite LC for evacuating 50 MW through MTOA. The continued failure on behalf of the Petitioner to provide the requisite documents and/or payment security mechanism, PGCIL was constrained to revoke the MTOA granted to the Petitioner. The same was conveyed to the Petitioner vide letter dated 01.11.2019.
- d) PGCIL, vide its letter dated 17.01.2020, informed SECI that the Petitioner may be requested to indicate their timelines to start power transfer requirement under LTA so that the same may be considered for allocation against the transmission margin to be available, upon commissioning of additional 4x500MVA, 400/220kV and 2x1500,

765/400kV ICTs at Bhuj PS (apart from already commissioned 4x500MVA, 400/220kV and 2x1500MVA, 765/400kV ICTs at Bhuj PS) which were expected to be commissioned progressively from Feb'20 to June'20.

- e) Meanwhile, M/s Adani Transmission Ltd. and Sterlite Grid 18 Limited (successful bidders for implementing the WRSS-XXI Transmission Scheme, including the identified ATS for the LTA of the Petitioner) informed that there will be a delay in the commissioning of the Transmission projects from the initial commissioning schedule of December 2020 owing to various reasons stated to be beyond the control of the TBCB licensees. The TBCB licenses also issued notices of *force majeure* to their long-term transmission customers (LTTCs), including to the present Petitioner.
- f) Acknowledging the delay in the competition of transmission infrastructure and its likely operationalized by March-April, 2021, the Petitioner, vide its letter dated 10.02.2020, revised the commissioning schedule of its generation project in order to match the commissioning of its generation project with the ATS identified for LTA.
- g) The Petitioner, vide its letter dated 17.03.2020, requested the answering Respondent to defer operationalization of its LTA owing to the delay in commissioning of its generating stations due to alleged force majeure events without any financial implications.
- h) On the inquiry of SECI, PGCIL, vide its email dated 09.04.2020, informed SECI that out of the ATS for the LTA granted to the Petitioner, augmentation of ICTs at Bhuj pooling station was expected to be commissioned by September 2020. It was further informed that few LTA grantees connected to the Bhuj pooling station had relinquished their respective LTAs; therefore, with the commissioning of the above ICTs at the Bhuj pooling station, sufficient margins were to be available for evacuation of entire power from the Petitioner's projects. This meant that irrespective of the implementation of the WRSS-XXI Scheme with its commissioning schedule of December 2020 or any extended date, the LTA granted to the Petitioner could be operationalized on the available margins.
- i) In the 27th Joint Co-ordination Committee (JCC) Meeting of generation projects granted connectivity/LTA in Western Region held on 21.04.2020, WRSS XXI(A) Transco Ltd. (the SPV of M/s Adani Transmission Ltd.) informed that the project timeline was getting hampered on account of issues stated to be beyond their control, including severe right of way issue because of exorbitant demand of compensation,

delay in land acquisition and recent situation to curb outbreak of pandemic COVID-19.

- j) WRSS XXI(A) Transco Ltd further informed that the WRSS-XXI Transmission Scheme could achieve commissioning in April 2021 instead of December 2020 and that the exact project completion timeline was stated to be ascertainable only after normalization of the situation.
- k) Lakadia Vadodara Transmission Ltd. (the SPV of M/s Sterlite Grid 18 Ltd.) also informed that due to a delay in getting co-ordinates of the Lakadia pooling station (to be implemented by M/s Adani Transmission Ltd), the commissioning schedule of transmission system under its scope was also getting delayed.
- l) On the other hand, the Petitioner intimated its tentative commissioning schedule to be 01.01.2021 which could only be confirmed by it after the lifting of the lockdown imposed by the Government of India. It is pertinent to mention here that in spite of the aforesaid delays in the commissioning of transmission assets by TBCB licensees, with the commissioning of the augmented ICTs at Bhuj pooling station and owing to the available margins in the grid on account of relinquishment of LTA by other entities, power evacuation from the Petitioner's projects could never be stated to have been restricted or stranded.
- m) In the 28th JCC Meeting of generation projects granted connectivity/LTA in Western Region held on 30.06.2020, the Petitioner informed that its dedicated transmission line had been commissioned on 05.09.2019 and the generation projects were expected to be commissioned on 30.05.2021. As regards the ATS for the LTA granted to the Petitioner, the Minutes of the above Meeting recorded that the commissioning scheduled of the WRSS XXI Part A and B Transmission System had been delayed from December 2020 to April 2021 and September 2021, respectively. However, since with the commissioning of the ICTs at the Bhuj pooling station, sufficient margins were to be available for evacuation of power from the Petitioner's projects, the above delay in commissioning of the WRSS XXI Part A and B Transmission System was not relevant for the operationalization of LTA granted to the Petitioner.
- n) In various correspondences exchanged between SECI and the Petitioner regarding the timeline for the commissioning of the generation project the Petitioner stated that since the commissioning of the WRSS XXI Transmission System had been delayed, it was unable to provide a firm commitment towards the exact date of commissioning of its generation projects. However, it is reiterated that the delay in commissioning of the

WRSS XXI Transmission System could never have been a reason for the delayed commissioning of the generation projects of the Petitioner inasmuch as the answering Respondent had already informed SECI that with the commissioning of the augmented ICTs at Bhuj pooling station, the LTA granted to the Petitioner could be operationalized in its entirety.

- o) In the meeting held on 03.07.2020, to resolve the issues surrounding operationalization of the LTA granted to the Petitioner, PGCIL indicated that *the revised date of completion of augmentation of Transformation capacity at Bhuj PS is progressively by Dec'20. However, as mentioned in their previous submissions to SECI, LTA of M/s AGEL may be operationalized on the margins created due to part commissioning of associated transmission system based on their request. Hence, delay in commissioning of the Project cannot be attributed to the delay in operationalization of LTA.* Further, SECI apprised that *Scheduled Commissioning Date for Projects has already lapsed on 24.11.2019 and 29.02.2020 respectively. SECI has been continually informing M/s AGEL since Jan' 2020 that M/s PGCIL is ready to operationalize the LTA on margins created due to part commissioning of associated transmission system at the request of M/s AGEL. SECI advised M/s AGEL to consider the possibility of LTA operationalization on part system as suggested by M/s PGCIL and accordingly submit the commissioning plan for both the Projects latest by 21.07.2020.*
- p) Vide letter dated 31.07.2020, the Petitioner informed PGCIL that due to force majeure events, it was constrained to surrender the connectivity granted to it and also sought to relinquish its LTA and requested for return of the LTA BG or, alternatively, to consider the same for the Petitioner's application under SECI Tranche-VI.
- q) Vide letter dated 07.08.2020, PGCIL revoked the Stage II connectivity granted to the Petitioner with immediate effect and also intimated that based on its request, the LTA granted to it stood relinquished w.e.f. 31.07.2020 and that the Petitioner was liable to bear the applicable relinquishment charges in accordance with the Order dated 08.03.2019 passed by this Commission in Petition No.92/MP/2015. As regards the request of the Petitioner regarding the return of the bank guarantees submitted by the Petitioner, it was stated that the same was required to be treated in accordance with the applicable Regulations and Procedures framed by this Commission.

- r) In accordance with the prevailing regulations, Conn-BG I of Rs. 50 lakhs have been encashed by PGCIL and the amount under Conn-BG-II, i.e., Rs. 4.5 Crores., has been returned to the Petitioner.
- s) Vide letter dated 24.12.2021, notified on its website, the liability towards relinquishment charges for the Petitioner for relinquishment of LTA has been notified as Rupees Fourteen (14) Crores. Accordingly, the LTA BG of Rs.12.5 Crores furnished by the Petitioner is liable to be retained by the PGCIL and subsequently adjusted toward the payment of relinquishment charges.

Rejoinder of the Petitioner on the Reply of PGCIL and SECI

13. The Petitioner, in its Rejoinder, has submitted as under:

- a) The Petitioner's claims in the present Petition lie solely against SECI. Therefore, PGCIL had no *locus* to file a reply either against the claims of the Petitioner *qua* SECI or *qua* its own claims.
- b) No separate Petition or Application has been filed by PGCIL to advance its claims against the Petitioner.
- c) As a matter of procedure, PGCIL cannot be allowed to advance its claims against the Petitioner merely by filing a Reply to the Petition, especially when PGCIL's claims are beyond the scope of the present Petition.
- d) As such, this Commission may outrightly reject PGCIL's Reply.
- e) The contract itself confers the right on either party to terminate the PPA, as per Article 4.5.3 read with Article 13.5 of the PPA, if there is a continuous period up to which Force Majeure events affect the Project, it is not open for PGCIL to argue at this stage that such right is not available with Adani and that Adani must have commissioned the Project in September 2020 on the basis of the margin capacity available.
- f) 'Force Majeure' need not always be invoked in a scenario of impossibility. Even part performance of works being hindered by a supervening event would trigger the 'Force Majeure' clause. In this regard, Adani places reliance on the judgment of the Hon'ble Supreme Court in *Energy Watchdog & Ors. vs. CERC & Ors.* (2017) 14 SCC 80 wherein it was held that a party can be said to have been hindered if there is something which partly prevents the performance of the obligation under the contract.

- g) As per Article 11.3 of the PPA, the essential ingredients necessary for making out a case of Force Majeure on the part of Adani are:
- i. occurrence of an event
 - ii. that causes unavoidable delay or hinders/prevents, partially or wholly, fulfillment of an obligation of Adani under the PPAs and,
 - iii. such delay/hindrance was beyond the reasonable control of Adani
- h) PGCIL's repeated assertion that Adani must have commissioned the Project in September 2020 itself, on the basis of margin capacity available is erroneous. The Petitioner, being entitled to terminate the PPAs on account of multiple Force Majeure events and consequent hardships faced by it, was not bound to commission the Project in September 2020 as per PGCIL's own subjective wishes.
- i) There have been multiple shifts in PGCIL's standpoint regarding LTA operationalization. In its letter dated 17.01.2020, PGCIL informed the Petitioner that additional ICTs with 1700 MW capacity are expected to be commissioned between February-June 2020 and that power transmission from the Petitioner's plant would only be possible after the establishment (by TSPs) of Bhuj-II pooling station vide LILO of Bhuj-Lakadia Line and commissioning of Lakadia-Vadodara Line (up to December 2020). However, in contradistinction to the earlier communication, PGCIL in its communication to SECI dated 09.04.2020, stated that the ICT augmentation at Bhuj PS is expected to be commissioned by September 2020 (earlier February-June 2020) and transmission of power will be possible by September 2020 onwards irrespective of commissioning of transmission lines by the TSPs (earlier PGCIL stated transmission would only be possible through commissioning of these lines by TSPs). On 03.07.2020, a meeting was held between SECI, PGCIL, and Adani wherein inter alia, it was informed by PGCIL that the capacity augmentation will now progressively be completed by December 2020 (which was supposed to happen by September 2020). There has been no firmness and predictability in PGCIL's conduct since its inception, which itself is a sectoral expert and statutory licensee under the Electricity Act, 2003.
- j) The nature of inordinate delay and uncertainty in the commissioning of transmission lines (WRSS-21- Part-B) by the TSPs can be ascertained from the fact that the SCoD of the transmission line was 31.12.2020. However, the actual commissioning of the project happened on 28.01.2023.

- k) The non-commissioning/non-availability of the transmission system is substantially attributable to the TSPs who have delayed for more than 4 years & 7 months since the Effective Date of the PPAs with SECI, i.e., 24.05.2019 and more than 3 years & 2 months from the SCoD, i.e. 24.11.2019. By no stretch of the imagination could the parties, including the Petitioner, have foreseen such an inordinate delay in the commissioning of the transmission system. Such excessive delay on part of the TSPs in commissioning the transmission system, being absolutely beyond contemplation of the parties at the time of entering into the PPAs and also beyond Petitioner's competence or control, amounts to Force Majeure as it seriously hindered and deprived Adani of even obtaining the LTA, and clearly falls under Article 11.3.1(d) of the PPAs read with Article 7.3.1 (f) of the PSAs between SECI and DISCOMs. It is now a settled position of law that PPAs and PSAs are back-to-back contracts and ought to be read together. In this regard, reliance is placed in *Ayana Ananthapuramu Solar Pvt. Ltd. v. APERC & Ors.*, 2020 SCC OnLine APTEL 32. Reliance also placed on Hon'ble Supreme Court in *Gujarat Urja Vikas Nigam Ltd. vs. ACME Solar Technologies (Gujarat) Private Limited* (2017) 11 SCC 801 vide which it was held that the liquidated damages cannot be imposed for the period wherein commissioning of the project is delayed due to the non-availability of the transmission line (here the concerned evacuation facility is transmission assets) and APTEL in *Chamundeswari Electricity Supply Co. Ltd. vs. Saisudhir Energy (Chitradurga) Pvt. Ltd. & Anr.* Appeal No. 176 of 2015 and IA Nos. 364 and 368 of 2015, dated 21.03.2018, reported as 2018 SCC Online APTEL 65 held that the obligations under the PPAs are contingent on the availability of the transmission facilities and non-availability of transmission lines results in a Force Majeure event.
- l) PGCIL's contention that the Petitioner must have commissioned the project in September 2020, especially when the partial operation was possible on margins is flawed because *firstly*, September 2020 was a period beyond the maximum SCoD permissible under the PPA, *secondly*, Adani had already chosen to terminate the project by surrendering the LTA grant as on 31.07.2020 (which could not be fructified due to Force Majeure) which it was rightfully entitled to, pursuant to its right to terminate the PPAs on account of Force Majeure event lasting for more than 12 months.
- m) If the contentions of PGCIL are accepted, that would amount to coercing the Petitioner to stick to the PPAs contrary to its right to move out of it as provided in

Articles 4.5.3 and 13.5 of the PPAs. This would not only be contrary to what the Petitioner and SECI, after due deliberations and negotiations expressly agreed to but would also affect the freedom of contract as freedom of contract also includes freedom to move out of the contract, especially when Adani and SECI have explicitly agreed upon.

- n) , PGCIL has fully retained the LTA BG on the erroneous ground that the same shall be realized against the net relinquishment charges payable by Adani on account of surrendering the LTA grant under both Tranche-3 as well as Tranche-4 projects. The PGCIL's act of retaining the LTA BG is erroneous and unlawful. As per settled law, invocation of bank guarantee can be restrained provided either there is an act of fraud vitiating the underlying transaction or there exist special equities such that if invocation were allowed, it would result in irretrievable injury to the party which furnished the bank guarantee.
- o) In the present case, there exists "special equities" in favour of the Petitioner, which warrants non-invocation/ non-encashment of bank guarantees to prevent irretrievable injury to the Petitioner. Further, PGCIL and the TSPs have utterly failed in discharging their obligations towards Adani to commission the transmission infrastructure within the due time, thereby causing serious prejudice to the Petitioner. Allowing encashment/retention of bank guarantees by PGCIL in such eventuality would not only be unjust and inequitable, but also cause irretrievable injury to the Petitioner as it would deprive it of financial resources when it is in dire need of the same in order to mitigate the effects of Force Majeure suffered, that too for no fault on its part.

Hearing dated 21.08.2023:

14. Vide Record of Proceedings dated 21.08.2023 it was held as under:

"3. The Commission directed the Petitioner to furnish its response on an affidavit within three weeks of the following queries:

- (a) Whether the Petitioner replied and/or furnished the requisite details/information including the status of the project as sought for by SECI vide various letters (prior to termination) for considering the grant of extension of time to the project?*
- (b) Parties (the Petitioner and the Respondent) to provide the sequence of requests and responses thereof in chronological order along with the gist (in verbatim) of the request/response.*

- (c) *Whether the Petitioner's projects under Tranche VI utilizes the same transmission system/elements (dedicated lines + ISTS S/s) as that of its project under Tranche III for which the Petitioner proceeded to surrender the LTA?*
- (d) *Details including GIS maps and line diagrams of Tranche-III, IV, V & VI along with justification thereof indicating how the elements of the Tranche-III vs. Tranche-VI & Tranche- VII and the associated transmission lines are different."*

Compliance affidavit filed by the Petitioner:

15. Through its compliance affidavit, the Petitioner has submitted as under:

- (i) The Petitioner has all along kept SECI informed qua the status of the construction of the Project and has also issued timely Force Majeure Notices for each of the Force Majeure events encountered during the construction stage of the Project.
- (ii) The Petitioner repeatedly brought to the notice of SECI regarding the unforeseen change of circumstances that occurred after the execution of the PPAs leading to inordinate delay/failure in the commissioning of transmission lines.
- (iii) The Petitioner also co-operated with SECI and responded to all queries/requisitions of SECI to process Petitioner's request for extension of SCoD, but in vain.
- (iv) The details of Petitioner's own efforts in keeping SECI updated about the status of construction of the Project, and also details of letters where the Petitioner responded to all queries/requisitions of SECI to process the Petitioner's request for an extension of SCoD are set out for the convenience of this Commission.
- (v) There was a common transmission infrastructure conceived and developed to cater to the evacuation of 725 MW wind power capacity up to the Bhuj-I sub-station (S/s). Originally, this 725 MW wind power capacity consisted of:(i) SECI Wind Projects Tranche 1 (50 MW), Tranche 2 (50 MW), Tranche 3 (250 MW) [present Project], Tranche 4 (300 MW) and (ii) MSEDCL Project with capacity of 75 MW [50 + 50+ 250 + 300 + 75 MW = 725 MW].
- (vi) Thus, originally, the present Project (Tranche III) was part of a 725 MW wind farm facility, which was supposed to utilize common transmission infrastructure connected to Bhuj-I S/s.
- (vii) On the other hand, the transmission systems which were to be connected with Bhuj-II S/s, were supposed to originally cater to SECI Wind Projects Tranche 5 (300 MW), Tranche 6 (250 MW) and Tranche 7 (130 MW), for purposes of evacuation of power [300 + 250 + 130 MW = 680 MW].

- (viii) For the present Project (Tranche III), which was supposed to be connected to Bhuj-I S/s, its dedicated 33 KV feeders coming from the individual WTGs firstly were to be terminated at 33/220 KV Ratadia Farm PSS and thereafter its power was supposed to be fed at Bhuj-I S/s through the common transmission infrastructure conceived and developed to cater to the evacuation of entire 725 MW wind power capacity.
- (ix) Evidently, for the present Project (Tranche III), Bhuj-I S/s was to cater to the evacuation of 250 MW capacity power, and for Tranche VI Project, Bhuj-II S/s was to cater to the evacuation of 250 MW capacity power. However, the following is noteworthy:
- (a) **Re: present Project (Tranche III):** During the construction of the Projects, the Petitioner was prevented and/or delayed due to Force Majeure events which were beyond its reasonable control. The cumulative impact of such events on the 'critical path' of Project, led to delays in the completion of the construction works for the Project. So much so that, the Project commissioning was delayed beyond the long-stop date i.e., 24.08.2020.
- (b) **Re: Tranche VI Project:** For the Tranche VI Project, the SCoD in terms of the PPAs was 21.12.2020. However, the Bhuj-II S/s, which was to cater to the evacuation of 250 MW capacity power, was delayed in its commissioning, which was eventually commissioned only in May 2022 (in part) and November 2022 (in entirety). The long-stop date for the Tranche VI Project in terms of its PPAs was 15.12.2021. Accordingly, if this Project had waited for the commissioning of the Bhuj-II S/s, then the long-stop date, i.e., 15.12.2021, would have kicked in, rendering the PPAs terminated.
- (x) Closer to the long-stop date i.e., 24.08.2020 of the present Project (Tranche III) (i.e., when the present PPAs were terminated), so as to utilize the available transmission facilities in an efficient manner, and to not let idling of substantial capacity of Bhuj-I S/s (~250 MW evacuation capability), the Petitioner followed prudent utility practices and informed PGCIL that due to Force Majeure Events/conditions in the implementation of the Project, the Petitioner was compelled to surrender the LTA connectivity granted to it by PGCIL. The Petitioner further requested PGCIL to allow the Petitioner's Tranche VI Project to be connected with Bhuj-I S/s instead of Bhuj-II S/s.
- (xi) Accepting such request:

- a. PGCIL revoked the connectivity of Petitioner's Tranche VI Project to Bhuj-II S/s.
- b. PGCIL granted Stage-1 and Stage-II connectivity to Petitioner's Tranche VI Project at Bhuj-I S/s.

(xii) Therefore, it was in the interest of all stakeholders that Petitioner's Tranche VI Project was connected with Bhuj-I S/s in place of the present Project (Tranche III) after the termination of the present PPAs w.e.f. 24.08.2020. Had such a transfer not occurred, even the long-stop date of Tranche VI Project (15.12.2021) would have been triggered, and both PPAs of the present Project (Tranche III) and Tranche VI Project would have been terminated, jeopardizing significant investments made by Petitioner, alongside resulting in idling of evacuation infrastructure.

16. The Petitioner has also provided the sequence of requests and responses thereof in chronological order, along with the gist of the request/response.

Analysis and Decision

17. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records and considered the submissions of the parties.

18. The brief facts of the case are that the Petitioner submitted its bid for setting up the wind Project of 250 MW (5X50 MW) and emerged as a successful bidder. On 23.02.2018, SECI issued LoA in favour of the Petitioner for the generation and sale of power at a discovered tariff of Rs. 2.45 per unit. Subsequently, on 28.06.2018, five (5) PPAs were executed between the Petitioner and SECI. The effective date of the PPAs was 25.05.2018, the date for completion of conditions subsequent was 24.12.2018, and the scheduled commissioning date (SCoD) was 24.11.2019. Transmission Agreement was executed between the Petitioner and PGCIL on 07.08.2018. Based on the decision reached during the 28th meeting of the Western Region constituents, the Petitioner applied to PGCIL for a grant of LTA for a combined capacity of 250 MW from its Project for the period from 24.11.2019 to 24.11.2044. Between March 2018 and May 2018, SECI entered into PSAs with the Respondents (buying entities) for the supply of electricity from the wind power projects. On 23.04.2019, TSAs were signed between a number of LTTCs (including the Petitioner) and the transmission service providers, i.e., WRSS XXI (A) Transco Limited and WRSS XXI (B) Transco Limited. Subsequently, due to expected delay in the commissioning of the Associated Transmission

System for the LTA for the project and based on the advice of PGCIL, the Petitioner made attempts to obtain MTOA. However, it did not materialise due to various reasons. On 31.07.2020, Adani Renewables informed PGCIL that the transmission line from the Petitioner's substation to the Bhuj Pooling Station had been completed. The Petitioner further informed that it has decided to surrender the LTA connectivity granted by PGCIL. The surrender of LTA connectivity by the Petitioner was accepted by the PGCIL on 07.08.2020. On 27.08.2020, the Petitioner informed SECI of its decision not to go ahead with the project execution due to a delay caused by force majeure events by invoking Article 13.5 of the PPAs. SECI rejected the claim of the Petitioner and maintained that for all purposes the SCoD of the project shall not be extended beyond 24.11.2019. SECI has also decided to revoke the BG of Rs 50 Crores provided by the Petitioner. Hence, the petition.

19. From the submissions of the contracting parties, the following issues emerge for adjudication before the Commission:

Issue 1: *Whether the Petitioner's Project has been has been delayed due to Force Majeure events in terms of the PPAs? And Whether the Petitioner may be relieved from performing its obligations under PPAs without any financial implication on the Petitioner due to delay in the execution of the project on account of force majeure events?*

Issue 2: *Whether the Respondent SECI should be directed to return the Performance Bank Guarantee bearing No. 007GM07181110001 amounting to Rs 50 Crores issued by Yes Bank Limited?*

20. Now we will discuss these issues.

Issue No.1:

Whether the Petitioner's Project has been has been delayed due to Force Majeure events in terms of the PPAs? And Whether the Petitioner's Project has been has been delayed due to Force Majeure events in terms of the PPAs? And Whether the Petitioner may be relieved from performing its obligations under PPAs without any financial implication on the Petitioner due to delay in the execution of the project on account of force majeure events?

21. The Petitioner has submitted that in terms of the PPAs, the Petitioner was required to commission the Project by 24.11.2019 i.e., within 18 months from the Effective Date of 24.05.2018. As per Article 4.1.1. (g) of the PPA, it was the Petitioner's responsibility to

obtain LTA and execute TSA for evacuation of the contracted capacity from the Project. The Petitioner applied for connectivity to the inter-state transmission network and LTA on 24.11.2018 well within the time, however, the transmission system required for the evacuation of power from the Project under LTA, was still not ready. Further, due to various Force Majeure events (as stated below) the Petitioner was hindered from performing its obligations under the PPAs, as a result of which the Project could not be commissioned by the SCoD.

S. No.	ALLEGED FORCE MAJEURE EVENT/ EVENTS	DELAY CLAIMED
a.	Damage caused to the Petitioner's transmission tower by the villagers of Village Jatavira	1 month, i.e. from 05.05.2019 to 05.06.2019
b.	Delay caused to due to the occurrence of Cyclone Vayu in Gujarat	10 days, i.e. from 11.06.2019 to 15.06.2019
c.	Delay and damage caused due to the occurrence of heavy rains in Gujarat	10 days, i.e. from 08.09.2019 to 19.08.2019
d.	Delay in filing of Tariff Adoption Petition under Section 63 of the Electricity Act, 2003	20 months from date of execution of the PPAs as the order was passed on 28.02.2020
e.	Delay in the Construction of Petitioner's 200 kV transmission line from Ratadiya Substation to the Bhuj Pooling Substation due to delay in land approval by Government authorities	-
f.	Imposition of lockdown due to Covid - 19 causing disruption in supply chain, leading to delay in availability of source components of WT	At least 6 months, i.e., from 24.03.2020 onwards
g.	Delay in issuance of NOC by the Buying Entities to the Petitioner for availing MTOA	175 days
h.	Non-availability of the transmission infrastructure required for the evacuation of power from the Projects	13 months, i.e., from 24.11.2019 (SCoD of the project) till 31.12.2020 (SCoD of the transmission system) and continuing from 01.01.2021 till date of commissioning of the transmission system which is expected to

		be commissioned by May, 2021
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22. The Petitioner has further submitted that due to the aforesaid delays, the completion and operation of the project at the tariff of Rs. 2.45/kWh has become unviable. As per Article 13.5, 4.5.1 of the PPAs, the Petitioner has the right to cause termination of the PPAs. Further, once the PPAs are terminated there is no further liability to either party from the date of such termination.

23. *Per-contra*, SECI has submitted as under:

- a) Firstly, the Petitioner had signed the Transmission Agreement (TA) with CTU on 07.08.2018. Secondly, the Transmission Service Agreement (TSA with WRSS) dated 23.04.2019 with WRSS XXI (A) Transco Limited provides for the availability of the said Associated Transmission Systems, connected to the Bhuj Substation of PGCIL, with effect from 31.12.2020. Thirdly, the Transmission Service Agreement (TSA with Lakadia) dated 23.04.2019 with Lakadia-Vadodara Transmission Project Limited also provides for the availability of the said Associated Transmission Systems, connected to the Bhuj Substation of PGCIL, with effect from 31.12.2020.
- b) Vide letter dated 08.05.2019, the Petitioner had sought for an extension of time to implement the wind power projects under the PPAs till the actual operationalization of the LTAs as per the Transmission Service Agreements, viz. 31.12.2020 or thereafter.
- c) Vide email dated 05.09.2019, the Petitioner gave advance notice prior to synchronization of 50 MW Wind Power Project under Tranche-III to SECI and submitted that they will commission 50 MW of project (part-capacity) around 15.09.2019 subject to the readiness of CTU evacuation infrastructure. Vide email dated 11.09.2019, SECI requested the Petitioner to provide certain documents to enable SECI to witness part commissioning. However, the Petitioner did not provide any documents.
- d) Vide email dated 18.09.2019, the Petitioner informed SECI that MTOA NOC for 50 MW was received from Goa utility and the same was also accepted by PGCIL. Vide letter dated 16.09.2019, the Petitioner requested PGCIL to defer the start date of MTOA from 01.11.2019 to 01.01.2020, inter-alia, submitting that *since the construction activities at project sites & movement of equipment and materials into such sites have come to a standstill since 10.08.2019, it would be difficult for AGEMPL to commission its 50 MW Wind Power project by 01.11.2019 from which MTOA is*

getting operationalized. Vide email and letter dated 20.09.2019, the Petitioner again requested SECI for issuance of NOC allowing Third-party Sale of power from the date of commissioning till operationalization of MTOA/LTA from the 50 MW Wind Project. Vide email dated 25.09.2020, SECI sought information in respect of modalities/ procedure by which the Petitioner's project is proposed to connect to the Grid (in the absence of LTA) for sharing the same with the Buying Entities. However, the Petitioner did not provide the requisite information. Further, the Petitioner, having obtained MTOA NOC for 50 MW from Goa, there was no need for NOC for third-party sale at the relevant time.

- e) Vide letter dated 22.10.2019, MNRE had communicated the course of action to be followed by SECI while considering the grant of extension for wind power projects under Tranches SECI I to V. Vide emails dated 23.10.2019 and 24.10.2019, SECI sought for documents from the Petitioner to consider the case of time extension in terms of letter dated 22.10.2019 of MNRE. In this regard, a meeting was also held on 31.10.2019 and vide email dated 31.10.2019, SECI requested the Petitioner to provide supporting documents to SECI to process the case for extension. However, the Petitioner has not provided the requisite information and documents to SECI to date.
- f) The CTU has repeatedly stated that it would be in a position to evacuate the power from the Petitioner's WPP from Bhuj Substation effective December 2020 by augmenting ICT transmission capacity by September 2020 and considering the relinquishment of LTAs by others, even without the availability of the two Associated Transmission Systems under the Tariff-Based Competitive (TBCB) Route. However, the Petitioner did not clearly provide the status of the Wind Power projects.
- g) Vide letter dated 04.02.2020, SECI informed the Petitioner that an additional LTA transfer capability of 1700 MW is likely to be progressively available from February 2020 to June 2020 as per the letter dated 17.01.2020 of PGCIL and sought for the commissioning schedule to be given by 11.02.2020 to enable SECI to process the request for extension of time. As per Minutes of the joint meeting dated 03.07.2020 between SECI, PGCIL and the Petitioner, the PGCIL informed that *'the revised date of completion of augmentation of Transformation Capacity is progressively by Dec/20. However, as mentioned in their previous submissions to SECI, LTA of M/s. AGEL may be operationalized on the margin created due to part commissioning of associated transmission system based on their request. Hence delay in commissioning of the Project cannot be attributed to the delay in operationalization of LTA'*. SECI

subsequently, informed the Petitioner that SECI may consider the commissioning of project by May, 2021 and that the Petitioner may give a revised commissioning timeline by 13.08.2020 to process the case for an extension of time. Vide letter dated 13.08.2020, SECI extended the timeline till 18.08.2020 to give the information as sought by SECI vide its letter dated 05.08.2020. However, on 31.07.2020, the Petitioner surrendered the LTA granted by PGCIL for Tranche-III projects, stating to utilize the same for Tranche-VI projects of the Petitioner's group.

- h) The Petitioner, while seeking to implement the Tranche V, VI (planning for early-commissioning), and VII projects located in the same area, using the same transmission elements under the LTA as in the case of Tranche-III and without claiming any Force Majeure event is selectively and wrongly invoking Force Majeure for Tranche-III project. The real reason is that the Petitioner will receive a higher tariff of Rs.2.76/kWh in the case of Tranche-V; Rs.2.82/kWh under Tranche-VI, and Rs.2.83 under Tranche-VII in comparison to the tariff of Rs.2.45/kWh quoted by the Petitioner for Tranche-III projects and tariff of Rs.2.51/kWh in case of Tranche- IV.
- i) The alleged delays for the period 24.11.2019 to May, 2021 related to the commissioning of the Associated Transmission System under the TSAs dated 23.04.2019 are patently erroneous and misplaced for the following reasons: (i) the delay or deferment of the above Associated Transmission System did not in any manner prevent or delay the construction or commissioning of the Wind power Projects of 250 MWs under the PPAs dated 28.06.2018; (ii) the evacuation system is required when the power projects are complete in all respects and are in a position to generate and inject power into the Grid i.e. at the Bhuj Substation for evacuation/conveyance to the procurers and not before; (iii) despite the above, the Petitioner had not chosen to undertake the performance of its obligations under the PPA, which was within its control and was not affected by the non-availability of the Associated Transmission System and the Petitioner could have easily undertaken the construction of wind power projects with reasonable care and prudent utility practices; (iv) The Petitioner had voluntarily agreed and accepted that the Associated Transmission System shall be available only by 31.12.2020 or later as would be clear from its letter dated 25.12.2018 and 29.01.2019 itself; (v) the Petitioner duly signed the TSAs dated 23.04.2019 again providing for the availability of the Associated Transmission System by 31.12.2020, [TSA with WRSS & TSA with Lakadia]. At that time, there was no reservation or

condition by the Petitioner that the Associated Transmission System should be available from 24.11.2019; (vi) further, the Petitioner vide letter dated 08.05.2019 had sought time for the implementation of the Wind Power Projects till 31.12.2020 or the operationalization of the Associated Transmission System, whichever is later.

- j) Further, the delay in commissioning of the Petitioner's project was not attributable to various force majeure events as alleged by the Petitioner. Therefore, SECI is not required to return/release the Performance Bank Guarantee.
- k) In terms of the bidding documents, viz. RfS Document and Article 4.6 of the PPAs, SECI is entitled to payment of liquidated damages if the Petitioner does not commence supply of the power by the stipulated time. Also, PGCIL has submitted that vide letter dated 07.08.2020, on the request of the Petitioner, PGCIL has revoked the Stage II connectivity granted to the Petitioner, and also, the LTA granted stood relinquished w.e.f. 31.07.2020. Further, the Petitioner was liable to bear the applicable relinquishment charges in accordance with the Order dated 08.03.2019 passed by this Commission in Petition No.92/MP/2015. The request regarding the return of the bank guarantees submitted by the Petitioner was required to be treated in accordance with the applicable Regulations and Procedures framed by this Commission.

24. We note that the relevant Articles of the PPAs stipulate as under:

4.1 WPD's Obligations:

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

...

- (g) ***Obtaining Long Terms Access (LTA) and executing transmission service agreement with CTU/ STU, as the case may be, for evacuation of contracted capacity and maintaining it throughout the term of the agreement.***

4.2 Information regarding interconnection facilities;

4.2.1 *The WPD shall be required to obtain all information with regard to the interconnection facilities as is reasonably necessary to enable it to design, install and operate all interconnection plants and apparatus on the WPD's side of the delivery point to enable delivery of electricity at the delivery point. The transmission of power upto the point of interconnection where the metering is done for energy accounting shall be the responsibility of the WPD at his own cost.*

4.2.2 *Penalties, fines and charges imposed by CTU/ STU under any statute or regulation in relation to delay in commissioning of the project shall be payable by the WPD to the extent the delay is attributable to the WPD*

4.2.3 *All cost and charges including but not limited to the wheeling charges and losses upto interconnection point associated with this agreement will also be borne by the WPD.*

...

4.5 Extensions of Time

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

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

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

...

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

...

4.5.6 *Notwithstanding anything to the contrary contained in this Agreement, any extension of the Scheduled Commissioning Date arising due to any reason envisaged in this Agreement shall not be allowed beyond 27 months from the Effective Date of this Agreement.*

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 the 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.
- d.
- 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.

.....

11.7 Available Relief for a Force Majeure Event

11.7.1 Subject to this Article 11:

(a) no Party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

(b) every Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations, including but not limited to those specified under Article 4.5;

(c) For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under this Agreement shall be suspended or excused due to the occurrence of a Force Majeure Event in respect of such Party;

(d) Provided that no payments shall be made by either Party affected by a Force Majeure Event for the period of such event on account of its inability to perform its obligations due to such Force Majeure Event."

...

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

25. We note that the relevant Articles of the PSAs stipulate as under:

3.1 Obligation of Buying Entity:

3.1.1 Buying Entity undertakes that it shall:-

a) Ensure offtake of available capacity from the Commercial Operation Date of the project

b) Availability of interconnection facility and evacuation of power from CTU- STU interface of Buying Entity's state periphery from the Commercial Operation Date of the project.

...

7.3.1 A 'Force Majeure' means any event or circumstance or combination of events and circumstances as stated below only 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 in performing its obligations:

[...]

(f) An event of force majeure affecting the concerned CTU/STU, as the case may be, thereby affecting the evacuation of power from the Delivery Points by Buying Entity:

26. Now, we take the issues event-wise as submitted by the Petitioner to analyse whether the events fall under the Force Majeure events as per Article 11.3 of the PPAs read along with 7.3.1 of the PSAs:

*a) **Re. Damage caused to the Petitioner's transmission tower by the villagers of Village Jatavira***

27. The Petitioner has submitted that on the night of 05.05.2019, the villagers of Jatavira Village severely damaged and fell a transmission tower along with damaging and clipping its conductor. The damage to the tower was so severe that the entire transmission tower would need to be replaced and re-stringing done, and the FIR had been lodged with the appropriate police station. The Petitioner has submitted that the above event was beyond its control and is a force majeure event and accordingly, relief for one month, i.e., from 05.05.2019 to 05.06.2019, should be granted.

28. *Per-contra*, SECI has submitted that in terms of the bidding documents and the PPAs, the responsibility of the arrangement of connectivity through a dedicated transmission line to the transmission system owned by the STU/CTU was entirely of the Wind Power Developer and the same was at the cost and risk of the Wind Power developer. The transmission of power up to the point of interconnection where metering is done for energy accounting, is within the scope of responsibility of the Petitioner.

29. We note that in terms of Clause 3.10 of the RfS and Article 4.1.1 of the PPAs, it is the responsibility of the Petitioner to obtain the necessary consents, clearances and Permits required for setting up the Wind Power Projects at its own cost and risk. The Bipartite Connection Agreement dated 12.09.2019 executed between the Petitioner and CTU, inter-alia, stated that construction of Dayapar- Bhuj 220 kV D/C line has been completed by

August, 2019. In August 2019, the Petitioner established the dedicated Transmission Line from Ratadia Pooling Station to Bhuj Substation of PGCIL to enable power evacuation from the wind power projects being set up under Tranches - I to IV (including present scheme-Tranche-III). Since the dedicated transmission line was established before the SCoD, i.e., 24.11.2019, there was no impact on the commissioning of the project on account of the same as alleged by the Petitioner. We note that as per Article 11.3.1 of the PPAs, 'Force Majeure' means any event or circumstance or combination of events viz. act of God; any act of war; radioactive contamination or ionising radiation and an event affecting the delivery of power from WPD to buying entity(ies). We observe that the alleged event is not covered under Article 11.3.1 of the PPAs. In view of the above, we hold that the Petitioner is not eligible for an extension on account of the alleged damage caused to the Petitioner's transmission tower.

b) Re. Delay caused to due to the occurrence of Cyclone Vayu in Gujarat

30. The Petitioner has submitted that the cyclone alert for the Gujarat coast in view of the Vayu cyclone issued by IMD on 11.06.2019 amounts to a Force Majeure event. Accordingly, the Petitioner has claimed relief of 10 days between 11.06.2019 and 15.06.2019 on account of force majeure event. *Per contra*, SECI has submitted that the notice for force majeure was given by the Petitioner on 15.06.2019 in anticipation that the cyclone would have a negative impact at their site. However, no physical evidence was provided that the cyclone had impacted their Project site. Further, SECI has said that the Office of District Collector, Bhuj only issued notice to stop work for the day when the cyclone was anticipated to hit Bhuj and not for complete demobilization.
31. We note that Article 11.3.1 (a) clearly indicates a cyclone as a force majeure event. We also note that the notification issued by IMD mentioned, 11.06.2019 to be the date of the cyclone storm, 12.06.2019 & 13.06.2019 as the dates of the cyclone storm getting severe, and 14.06.2019 to be the day of the cyclone depression. Also, for 14.06.2019 IMD has issued instruction declaring "*Heavy to very heavy rains very likely at isolated places in the districts of Saurashtra-Kutch namely Rajkot, Jamnagar, Porbandar, Morbi, Dwarka and Kutch.*" It was also mentioned in the notice issued by IMD that "*The sea condition is very likely to become rough to very rough over Gujarat Coast during 14th and 15th June 2019.*" From the above discussion, we are of the view that as per the IMD instructions the force majeure event continued for five (5) days starting 11.06.2019 for the Kutch region where the project is located. In view of the above, we hold that the Petitioner is eligible for an extension for a

period of 5 days, i.e., from 11.06.2019 to 15.06.2019 on account of the delay caused to due to the occurrence of Cyclone Vayu.

c) Re. Delay and damage caused due to occurrence of heavy rains in Gujarat

32. The Petitioner has submitted that continuous heavy rainfall from 08.09.2019 to 19.08.2019 has resulted in the inundation of the project leading to halting the construction activities and damaging the approach roads, bridges, etc., The Mamalatdar (Chief Revenue Officer), Nakhatrana, Government of Gujarat issued a notice dated 13.08.2019 to stop all vehicular movements, including construction machinery and tools, up to 19.08.2019, leading to a standstill of work at the project since 10.08.2019.
33. *Per contra*, SECI has submitted that heavy rain does not qualify as a force majeure event under Article 11.3.1 (a) of the PPAs. In fact, after the above event, the Petitioner vide letter dated 06.09.2019 had submitted that the Petitioner would commission the wind power projects in stages in the next 1 to 3 months and had also given advance notice prior to synchronization under Article 5.1.1 of the PPAs in regard to 50 MW Wind Power Project of the Petitioner.
34. We are of the view that the Petitioner has failed to bring on record any official notification/document about the alleged force majeure event (rainfall from the period from 08.09.2019 to 19.08.2019) or the justification of its effect on the Petitioner's project. As such, we hold that no relief can be extended to the Petitioner for the alleged event of rainfall from the period from 08.09.2019 to 19.08.2019.

d) Re. Delay in filing of Tariff Adoption Petition under Section 63 of the Electricity Act, 2003

35. The Petitioner has submitted that SECI approached this Commission for the adoption of tariff only in October 2019, after a period of almost 16 months from the date of execution of the PPAs. As per the PPAs, SECI was supposed to approach this Commission in a reasonable time for the adoption of the tariff. Further, with the grant of LOA and execution of PPAs,

vested rights were created in favour of the Petitioner, leading to the entitlement of the petitioner to receive the discovered tariff once it has been adopted by this Commission. That Tariff was adopted only on 28.02.2020 in Petition No. 161/AT/2019, i.e., approximately 21 months after the execution of the PPAs and after 24.11.2019, the date of SCoD of the project. It has been argued that raising capital for the project has been delayed due to a delay in tariff adoption for which relief of 20 months should be provided to the Petitioner. *Per contra*, SECI has claimed that Clause 12 of the Guidelines and Article 3.1 of the PPAs do not provide adoption of the tariff as a condition precedent to fulfil the stipulated Conditions Subsequent and Financial Closure. The Financial Closure of the Project was achieved on 24.12.2018 much before the adoption of the Tariff. Even during the hearing on IA in Petition No 161/AT/2019, the Petitioner chose not to participate in the proceeding before this Commission and proceeded with the implementation of the PPAs even after 28.02.2020 when the Tariff Adoption Order was passed by the Commission.

36. We observe that SECI issued an LOA to the Petitioner 23.02.2018 and the PPAs were executed on 23.05.2018 with an 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, the Petitioner's argument about it being affected by SECI's delay in initiating the tariff adoption process would have merited consideration 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, the Petitioner has not commissioned the project. Hence, we hold that no relief can be extended to the Petitioner on this account.

e) Re. Delay in the Construction of Petitioner's 200 kV transmission line from Ratadiya Substation to the Bhuj Pooling Substation due to delay in land approval by Government authorities

37. The Petitioner has submitted that some parts of the transmission line connecting the wind projects to the Bhuj substation passed through patches of land whose ownership was not yet established between the Revenue and Forest Departments of the Government of Gujarat. This led to a situation wherein the approval authority was not known, due to which the construction of the transmission line was affected. *Per Contra*, SECI has submitted that in terms of Clause 18 of the Guidelines, Clause 3.7 of the RfS Document, and Article 4.1.1 (g) and Article 4.2 of the PPAs, the responsibility of arrangement of connectivity through a

dedicated transmission line to the transmission system (owned by the STU/CTU), was entirely of the Petitioner and the same was to be developed at the cost and risk of the Petitioner. Further, under the Bipartite Connection Agreement dated 12.09.2019 executed between the Petitioner and PGCIL, the Petitioner accepted that the above dedicated line was established by August 2019, i.e., much before the SCoD of the project, i.e., 24.11.2019.

We note that as per Article 4.2.2 of the PPAs, it was the responsibility of the Petitioner to design, install, and operate all interconnection plants and apparatus on the WPD's side of the delivery point to enable delivery of electricity at the delivery point.

38. We note that the establishment and commissioning of the generation plant and the transmission line for the evacuation of power from the plant to the interconnection point of the PGCIL are not sequential in nature and can be taken up parallelly. We note that as per the Annexure of the Bipartite Connection Agreement dated 12.09.2019, the Petitioner has agreed that the work of the evacuation line has been established by August 2019, i.e., much before the SCoD of the first phase of 50 MW of the plant. Further, as per Article 4.2 of the PPAs, it was the responsibility of the Petitioner to arrange connectivity through a dedicated transmission line to the transmission system (owned by the STU/CTU), and the same was to be developed at the cost and risk of the Petitioner. From the discussion above, we are of the view that delay in land approval, if any, is not covered under Article 11.3 of the PPAs. As such, we hold that no relief can be extended to the Petitioner for the alleged event.

f) Re. Imposition of lockdown due to Covid - 19 causing disruption in supply chain leading to delay in availability of source components of WT

39. The Petitioner has submitted that in view of the spread of Covid-19 across India and the consequent lockdown, communications issued by the Government of India treating disruption in the performance of contractual obligations as a Force Majeure event qualifies the event as a Force Majeure event under the PPAs and the TSA. The Ministry of Finance, Government of India, Office Memorandum dated 19.02.2020 (O.M. dated 19.02.2020) designated Covid-19 as a 'Natural Calamity'. O.M. dated 19.02.2020 has been adopted by MNRE in its Notification dated 20.03.2020, which has also treated Covid-19 as a natural calamity. Further, MNRE vide Office Memorandum dated 17.04.2020 (O.M. dated 17.04.2020) has directed all renewable energy implementing agencies under MNRE to treat the national lockdown due to Covid-19 as a Force Majeure Event. MNRE, by way of OM dated 17.04.2020, has also

directed States to consider lockdown due to Covid-19 as a Force Majeure Event. In terms of Article 11.3.1 of the PPA, the designation of an event as a natural calamity suffices for force majeure. Thereafter, MNRE by the OM dated 13.08.2020 (in supersession of its OM dated 17.04.2020) directed that:

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

b) All RE projects under implementation as on the date of lockdown, i.e. 25th March 2020, through RE Implementing Agencies designated by the MNRE or under various schemes of the MNRE, shall be given a time extension of 5 (five) months from 25th March 2020 to 24th August 2020...”

40. The Petitioner has submitted that on 16.03.2020, it issued notice to SECI under Article 11 of the PPAs declaring the outbreak of Covid-19 pandemic a Force Majeure event that resulted in disruption of the supply chain and impacted the Petitioner’s performance of obligations under the PPAs. *Per contra*, SECI has submitted that Covid-19 cannot be said to have any impact on the timelines of the Petitioner.

41. We note that in terms of PPAs, the Petitioner had achieved the Conditions Subsequent and financial closure on 24.12.2018, and the SCoD was to be achieved by 24.11.2019, which is prior to the disruption of the supply chain and imposition of lockdown (viz. 25.03.2020). Hence, the alleged event (disruption of the supply chain and imposition of lockdown due to Covid-19) is not covered as a force majeure event under Article 11.3 of the PPAs.

g) Re: Delay in issuance of NOC by the Buying Entities to the Petitioner for availing MTOA

42. The Petitioner has submitted that on 29.01.2019, the Petitioner had informed SECI that due to the expected delay in commissioning of the Associated Transmission System for the LTA for the Project PGCIL had advised the Petitioner to explore other modes of open access, viz. MTOA and STOA in order to evacuate power from the wind power project. Based on the suggestions of PGCIL, the Petitioner made efforts to obtain NOC from the beneficiaries for availing MTOA. On 10.05.2019, Goa SLDC issued the NOC required for the issuance of the MTOA. However, Chhattisgarh SLDC’s NOC for MTOA was received only on 23.07.2019. The term of the MTOA, in respect of which the NOC was issued, was as follows: (a) 50 MW: 01.11.2019 to 30.06.2021 and (b) 100 MW: 01.12.2019 to 30.06.2021. However, as per the procedure for making an application for MTOA, the start date for MTOA could not be earlier than 5 months from the date of making the application for MTOA. Since the application had

not been made due to Chhattisgarh SLDC's delay in issuing the NOC, the dates mentioned in the NOC needed to be revised. The Petitioner requested SECI to direct CSPDCL to issue a revised NOC so as to enable the Petitioner to obtain MTOA at the earliest.

43. The MTOA was granted to the Petitioner for 50 MW based on the NOC from Goa by PGCIL, with the start date of MTOA being 01.11.2019. Subsequently, vide letter dated 16.09.2019, the Petitioner requested PGCIL to defer the start date of MTOA from 01.11.2019 to 01.01.2020, as the construction activities at project sites and movement of equipment and materials to sites had come to a standstill since 10.08.2019, making it difficult for AGEMPL to commission its 50 MW project by 01.11.2019. However, the request of the Petitioner was declined by the PGCIL via letter dated 01.10.2019 informing that *'the start date of MTOA cannot be deferred at this stage'*. Subsequently, on 01.11.2019, PGCIL revoked the MTOA granted to the Petitioner for the transfer of 50 MW power to the Electricity Department, Goa on account of the failure of the Petitioner to establish the required Payment Security Mechanism and for not having furnished requisite documents for waiver of transmission charges and losses. The Petitioner has argued the delay in issuing the No Objection Certificate (NOC) required for MTOA is a Force Majeure event, which rendered the performance of the Petitioner's obligations impossible within the agreed timelines under the PPAs. The Petitioner contended that the delay in the grant of MTOA is a force majeure event under Article 11.3.1(d) of the PPAs read with Article 7.3.1 (f) of the PSAs.

Per contra, SECI has submitted that the Guidelines, RfS Document, PPAs, and PSAs do not envisage obtaining of MTOA and only provide for LTA. The Petitioner obtained MTOA at its cost and risk and neither SECI nor the distribution licensees can be held accountable for the same.

44. We note that vide letter dated 01.03.2019, SECI requested the buying entities to arrange for NOC from the respective SLDCs to enable Petitioner to comply with formalities of CTU for issuance of MTOA. Goa SLDC provided NOC for MTOA on 10.05.2019 for 50 MW power from 01.11.2019 to 30.06.2021. On 10.07.2019, PGCIL granted MTOA to the Petitioner for the transfer of 50 MW Power from Bhuj, Gujarat, to the Electricity Department, Goa, for the period 01.11.2019 to 30.06.2021. Vide letter dated 23.07.2019, CSPDCL provided the NOC issued by SLDC of Chhattisgarh for receiving 150 MW of power through MTOA. Further, on 05.08.2019, an MTOA Agreement was executed between Petitioner and PGCIL for the supply of 50 MW capacity of power to Goa. The MTOA was granted with effect from

01.11.2019 till 30.06.2021. Vide email dated 05.09.2019, the Petitioner gave advance notice prior to synchronization under Article 5.1.1 of the PPAs in regard to 50 MW Wind Power Project under Tranche-III and stated that the Petitioner will commission 50 MW of the project (part-capacity) around 15.09.2019 subject to readiness of CTU evacuation infrastructure. Vide letter dated 06.09.2019, the Petitioner informed SECI that it will commission the project in stages in the next 1 to 3 months and requested SECI to grant NOC for third-party sale from commissioning till COD of the plant. Vide email dated 11.09.2019, SECI requested the Petitioner to provide certain documents (set out in the email) to enable SECI to witness the part commissioning. However, the petitioner did not provide the requisite documents.

45. We note that the Bipartite Connection Agreement dated 12.09.2019 executed between the Petitioner and CTU, inter-alia, provided that *'50 MW shall be commissioned by November, 2019. Remaining is expected to be commissioned as per LTOA/MTOA availability.'* However, the Petitioner vide letter dated 16.09.2019 requested PGCIL to defer the start date of MTOA from 01.11.2019 to 01.01.2020. Vide email dated 25.09.2019, SECI, inter-alia, sought information in respect of modalities/ procedure by which the Petitioner's project is proposed to connect to the Grid (in the absence of LTA) for sharing the same with Buying Entities. The Petitioner did not provide the requisite information.
46. The PGCIL vide letter dated 01.10.2019 to the Petitioner denied the request of the Petitioner for deferment of MTOA from 01.11.2019 to 01.01.2020 stating that *'the start date of MTOA cannot be deferred at this stage.'* On 01.11.2019, PGCIL revoked the MTOA granted to the Petitioner for the transfer of 50 MW power to the Electricity Department, Goa, on account of *the failure of the Petitioner to establish the required Payment Security Mechanism and for not having furnished requisite documents for waiver of transmission charges and losses* for the 50 MW MTOA quantum till that date, i.e., 01.11.2019.
47. We note that the Petitioner also requested the issuance of NOC for third-party sale. The Petitioner, on the one hand, was requesting PGCIL to defer the date of commencement of MTOA for the 50 MW capacity to be supplied to Goa and, on the other hand, was requesting SECI for issuance of NOC for third-party sale of the said 50 MW quantum of power. Moreover, the MTOA granted to the Petitioner for transfer of 50 MW power to the Electricity Department, Goa, was revoked on account of the failure of the Petitioner to establish the

required Payment Security Mechanism and for not having furnished requisite documents for waiver of transmission charges and losses. As such, the Petitioner itself was responsible for the revocation of MTOA in the instant case. Further, any delay in obtaining MTOA, as alleged by the Petitioner, does not amount to Force Majeure within the scope of Article 11.3 of the PPAs. In view of the above, we hold that the Petitioner is not eligible for an extension on account of the alleged delay in issuance of NOC by the Buying Entities for availing MTOA.

h) Re. Non-availability of the transmission infrastructure required for the evacuation of power from the Projects

48. The Petitioner has submitted that the LTA provided by the PGCIL to the Petitioner on 28.01.2019 was granted from 24.11.2019, or the availability of the transmission system, whichever is later. Subsequently, the transmission system required for the evacuation of power under LTA was scheduled to be operationalized by December 2020. However, the date for commissioning of the transmission system was revised continuously and, the transmission system was ultimately revised to April 2021 and subsequently, to May 2021 and was actually commissioned on 28.01.2023. Further, for the first time on 17.01.2020, PGCIL informed that an alternate arrangement may be available for the evacuation of power from February 2020 to April 2020. However, the date of availability of alternate arrangement was revised to September 2020 and subsequently, to December 2020, which is much beyond the SCoD (24.11.2019) and even beyond 27 months (24.08.2020) from the effective date permissible under clause 4.5.6 of the PPAs, i.e., 25.05.2018. This led effectively to a situation when no transmission facility was provided by PGCIL for evacuation of power till 24.08.2020 (long stop date). As the commissioning of the transmission system is beyond the control of the Petitioner, the event of delays in the commissioning of the transmission system is a force majeure event. Further, Article 4.5.6 of the PPAs provides that any extension of the SCoD of the project may not be allowed beyond 27 months from the effective date of the PPAs.

49. *Per Contra*, SECI has submitted that based on the request of the Petitioner, SECI obtained approval of the MNRE on 22.10.2019 for an extension of SCoD of the project beyond 27 months from the effective date, and the same was conveyed to the Petitioner. Further, on 17.01.2020, PGCIL provided an alternative arrangement for evacuation of power basis, which SECI has repeatedly requested the Petitioner to provide a tentative commissioning date for the Project. However, the Petitioner failed to provide the revised commissioning schedule.

The Petitioner was also informed on 05.08.2020 that SECI may consider extending the SCoD of the project even till May 2021 even though the delay in the commissioning of the transmission line cannot be a ground for delay as the PGCIL has provided the alternate arrangement for evacuation of power. However, the Petitioner surrendered the LTA to PGCIL on 31.07.2020 without the knowledge of SECI. Thus, in view of the abandonment of the project by the Petitioner and unsustainable claim of fourteen (14) months delay due to force majeure events, SECI has submitted that no time extension can be granted to SCoD of the Project, and SCoD will remain as 24.11.2019 for all record and calculation purposes. Hence, the request of the Petitioner to return a bank guarantee of Rs 50 Crores cannot be acceded to.

50. Further, PGCIL has submitted that on 17.01.2020, PGCIL provided an alternate arrangement for evacuation of power from the project of the Petitioner wherein it was suggested to evacuate the power by utilising the transmission margin to be available upon commissioning of additional 4x500MVA, 400/220kV and 2x1500, 765/400kV ICTs at Bhuj PS, which was expected to be commissioned by progressively from Feb'20 to June'20. On 09.04.2020, PGCIL submitted that the augmentation of ICTs at the Bhuj pooling station was expected to be commissioned by September 2020 and suggested that Petitioner may submit its commissioning schedule accordingly. On 03.07.2020, the Petitioner was informed that the date for augmentation of ICT would be completed by December 2020, and thus, the Petitioner should commission its project accordingly. However, vide letter dated 31.07.2020, the Petitioner surrendered the connectivity granted to it and requested for the return of the LTA BG or, alternatively, to consider the same for the Petitioner's application under SECI Tranche-VI.

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

Article 1: Definition and Interpretation

...

"Scheduled Commissioning Date" shall mean 24.11.2019;

Article 2: Term of Agreement

2.1 Effective Date

2.1.1 This agreement shall come into effect from 24.05.2018 and such date shall be referred to as the Effective Date

4.5 Extensions of Time

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

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

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

...

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

...

4.5.6 *Notwithstanding anything to the contrary contained in this Agreement, any extension of the Scheduled Commissioning Date arising due to any reason envisaged in this Agreement shall not be allowed beyond 27 months from the Effective Date of this Agreement.*

4.6 Liquidated damages not amounting to penalty for delay in commencement of supply of power to Buyer

4.6.1 *The Project shall be fully commissioned within 18 months from the Effective Date of this Agreement. In case of failure to achieve this milestone, SECI shall encash the Performance Bank Guarantee (PBG) in the following manner: Delay upto six (6) months beyond the Scheduled Commissioning Date - Buyer will encash total Performance Bank Guarantee on per day basis and proportionate to the balance Capacity not commissioned.*

4.6.2 *In case the commissioning of the project is delayed over Six (6) months 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.***

...

5.2 Performance Bank Guarantee

5.2.1 *The Performance Bank Guarantee furnished by WPD to SECI shall be for guaranteeing the commencement of the supply of power up to the Contracted Capacity within the time specified in this Agreement.*

5.2.2 *If the WPD fails to commence supply of power from the Scheduled Commissioning Date specified in this Agreement, subject to conditions*

mentioned in Article 4.5, SECI shall have the right to encash the Performance Bank Guarantee without prejudice to the other rights of Buyer under this Agreement

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 :

...
d) An event of Force Majeure identified under Buyer-Buying Entity (ies) PSA, thereby affecting the 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:

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

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

11.7 Available Relief for a Force Majeure Event

11.7.1 Subject to this Article 11:

(a) no Party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

(b) every Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations, including but not limited to those specified under Article 4.5;

(c) For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under this Agreement shall be suspended or excused due to the occurrence of a Force Majeure Event in respect of such Party;

(d) Provided that no payments shall be made by either Party affected by a Force Majeure Event for the period of such event on account of its inability to perform its obligations due to such Force Majeure Event. ”

...

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

52. Relevant Articles of the PSAs stipulate as under:

7.3.1 A 'Force Majeure' means any event or circumstance or combination of events and circumstances as stated below only 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 in performing its obligations:

[...]

(f) An event of force majeure affecting the concerned CTU/STU, as the case may be, thereby affecting the evacuation of power from the Delivery Points by Buying Entity;

53. We observe that the Petitioner, vide letter dated 06.08.2018, informed PGCIL regarding the commissioning details of the generation pooling station and dedicated transmission line as per Annexure 3 of the TSA, as under:

Scheduled commissioning date of the wind/solar/wind-solar Generator/developer pooling station and Dedicated Transmission line

1.	<i>Installed capacity of the Generation Project/Park (Stage-wise).</i>	<i>250 MW</i>
2.	<i>Scheduled commissioning date of the wind/solar/wind-solar generator/developer pooling station</i>	<i>1 November 2019</i>
3.	<i>Scheduled commissioning date dedicated Transmission Line (including the terminal bays at ISTS substation and generation switchyard is to be implemented)</i>	<i>01 February 2019 Or Availability of ISTS system</i>

54. We observe that in the 3rd Meeting of Empowered Committee on Transmission, Ministry of Power, held on 21.12.2018, stated regarding the implementation of WRSS-21 Part-A and WRSS-21 Part-B, the transmission system associated with the evacuation of power from the Petitioner's Project under the LTA by December 2020 as under:

2. *WRSS-21 Part-A (TBCB): "Transmission System strengthening for relieving over loadings observed in Gujarat Intra-state system due to RE injections in Bhuj PS". Details of the scheme is as below:*

<i>S. No.</i>	<i>Scope of the Transmission Scheme</i>	<i>Capacity /km</i>	<i>Estd. Cost (Rs. Cr.)</i>
<i>1</i>	<i>Establishment of 2x1500MVA, 765/400kV Lakadia PS with 765kV (1x330MVAR) & 400kV (1x125 MVAR) bus reactor Future provisions: Space for: i) 765/400kV ICTs along with bays: 2 nos. ii) 400/220kV ICTs along with bays: 8 nos.</i>	<i>2x1500MVA, 765/400kV 400kV ICT bay-2 765kV ICT bay-2 400kV line bay-4 765kV line bay-2 1x330MVar, 765 kV,</i>	<i>319</i>

	iii) 765kV line bays:4 nos. iv) 400kV line bays: 6 nos. v) 220kV line bays: 16 nos vi) 765kV bus reactor along with bays: 1no vii) 400kV bus reactor along with bays: 1no	1x125MVAR, 420 kV 765kV Reactor bay- 1 400kV Reactor bay -1	
2	LILO of Bhachau – EPGL 400kV D/c (triple) line at Lakadia PS	10km (approx.)	37
3	Bhuj PS – Lakadia PS 765kV D/c line	100km (approx.)	463
4	2 nos of 765kV bays at Bhuj PS for Bhuj PS –Lakadia PS 765kV D/c line	– Lakadia PS 765kV D/c line 765kV line bay-2	37
		Total (Rs. Cr.)	856

Note:

POWERGRID to provide space for 2 nos of 765kV bays at Bhuj PS for Bhuj PS – Lakadia PS 765kV D/c line

2.1 NCT had recommended the above scheme for implementation through TBCB by December 2020 and suggested that BPCs may be requested to complete the bidding process in 140 days.

2.2 ECT concurred the recommendations of NCT.

.....

3. WRSS-21 Part-B (TBCB) - Transmission System strengthening for relieving over loadings observed in Gujarat Intra-state system due to RE injections in Bhuj PS:

S.No.	Scope of the Transmission Scheme	Capacity /km	Estd. Cost (Rs. Cr.)
1	Lakadia–Vadodara 765kV D/c line	350km (apprx.)	1619
2	330MVAR switchable line reactors at both ends of Lakadia–Vadodara 765kV D/c line	330 MVAR reactor -4 no. 765kV line bays- 4	172
3	2 nos of 765kV bays each at Lakadia and Vadodara S/Ss for Lakadia – Vadodara 765kV D/c line	765kV line bays- 4	74
		Total (Rs. Cr.)	1865

Note:

a. POWERGRID to provide space for 2 nos of 765kV bays and space for 2 nos. of 330MVAR switchable line reactors at Vadodara end for Lakadia – Vadodara 765kV D/c line

b. Developer of Lakadia S/s to provide space for 2 nos of 765kV bays and space for 2 nos. of 330MVAR switchable line reactors at Lakadia end for Lakadia – Vadodara765kV D/c line

3.1 NCT had recommended the above scheme for implementation through TBCB by December 2020 and suggested that BPCs may be requested to complete the bidding process in 140 days.

3.2 ECT concurred the recommendations of NCT as above.”

55. On 18.04.2019, PGCIL informed the Petitioner that the tentative timeline for the grant of LTA was December 2020, as per the ECT Meeting. The extract of the email has been reproduced as under:

Subject: Availability of Transmission system for Long Term Access for 250 MW AGEMPL wind project at Bhuj PS- reg.

This is with reference to your letter dated 03.04.2019 regarding providing the tentative timeline for availability of Transmission system for Long Term Access required for 250 MW AGEMPL wind project at Bhuj PS. In this regard, it is to mention that tentative time line of transmission elements identified for commencement of 250 MW LTA is Dec'20, as per 3rd ECT MOM dated 08.01.2019.

56. On 23.04.2019, the TSA was executed between the Petitioner and WRSS XX(A) Transco Limited. The SCoD of the Transmission System was December 2020. In this regard, Schedule-3 of the TSA dealing with Scheduled COD reads as under:

*Schedule:3
Scheduled COD*

<i>S.No.</i>	<i>Name of the Transmission Element</i>	<i>Scheduled COD in months from Effective Date</i>	<i>Percentage of Quoted Transmission Charges Recoverable on Scheduled COD of the Element of the Project</i>	<i>Element(s) which are prrequired for declaring the commercial operation (COD) of the respective Element</i>
1.	<p><i>Establishment of 2x1500MVA, 765/400kV Lakadia PS with 765kV (1X330MVAR) & 420kV (1x125 MVAR) bus reactor</i></p> <ul style="list-style-type: none"> • 2X1500MVA, 765/400kV • 400kV ICT bay-2 • 765kV ICT bay-2 • 400kV line bay-4 • 765kV line bay-2 • 1x330MVA, 765 kV, • 1x 125 MVA, 420 kV • 765kV Reactor bay-1 • 420 kV Reactor bay -1 <p><i>Future provisions:</i></p> <p><i>Space for:</i></p> <p>(i) 765/400KV ICTs along with bays: 2 nos.</p> <p>(ii) 400/220kV ICTs along with bays: 8 nos.</p> <p>(iii) 765kV line bays: 4 nos.</p> <p>(iv) 400kV line bays: 6 nos.</p> <p>(v) 220kV line bays: 16 nos.</p> <p>(vi) 765kV bus reactor along with bays: 1 no</p> <p>(vii) 400kV bus reactor along with bays: 1 no</p>	<i>18 months # (Dec'20)</i>	37.27%	<i>Elements marked at Sl. No. 1, 2, 3 & 4 are required to be commissioned simultaneously as their utilization dependent is on commissioning of each other.</i>

#Scheduled COD in months is considering Effective Date in June, 2019. It is clarified that in case there is delay in achieving Effective Date, the schedule shall be compressed accordingly to achieve Scheduled COD by December, 2020.

57. On 23.04.2019, TSA was executed between the Petitioner and Lakadia-Vadodara Transmission Project Limited. The SCoD of the Transmission System was 31.12.2020. In this regard, Schedule-3 of the TSA dealing with Scheduled COD reads as under:

*Schedule:2
Project Description and Scope of Project*

1. Detailed Scope of Work

<i>S.No.</i>	<i>Name of the Transmission Element</i>	<i>Completion Target</i>	<i>Conductor per phase</i>

(i)	Lakadia-Vadodara 765kV D/c line	December 31, 2020	Hexa Zebra ACSR The transmission lines shall have to be designed for a maximum operating conductor temperature of 85 deg C for ACSR.
(ii)	330MVAR switchable line reactors at December both ends of Lakadia - Vadodara 765kV 31, 2020 D/c line along with 500 ohms NGR at both ends of Lakadia - Vadodara 765kV D/c line (330 MVAR line reactor - 4 no & 765kV Reactor bay - 4 no.)	December 31, 2020	
(iii)	2 nos. of 765kV bays each and Vadodara S/Ss at Lakadia Vadodara 765kV D/c line (765kV line bay - 4 no.)	December 31, 2020	

Note.

a. As per MOM of 3rd ECT held on 21.12.2018, it was decided that the scheme is to be implemented by December 2020

...

**Schedule:3
Scheduled COD**

S.No	Name of the Transmission Element	Scheduled COD in months Effective Date	Percentage of Quoted Transmission Charges recoverable on Scheduled COD of the Element of the Project	Element(s) which are prerrequired for declaring the commercial operation (COD) of the respective Element
1	Lakadia-Vadodara 765kV D/c line	December 31, 2020	86.81%	<ul style="list-style-type: none"> • Elements marked at SI No. 1, 2 & 3 are required to be commissioned simultaneously as their utilization is dependent on commissioning of each other. • Availability of transmission scheme being implemented under "Westem Region Strengthening Scheme-21 (WRSS 21) Part A-Transmission System strengthening for relieving over loadings observed in Gujarat Intra-state system due to RE injections in Bhuj PS (Scope as per 3d ECT MOM)
2	330MVAR switchable line reactors at both ends of Lakadia Vadodara 765 kV Dic line along with 500 ohms NGR at both ends of Lakadia - Vadodara 765kV D/c line (330 MVAR line reactor - 4 nos & 765kV Reactor bay - 4 nos)		9.22%	
3	2 nos of 765KV bays each at Lakadia and Vadodara S/S for Lakadia - Vadodara 765kV D/c line (785kV line bay - 4 nos.)		3.97%	

Scheduled COD for the entire project: December 31, 2020.

58. Vide letter dated 22.10.2019, MNRE informed SECI to provide the course of action for granting extension for wind power projects under Tranches I to V.

- c. **Extension in scheduled commissioning of the project for a period equal to 60 days subsequent to operationalization of LTA** (allowing additional time to be provided to the developer to complete the commissioning activities once the ISTS infrastructure is ready) may be considered.
- e. Overlapping periods due to extensions being given due to different reasons covering the same periods of time, would be counted only once and double benefit for the same should not be granted.
- f. In cases where SCD of the projects are extended based on the reasons as above, FC milestone will be extended accordingly, considering that project commissioning is

*the ultimate target. **Further, delay in commissioning beyond the extended SCD will be dealt as per the provisions of RfS and PPA.***

.....
3. **SECI may examine each representation** for grant of extension accordingly and provide relief thereof.”

59. The 5th meeting of the Working Group for expeditious implementation of RE Generation & associated Transmission System was held on 31.10.2019. In the said meeting, the Petitioner submitted that it intends to commission the Power Projects proposed to be connected at Bhuj-I and Bhuj-II substations at the earliest, but for want of a firm date of LTA operationalization, it is not moving ahead to avoid non-productive capital expenditure. In response, PGCIL asked the Petitioner to submit its tentative project execution programme for consideration and agreed to find out possible solutions for power evacuation.

60. Vide letter dated 14.11.2019, the Petitioner requested SECI for an extension of SCoD by at least 90 days from the actual date of LTA Operationalization, stating as under:

“As per referred PPA, the SCOD of the above project is 24-Nov-19. The Connectivity for the project has been granted at 220 kV level of 765/400/220kV Bhuj -1 Pooling Substation (PSS) was granted by Power Grid Corporation of India Limited (PGCIL). The CTU had confirmed operationalization of the LTA effective from 23-Feb-18 (attached as Annexure - 1).

As per 3rd ECT dated 08-Jan-19, the transmission system elements required for commencement of the LTA shall be ready tentatively only by Dec'20. The said document is attached as Annexure - 2.

In view of the above, since evacuation of the power from the said project is dependent on the timely availability transmission facility, and LTA for 250 MW will not get operationalized by SCOD, and PGCIL transmission infrastructure will get delayed due to delay in availability of PGCIL's evacuation infrastructure, which is beyond the control of AGEMPL.

.....
In view of the above, we request SECI to grant extension of time in Scheduled Commissioning Date, at least 90 days from the date of actual operationalization of the LTA.

61. On 18.11.2019, the Petitioner, inter-alia, informed SECI that LTA is likely to operationalized in March 2021/April 2021 and requested SECI to align the SCoD in line with LTA Operationalization dates.

The 3rd Empowered Committee on Transmission (ECT), vide its meeting dated 8th Jan'19, has informed that the transmission Infrastructure identified in the above LTAs would be completed only in Dec 20; this issue regarding the likely delay in operationalization of the above LTAS and its impact on the timely Implementation of

the above projects & the hardship being suffered by the SPVs due lack of visibility in completion of the said transmission infrastructure was brought to SECI's notice.

However, it is now apparent that the transmission infrastructure required to be completed for the operationalization of the LTA's as above will get further delayed, and the LTA's are likely to be operationalized only by Mar' 21/Apr' 21.

In view of the cloud of uncertainty surrounding the completion of transmission infrastructure as above necessary to evacuate power from the above projects, it is necessary to appreciate that it would be an onerous task for us to plan project construction activities. It is also to appreciate that, given that the LTA for all the above project of a cumulative capacity of 1100 MW are likely to get operationalized only in Mar'21/Apr'21, we would be forced to keep a cumulative 1100 MW ready for commissioning on such date, which would not only have a significant impact on the IDC, but is also highly impracticable.

In view of above, we request SECI to align the Scheduled Commissioning Dates of the above projects in line with the LTA operationalization dates & allow staggered commissioning of this Project of 1100 MW, such that the commissioning dates of the respective capacities under Tranche-III, Tranche-IV, Tranche-V & Tranche-VI are separated by a period of at least 60 days."

62. Vide letter dated 17.01.2020, PGCIL informed SECI as under:

Presently, 4x500MVA, 400/220kV and 2x1500MVA, 765/400kV ICTs are under operation at Bhuj PS with LTA transfer capability of 1450MW, out of which 1400MW have been allocated and a margin of 50MW is available. Further, the additional 4x500IWA, 400/220kV and 2x1500MVA, 765/400kV ICTs are expected to be commissioned progressively from Feb'20 to Jun'20, which would provide an additional margin of around 1700MW considering power transfer capability of the existing transmission system.

In view of the above, M/s Adani Green Energy (MP) Ltd. and M/s Adani Renewable Energy (TN) Ltd. may be requested to indicate their timelines to start power transfer requirement under LTA so that the same may be considered for allocation against the transmission margin to be available as indicated above.

63. Vide letter dated 13.04.2020, SECI informed the Petitioner as under:

Ref: 1. M/s AGEMPL letter no. AGEMPL/SECI/10Feb20, dated 10.02.2020:

Vide ref. letter M/s Adani informed that they surmise that the LTA for 250 MW Wind Project under Tranche-III & 300 MW Wind Project under Tranche-IV may get operationalized by Mar'21/Apr'21 and hence they have planned the project commissioning accordingly. It is further stated that though all agencies (PGCIL, CEA, CERC) have said/acknowledged that the transmission infrastructure will be ready by Dec 2020, the Transmission Service Providers (WRSS XXI (A)Transco) has requested for extension of time in SCOD by another 3 months due to an inordinate delay in the acquisition of the SPV from the BPC.

We confirmed this delay in LTA operationalisation from M/s Power Grid Corporation of India (PGCIL) and we have been informed the following:

M/s PGCIL vide email dated 09.04.2020, has stated that the LTA of 250 MW & 300 MW was granted to AGEMPL with the following transmission system:

- Augmentation of transformation capacity (6x500MVA, 400/220kV & 2x1500MVA, 765/400kV ICTs) at Bhuj PS
- WRSS-XXI Part-A & B:
 - Establishment of 2x1500MVA, 765/400kV substation at Lakadia
 - Lakadia-Vadodara 765kV D/c line
 - Bhuj PS - Lakadia PS 765kV D/c line
 - LILO of Bhachau - EPGL 400kV D/c (triple) line at Lakadia PS

M/s PGCIL further informed that Transmission scheme viz. WRSS-XXI Part-A & B is expected to be commissioned by Dec'20. ICT augmentation at Bhuj PS is expected to be completed by Sept'20. Further, few LTA grantees connected at Bhuj PS have relinquished their LTAs. Accordingly, with the augmentation of ICTs at Bhuj PS, sufficient margin shall be available for transfer of power from AGEMPL's 250MW & ARETNL's 300MW projects.

Hence, with the above submission it is very clear that M/s PGCIL will be able to transfer Power from the Projects from Sept' 20 onwards, irrespective of the commissioning of the Transmission scheme viz. WRSS-XXI Part-A & B. Further, it will be a national wastage if ICTs augmentation at Bhuj PS which is proposed to be commissioned by Sept'20 remains unutilized.

In view of the above, it is requested that M/s AGEMPL and M/s ARETNL may plan to commission their respective Projects by the proposed date of completion of ICTs augmentation at Bhuj PS i.e. **by Sept' 20 and intimate M/s PGCIL to operationalize the LTA accordingly.**

64. Vide letter dated 02.06.2020, SECI informed the Petitioner as under:

With reference to your letter cited above at sl. no. 05, we would like to bring your kind attention to our letter dated 13.04.2020 wherein M/s PGCIL email dated 09.04.2020 was referred to wherein it was clearly mentioned by M/s PGCIL that they will be able to transfer Power from the Projects of M/s Adani Green Energy (MP) Limited (AGEMPL) and M/s Adani Renewable Energy (TN) Limited (ARETNL) under SECI Wind Tranche III & IV respectively by Sept' 20, irrespective of the commissioning of the Transmission scheme viz. WRSS-XXI Part-A & B. In view of this, it was requested that M/s AGEMPL and M/s ARETNL may plan to commission their respective Projects according to the proposed date of completion of ICTs augmentation at Bhuj PS i.e. Sept' 20 and intimate M/s PGCIL to operationalize the LTA accordingly.

We fail to understand why M/s AGEMPL and M/s ARETNL are not agreeing to commission their projects when M/s PGCIL is ready to operationalize the LTA by Sept' 20. Further M/s AGEMPL and M/s ARETNL are still referring to the uncertainty & lack of visibility in the transmission infrastructure covered under the LTA for the Project (refer letter dated 01.06.2020).

...

...

However, any time extension to SCD due to COVID-19 will be strictly governed by the MNRE OM No. 283/18/2020-GRID SOLAR dated 20-03-2020 & 17-04.2020 only and shall not be given for delay caused by any other reason.

In view of the above, it is again requested that M/s AGEMPL and M/s ARETNL may plan to commission their respective Projects according by the proposed date of completion of ICTs augmentation at Bhuj PS i.e. by Sept' 20 and intimate M/s PGCIL to operationalize the LTA accordingly. Kindly acknowledge the above at the earliest so that your request to grant time extension to Scheduled Commissioning Date (SCD) for Projects can be processed as per the guidelines issued by MNRE vide letter dated 22.10.2019.

Response to this letter should be made within 07 days i.e. up to 09.06.2020 failing which it will be construed that M/s AGEMPL and M/s ARETNL does not require any extension in the SCD due to delay in operationalization of LTA for the projects allocated under SECI Wind Tranche – III and IV respectively. SECI will be compelled to take necessary action as per the provisions in the RfS and PPA.

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

65. Relevant extracts of the Minutes of the meeting held on 03.07.2020 between SECI, PGCIL, and the Petitioner are as under:

3. M/s PGCIL informed that the revised date of completion of augmentation of Transformation capacity at Bhuj PS is progressively by Dec'20. However, as mentioned in their previous submissions to SECL LTA of M/s AGEL may be operationalised on the margins created due to part commissioning of associated transmission system based on their request. Hence, delay in commissioning of the Project cannot be attributed to the delay in operationalization of LTA.

66. Vide letter dated 31.07.2020, the Petitioner informed PGCIL as under:

Dear Sir,

Adani Green Energy (MP) Limited (AGEMPL) had won 250 MW Wind Power Project under SECI Tranche III & had applied for connectivity at Bhuj-I substation, Kutch District, Gujarat vide application ref. no. 1200001363. The CTU had granted Stage-II connectivity at Bhuj-I substation (with a capacity of at least 725 MW at nominal voltage) through 220 kV D/c line along with associated bays at both ends, under the scope of AGEMPL, vide intimation u/r (2) above.

The CTU has granted LTA for the Project vide intimation u/r (3) above.

AGEMPL has completed the 220-kV transmission line from its 220-kV substation to Bhuj 1-PS and associated bays at both ends. However, due to Force Majeure events/conditions in the implementation of the Project, AGEMPL is constrained to surrender the Connectivity granted to it for the 250 MW SECI-III Wind project against its application ref. no. 1200001363.

It may be noted that AGEMPL is the lead generator for transmission evacuation system from Ratadia to Bhuj-I. Therefore, the above transmission system and the connectivity is planned to be utilized by our affiliates, M/s Adani Green Energy Three Limited (AGE3L) under SECI Tranche VI bid, as per Para 14.1 (Sharing of Connectivity and Dedicated Transmission Infrastructure) of the detailed procedure for "Grant of connectivity to projects based on Renewable sources to inter-State transmission system".

Our affiliates, M/s Adani Green Energy Three Limited, is developing a 250 MW Wind Power Project under SECI Tranche VI in the region and is applying for the connectivity for the same 250 MW capacity at Bhuj-I substation of the CTU. It shall utilize the same transmission lines....

67. Vide letter dated 05.08.2020, SECI informed the Petitioner as under:

With reference to the above, we would like to highlight the commissioning timelines of the WRSS- XXI Part-A&B:

<i>Sl. No.</i>	<i>Transmission Element</i>	<i>Scheduled Commercial Operation Date</i>	<i>Tentative Commissioning (As per Monthly Progress Report of Transmission Projects awarded through Tariff Based Competitive Bidding (TBCB) Route (As on 30.06.2020))</i>	<i>Revised Schedule Commercial Operation Date (As per Letter no. 3/1/2020-Trans dated 27.07.2020 issued by MoP, GoI)</i>
1	<i>Establishment of 2x1500 MVA, 765/400kV substation at Lakadia</i>	<i>31.12.2020</i>	<i>30.04.2021</i>	<i>31.05.2021</i>
2	<i>Lakadia-Vadodara 765kV D/c line</i>	<i>31.12.2020</i>	<i>-</i>	<i>31.05.2021</i>
3	<i>Bhuj PS - Lakadia PS 765kV D/c line</i>	<i>31.12.2020</i>	<i>30.04.2021</i>	<i>31.05.2021</i>
4	<i>LILO of Bhachau-EPGL 400kV D/c (triple) line at Lakadia PS</i>	<i>31.12.2020</i>	<i>30.04.2021</i>	<i>31.05.2021</i>

68. Vide email dated 18.04.2019, PGCIL informed M/s AGEL about the commissioning date of above elements as Dec-20. Hence, M/s AGEL must have planned to commission the plants accordingly.

Since Jan, 2020, SECI had been continuously informing your good office that M/s PGCIL- CTU is ready to operationalize the LTAs of the Projects stated in the subject matter on margins created due to part commissioning of associated transmission system at the request of M/s AGEL. In spite of our regular follow up, M/s AGEL did not show any intention for commissioning of the Projects. Further, M/s AGEL neither provided the progress status nor any commissioning plan for the Projects.

To resolve the issues and finalise a mutually agreed timeline for the Projects, a joint meeting between SECI, PGCIL and M/s AGEL was held on 03.07.2020 by video conferencing. In the said meeting, PGCIL again informed that they may operationalize the LTAs for the said Projects on the request of M/s AGEL. Hence, delay in commissioning of the Projects cannot be attributed to the delay in operationalization of LTA. During the meeting, M/s AGEL informed that their OEM i.e. M/s Suzlon is under financial stress and on 30.06.2020, M/s Suzlon has received the lender's approval for debt resolution. We would refer to Clause no. 11.4.1 (b) of the PPA which clearly establishes that delay in the performance of any contractor, sub-contractor or their agents cannot be attributed as Force Majeure. M/s AGEL further assured to provide the commissioning plan for the Projects by 21.07.2020.

Till date no response has been received regarding progress status of the projects awarded to M/s AGEL under Wind Tranches III and IV nor the commissioning plan as committed by M/s AGEL.

We would also like to submit that power from the projects awarded under Tranches III and IV are mapped with DISCOMs of Goa, Chattisgarh, Bihar and Maharashtra. Further, the scheduled commissioning date of the projects awarded under Tranches III and IV are 24.11.2019 and 28.02.2020 respectively. As these dates have already lapsed, DISCOMs are raising concerns over delay in commissioning of the Projects which will result in non-achievement of their RPO targets. In fact, DISCOMs had already suggested to utilize alternative corridor available with CTU in case of non-availability of main Corridor (as mentioned in the LTA granted by PGCIL-CTU). In

the absence of any commissioning schedules for the Project, SECI is finding it difficult in addressing the DISCOM's concerns.

*In view of the above and considering the commissioning of the Project as an ultimate goal, we again request your good office to provide all the necessary details along with the commissioning plan considering the availability of power evacuation facility at Bhuj PS by 06.08.2020, so that the cases of Time extension in SCDs of the respective Projects as per the provisions of RfS, PPA and guidelines issued by MNRE. **We would emphasize that though delay in commissioning of Project cannot be attributed to delay in operationalization of LTA as PGCIL is ready to operationalize the LTA, we may consider the commissioning of Projects by May, 2021 i.e. up to revised SCOD of the transmission element or actual date of operationalization of LTA by PGCIL.***

Failing to provide above said details, it will be construed that M/s AGEMPL and M/s ARETNL do not require any extension in the SCD and are not interested in executing the Project and SECI shall take necessary action as per provisions of RfS and PPA.

69. Vide letter dated 23.12.2020, SECI has informed the Petitioner as under:

*In view of the above and considering the fact that M/s AGEMPL had surrendered its stage-II connectivity and relinquished the LTA granted against the 250 MW wind power projects awarded by SECI under Wind Tranche - III. **we regret to inform that no time extension can be granted to Schedule Commissioning Date of the Project and it will be remain same as 24.11.2019 for all record and calculation purposes.** It is to further inform that SECI is initiating the action to cancel the Project as per the provision of RfS and PPA.*

70. We note that, as per the TSAs executed on 23.04.2019, between the Petitioner and WRSS XX(A) Transco Limited and between the Petitioner and Lakadia-Vadodara Transmission Project Limited, the SCoD of Transmission Systems was December, 2020. We note that PGCIL identified two TBCB licensees, viz. WRSS XXI(A) Transco Limited and Lakadia Vadodara Transmission Limited, for the development of transmission systems at the Bhuj substation and beyond.

71. From the above and as per records, we note that on 23.11.2018, the Petitioner applied to the PGCIL for a grant of LTA approval for 250 MW from its Project for the period 24.11.2019 to 24.11.2044. The Petitioner achieved financial closure/conditions subsequent with respect to 250 MW Wind Power Projects on 24.12.2018. On 28.01.2019, LTA was granted by PGCIL to the Petitioner. The evacuation system from the generation plant to the pooling station at Bhuj was to be constructed by the developer at its own cost and risk. In August 2019, the Petitioner established the dedicated transmission line before SCoD, i.e., 24.11.2019.

72. We note that many developers approached SECI to provide relief by granting extension for wind power projects under Tranches I to V since there was a delay in LTA. Vide letter dated 22.10.2019, MNRE informed SECI to provide the course of action for granting extension for wind power projects under Tranches I to V. Further, MNRE directed that SECI may examine the representations received from SPDs and may consider extension in SCoD of the project for a period equal to 60 days subsequent to operationalization of LTA subject to various provisions of RfS and PPA.
73. We note that vide the letter dated 14.11.2019, the Petitioner requested SECI for an extension of SCoD by at least 90 days from the actual date of LTA Operationalization. On 18.11.2019, the Petitioner, inter-alia, informed SECI that LTA is likely to be operationalized in March 2021/April 2021 and requested SECI to align the SCoD in line with LTA Operationalization dates. Further, vide letter dated 17.01.2020, PGCIL informed SECI that 4x500MVA, 400/220kV, and 2x1500MVA, 765/400kV ICTs are under operation at Bhuj PS with LTA transfer capability of 1450MW, out of which 1400MW have been allocated and a margin of 50MW is available. Further, additional 4x500IWA, 400/220kV, and 2x1500MVA, 765/400kV ICTs are expected to be commissioned progressively from Feb'20 to Jun'20, which would provide an additional margin of around 1700MW. Accordingly, the Petitioner was requested to indicate the timelines to start the power transfer requirement under LTA so that the same may be considered for allocation against the transmission margin to be available as indicated above.
74. Vide letter dated 13.04.2020, SECI confirmed there is a delay in LTA operationalisation from PGCIL and that Transmission scheme, viz. WRSS-XXI Part-A & B was expected to be commissioned by Dec'20. However, the ICT augmentation at Bhuj PS was expected to be completed by September 20, and since a few LTA grantees connected at Bhuj PS have relinquished their LTAs, accordingly, sufficient margin shall be available for transfer of power from Sept'20. Vide letter dated 02.06.2020, SECI re-affirmed the Petitioner that PGCIL has clearly mentioned that it will be able to transfer power by Sept' 20, irrespective of the commissioning of the Transmission scheme viz. WRSS-XXI Part-A & B. Accordingly, the Petitioner may plan to commission its project according to the proposed date of completion of ICTs augmentation at Bhuj PS, i.e., by Sept' 20 and intimate M/s PGCIL to operationalize the LTA accordingly. Only after acknowledgement by the Petitioner, can SECI

process the request for a grant of time extension to SCoD as per the guidelines issued by MNRE vide letter dated 22.10.2019.

75. We further note that as per the extracts of the Minutes of the meeting held on 03.07.2020 between SECI, PGCIL, and the Petitioner, M/s PGCIL informed that the revised date of completion of augmentation of Transformation capacity at Bhuj PS is progressively by Dec'20.
76. Vide letter dated 31.07.2020, the Petitioner informed PGCIL that due to force majeure events, it was constrained to surrender the connectivity granted to it and also sought to relinquish its LTA and requested for return of the LTA BG or, alternatively, to consider the same for the Petitioner's application under SECI Tranche-VI. Vide letter dated 05.08.2020, SECI informed the Petitioner that since January 2020, SECI had been continuously informing the Petitioner that M/s PGCIL- CTU is ready to transfer the power of the project on margins created due to part commissioning of associated transmission system at the request of the Petitioner. Further, in spite of the regular follow up by SECI, the Petitioner did not show any intention to commission the Projects. Further, the Petitioner neither provided the progress status nor any commissioning plan for the Projects. We note that a joint meeting was also held between SECI, PGCIL, and the Petitioner on 03.07.2020 through video conferencing. In the said meeting, PGCIL informed that it may operationalize the LTAs for the said project at the request of the Petitioner. In fact, the Petitioner informed that its OEM, i.e., M/s Suzlon, is under financial stress, and on 30.06.2020, M/s Suzlon received the lender's approval for debt resolution. The Petitioner assured to provide the commissioning plan for the Projects by 21.07.2020.
77. We note that vide letter dated 05.08.2020, SECI informed the Petitioner that the SCoD of projects awarded under Tranches III and IV have already lapsed and the delay in commissioning of the Projects will result in non-achievement of their RPO targets. Accordingly, the Petitioner may consider the commissioning of Projects by May 2021, i.e., up to the revised SCoD of the transmission element or actual date of operationalization of LTA by PGCIL, failing which it will be construed that the Petitioner does not require any extension in the SCoD and is not interested in executing the project and SECI shall take the necessary action as per provisions of RfS and PPA.

78. We note that on 07.08.2020, PGCIL revoked the Stage II connectivity granted to the Petitioner with immediate effect and also intimated that based on its request, the LTA granted to it stood relinquished w.e.f. 31.07.2020 and informed the Petitioner that it was liable to bear the applicable relinquishment charges in accordance with the Order dated 08.03.2019 passed by this Commission in Petition No. 92/MP/2015. Vide letter dated 23.12.2020, SECI informed the Petitioner that no time extension in SCoD can be granted for the Project, and it will remain the same as 24.11.2019 for all record and calculation purposes.

79. From the discussion in the preceding paragraphs, we observe that:

- a) We observe that the Petitioner executed five PPAs on 24.05.2018, and as per the PPAs, the SCoD of the project was 24.11.2019. On 23.11.2018, the Petitioner applied to the PGCIL for a grant of LTA for the period 24.11.2019 to 24.11.2044. The Petitioner achieved financial closure/conditions subsequent on 24.12.2018. LTA was granted by PGCIL on 28.01.2019. Pertinently, the Petitioner executed the TSAs dated 23.04.2019 and agreed for the availability of the Associated Transmission System by 31.12.2020, [TSA with WRSS & TSA with Lakadia] which is beyond the SCoD, i.e. 24.11.2019. At that time, the Petitioner did not insist that the Associated Transmission System should be available from 24.11.2019 (SCoD as per PPAs). Hence, the Petitioner had voluntarily agreed and accepted that the Associated Transmission System shall be available only by 31.12.2020 or later (operationalization of LTA), which is even beyond the long stop date, viz. 24.08.2020.
- b) PGCIL had made alternate transmission arrangements for evacuation of the power with ICT augmentation at Bhuj PS. Vide letter dated 02.06.2020, SECI re-affirmed the Petitioner that PGCIL has clearly mentioned that it will be able to transfer Power by Sept' 20, irrespective of the commissioning of the Transmission scheme viz. WRSS-XXI Part-A & B. Accordingly, the Petitioner may plan to commission its project according to the proposed date of completion of ICTs augmentation at Bhuj PS, i.e., by Sept' 20 and intimate M/s PGCIL to operationalize the LTA accordingly. However, the Petitioner failed to provide the proper documentation and the details of the date of commissioning of the project.
- c) During the joint meeting held on 03.07.2020 PGCIL informed that there is no delay in operationalization of LTA. On the other hand, the Petitioner informed that its OEM, i.e., M/s Suzlon, is under financial stress and has received the lender's approval for debt resolution. It is pertinent to mention here that 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 'Insufficiency of finances or funds or the agreements becoming onerous to perform.' Therefore, the failure of the original equipment manufacturer of the project, i.e., M/s Suzlon, to perform its obligations cannot be considered a Force Majeure Event and is, in fact, a Force Majeure Exclusion under Article 11.4 of the PPAs.

- d) Vide letter dated 22.10.2019, MNRE informed SECI to provide the course of action for granting extension for wind power projects under Tranches I to V since there was a delay in LTA and many developers approached SECI to provide relief. Further, MNRE directed that SECI may examine the representations received from SPDs and may consider an extension in SCoD of the project for a period equal to 60 days subsequent to the operationalization of LTA subject to various provisions of RfS and PPAs. Vide letter dated 14.11.2019, the Petitioner requested SECI for an extension of SCoD by at least 90 days from the actual date of LTA Operationalization. On 18.11.2019, the Petitioner again informed SECI that since LTA is likely to be operationalized in March 2021/April 2021, and requested SECI to align the SCoD in line with LTA Operationalization dates. However, the final consensus between the contracting parties on the timelines for the extension of SCoD could not be reached for want of pending information/documentation from the Petitioner.
- e) Vide letter dated 17.01.2020, PGCIL informed SECI that 4x500MVA, 400/220kV, and 2x1500MVA, 765/400kV ICTs are under operation at Bhuj PS with LTA transfer capability of 1450MW, out of which 1400MW have been allocated and a margin of 50MW is available. Further, additional 4x500MVA, 400/220kV, and 2x1500MVA, 765/400kV ICTs are expected to be commissioned progressively from February 2020 to June 20, which would provide an additional margin of around 1700MW. Accordingly, the Petitioner was requested to indicate the timelines to start the power transfer requirement under LTA so that the same may be considered for allocation against the transmission margin to be available as indicated above. However, the Petitioner failed to provide the details of the date of commissioning of the project.
- f) As per the extracts of the Minutes of the meeting held on 03.07.2020 between SECI, PGCIL, and the Petitioner, M/s PGCIL informed that "*the revised date of completion of augmentation of Transformation capacity at Bhuj PS is progressively by Dec '20. However, the Petitioner's projects can be operationalised on the margins created due to part commissioning of associated transmission system based on their request.*"

However, the Petitioner, vide letter dated 31.07.2020, informed PGCIL that due to force majeure events, it was constrained to surrender the connectivity granted to it and also sought to relinquish its LTA and requested for return of the LTA BG or, alternatively, to consider the same for the Petitioner's application under SECI Tranche-VI. On 07.08.2020, PGCIL revoked the Stage II connectivity granted to the Petitioner with immediate effect and also intimated that based on its request, the LTA granted to it stood relinquished w.e.f. 31.07.2020 and informed the Petitioner that it was liable to bear the applicable relinquishment charges in accordance with the Order dated 08.03.2019 passed by this Commission in Petition No. 92/MP/2015. Vide letter dated 23.12.2020, SECI informed the Petitioner that no time extension in SCoD can be granted for the Project and it will remain the same as 24.11.2019 for all record and calculation purposes.

- g) From the discussions in the preceding paragraphs, we are of the view that as per TSAs dated 23.04.2019, the Petitioner had agreed to the availability of the Associated Transmission System by 31.12.2020 and not from 24.11.2019 (SCoD as per PPAs). The Petitioner, instead of commissioning the project, relinquished its LTA on 31.07.2020, i.e., much before December 2020, whereas PGCIL had time and again requested the Petitioner to indicate the timelines for the commissioning of its projects so as to evacuate the power on the available alternate transmission system. Thus, PGCIL had made alternate arrangements for the evacuation of power. We also observe that as per Article 4.6.2 of the PPAs, the maximum time period allowed for the commissioning of the projects was limited to 27 months from the Effective Date of the PPAs. Hence, the long stop date for the PPAs was 24.08.2020. However, we find that the contracting parties in the instant case were in constant negotiations even beyond the SCoD, i.e., 24.11.2019, regarding the extension of SCOD, and the Petitioner was agreeable to grant of LTA beyond the Long Stop Date, i.e., 24.08.2020. The Petitioner was requested to indicate the timelines to start power transfer requirements so that the same may be considered for allocation against the transmission margin to be available as indicated above. However, the Petitioner failed to provide the details of the date of commissioning of the project and the final consensus between the contracting parties on the timelines for extension of SCoD could not be reached for want of pending information/documentation from the Petitioner.

80. In view of the above, we are of the view that the sudden relinquishment of LTA and the invocation of a long stop date by the Petitioner appears to be an afterthought. Therefore, the termination of PPAs cannot be attributed to the delay in the operationalization of LTA, as PGCIL had made alternate arrangements for the evacuation of power. Accordingly, we hold that the alleged event, the non-availability of the transmission infrastructure required for the evacuation of power from the projects, is not covered as a force majeure event in terms of Article 11.3.1 of the PPAs.

81. The Issue is decided accordingly.

Issue 2:

Whether the Respondents should be directed to return the Performance Bank Guarantee bearing No. 007GM07181110001 amounting to Rs 50 Crores issued by Yes Bank Limited?

82. In view of our findings on Issue No.1, Issue No. 2 is decided against the Petitioner and in favour of the Respondents.

83. Accordingly, Petition No. 43/MP/2021 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

Sd/-
अरुण गोयल
सदस्य

Sd/-
जिष्णु बरुआ
अध्यक्ष