



नईदिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 117/MP/2021

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेशदिनांक/ Date of Order: 5th of December, 2023

IN THE MATTER OF:

Petition under Section 79(1)(f) read with Section 79(1)(k) of the Electricity Act, 2003 along with Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking recognition of Force Majeure events impacting the implementation of the project by the Petitioner and seeking appropriate reliefs with regard to extension of scheduled commissioning date and stay of any coercive measures including stay of encashment of performance bank guarantee.

AND IN THE MATTER OF:

Mytrah Vayu (Sabarmati) Private Limited
8001, Survey No. 109,
Q city, Nanakramguda, Gachibowli,
Hyderabad- 500032

...Petitioner

VERSUS

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

2. PTC India Limited

2ndFloor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi-110066

...Respondents

Parties Present: Shri Sanjay Sen, Sr. Advocate MVSPL
Ms. Pratiksha Chaturvedi, Advocate, MVSPL
Ms. Ruth Elwin, Advocate, MVSPL
Ms. Anushree Bardhan, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Surbhi Kapoor, Advocate, SECI
Ms. Srishti Khindaria, Advocate, SECI
Shri Aneesh Bajaj, Advocate, SECI

आदेश/ ORDER

The Petitioner, M/s Mytrah Vayu (Sabarmati) Private Limited, is a company engaged in the business of generating electricity through its 250 MW Wind Power Plant (WPP) (project) located at Manyachi, Ottapidaram Taluk, Thoothukkudi district, in the State of Tamil Nadu. M/s Mytrah Energy (India) Private Limited (MEIPL/parent company) has been declared as successful bidder against the Request for Selection (RfS) dated 28.10.2016, issued by SECI for selection of Wind Power Developers (WPDs) for the development of a cumulative capacity of 1000 megawatts in the windy States. PTC India Ltd. emerged as the successful bidder as Intermediary Trading Licensee, and SECI issued a Letter of Award to PTC India Ltd., on 26.08.2016. As per the RfS, the last date for submission of a bid for the project was 09.01.2017. The e-Reverse auction was conducted on 23.02.2017. SECI issued a Letter of Award (LOA) dated 05.04.2017 in favour of M/s Mytrah Energy (India) Private Limited (the parent company) for the development of WPPs generation and sale of wind power under the above scheme. M/s Mytrah Energy (India) Private Limited (the parent company) incorporated M/s Mytrah Vayu (Sabarmati) Private Limited (the Petitioner), a special purpose vehicle (SPV), which is a 100% subsidiary of M/s Mytrah Energy (India) Private Limited for the implementation of the wind power project. The Petitioner executed the Power Purchase Agreement (PPA) on 21.07.2017. Under the PPAs, the entire capacity of 250 MW was scheduled to be commissioned by 04.10.2018 (the Initial SCOD). However, the initial SCOD was subsequently revised by

the Solar Energy Corporation of India Limited vide its letter dated 19.11.2018, considering the delays on account of the Law and Order issue and the imposition of Section 144 of the CrPC. Accordingly, the initial SCOD of the Project was revised to 13.11.2018 (Revised SCOD). Out of the contracted capacity of 250 MW, the Petitioner commissioned 128.79 MW in the 1st Phase on 29.01.2019, 58.32 MW in the 2nd Phase on 15.04.2019 and 62.89 MW in the 3rd Phase on 10.05.2019. The Petitioner has alleged that the delay in achieving the revised SCoD is due to Force Majeure and that it cannot be held liable for the delay in the commissioning of the project. The Petitioner has filed the petition seeking recognition of force majeure events impacting the implementation of the project by the Petitioner and seeking appropriate reliefs with regard to the extension of SCoD and the stay of any coercive measures, including the stay of the encashment of the performance bank guarantee.

2. The Respondent No.1, Solar Energy Corporation of India Limited (SECI), is a Central Public Sector Undertaking under the administrative control of the Ministry of New and Renewable Energy (MNRE). SECI is the nodal agency for the implementation of the Jawaharlal Nehru National Solar Mission (NSM) for the development, promotion, and commercialization of solar energy technologies in the country and to achieve targets set out in the NSM.
3. The Respondent No.2, PTC India Ltd. (PTC), is a company registered under the Companies Act and is engaged in the business of purchasing all forms of electrical power (conventional and non-conventional) from Independent Power Purchasers etc., for sale to SEBs, Power Utilities, etc., in India and abroad. PTC executed Power Sale Agreements (PSA) for the sale of electricity in the States of Assam, Bihar, Jharkhand and Uttar Pradesh.
4. The Petitioner has made the following prayers:

Interim Prayers:

- a) *Issue ex-parte ad interim orders/directions to Respondent – Solar Energy Corporation of India to not act in any manner prejudicial to the rights and interest of the Petitioner, including, invoking and/or encashing the Performance Bank Guarantee no. LOBG802011700743 dated 04.05.2017 amounting to Rs. 33,02,87,667/- issued in its favour by the Petitioner;*

- b) *Issue ex-parte ad interim orders/directions to Respondent – Solar Energy Corporation of India to not take any coercive and/or precipitative actions till the final disposal of the instant petition; and /or*
- c) *Issue ex-parte ad interim orders/directions to Respondent – Solar Energy Corporation of India that in case it has issued any direction for invocation of BG, the same should be immediately revoked.*
- d) *Pass any such further/other orders that this Hon’ble Commission may deem fit in the interest of equity and justice.*

Main Prayers:

- a) *Hold and declare that the delay in achieving the Scheduled Commercial Operation Date was on account of Force Majeure events impacting Petitioner’s inability to implement the Project;*
- b) *Direct Solar Energy Corporation of India Limited to extend the Scheduled Commercial Operation Date for 6 months i.e. from 14.11.2018 till 10.05.2019;*
- c) *Direct Solar Energy Corporation of India Limited to return/release forthwith the Performance Bank Guarantee dated 04.05.2017 amounting to Rs. 33.02 Crores issued in its favour by Mytrah pursuant to the terms of the Letter of Intent and Power Purchase Agreement dated 21.07.2017;*
- d) *Grant exemption from filing duly affirmed affidavit in view of the lockdown due to the second wave of COVID-19 with an undertaking that the duly affirmed affidavit will be submitted once the regular functioning of the Courts resumes;*
- e) *Pass any such further/other orders that this Hon’ble Commission may deem fit in the interest of equity and justice.*

Brief Background:

5. The brief facts of the case are as under

Scheme	Setting up of 1000 MW Inter-State Transmission System (ISTS) Wind Power Projects
Request for Selection (RFS) was issued on	28.10.2016; 29.12.2016 (Amended RfS)
Bid submission date	09.01.2017
E-Reverse auction was conducted on	23.02.2017
Letter of Award for 250 MW was issued on	05.04.2017
Bank Guarantee Agreement (BG) was executed on	04.05.2017
Financial closure was achieved by	20.07.2017
PPA executed on	21.07.2017

Validity of BG till	05.10.2022 (vide amended BG dated 09.03.2022)
Tariff	Rs. 3.46/kWh
SCOD	04.10.2018 (as per PPA) 13.11.2018 (extended by SECI)
Actual commissioning date of the project	28.01.2019 (128.79 MW) 13.04.2019 (58.32 MW) 09.05.2019 (62.89 MW)
COD of the project	30.01.2019 (128.70 MW) 16.04.2019 (58.32 MW) 11.05.2019 (62.89 MW)
Tariff Adoption Order	03.12.2019
SECI's letter refusing to further extend SCoD on account of alleged force majeure events	27.05.2021
Status of BG	Vide RoP dated 06.10.202, SECI submitted that it will not pursue its letter issued for invocation of bank guarantee till the next date of hearing

Submissions of the Petitioner:

6. The Petitioner has submitted as under:

a) In order to invoke Liquidated Damages in terms of Article 4.6, two conditions are required to be met:

- (i) Failure on the part of the WPD to commission the project within 18 months from the date of issuance of LOA; and
- (ii) Ingredients of Article 4.4.1 are required to be met.

Both conditions for invoking Liquidated Damages in terms of Article 4.6 are not fulfilled in the said case. The COD took place on 29.01.2019, when 128.70 MW was operationalised out of a total of 250 MW. There is nothing on record to show that SECI has paid or is required to pay compensation to the Discoms towards non-meeting of their RPOs in terms of Article 4.4.1. The compensation under Article 4.4.1 is not applicable in events of Force Majeure affecting the supply of wind power by WPD in terms of Article 4.4.3 of the PPA. A delay of about 2.5 months from the revised and extended SCoD is squarely covered due to the occurrence of Force Majeure events.

b) The question of imposition of liquidated damages by way of encashment of PBG does not arise at this stage until the matter is adjudicated by this Commission. However, SECI, by invoking the PBG twice, i.e. on 31.08.2020 and 27.05.2021, acted completely in derogation of the provisions of the PPA.

- c) In response to SECI's letter dated 27.05.2021 (regarding the encashment of Performance Bank Guarantee of Rs 33,02,87,667), it is submitted that:
- (i) SECI has yet to receive formal communication from DRC in regard to the rejection of its appeal. Therefore, the actions of SECI imposing Liquidated Damages and taking steps for invoking Performance Bank Guarantee are premature and non-est in law.
 - (ii) As per the DRC Procedure Guidelines, while the application is pending before the DRC, SECI is barred by law from initiating any steps for the invoking Performance Bank Guarantee.
 - (iii) The Hon'ble High Court of Delhi, in its Order dated 24.12.2020 passed in W.P.(C) 11155/2020, clearly held that 'as per Clause 12 of the DRC Procedure Guidelines, the developer is financially protected till the decision is taken by DRC, and that would entail supplying a copy of the decision of DRC to the developer.
- d) SECI cannot proceed with the invocation of Bank Guarantee as the special equity is completely in favour of the Petitioner. The lack of approval of the extension of the SCoD of the project on account of force majeure events severally affected the construction progress and the bankability of the Project, which directly resulted in large cost overruns and further resulted in a consequential delay in receiving revenues, due to delays and a lack of timely funding from the lenders of the Petitioner.
- e) The Petitioner, diligently complied with its part of the obligations under the PPA and commissioned the Project, although with a 6-month delay for no fault attributable to it. Hence, the PBG is to be duly returned to the Petitioner.
- f) Despite the PPA being executed on 21.07.2017, PTC India Limited did not approach the Appropriate Commission seeking adoption of the tariff till 03.12.2019 i.e. 27 months after the execution of the PPAs. Although the obligation to have such tariff adopted was entirely on PTC India Limited, it was the responsibility of SECI, being the bidding agency, to ensure that the tariff was adopted in a timely manner. However, PTC/SECI miserably failed in discharging their obligations. SECI also failed to comply with its obligation to approach MNRE to seek an extension of SCOD for a period of more than 03 months as per RfS clause 3.17 and Clause 3.14 of the MNRE Guidelines.
- g) SECI was well aware of the fact that the jurisdiction to adopt a tariff for the power supplied by the Petitioner lay with this Commission. However, it did not act on it till 12.10.2019, until the jurisdiction of this Commission was clarified by the Uttar Pradesh

Electricity Regulatory Commission (UPERC) vide its Order dated 10.02.2019 in Petition No. 1481 of 2019. UPERC's direction not to schedule power till the adoption of tariffs put RE developers like the Petitioner in a precarious situation, which was detrimental to the development of projects and the revenue stream of the project. SECI failed to appreciate the position taken by CERC/SERC on the importance of tariff adoption prior to scheduling power from the generating project.

- h) In the absence of prompt adoption of tariffs and procurement of power by the respective Appropriate Commissions, there is uncertainty with respect to tariffs and contracted capacity under the PPA. As a direct consequence thereof, any prudent business utility will be constrained to undertake the implementation of the Project in full swing until such uncertainty regarding the tariff and contracted capacity under the PPA is removed. Such apprehensions have been recognized as valid to the extent that, in certain cases, the Appellate Tribunal for Electricity (APTEL) has observed and held that the effective date under the PPA shall be the date on which the tariff adoption process attains finality.
- i) Any of the events relied upon by the Petitioner that have caused a delay in the development of the Project do not fall under the list of excluded events, or the list of force majeure events.
- j) The Petitioner had issued the notice to SECI notifying SECI of the force majeure events. Even in a scenario assuming, though not admitting, that the Petitioner had failed to follow the process specified in Article 11.5.1 of the PPA, the Petitioner cannot be deprived of its right to seek substantive relief under the PPA for the impact of force majeure events.
- k) It is a settled principle of law that no one can take advantage of its own wrong. In the present facts and circumstances, SECI was required to adopt the tariff in a time-bound manner. The delay caused in achieving SCOD is due to the inactions of SECI and its consistent failure to fulfil its material obligations in a reasonable time. Such inactions, having a direct consequence on the project implementation timelines, caused delays in executing the Project.
- l) Due to the enactment of GST law, there has been a huge structural change in the prevailing tax regime that has mandated all the vendors/businesses to recalibrate or revamp their systems to align them in accordance with GST, which has caused a delay in the finalization of vendor agreements/purchase orders, which has significantly delayed the supply of materials and in turn further delayed the project for about 3 months. Accordingly, the vendors gave various representations stating that their regular business

transactions have been disrupted due to the implementation of GST, which has led to changes in the prices of materials/and the addition of overhead costs, due to variations in the newly implemented taxes, which are implicit in the initial phases after implementation.

- m) The Petitioner suffered a serious setback in the initial phases of the project execution in terms of a delay in the finalization of contracts as vendors were not sure of the levy of GST on respective goods, which had a cascading effect on the closure of project costs leading to a delay in the appraisal and funding of the project for about 2-3 months. The delay in achieving financial closure had a direct effect on the project timelines, which severely impacted the execution plan and forced execution schedules to be pushed to the monsoon and high wind season, which brought the construction work to a halt and delayed the execution activities and directly affected SCoD timelines. Despite multiple notices and requests made by the Petitioner to SECI regarding the issues and delay of project executions faced due to the implementation of GST and the request for an extension of SCoD, the Petitioner's concerns were neither acknowledged nor any relief granted by SECI. Hence, the project deserves an extension of 2 months to achieve the SCoD due to the impact of GST on project execution.
- n) The cyclone Ockhi hit the southernmost coast of Tamil Nadu on 30.11.2017, which seriously impacted the first stage of construction activities. The impact of the cyclone was intensified due to black cotton soil, which impeded the movement of vehicles/equipment and halted construction activities at the very early stage of the project for a long time after the Cyclone. Since the cyclone affected work during the initial construction phase itself, it had a profound and cascading impact on the rest of the project timelines. The impact of the cyclone not only held up the project activities but also delayed the commencement of work post the cyclone. Despite putting in the best efforts to kick start the normal construction operation, it took more than two (02) Months' time, i.e. 27.11.2017 to 31.01.2018, to restore normalcy.
- o) The entire foundation work, such as PCC, reinforcement, and casting, had been severely hampered. Further, the new excavation work, as per the schedule, had also been hampered due to heavy rainfall. The waterlogging that resulted from the rainfall left the roads unsuitable for heavy vehicle movement, which left the pathways inaccessible, furthering the delay. Due to intermittent rains, the pathways continued to be wet, making the site inaccessible to vehicles, material movements, and deployment tools.

- p) After facing several hurdles, the Petitioner deployed the best available tools and water-pumping equipment to carry out disaster management work. Despite best efforts to restore normalcy, the Petitioner faced a delay of 2 months to resume normal construction activities.
- q) The contention of SECI that any submission made by a senior officer can only be overruled by an officer of a senior/higher rank than him and not by a junior rank officer holds invalid as the District Collector is above the District Revenue Officer. A statement made by the District Collector about the severity of Cyclone Ockhi and its impact on the villages clearly states that there was a severe impact from Cyclone Ockhi. The submission made by the Revenue Officer is invalid as the same has been overruled by an officer of senior rank, as the District Collector is above the District Revenue Officer in rank.
- r) The Petitioner's project experienced unprecedented and heavy rainfall, which in turn led to unexpected floods from 23.09.2018 onwards in the project area spread over 13 villages in the Thootukudi district. Due to the unprecedented heavy rainfall, various project activities, such as civil, electrical, pathway development, and WTG installation activities, were severely impacted, and the entire execution work was hampered. The internal pathways, which play a crucial role during the construction of a wind power project for shifting/ transportation of materials, cranes and heavy vehicle movements, came to a standstill due to flooding and made the project site inaccessible.
- s) The impact of the heavy rainfall in the months of September 2018 and October 2018 lasted for several weeks, and the situation further worsened due to cyclone 'Gaja' in mid-November 2018. The cyclonic storm hit the northern coast of Tamil Nadu on 15.11.2018 and 16.11.2018, severely affecting the construction activities of Wind Power Projects, which further extended the timelines. The Petitioner took reasonable measures to ensure that work at the project site is resumed at the earliest and took appropriate steps to make it favourable for work. The time required to restore the site to be fit for resuming construction activities is always greater than the actual period of rain.
- t) Despite severe setbacks faced during the project execution, the Petitioner was able to erect 53 WTGs which were ready for commissioning.
- u) MEIPL (parent company of the Petitioner) made a specific request to PGCIL vide letter dated 09.08.2017 seeking the transfer of Grant of Connectivity and Long-term access from MEIPL to its 100% owned subsidiary, the Petitioner. However, PGCIL denied the same vide its letter dated 31.08.2017, citing that "*in the present CERC Regulations 2009,*

& Detailed procedure, there is no such provision for transfer of connectivity & Long Term Access”

- v) CERC acknowledged the submission of the Petitioner vide its order dated 29.09.2017 in Petition no. 145/MP/2017, which stated that 100% subsidiary companies should be allowed to utilize the connectivity granted to parent companies and that necessary undertakings may be obtained by the CTU. Six (6) months were lost at the very beginning of the project execution, due to which MEIPL could not progress with critical activities like finalization of land procurement, placing of orders for major equipment and balancing the plant. Consequently, the lender delayed the loan disbursement for the project leading to considerable delays in project execution timelines.
- w) CERC issued the detailed procedure only on 15.05.2018, and the Petitioner raised this issue before SECI on 26.03.2018 itself, which is much before the issuance of the detailed procedure on 15.05.2018. However, as a prudent developer, the Petitioner did not seek for the extension of SCoD till such time, as the Petitioner was under the apprehension that once the Regulatory Order is in place (on 29.09.2017), an amendment to Regulations will subsequently follow and accordingly, the Petitioner approached the lenders and equipment suppliers to move ahead with the project.
- x) From February 2018 to March 2018, the local population at the project site acting in concert and with ulterior motives, created serious Law and Order issues which forced the District Collector, Tuticorin, to advise the Tahsildar and administrative officer of Ottadipuram Taluk to stop the activities of all the contractors of all the wind generators implementing the projects. The letter dated 06.02.2018 to this effect was issued by the Tahsildar, whereafter all works pertaining to project execution were stalled between February 2018 and March 2018. On 21.05.2018, a violent protest started in Toothukkudi district demanding the Closure of the Sterlite Copper unit in Toothukkudi District due to which the District Collector of Toothukkudi imposed Section 144 of the CrPC in Toothukkudi on 23.05.2018. This order severely disrupted the ongoing project implementation activities for almost 3 weeks from 15.05.2018 to 04.06.2018. SECI, vide its letter dated 19.11.2018, granted an extension of 39 days on account of Law and Order issue and imposition of Section 144 of the Cr.P.C. against the Petitioner's request for Law and Order issue of 30 days and the imposition of Section 144 of the Cr.P.C. issue of 21 days.

- y) The official communication with regard to the existing GIS module along with financial dimensions was provided by PGCIL through mail dated 28.02.2018, which was a delay on their part. The Petitioner immediately submitted the interface drawing for approval on 26.03.2018. After the submission of the above application, the Petitioner was asked to revise the drawings multiple times. PGCIL approved the drawing under CAT-II on 07.05.2018, and the final approval for manufacturing clearance was provided on 15.05.2018 for the interface part. PGCIL took almost six (6) months to grant manufacturing clearance, and it is thereby understood that precious time of six (6) months lapsed due to delay by PGCIL, which has affected the entire Bay construction process and subsequently affected the SCoD timelines. Approval for GIS LCC drawings was not received as on 10.05.2018, and CRP drawings could be submitted for approval only after obtaining LCC drawing approval, which resulted in further delay of the entire process. LCC wiring drawing approval in Cat-I was provided on 18.06.2018 but again, the same approved drawing was revised as per PGCIL requirement, and final approval was provided on 13.07.2018.
- z) The Gas SLD drawing was submitted to PGCIL on 28.12.2017 and thereafter was revised three times with final approval in Cat-I provided on 24.04.2018. Again, the Petitioner was asked to revise the approved gas SLD and final approval in Cat-I was provided again on 04.06.2018; hence, there was a lapse of about five (5) months in getting approved drawings. This had a major impact on the project commissioning timelines. The Bay SLD and the Bay Layout were approved with delay by PGCIL causing a cascading effect on the project execution that impacted the SCOD timelines. Equipment like metering CT drawing approval was delayed for about a month, and the final approval for the drawing was received only on 17.07.2018. Also, the metering CVT drawing approval was further delayed by three (3) months and was finally approved on 03.09.2018. The Control and relay Panel drawing approvals were delayed by over six (6) months, and the final approval was received only on 13.07.2018.
- aa) The Petitioner was not in a position to pay a consulting fee before getting certainty on the implementation of the Project. Therefore, it was only after the issuance of the LOA from SECI on 05.04.2017 that the Petitioner paid the consulting fee. The delay of 6 months on behalf of PGCIL for granting clearances has occurred post the payment of consulting services, which has no bearing on the time gap between the grant of connectivity and the payment of consulting services.

bb) Due to the nationwide Chakkajam i.e. strike by truckers from 20.07.2018 to 27.07.2018, 93 lakh trucks and other goods vehicles stayed off the roads across the country, impacting the project activities at the site, which was timely brought to SECI's notice vide communication dated 30.07.2018. Although, the strike continued for one week, the aftermath impact continued for 15 days to resume the duties by truckers who went on strike. The nationwide strike was not within the reasonable control of the Petitioner, as contended by SECI, and this strike was not at the project site but nationwide therefore, Force Majeure exclusion as per PPA is not applicable.

Submissions on behalf of SECI:

7. SECI has submitted as under:

- a) There were delays on the part of the Petitioner in fulfilling the obligations with respect to the construction and development of the project as well as in achieving the SCoD in terms of the provisions of the PPAs and the bidding documents.
- b) SECI has a right to encash the Performance Bank Guarantee towards payment of the liquidated damages. In terms of the bidding documents and PPAs, the Liquidated Damages are payable to SECI, and the amount is to be credited to a separate Fund maintained by SECI under the guidance of the Ministry of New and Renewable Energy.
- c) The PPAs provide for limited and restricted Force Majeure events in Article 11. There is no provision in the PPAs for '*events akin to force majeure*'.
- d) The Petitioner is not entitled to any relief in regard to the payment of liquidated damages for the delayed commissioning of the wind power project. SECI has suffered a legal injury/loss entitling SECI to the recovery of liquidated damages. The non-deposit of the liquidated damages in the fund is a legal injury in view of the settled principles of law. Article 4.5 of the PPAs dealing with Liquidated Damages for the delay in the commissioning of the project does not refer to Article 4.4 of the PPAs as alleged by the Petitioner.
- e) The Petitioner has mixed up the issues of compensation payable for the shortfall in generation during the operation period, which is to the benefit of the buying utilities in terms of Article 4.4 of the PPAs and the liquidated damages payable for the delay in the commissioning in terms of Article 4.6 of the PPAs, which is to the account of the Payment Security Mechanism Fund maintained by SECI as per the Central Government's directions contained in the Guidelines.

- f) The Bidding documents or the PPA do not contain any provision restricting SECI from encashing the Performance Bank Guarantee towards Liquidated Damages in the event of a delay in commissioning by the Petitioner.
- g) In the Petition and interim application filed before APTEL, Petitioner had concealed the following material facts:
- i. *The Petitioner had not taken any steps for filing the Application before the Dispute Resolution Committee constituted by MNRE, Government of India and that it had no intention to do so;*
The Bank Guarantee which was required to be extended till 05.04.2021 was sought to be maintained only till 05.10.2020 so as to allow the same to be expired in a short period; and
 - ii. *The letters dated 01.09.2020, written by the Petitioners seeking reduction in the Bank Guarantee and the letter dated 08.09.2020 written by SECI seeking extension of the Bank Guarantee for the reduced amount till 05.04.2021 were not placed on record and thereby purporting to give an impression that SECI is immediately invoking the Bank Guarantee, after having agreed to the contrary in the letter dated 02.09.2020.*
- h) After a delay of more than four (4) months from the stipulated time limit for filing a case before the Dispute Resolution Committee (DRC) against the decision of SECI, on 04.02.2021, the Petitioner filed an Application before the Dispute Resolution Committee. The Petitioner has no case, much less a prima facie case, to seek any restraint on the encashment of the Performance Bank Guarantee by SECI.
- i) The Petitioner has no cause or justification for seeking restraint on encashment of the Bank Guarantee, in law as well as in the particular facts and circumstance of the case on account of the petitioner's conduct. The Petitioner is in deliberate breach of the fundamental obligations under the PPAs regarding the commencement of the supply of power by the scheduled commissioning date. The balance of convenience as per the settled law on the Bank Guarantee is entirely against the Petitioner and is in favour of SECI.
- j) The Petitioner was a party to the proceedings before the Commission in the above Petition No.340/AT/2019. At no point in time did the Petitioner raise any issue in the said proceedings until the adoption order was made that there had been any impact on account of the alleged delay as claimed in the Petition filed.
- k) The reliance placed by the Petitioner on the Guidelines dated 08.12.2017 is misplaced as the relevant Guidelines applicable for the present case are the Guidelines dated 22.10.2016 notified by MNRE, Government of India. There is no such provision in the

Guidelines dated 22.10.2016 notified by the Government of India similar to Clause 12 or particularly Clause 12.4 of the Guidelines dated 08.12.2017 as referred to by the Petitioner. The Petitioner has misquoted Clause 10 of the Solar Guidelines, which has no application in the present case.

- l) The Petitioner is also wrong in proceeding on the basis that the order for adoption of the tariff is a condition precedent for the Petitioner to implement the obligations under the PPA. The PPA executed between PTC and the Petitioner does not provide for any such condition precedent of Adoption of Tariff for implementation of the PPA. The relief admissible to the Petitioner, if any, has to be considered only within the confines of the PPA. No issue of delay in tariff adoption was raised at the stage of Financial Closure or commissioning. The said issue is being raised as an afterthought, as mentioned herein.
- m) The reliance placed by the Petitioner on the Ayana Ananthapuramu decision dated 27.02.2020 of the APTEL in Appeal No. 368 of 2019 and Batch is misplaced as the PPA provisions in that case are different from the PPAs dated 21.07.2017 in the present case. In the PPA in the Ayana Ananthapuramu case, there was a specific pre-condition for the adoption of a tariff within the stipulated time for enforcement of obligations under the PPA in the above case as against the PPA in the present case.
- n) PTC and UPPCL had taken steps for the approval of the procurement of power and adoption of a tariff PPA/PSA, and the Petitioner was fully aware of the steps taken and had participated in the proceedings before the Commission. The allegations raised by the Petitioner of non-scheduling of power by UPPCL are irrelevant for considering the issue of delay in commissioning of the power project, which occurred prior to that i.e. by 19.05.2019.
- o) Clause 3.14 of the Guidelines dated 22.10.2016 provides ‘... *SECI after having satisfied with documentary evidences produced by the WPD for the purpose, can extend....*’ as a pre-condition for the grant of an extension of time up to three (3) months by SECI as well as for approaching MNRE for any extension beyond the period of three (3) months. The said pre-condition was not fulfilled in the present case as the Petitioner failed to furnish documentary evidence to the satisfaction of SECI in support of the claim of force majeure.
- p) The Scheduled Financial Closure was 05.01.2018, and SCoD was 13.11.2018. As the period between the Financial Closure and SCoD of the Project does not fall within the period specified by MNRE i.e. 01.07.2017 to 31.08.2017 in Office Memorandum dated

20.06.2018, accordingly, the Petitioner is not eligible for obtaining an extension on this account.

- q) The Petitioner raised the issue of extension of time on account of GST (effective 01.07.2017), for the first time, vide letter dated 20.06.2018. The same was raised after achieving the Financial Closure. The Petitioner did not furnish any Notice in terms of Article 11.5.2 of the PPA dealing with Notification of Force Majeure.
- r) The Force Majeure Notice dated 13.12.2017 given by the Petitioner with regard to the occurrence of Cyclonic Storm Ockhi on 30.11.2017 does not satisfy the criterion under Article 11.5 of the PPAs dated 21.07.2017. The documents submitted by the Petitioner based on certification from the Village Administrative Officer were not accepted in view of the clarification given by the District Revenue Officer, Office of District Administration, which is an officer having a senior rank over the village administrative officer. As a rule of settled Government functioning, any submission made by a senior officer can only be overruled by an officer of a senior/higher rank than him and not by a junior rank officer. Hence, the claim of the Petitioner for an extension of time on account of Cyclone Ockhi is not sustainable.
- s) The Petitioner has wrongly alleged that after the passage of more than 2 years from the date of the first representation of the Petitioner, SECI, vide its letter dated 31.08.2020, rejected the request for an extension of SCoD without giving any reason. SECI had already communicated an extension of 39 days by its letter dated 19.11.2018 after having examined certain issues alleged at that time, namely Cyclonic Storm Ockhi, Law and Order issues, Unusual Weather Conditions at the site, Imposition of Section 144 of Cr.P.C., delay in getting clearance from Powergrid. Based on the documents received and after examination of the issues alleged by the Petitioner for extension of time, SECI decided that no further extension of the scheduled commissioning date could be granted to the Petitioner. Accordingly, a letter dated 31.08.2020 was issued by SECI to the Petitioner stating that the SCoD for the Project stands as 13.11.2018.
- t) The Petitioner did not give a Force Majeure Notice for any such rainfall as per Article 11.5 of the PPAs. The letter dated 18.12.2018 from the Petitioner regarding Cyclone Gaja does not satisfy the criterion of Force Majeure Notice within the scope of Article 11.5 of the PPAs.

- u) The documents submitted by the Petitioner based on certification from the Village Administrative Officer were not accepted in view of the clarification given by the Office of District Administration.
- v) The Standing Committee of SECI found the claim of the Petitioner for extension of time on account of alleged force majeure events of heavy rainfall and cyclone Gaja inadmissible for the following reasons:
- i. *The documents submitted by the Petitioner did not provide sufficient justification for consideration of the extension as issues such as heavy rainfall are part of project management activities.*
 - ii. *The erection and commissioning of Wind Mills requires multiple activities and certain weather conditions would only affect certain activities. The Petitioner had erected approximately 53 numbers of Wind Turbine Generators (WTGs) which were ready for commissioning. There is therefore no justification for seeking time extension due to the unusual weather condition at site.*
 - iii. *The copy of the IMD report provided by the Petitioner only showed rainfall on few days which is a regular phenomenon in Project Implementation Cycle.*
- w) Since the project location is near Thoothukudittown, there was no movement of vehicles or workers which resulted in a stoppage of construction and erection activities. Therefore, a time extension of 21 days from 15.05.2018 to 04.06.2018 was agreed to under this head. SECI has granted full extension, i.e. of 21 days as claimed by the Petitioner on account of the imposition of Section 144 of the Cr.P.C. Further, with respect to the Law and Order issue, SECI has granted an extension of 18 days strictly as per the Tahsildar (Government) order. The Petitioner is not entitled to any further extension of time.
- x) The date of issuance of the order by the Central Commission i.e. 29.09.2017 in Petition No.145/MP/2017 filed by Powergrid, is well before the date of compliance of Financial Closure, i.e. 05.01.2018. As there is no delay in the completion of the Financial Closure activity, accordingly, the Petitioner is not entitled to an extension under the aforesaid head.
- y) In terms of the bidding documents and the PPAs, the responsibility of getting Transmission Connectivity to the transmission system owned by the STU/CTU was entirely of the Petitioner and the same was at the cost and risk of the Petitioner. The transmission of power up to the point of interconnection where metering is done for energy accounting, is within the scope of the petitioner's responsibility.
- z) The Petitioner did not give a Force Majeure Notice for this issue as per Article 11.5 of the PPAs.

- aa) Powergrid has clearly stated that the delay is solely on account of the Petitioner as the Petitioner had not taken up various activities in time, despite the 27 months' delay in the initial stages. Accordingly, the claim of the Petitioner attributing the delay to the Powergrid is not acceptable. All approvals, permits and clearances required for the setting up of the Project (including connectivity to the transmission system) were to be obtained by the Petitioner and the same were entirely within the scope and responsibility of the Petitioner. The terminal bays at the Tuticorin-II sub-station were commissioned on 17.11.2018, i.e., well before the first phase of commissioning by the petitioner on 28.01.2019.
- bb) The documents provided by the Petitioner do not provide any evidence of the impact of the strike on material delivery or delay in execution of work, and accordingly the extension of time has not been given by SECI for the aforesaid head.
- cc) The events alleged by the Petitioner do not fall under any of the sub-clauses specifically dealt with in Article 11.3.1 of the PPA. The contractual scheme does not recognize any event "*akin to force majeure*" or "*in the nature of force majeure*" as being sought by the Petitioner. Force Majeure is a contractual provision expressly incorporated in the PPA and has to be considered only on the terms contained in the contract.

Hearing dated 25.06.2021

8. During the hearing held on 25.06.2021, Learned senior counsel for the Petitioner requested that SECI be directed not to take any coercive action against the Petitioner till the next date of hearing. In response, the learned senior counsel for the Respondent, SECI, submitted that SECI will not pursue its letter issued for invocation of bank guarantee till the next date of hearing. The submission made by the learned senior counsel for SECI was taken on record, and accordingly, interim protection was given to the Petitioner as desired through interim prayers.

Analysis and Decision:

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

11. **Issue No.1:** *Whether the Petitioner was prevented by unforeseen and uncontrollable events/factors, and whether the same constitute Force Majeure under Article 11 of the Power Purchase Agreement dated 21.07.2017 and Whether the Scheduled Commissioning Date needs to be extended by six (6) months i.e. from 14.11.2018 till 10.05.2019? and the another issue juxtaposed to it is , whether the inordinate delay caused by the respondents in having the tariff adopted could be ignored altogether and whether there is any case for grant of relief to the Petitioner on this account?*

Issue No.2: *Whether SECI's letter dated 27.05.2021 regarding the encashment of the Petitioner's Performance Bank Guarantee amounting to Rs. 33,02,87,667 be set aside? And Whether SECI should be directed to release the Performance Bank Guarantee in favour of the Petitioner?*

12. Now we will discuss these issues.

Issue No.1:

13. The Petitioner has submitted that there was a delay in achieving the commissioning of the project till 13.11.2018 (revised SCoD) due to Force Majeure events. Therefore, the SCoD may be extended from 14.11.2018 to 10.05.2019. *Per contra*, SECI has submitted that the events alleged by the Petitioner do not fall under Article 11 of the PPA. The contractual scheme does not recognize any event “*akin to force majeure*” or “*in the nature of force majeure*” as being sought by the Petitioner. Force Majeure is a contractual provision expressly incorporated in the PPA and has to be considered only in terms of the contract. SECI has further submitted that it is entitled to encash the performance bank guarantee.
14. We observe that the Petitioner, M/s Mytrah Vayu (Sabarmati) Private Limited is an SPV of M/s Mytrah Energy (India) Private Limited (MEIPL). The Petitioner has set up a 250 MW Wind Power Plant (WPP) located in Tamil Nadu. The Petitioner executed PPA on 21.07.2017. Under the PPA, the entire capacity of 250 MW was scheduled to be commissioned by 04.10.2018 (the initial SCoD). However, the Initial SCoD was subsequently revised by SECI vide its letter dated 19.11.2018 considering the delays on account of the Law and Order Issue and Imposition of

Section 144 of the CrPC. Accordingly, the Initial SCoD of the Project was revised to 13.11.2018 (Revised SCoD). The relevant commissioning timelines is as under:

Capacity	SCoD	Extended SCoD	Capacity	Commissioning Date	Actual COD	Delay (in days)
250 MW	04.10.2018	13.11.2018	128.79 MW	28.01.2019	30.01.2019	78 days
			58.32 MW	13.04.2019	16.04.2019	154 days
			62.89 MW	09.05.2019	11.05.2019	177 days

15. The Petitioner has sought an extension of SCoD due to the following Force Majeure events:

	Force Majeure event	Period of Force Majeure event	Requested time extension for SCOD
a.	Delay in obtaining Adoption of Tariff Order by SECI/PTC/Procurers.	21.07.2017 to 03.12.2019	27 Months
b.	Implementation of GST	01.07.2017 to 30.09.2017	03 Months
c.	Cyclonic Storm Ockhi	30.11.2017 to 31.01.2018	02 Months
d.	Issue of use of connectivity of Parent company by SPV	05.04.2017 to 29.09.2017	06 Months
e.	Delay in clearance from PGCIL	28.12.2017 to 15.05.2018	05 Months
f.	Nation-wide Trucker's Strike	20.07.2018 to 27.07.2018	15 days
g.	Impact of Heavy rains in TN	23.09.2018 to 20.11.2018	04 Months
h.	Gaja Cyclone	15.11.2018 to 16.11.2018	03 Months

16. We observe that the relevant provisions of the PPA stipulate as under:

4.5 Extensions of Time

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

a) any Buyer Event of Default; or

b) Force Majeure Events affecting Buyer/Discom, 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 Buyer/Discom through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the WPD or Buyer Discom, or till such time such Event of Default is rectified by Buyer.

4.5.2 Void.

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

4.5.4 If the Parties have not agreed, within thirty (30) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 16.

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

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

4.6 Liquidated Damages for delay in commencement of supply of power to Buyer

4.6.1 The selected projects shall be commissioned within 18 months from date of issuance of Letter of Award. A duly constituted Committee will physically inspect and certify successful commissioning of the project. In case of failure to achieve this milestone SECI shall encash the Performance Bank Guarantee (PBG) in the following manner:

Delay upto six (6) months Buyer will encash total Performance Bank Guarantee on per day basis and proportionate to the balance Capacity not commissioned.

4.6.2 In case the commissioning of the project is delayed over Six (6) months, the tariff discovered after e-Reverse Auction shall be reduced at the rate of 0.50 paise/ kWh per day of delay for the delay in such remaining capacity which is not commissioned. The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and reduction in the fixed tariff shall be limited to 27 months from the date of LoA. In case, the Commissioning of the Project is delayed beyond 27 months from the date of LoA, the PPA capacity shall stand reduced / amended to the Project Capacity Commissioned, provided that the commissioned capacity is not below 50 MW or 50% of the allocated Project Capacity, whichever is higher, and the PPA for the balance Capacity will stand terminated and shall be reduced from the selected Project Capacity.

4.6.3 However, if as a consequence of delay in commissioning, the Applicable Tariff changes, that part of the capacity of the Project for which the commissioning has been delayed shall be paid at the tariff as per Article 9.2 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;

b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

c) radio active contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or

has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party.

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

11.4 Force Majeure Exclusions

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

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

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...*

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

a. Re: Inordinate delay seeking Tariff Adoption approval by procurers and buyers:

18. The Petitioner has alleged that the inordinate delay in tariff adoption by the Appropriate Commission has caused contractual uncertainty making it impossible to secure funds in time to execute the project within timelines. The Petitioner has further submitted that as a consequence of the long time taken by PTC/UPPCL to file the adoption of the tariff petition before the Appropriate Commission, UPERC directed not to schedule power from the Petitioner's project till the adoption order is secured by UPPCL, which has put the entire RE Industry in a precarious situation. *Per Contra*, SECI has submitted that the PPA does not provide for the adoption of tariffs as a condition precedent for implementing the PPA. Further, the Petitioner did not raise the instant issue till 20.11.2019, and hence the same is an afterthought.

19. Clause 3.16 of the Amended RfS dated 23.12.2016 states as under:

"Financial Closure or Project Financing Arrangements:

The Project Developer shall report tie-up of Financing Arrangements for the projects within 9 months from the date of issue of LoA, in the form of loan sanction letter for debt component and Board Resolution for equity contribution. At this stage, the Project Developer would furnish within the aforesaid period the necessary documents to establish that the required land for project development is in clear possession of the Project Developer. The WPD shall be required to submit the transmission connectivity agreement with the ISTS and also with InSTS, if applicable.

In case of delay in achieving above condition as may be applicable, SECI shall encash Performance Bank Guarantees and shall remove the project from the list of the selected projects, unless the delay is on account of Force Majeure.”

20. From the above, we observe that clause 3.16 of the amended RfS dated 23.12.2016 may not *strictu sensu* stipulate the adoption of tariff by this Commission or approval of a PSA by the State Commission as a condition for the fulfilment of Financial Closure by the Petitioner. As per RfS, the scheduled financial closure date was 05.01.2018 i.e. 9 months from the date of Letter of Award (05.04.2017). The Petitioner has admitted on records that the financial closure of the project was achieved on 20.09.2017. Further, we note that the delay in the adoption of the tariff may not specifically figure as one of the Force Majeure events/circumstances under Article 11.3.1 of the PPA. However, the question that we tend to deal with is whether the inordinate delay caused by the respondents in having the tariff adopted could be ignored altogether and whether there is any case for a grant of relief to the Petitioner on this account?
21. We observe that UPERC, vide Order dated 26.09.2019, in *Petition No.1481 of 2019 filed by UP Power Corporation Ltd.*, has held as under:

The matter came up for hearing today.

....

Further, the SLDC has been scheduling the power in the instant matter without approval of the power procurement and PSA by the competent body or appropriate Commission. Upon enquiry by the Commission regarding the payment made by the Petitioner to the intermediary, PTC, legal counsel of the Petitioner submitted that no payment was made by UPPCL to PTC. It was also observed that Energy Watchdog order is dated 11th April'17, yet the Petition has been filed before this Commission for tariff adoption by UPPCL, the Petitioner.

The Commission expressed its displeasure on the conduct of the Petitioner and UP SLDC, who have shown little regard for rule/law and acted upon in irregular and illegal manner in contravention to the provisions of Regulations and Electricity Act'03, by buying power and scheduling power respectively without approval of the appropriate Commission.

The Commission directed the following:

1. ***Notice be issued to UPPCL and SLDC asking them to explain why penal***

proceedings should not be initiated against them for buying and scheduling of power without approval of the power Procurement and PSA which are the subject matter of the instant Petition.

2. *Petitioner to file supplementary affidavit with a week after fixing responsibility and action taken on responsible person for delay of 2 years in filing this petition.*
3. *PTC legal counsel to submit cases of tariff adoption by CERC referred during the hearing.*

22. Further, UPERC vide order dated 17.02.2020 in the same Petition viz. in *Petition No.1481 of 2019 filed by UP Power Corporation Ltd.*, has held as under:

The Commission is aware of the Renewable Power Obligation of the Petitioner All stakeholders viz; the Procurer, Supplier, and the Intermediary must abide by legal and regulatory framework while complying to RPO obligation. The Petitioner must timely file such Petitions so that PSA is approved well in time before scheduled commissioning of the Projects...

23. From the above we observe that UPPCL delayed in filing the adoption of the tariff of the PSA and UPERC had issued notice to UPPCL and SLDC asking them to explain why penal proceedings should not be initiated against them for buying and scheduling power without approval of the power procurement and PSA which are the subject matter of the instant Petition.

24. In the instant petition, we observe that the Petitioner was issued LOA for 250 MW on 05.04.2017, and the PPA was executed on 21.07.2017. As per the PPA, the SCoD of project was 04.10.2018, which was subsequently extended to 13.11.2018. The Petitioner commissioned 128.79 MW, 58.32 MW, and 62.89 MW on 30.01.2019, 16.04.2019 and 11.05.2019, respectively. The Respondents have submitted that there was a delay of 78 days (128.79 MW), 154 days (58.32 MW) and 177 days (62.89 MW) in commissioning of the project by the Petitioner. We note that the PTC filed 340/AT/2019 for Adoption of Tariff of PPA only on 15.10.2019 i.e. much after the Petitioner achieved full Commissioning (250 MW) on 11.05.2019. The Tariff was finally adopted by the Commission vide Order dated 03.12.2019. We note that the Petitioner could not have sold the power and scheduled power to the beneficiaries without approval of the tariff by the Commission. We observe that the object of the PPA was that the power was to be routed through the PTC, a signatory of the PPA through the nodal agency SECI. Therefore, as a nodal agency, it was incumbent upon the SECI to initiate timely action for the adoption of tariff by the appropriate Commission well before the final SCoD. Timely PPA adoption is very critical for power projects. Had the Respondents taken diligent and prompt action as expected of it, the adoption of Tariff/PPA/PSA could have been completed in time, and the resultant delay in the

adoption of the tariff could have been avoided, thereby giving the Petitioner the opportunity of scheduling/selling power as per PPA. The Petitioner cannot be held wholly responsible when the Respondents have not even cared to file the petition for the adoption of the tariff even after commissioning of the entire project on 11.05.2019. The Petitioner could not have scheduled its power from the date of commissioning till the adoption of the tariff by the Commission. We observe that even if the words condition-precedent are not exclusively written in the PPA, it was agreed upon by the parties, and it was the foundation of the agreement amongst the parties that PTC, the signatory, will be taking power and the entire arrangement such as adoption of tariff was to be managed by the SECI.

25. Section 54, of the Indian Contract Act, 1872 reads as:

When a contract Consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

26. In a similarly situated case titled as *Suraj Kana Pharmaceuticals Vs. Bihar State Financial Corporation AIR 2009 at 1991-92*, it was held as under:

4. Petitioner and his partners, thereafter, invested about Rs. 9 lacs from their own pocket and, thereafter, tried to persuade the Corporation to disburse the rest of the sanctioned amount. Regrettably, even though petitioner and his partners had undertaken the project on the assurance of the sanctioned loan and invested about Rs. 9 lacs from their pockets as well, the Corporation now informed the petitioner on 17-6-1993 that due to financial constraint through which the Corporation was going, the Corporation was not in a position to disburse the balance sanctioned loan and petitioner was free to approach any other commercial bank. This left the petitioner high and dry. It had no funds of its own to complete the industrial project. Midway, the Corporation backed out and the project was never completed. The commercial Banks, apart from being uneconomic, were not ready to advance any money on such industries in Bihar at that time. In paragraph-10 of the counter-affidavit, these basic facts have not been disputed by the Corporation which goes to the extent of saying that petitioner was ultimately advised to refund the loan by selling the assets as created. Nowhere Corporation has taken stand that it was ready to abide by its promise to disburse the full sanctioned amount as per the project approval or that the disbursement was stopped because of any default on part of the unit or its partners.

5. Having abandoned and left the petitioner as an orphan child, now the Corporation wants its pound of flesh from the petitioner. As against the partial disbursement of Rs. 4.07 lacs, it now demands a refund/repayment of Rs. 60 lacs. This is what shocks this Court. First, the Corporation abandons the project, resiles from its promise and turns the situation upside down and now puts the petitioner on the block. To my mind, there can be nothing more arbitrary than this.

6. In this connection, I cannot improve upon what the Apex Court had to say in the case of *Gujarat State Financial Corporation v. Lotus Hotels Pvt. Ltd.* since reported in (1983) 3 SCC 379 (AIR 1983 SC 848), paragraph-3 of which is quoted hereunder:

“How a public sector Corporation set up to give impetus to industrial development of the country, a promise of planned economy aimed at job expansion to liquidate the curse of unemployment, and larger production helping price stabilization acts in a manner contrary to its raison d'etre and becomes counter-productive is aptly illustrated by the facts of this case.”

...

...

10. Under the Laws of Contract, there is a principle known as **“fundamental breach”**. A fundamental breach is a breach by either party of a term which was fundamental to the contract. The contract being based on the premise of the fundamental, it is akin to foundation of the contract. Here the entire foundation of contract as between the petitioner and the Corporation was that the Corporation, on appraisal of the project report by its experts, was satisfied that to make the petitioner unit, viable, it needed certain financial assistance and once the unit was viably established, it had a viable financial resource to repay the debt incurred. Thus, the fundamental basis of the contract was the fulfillment of obligation on part of the Corporation in disbursing the full amount of sanctioned loan in absence whereof nothing could move forward for the implementation of the contract the later part of which was obligation to repay. This fundamental premise, on which based was the contract, was breached by the Corporation itself. Once this fundamental basis is breached by the Corporation itself, admittedly not because of any default on part of the petitioner but solely because of inability on part of the Corporation to perform its part of the contract, the contracting parties are relieved of their obligations which are reciprocal because of the fundamental breach. One party, who has committed the fundamental breach, cannot enforce and ask the other party to perform his part of the obligation without fulfilling its own obligations. What best the Corporation can now do is to ask the petitioner to repay the principal amount advanced to it because if Corporation asked for interest and penalties (penal interest) which are not small by any means and are compounded then the petitioner has a right to sue the Corporation for damages in equal terms.

11. This Court is, thus, of the view that permitting the Corporation to enforce its statutory right to recover its dues based on the fundamental premise which the Corporation itself breached would be unfair, unjust, arbitrary, capricious and illegal and, thus, clearly violative not only of the contractual obligations binding the parties but would be equally violative of Article 14 of the Constitution of India. The Corporation was set up with the object of encouraging industrial growth and encouraging new entrepreneurs in the State. It miserably failed to do the same. Now it cannot turn around and say that I defaulted in my obligation but I will bind you to your obligations. Thus, the action of the Corporation in trying to auction the properties of petitioner is wholly arbitrary and cannot be sustained by this Court.

27. From the above, we observe that, under the Laws of Contract, there is a principle known as a fundamental breach. A fundamental breach is a breach by either party of a term which was fundamental to the contract. The contract is based on the premise of the fundamental. It is akin

to the foundation of the contract between the Petitioner and the other party. The fundamental basis of the contract is the fulfilment of obligation on the part of the parties.

28. In the cited case, it was observed by the Hon'ble Court that the Corporation itself was in breach of the fundamental contractual obligation and accordingly permitting the Corporation to enforce its statutory right to recover its dues based on the fundamental premise which the Corporation itself breached, would be not only unfair, unjust, arbitrary, capricious and illegal but also be violative of Article 14 of the Constitution of India. It was observed that the Corporation was set up with the object of encouraging industrial growth and encouraging new entrepreneurs in the State, and it miserably failed to do the same. Now the Corporation cannot turn around and say that though it defaulted in its obligation the Corporation can bind the other party to its obligation.
29. In the instant case, due to a delay on the part of the SECI, the nodal agency in having the tariff adopted, the Petitioner could not schedule its power for months together. Hence, it was itself in breach of the agreement qua the PTC.
30. We observe that the Appellate Tribunal for Electricity in *Ayana Ananthapuramu Solar Private Limited vs. Andhra Pradesh Electricity Regulatory Commission & Ors., Appeal No. 368 of 2019* (Judgment dated 27.02.2020), has held as under:

*“68. AP Discoms have voluntarily agreed to pay the applicable tariff in terms of Article 1 of PSA i.e., tariff at Rs.2.72 per kWh for payment by NTPC/SECI to SPD in terms of PPA and in addition to that, a trading margin of Rs.0.07 per unit is payable by AP Discoms to NTPC/SECI. This trading margin was described as income of NTPC/SECI. Now is it open to AP Discoms to back out or resile from their undertaking under PSA? Are they permitted to approbate and re-approbate? **On fact, once a party enters into an agreement with the other party with clear understanding of terms and conditions, they cannot take advantage of some terms and conditions of the same contract and challenge or retract/repudiate other terms and conditions of the same contract. This is well settled principle. For this we rely upon (1981) 1 SCC 537 in the case of M/s New New Bihar Biri Leaves Co. & Ors. v. State of Bihar & Ors., Para 48. Therefore, AP Discoms cannot selectively rely upon some terms of PSA i.e., the tariff they are agreed to pay at Rs.2.72 per kWh but refusing to pay trading margin of Rs. 0.07 per kWh along with the tariff in terms of Article 1 of PSA.**”*

95. In terms of the signing of PPA, tariff price was fixed at Rs. 6.86, 6.89 and 6.97 respectively so far as the three Appellants and within 18 months from effective date, the project has to be completed. According to the Appellant, if we take the date of signing of the PPA by the parties, the question would be when does the effective date come into picture. The effective date to implement the terms of contract between the parties would be the day when PPA is approved. In the absence of approval of the PPA, the signed

PPA only becomes agreed terms between the parties, but it has to get the seal of approval by the Respondent Commission to act on the basis of the PPA by both the parties. "

31. In view of the above, we are of the view that the Respondents by their own conduct, delayed the adoption of tariff qua the project. We are also of the view that when the contracting parties enter into a PPA, there should be a clear understanding of the terms and conditions. Any party cannot take advantage of some terms and conditions of the same contract and challenge, retract or repudiate other terms and conditions of the same contract. In the instant case, the SECI/PTC, on the one hand, has delayed the process of adoption of the tariff, resulting in a delay in the adoption of the tariff by the Commission more than six months after the COD of the entire project . On the other hand, SECI is levying a penalty for the delay in commissioning of the project beyond SCoD. With timely PPA adoption being very critical for power projects, the Respondents should have acted diligently. While the SPDs are required to commission the project by the SCoD; at the same time, the Respondents are also duty-bound to get the tariff adopted before the SCOD. Ostensibly, the adoption of a tariff before the SCoD gives confidence to the contracting parties about the future of the project. In the instant case, the extended SCoD was 13.11.2018. While the Petitioner commissioned the full 250 MW on 11.05.2019 (though after a delay of 117 days), the Respondent got the tariff adoption Order on 03.12.2019 i.e. after much delay beyond the commissioning of the project. We observe that from 11.05.2019 (commissioning of the project) till 03.12.2019 (adoption of tariff), the LTA executed by the contracting parties could not be honoured by the Petitioner because of the fault of the Respondents. No power could be scheduled for the beneficiaries. Accordingly, we hold that, given the facts of the present case, no penalty can be imposed on the Petitioner for the alleged delay in commissioning the project (till 11.05.2019) on account of the delay in obtaining the adoption of the tariff by the Respondent.

b. Re: Impact of the implementation of GST Laws:

32. The Petitioner has submitted that with the coming into force of the GST Laws, there was a delay in the finalization of vendor agreements which in turn has delayed the project by three (3) months. It faced setbacks in the execution of the project. Despite sending multiple notices to SECI, the petitioner's concerns were not acknowledged. *Per Contra*, SECI has submitted that MNRE, vide the Office Memorandum (OM) dated 20.06.2018, has provided an extension to only those projects for which the period 01.07.2017 till 31.08.2017 falls between the stage of financial closure and the SCoD of the project. As the period between the scheduled Financial

Closure, i.e. 05.01.2018, and SCOD, i.e. 13.11.2018, does not fall within the period specified by MNRE, the Petitioner is not entitled to an extension.

33. MNRE OM No. 283/131/2017-Grid Solar dated 20.06.2018 states as follows:

(2). *The issue has been examined in MNRE.*

(3). *Due to business disruption & consequent delays in project commissioning on account of introduction of GST from 1/7/17, it has been decided to give extension of upto two months for Commissioning Date (COD) to projects which might have been affected due to this disruption. The extension can be given by SECI/ NTPC/Other Implementing agencies as per following principles. The presumption adopted in suggesting extension is that only those projects whose period between Financial Closure and COD overlapped with the two month period from WJYI to 31/8/17, would have been affected and therefore eligible for extension. For this purpose, following principles shall be followed:*

(i) (a). *The disruptions due to GST imposition would have occurred for two months i.e. 62 days from the date of imposition of GST i.e. from 1/7/17 to 31/8/17.*

(b). *Only those projects would have faced the above disruptions, which, during the two month period from 1/7/17, were at a stage between the Financial Closure and COD.*

(ii) *For being eligible for extension, the effective Financial Closure date and the COD will be determined as follows:*

(a). *For purpose of Financial Closure, the Scheduled Financial Closure Date (SFC) or the actual Financial Closure Date (AFC), whichever is later would be taken into consideration.*

(b). *For CoD purposes, the Scheduled Commissioning Date (SCOD) would be taken into consideration.*

(4). (i) *Applying the above principles, following situations for extension would arise:*

(a) *Full Extension of two months (62 days) may be eligible for Projects having date of Actual Financial Closure (AFC) / Scheduled Financial Closure (SFC) (whichever was later), before 1.7.2017, AND having scheduled commissioning date (SCOD) after 31.8.2017.*

(For example, if the date of AFC/SFC (whichever was later) was 30.06.2017, and SCOD was 1/9/17 the project will become eligible for Full Extension of two months (62 days) under this.)

(b) *In case, for a project, for which the date of AFC I SFC (whichever was later) was 1.7.2017 or later, the eligible extension gets reduced by the number of days such AFC/SFC was after 30.6.2017.*

(For example, if the date of AFC I SFC (whichever was later) was 31.07.2017 and SCOD was 1/9/17, the extension admissible would be 31 days less than full extension of 62 days.)

(c) *In case, for a project for which the Scheduled Commissioning Date (SCOD), was on or before 31/8/2017, the eligible extension gets reduced by the number of days such SCOD was before 1.9.2017.*

(For example, if the date of AFC/SFC (whichever was later) was 1.06.2017 and SCOD was 1/8/17, the extension admissible would be 31 days less than full extension of 62 days.)

- (d) *In case, for a project, the situation existing both at (b) and (c) above are applicable, the full extension period will be reduced both to the extent AFC/SFC (whichever is later) is after 30/6/17 and SCOD is before 1/9/17. (For example, if the date of AFC/SFC (whichever was later) was 5.07.2017 and SCOD was 27/8/17, the extension admissible would be less than full extension of 62 days to the extent of 5 days due to Financial Closure, and additional 5 days due to SCOD i.e. 52 days.)*
- (e) *In addition to above, if any separate extension has already been given (or is being given) to a project, for any reason other than GST induced disruption which subsisted during this period of business disruption between 1.07.2017 and 31/8/2017, then, in order to avoid giving of double relief for the same period, the admissible extension under this provision due to GST induced disruption would be reduced to the extent the extension period granted due to the other reason overlaps with the extension period granted for the reason of GST induced disruption. (For example, if there was a period of flood from 1.06.2017 to 31.07.2017, for which corresponding extension has been allowed, then since there was an overlap of 31 days (1.07.2017 to 31.07.2017), and the project would be eligible for Full extension for GST induced disruption, 62 days but the extension admissible would be reduced by 31 days from the eligible Full Extension due to overlapping period relief on account of flood.)*
- (ii) *All the Project developers who claim to have been affected by GST induced disruptions shall make a formal application to SECI/ NTPC/ other implementing agencies for Extension of Time (EoT) due to GST disruptions giving all documentary evidence in support of their claim. SECI/ NTPC/ Implementing agencies shall examine the claim objectively and grant EoT based on facts, following above principles. While applying the above principles, SECI/NTPC/any other implementing agency may satisfy itself that the claimants were actually affected due to GST induced disruptions in the period for which extension has been claimed. The implementing agencies shall also ensure that no double relief is granted due to overlapping reasons cited for grant of EoT.*

34. From the above, we observe that as per MNRE OM dated 28.06.2018, the projects that were on the stage between the financial closure and COD and which have faced disruptions during the period 01.07.2017 till 31.08.2017 will be eligible for an extension. In the instant case, the Scheduled Financial Closure as per the PPA was 05.01.2018, and the SCoD of the project was 13.11.2018. The Petitioner has admitted on record that the financial closure of the project was achieved on 20.09.2017. The instant case does not fall under any of the examples given in the OM dated 28.06.2018. In view of the above, we hold that the Petitioner is not eligible for an extension on account of the implementation of the GST Laws.

c. Re: Impact of cyclone Ockhi in November 2017

d. Re: Impact of Heavy Rains and Gaja Cyclone in Tamil Nadu from September 2018 till December 2018

35. The Petitioner has submitted that it was prevented from performing its obligations qua commissioning on account of the force majeure event of cyclone Ockhi, which hit the coast of Tamil Nadu on 30.11.2017 and accordingly the Petitioner requested an extension of the SCoD by two (2) months from 30.11.2017 to 31.01.2018. The Petitioner has further submitted that its project experienced unprecedented and heavy rainfall, which led to unprecedented floods that spread over 13 villages in the Thootukudi district and impacted the project. The Petitioner requested an extension of SCoD by four (4) months from 23.09.2018 to 20.11.2018. They have further submitted that vide letter dated 18.12.2018, SECI was requested to consider the effects of cyclone Gaja and sought an extension of 3 months i.e. from 15.11.2018 to 16.11.2018, for completing its project. *Per Contra*, SECI has submitted that the Petitioner has failed to issue a force majeure notice within seven (7) days for the above three force majeure events as required under Article 11.5 of the PPA. The Petitioner has not furnished the relevant documents in support of the claims vide letter dated 09.04.2018. Rather, the Petitioner expressed its inability to provide supporting documents in support of its claim. SECI also submitted that the Standing Committee constituted by it did not find the documents submitted by the Petitioner to be appropriate for granting an extension on the said ground.

36. Vide letter dated 09.04.2018, the Petitioner informed SECI as under:

“

We would like to submit that Cyclone has disrupted the foundation work and rendered pathways

.....

The event occurred in the last week of November'18 and it is difficult to provide any supporting report/documents having a justification for effect of Cyclone for a certain period. *In this regard, we have already submitted photos of project after cyclone and various reports of Govt. agencies which show the intensity of cyclone. It is difficult to provide correspondence after 4 months, which shows that our project was in normal phase of construction.”*

37. Vide letter dated 18.07.2019, SECI has informed the Petitioner as under:

This has reference to you letters as per above references, submission seeking extension of the Schedule commissioning date on ground of force majeure event due to natural calamity, for your 250 MW ISTS Connected Wind Power Project in Maniyachi, Tamil Nadu as mentioned above.

In this regard, it is to inform you that SECI has scrutinized your submission for seeking extension on ground of work affected due to natural calamities i.e. Cyclon Storm Ockhi, Heavy rain and Cyclon Strom Gaja. Supporting Documents submitted vide letter dated 15.05.2019 pertaining to force majeure event due to Natural calamity are inadequate to be considered as Force Majeure Event as per Article 11 of PPA.

In this regard, you are directed to submit additional supporting documents which may include but not limited to following

- i. PERT Chart or GANTT Chart for entire Project*
- ii. Planned Schedule for erection and commissioning of each WTG*
- iii. Delay incurred on each WTGs due to above mentioned Natural Calamities events*
- iv. Orders/notifications/circulars issued in relevance to Natural Calamities as mentioned in your previous correspondences*

Additional Documents including above sought documents may be submitted within 15 days from issuance of this letter to substantiate your claims to be considered as Force Majeure Event Due to Natural Calamities, failing which SECI may take action as per article 4.6 of PPA.

38. Vide letter dated 30.07.2019, the Petitioner informed SECI as under:

Our project has faced various unforeseen challenges, among others, which were beyond the control of company & affected the project directly and the same were brought to your kind notice from time to time through our representations.

It is to be submitted that our 250 MW Wind Power Project spread in various surrounding Villages of District Tuticorin, Tamil Nadu and the Govt, officer in village level, i.e. Village Administrative Officers (VAO), has also issued certificates regarding impact due to Cyclonic Storm Ockhi, & Gaja and Heavy Rain in the respective villages on ground level. (Copy of Govt. Notification & Certificates have already been submitted vide letter dt. 15.05.2019), a self certificate for the same related to Village Administrative Officers are Govt, officers is attached as Annexure-1.

We submit that, the project activities were started very soon after issuance of LOA and best efforts were put in after signing PPA to identify and procure land along with procedural activities initiated with PGCIL for grant of connectivity and LTA. Our efforts are evident from the timely submission of requisite land documents and financing of the project. As we are holding land, the construction activities were started as early as from November 2017 onwards, however, the project has faced various unforeseen challenges which has effected the progress of project at various stages and is explained below the month wise progress of project including challenges faced during the period (Copy of PERT Chart having details of activates on Days & WTG wise with Planned Scheduled is attached as Annexure - 2):

1. Nov'17 to Jan'18: *We started our foundation excavation work in the month of November'17, whereas Ockhi "Cyclone" hit Southernmost Coast of Tamil Nadu on 27th Nov 2017 and heavy rain adversely affected construction activities and site infrastructure of Project. We would like to submit that in the period of Cyclone, project was in the initial phase of construction and disrupted the foundation works and rendered pathways unsuitable for movement of heavy vehicle/trailers.*

The event, Ockhi "Cyclone", significantly impacted initial phase of our project. Major works such as Excavation, PCC, Reinforcement and Casting requires huge low skill trained manpower. Heavy rain hampered progress at site for several days and in such circumstances, existing labors moved to their respective home towns or other projects, and has taken time of more than a month to join project activities again. As a usual practice, in our project also, the entire construction / Foundation work was offloaded to third party contractors and they have faced a big challenge to bring back labour

after rainfall in site on immediate basis. Our contractors did the best possible work with the help of limited availability of local labor.

We submit that the construction work was started smoothly, however, due to the impact of cyclone Ockhi causing heavy rainfall disrupting the foundation work which has affected the scheduled timelines and tasks. From the period of Nov '17 to Jan '18, we had planned to do excavation work for 62 locations but completed only 30 locations, whereas casting work was done only 16 locations against 50 locations. Since the cyclone affected our work at the initial construction phase itself, it has had a profound and cascading impact on the rest of the project timelines.

We would like to submit that after rainfall, we deployed the best available Tools & Plant and water pumping equipment to carry-out all disaster management work. Despite our best efforts to kick start the normal construction operation and restore normalcy it has taken more than two (02) Months' time, i.e. 27th November, 2017 to 31st January 2018. As per the planned project timelines, the target was to make the foundations ready for installation of 3 WTGs by end of Jan 2018, however, due to the devastating impact of cyclone Ockhi for a period of 02 months, even a single WTG was not commissioned.

...

...

4. **Sep'18 – Dec'18:** After completion of High Wind season from the month of August'18, we planned to complete major work on erection & commissioning activities, however after completion of around 3 weeks of work, heavy rain fall was started from 23rd September'18, and as per Indian Meteorological Department (IMD) reports, areas near Thoothukudi received 196% excess rainfall in the last week of September 128% and 139% excess rain during the first two weeks of October. The heavy rainfall was happened due to low pressure system, as cyclonic storm Gaja (“Cyclone”) hit northern coast of Tamil Nadu on 15.11.2018 & 16.11.2018. It is to be noted that Ministry of Earth Science has also issued notification in Press Release and mentioned about heavy rainfall warning, above 20 cm in the districts of Tuticorin. In the notification, Ministry has intimated heavy rain for Tuticorin district under top most priority (RED Color) for taking action.

Heavy rains during the period from 23rd Sep'18 to 20th Nov'18 affected our civil, electrical, pathway development and WTG (Wind Turbine Generator) installation activities. Locations have become inaccessible as the internal pathways have become waterlogged and have become unsuitable for any vehicle movement. Despite repeating pathway rectification work multiple times, all the effort was seen to be in vain as the roads become unsuitable for vehicle movement after each rain. The clayey nature of the Black Cotton soil at site had caused the vehicles to become lodged in the mud several times making material shifting extremely difficult.

In a situation where heavy rain was more than 100%, i.e. upto 196% & event takes more than 10 -15 days, labors move to home town or other projects and it has took at least 10 -15 days to join project activates. We would like to submit that after rain, we deployed the best available Tools & Plant and water pumping equipment to carry-out all disaster management work. Despite our best efforts to restore normalcy, it has taken more than 3 months' time to kick start the normal construction operations.

Since, it was difficult to do erection & commissioning activities in the period of heavy Rainfall due to inaccessible of internal pathways, we worked on Sub-station, as commissioning of sub-station is one of the key milestone for disbursement of loan. We have commissioned our Sub-Station on 17th November, 2018 and also erected &

commissioned (DP Yard) for additional 16 WTGs during the period of Sep'18 to Dec'18. Therefore, by end of Dec'18 we erected St commissioned 64 WTGs.

39. SECI, vide letter dated 15.10.2019 to the Petitioner stated as under:

“....

This has reference to the letter dated 30.07.2019 and discussion held on 14.10.2019 with your team on the subject matter. As discussed, it is again requested to provide the documentary evidence in support of the reasons quoted by the M/s Mytrah Vayu (Sabarmati) Private Limited for processing the case of granting Time Extension to Schedule Commissioning Date.”

40. The Petitioners have placed reliance on the statement made by District Collector published in the Hindu Newspaper. Relevant excerpts are reproduced below:

“.....

In Thoothukudi

In Thoothukudi, where it had been raining since Wednesday, rainfall caused waterlogging alongside Palayamkottai Road, WGC Road and VE Road and some other low-lying areas.

Rainfall, accompanied by strong winds, caused damage to 11 huts, uprooted 27 trees and left 58 electricity poles tilted at several locations in the district, Collector N. Venkatesh told The Hindu. However, there was no casualty.....”

41. From the above, we observe that the Petitioner has only alleged that the Petitioner's project was prevented from performing its obligations qua commissioning on account of the force majeure event of cyclone Ochki, heavy rainfall and cyclone Gaja. The Petitioner has failed to bring on record any official notification/document about alleged force majeure events or the justification of their effect on the Petitioner's project in spite of various letters from SECI. We note that there is no official document from an appropriate authority classifying any of the alleged events as force majeure events and the declaration of the period of such alleged force majeure events, if any. As such, we hold that no relief can be extended to the Petitioner for the alleged events.

e. Re: Impact of Nationwide Trucker's Strike:

42. The Petitioner has submitted that the Nationwide trucker's strike from 20.07.2018 till 20.07.2018 impacted its project activities as it intimated to SECI vide letter dated 30.07.2018. ***Per Contra***, SECI has submitted that the documents submitted by the Petitioner do not provide any evidence of the impact of the alleged event on the material delivery or delay in execution of work. Also, the Petitioner did not give a Force Majeure Notice as per Article 11.5 of the PPA.

43. We observe that Article 11.4.1 of the PPA specifically stipulates that unavailability, late delivery, or changes in the cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project; delay in the performance of any contractor, sub-contractor or their agents; Strikes at Petitioner's facilities etc. are not recognised as force majeure events. The Petitioner has failed to bring any document on record from which it can be concluded that the Petitioner's project was indeed impacted by the aforesaid Force Majeure event. There is no official document from an appropriate authority classifying the Nationwide Truckers strike as a Force Majeure event. As such, we hold that no relief can be extended to the Petitioner for the alleged event.

f. Re: Impact of Law and Order

44. The Petitioner has submitted that there was an *Impact of Law and Order* for 30 days and a problem due to violent protest and *imposition of Section 144 of CrPC* for 21 days. Accordingly, the SCoD of the project may be extended by 51 days. Whereas, based on the documentation submitted by the Petitioner, SECI allowed an extension of 39 days on account of the *Law and Order Issue* and *Imposition of Section 144 of the Cr.P.C.* and accordingly, the SCoD for the Project was extended to 13.11.2018. However, the Petitioner has submitted that another 12-day extension may be given on this account since there was a delay in the mobilization of contractual labour and restoration of normalcy. We observe that SECI has restricted the benefit of an extension of SCOD to 39 days in the absence of any documentation on record to substantiate the claim with respect to an extension of another 12 days. The Petitioner has not at the same time furnished before the Commission any additional document to justify its claim for the said 12 days. Accordingly, no benefit can be allowed to the Petitioner qua 12 days.

g. Re: Issue of usage of connectivity of Parent Company by SPV:

45. The Petitioner has submitted that it had secured connectivity at Tirunelveli Substation from Powergrid for 300 MW on 22.01.2015. After the issuance of a letter of award dated 05.04.2017 by SECI, the Petitioner approached Powergrid for permission to utilize the connectivity obtained by the Petitioner by its SPV with respect to the Wind Power Projects under the present scheme. However, the approval process was delayed by PGCIL as Petition No.145/MP/2017 was filed with the Commission, and the order was passed on 29.09.2017. *Per Contra*, SECI

has submitted that the entire responsibility of getting transmission connectivity to the transmission system owned by CTU/STU was within the scope of the Petitioner. Further, this Commission passed an order on 29.09.2017 which is way before the date of financial closure, so the Petitioner is not entitled to exemption on the aforesaid ground.

46. Clause 3.7 of the Guidelines dated 22.10.2016 states as follows:

“Connectivity with the Grid:

.....

ii. The responsibility of getting the ISTS connectivity and Long Term Access (LTA) shall entirely be with the WPD.....

iv. The WPD shall not be entitled to deemed generation in case of any delay in grant of connectivity or non-availability of LTA to the Project.

v. The WPDs shall comply CERC/SERC regulations on Forecasting, Scheduling and Deviation Settlement, as applicable and are responsible for all liabilities related to LTA and Connectivity....”

47. Clause 3.7 of the RfS dated 28.10.2016 stipulates as under:

3.7. Connectivity with the Grid

....

3.7.2. The responsibility of getting the ISTS connectivity and Long Term Access (LTA) shall entirely be the WPD.....

3.7.3. The arrangement of connectivity can be made by the WPD through a dedicated transmission line which the WPD may construct himself or get constructed by PGCIL/State Transmission Company or any other agency on deposit work basis. The entire cost of transmission including cost of construction of line, wheeling charges, maintenance, losses etc. from the project upto the interconnection point will be borne by the WPD.

...

3.7.5. The WPD Shall comply CERC/SERC regulations on Forecasting, Scheduling and Deviation Settlement, as applicable and are responsible for all liabilities related to LTA and Connectivity....”

48. From the above, we observe that as per 3.7 of the Guidelines and the RfS, the responsibility of getting the ISTS connectivity and Long Term Access (LTA) is that of the WPD. Further, it is mandated that WPD shall comply with the CERC/SERC regulations on Forecasting, Scheduling and Deviation Settlement, as applicable and is responsible for all liabilities related to LTA and Connectivity. In case of any delay in the grant of connectivity or the non-availability of LTA to the Project, WPD shall not be entitled to deemed generation.

49. This Commission passed order in Petition 145/MP/2017 (*Petition under Section 79(1)(f) of the Electricity Act, 2003 and Regulation 33B (Power to Remove Difficulty) alongwith Regulation*

111 (Inherent Powers) of the CERC (Conduct of Business) Regulations, 1999 read with Regulation 2(3) of the CERC (Payment of Fees) Regulations, seeking directions for preventing underutilization of bays for Connectivity granted to Wind/Solar generation projects) on 29.09.2017 and the scheduled date of Financial Closure was 05.01.2018. We observe that the details of the SCoD of the project as under:

Capacity	SCoD	Extended SCoD	Commissioning Date	Actual COD
128.79 MW	04.10.2018	13.11.2018	28.01.2019	30.01.2019
58.32 MW			13.04.2019	16.04.2019
62.89 MW			09.05.2019	11.05.2019

50. From the above, we observe that the order dated 29.09.2017 and the detailed procedure dated 15.05.2018 had under no circumstances impacted either on financial closure (20.09.2017) or SCoD. Hence, we hold that no relief can be extended to the Petitioner for the alleged event.

h. Re: Delay in getting clearance of Substation Terminal Bay Drawing from Powergrid:

51. The Petitioner has submitted that PGCIL took 6 (six) months to approve the drawing on 07.05.2018 and manufacturing clearance on 15.05.2018 despite the Petitioner's request to PGCIL in December 2017 to provide a GIS module to prepare interface module design. The Petitioner wrote a letter dated 30.11.2018 to SECI seeking an extension of 5 (five) months on account of a delay in obtaining clearance from PGCIL. The Petitioner submitted that SECI's approach to denying relief to the Petitioner is arbitrary and irrational. **Per Contra**, SECI has submitted that all approvals, permits and clearances required for setting up the Project, including connectivity to the transmission system, were within the scope of the Petitioner. Terminal bays at the Tuticorin-II sub-station were commissioned on 17.11.2018, i.e., well before the first phase of commissioning by the petitioner on 28.01.2019. The claim of the Petitioner attributing the delay to Powergrid is not acceptable as per the Respondent's contention.

52. SECI vide letter dated 18.10.2018, sought confirmation from PGCIL regarding the issue of procedural delays in grant of approvals. PGCIL vide letter dated 06.11.2018 to SECI stated as follows:

"1. M/s Mytrah Energy (India) Pvt. Ltd. (MEIPL)
M/s MEIPL was granted Connectivity (300MW) and LTA (75MW) vide letter dated 22.01.2015 for its proposed wind power project in Maniyachi, Tamil Nadu with scheduled commissioning in Feb'16 or availability of identified transmission system,

whichever is later. **Implementation of 230kV dedicated transmission line along with terminal bays at Tuticorin-II S/s (erstwhile Tirunelveli) was under the scope of M/s MEIPL. However, MEPL have signed consultancy agreement with POWERGRID for bay implementation in November, 2016 for first bay & in April, 2017 for second bay and submitted the advance in May, 2017 for both the bays i.e. after 27 months from the grant of Connectivity. In the process, crucial time for implementation of bays was elapsed and they have started activity only in April/May, 2017.**

As per the consultancy service agreement, the BOQ & tender documents were to be provided within 3 months from submission of initial advance, the same were provided by 25.08.2017. After placement of award by M/s MEIPL to M/s Taikai, MEIPL arranged post award discussion which was held in Jan'18. Further, most of the documents like component drawing, design etc. were approved within 2-3 days from their submission. Some documents which are required at later date at site were approved within reasonable time of 2-3 weeks. Regarding Interface module, existing end piece module (M/s Xian make) interface details shared with M/s MEIPL on 12.01.18 and a joint meeting with M/s Taikai and M/s Xian was held on 18.01.2018. Further, M/s Taikai was also advised to visit for additional details.

From the above, it is seen that there is no delay in approval of drawing/specification by POWERGRID. **The delay in implementation is solely on account of the fact that M/s MEIPL did not take up various activities in time including precious lapse of 27 months as mentioned above.**

53. Relevant provisions of RfS/Amended RfS dated 23.12.2016 and Guidelines dated 22.10.2016 is as under:

Clause 3.2 of the Amended RfS:

Project Scope and Technology Selection

Under this scheme, the WPD shall set up Wind Power Project(s) including the transmission network up to the Delivery Point in line with Clause 3.7, at its own cost and in accordance to the provisions of this RfS document. All approvals, permits and clearances required for setting up of the Project (including connectivity) including those required from State Government and local bodies shall be in the scope of the WPD.

Clause 3.10 of the RfS and clause 3.8 of the Guidelines dated 22.10.2016:

Clearances required from the State Government and other local bodies

The Wind Power Developers are required to obtain necessary clearances and permits as required for setting up the Wind Power Projects.

54. Relevant provisions of the PPA are reproduced below:

Article 1:

Consents, Clearances and Permits

shall mean all authorizations, licenses, approvals, registrations, permits, waivers, privileges, acknowledgements, agreements, or concessions required to be obtained from or provided by any concerned authority for the purpose of sell rug up of the generation facilities and/or supply of power

Article 4.1.1 (a) of the PPA:
WPD's obligations

....
a) **obtaining all Consents. Clearances and Permits as required and maintaining all Consents. Clearances and Permits in full force and effect during the term of this Agreement;.....**

55. Let us consider some of the important timelines:

Events	Dates
Date of connectivity at Tirunelveli Substation	22.01.2015
Consultancy Agreement with PGCIL	November 2016- 1 st Bay April 2017- 2 nd Bay
LoA	05.04.2017
Advance payment	May 2017 for both bays
SCOD	04.10.2018 (as per PPA) 13.11.2018 (extended by SECI)
Terminal bays at Tuticorin-II Substation commissioned on	17.11.2018
Actual commissioning date of the project	28.01.2019 (128.79 MW) 13.04.2019 (58.32 MW) 09.05.2019.89 MW)

56. From the above, we observe that it was within the array of responsibilities of the Petitioner to obtain approval, permits, clearances etc for setting up of the project. After the issuance of the LoA by SECI on 05.04.2017, the Petitioner paid the consultancy fee. We note that, the extended SCoD of the project was 13.11.2018, whereas Terminal bays at Tuticorin-II Substation were commissioned on 17.11.2018. Hence there was definitely a delay of five (5) days. However, the Petitioner itself was not ready for the commissioning of the project. The Petitioner could commission 128.79 MW only on 28.01.2019 i.e. there was seventy-three (73) days' delay after the commissioning of terminal bays at Tuticorin-II Substation. Hence, we hold that no relief can be extended to the Petitioner for the alleged event.

57. To sum up, we hold that no penalty can be imposed on the Petitioner for the alleged delay in commissioning the project (till 11.05.2019) on account of the delay on the part of the respondents in obtaining the adoption of the tariff order before COD. Various other events claimed by the Petitioner are not covered as force majeure events under Article 11 of the Power Purchase Agreement dated 21.07.2017.

Issue No.2: Whether SECI's letter dated 27.05.2021 regarding the encashment of Petitioner's Performance Bank Guarantee amounting to Rs. 33,02,87,667 be set aside? AND Whether SECI should be directed to release the Performance Bank Guarantee in favour of the Petitioner?

58. In view of our findings on Issue No.1, Respondents are directed to release the Performance Bank Guarantee in favour of the Petitioner.

59. Accordingly, Petition No. 117/MP/2021 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
आई. एस. झा
(सदस्य)

Sd/-
जिष्णु बरुआ
(अध्यक्ष)