



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 241/MP/2024 along with IA 10 of 2025

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री रमेश बाबू वी., सदस्य/Shri Ramesh Babu V., Member
श्री हरीश दुदानी, सदस्य/Shri Harish Dudani, Member

आदेश दिनांक/ Date of Order: 16th of March, 2025

IN THE MATTER OF:

Petition under Section 79(1)(f) of the Electricity Act seeking the return of Payment of Order Instrument given under the Power Purchase Agreement dated 05/04/2019 entered into between the Petitioner and the Respondent No. 1 for the supply of power from its Wind Power Project.

AND

IN THE MATTER OF:

Boreas Renewable Energy Private Limited
P. No. 1202, 1215A, D. No. 8-2-293/82/A/1202,
S.L. Jubilee Road No. 61,
Jubilee Hills
Hyderabad – 500033

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited

1st Floor, A-Wing, D-3,
District Centre, Saket,
New Delhi – 110017

2. Bihar State Power Holding Company Limited

1st Floor, Vidyut Bhawan,
Jawahar Lal Nehru Marg,

Patna-800001

3. North Bihar Power Distribution Company Limited

Third Floor, Vidyut Bhawan,
Bailey Road,
Patna 800 001

4. South Bihar Power Distribution Company Limited

Second Floor, Vidyut Bhawan
Bailey Road,
Patna 800 001

...Respondents

Parties Present:

Ms. Swapna Seshadri, Advocate, BREPL
Shri M. G. Ramacandran, Senior Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI

आदेश/ ORDER

The Petitioner, Boreas Renewable Energy Private Limited (a project company of M/s Ecoren Energy India Private Limited (EEIPL), had agreed to set up a wind power plant of 175 MW in the Bellary district in the State of Karnataka under the PPA. Solar Energy Corporation of India Limited (SECI) issued a Request for Selection (RfS) dated 30.06.2018, inviting proposals for setting up 1200 MW ISTS connected Wind Power Projects along with amendment and clarifications, which was later amended on 03.08.2018. M/s Ecoren Energy India Private Limited submitted its bid on 29.08.2018. The e-Reverse auction process was carried out on 25.09.2018, and M/s Ecoren Energy India Private Limited was declared as a successful bidder. Thereafter, SECI issued a Letter of Award (LoA) dated 24.10.2018 in favor of M/s Ecoren Energy India Private Limited for the development of the Project for the generation and onward sale of wind power to SECI. M/s Ecoren Energy India Private Limited formed the project company M/s Boreas Renewable Energy Private Limited (the Petitioner/ BREPL) within the provisions of RfS for the development of wind power projects, generation and sale of wind power. The Power Purchase Agreement (PPA) was executed on 05.04.2019 (with an effective date as 22.01.2019) for the purchase of 175 MW ISTS connected wind power capacity from the Project at a tariff of Rs. 2.77/ kWh. As per the PPA, the scheduled date of commissioning of the Projects was 22.07.2020 which was later revised to 22.12.2020 by SECI vide its letter dated 04.01.2022. The Petitioner is seeking discharge from PPA dated 05.04.2019 along with the return of the

performance bank guarantee (PBG) in the sum of Rs 35,00,00,000 furnished by the Petitioner under Article 3.3. of the Power Purchase Agreement dated 05.04.2019.

2. The Respondent No. 1, Solar Energy Corporation of India Limited (SECI), is a company incorporated under the Companies Act 1956, which had agreed to purchase power from the Petitioner under the PPA pursuant to a competitive bidding process under Section 63 of the Electricity Act, 2003 as an intermediary procurer and sell the power to Respondents by entering into a back-to-back agreement with them.
3. Respondent No. 2, Bihar State Power Holding Company Limited (BSPHL), is the holding company that engages in bulk purchase of power from the generating companies for the State of Bihar.
4. Respondent No. 3 and 4, North Bihar Power Distribution Company Limited & South Bihar Power Distribution Company Limited, are companies existing under the Companies Act 2013 and are distribution licencees of the State of Bihar.
5. The Petitioner has made the following prayers:
 - a) *Hold and direct that the PPA dated 05.04.2019 stands discharged by the conduct of the Respondent No. 1 and the Petitioner;*
 - b) *Direct Respondent No. 1 return the performance bank guarantee of 35 Crores to the Petitioner in light of the fact that the contract stands discharged and Parties do not owe any obligation towards each other;*
 - c) *Direct the Respondent No. 1 to pay the interest/ carrying cost on the amount of Rs. 35 Crores from Dec 2018 till the same is returned;*
 - d) *Direct the Respondent No. 1 to pay the Bank Guarantee Charges amounting to Rs. 1.40 Crores spent by the Petitioner on maintaining the Performance Bank Guarantee for last several years;*
 - e) *Award costs of the present proceedings;*
 - f) *Pass such as the further orders the Hon'ble Commission may deem just in the facts of the present case.*

Prayers in I.A. 10 of 2025

i. Amend the original Prayer in the Petition to insert the following Prayers:

“(g) Stay the letters dated 15.01.2025 & 16.01.2025 issued by SECI to the Petitioner & IREDA respectively;

(h) Hold and direct that the Respondents are not entitled to any liquidated damages under the PPA;

(i) Direct refund of any amounts wrongfully recovered from the Petitioner along with punitive interest.”

ii. Pass such as the further orders the Hon’ble Commission may deem just in the facts of the present case.

Factual Matrix:

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

Location	Villages Nimbalgiri, Suladahalli, Banavikal, Tehsil Kudligi, District: Bellary in Karnataka
<i>Tariff Based Competitive Bidding Process for procurement of Power from Grid Connected Wind Power Projects notified by the Ministry of Power, Government of India on</i>	08.12.2017
Nodal agency	SECI
Capacity (MW)	175 MW
Power	Wind Power Project
RfS issued on	30.06.2018
Bid submitted on	29.08.2018
E-Reverse auction held on	25.09.2018
LOA issued on	24.10.2018
Tariff	Rs. 2.77/kWh
PSA executed on	08.01.2019
Effective date of the PPA	22.01.2019
PPA executed on	05.04.2019
<u>Date of meeting Condition Subsequent and Financial Closure as Per Article 3 of the PPA</u>	<u>22.08.2019</u>
SCoD of the project as per PPA	22.07.2020
MNRE issued an O.M. granting a blanket time extension of 5 months to the RE projects in achieving the SCoD on account of the COVID-19 pandemic	13.08.2020
Extended SCoD (as per SECI letter dated 04.01.2022)	22.12.2020

IREDA issued a payment order of Rs. 35 Crores in favor of SECI as a counter-guarantee for the performance bank guarantee to be issued by the Petitioner	05.01.2021
The Petitioner requested SECI to extend the SCoD of the Project and also approve the reduction of the PBG to 2% of the Project cost	07.09.2021
<u>Long Stop date (27 months from the effective date of PPA as per Article 4.6.2)</u>	<u>22.09.2021</u>
SECI acknowledges the receipt of the letter dated 28.09.2021 along with annexures, i.e., copies of 04 numbers of Government Orders issued by the Energy Department, Govt, of Karnataka for setting up of 20 MW Wind Power Project proposed to be connected with the State grid	27.09.2021
SECI informed MNRE, <i>inter-alia</i> , that <i>necessary direction for further processing of the request of the Petitioner to grant time extension may be given so that SECI may consider to process the request of the Petitioner.</i>	13.10.2021
MNRE responded to SECI's letter dated 13.10.2021 and informed that such matters may be decided by SECI itself, keeping in view the provisions of the bidding document and the contract	17.12.2021
BSPHCL informed SECI that in view of the inordinate delay in the start of construction of the wind project by the Petitioner, a grant of time extension for the project would not be accepted	02.03.2022
<i>SECI informed the Petitioner that no further time extension can be granted beyond the period already granted by SECI, which has expired on 22.09.2021</i>	29.06.2022
BSPHCL gave its consent for the grant of additional time extension to the Petitioner	04.07.2022
SECI informed the Petitioner that no further time extension can be granted beyond the period already granted by SECI, which has expired on 22.09.2021	14.07.2022
The Petitioner moved the Dispute Resolution Committee against the refusal of the grant of time extension by SECI	18.07.2022
The Petitioner filed the present petition before the Commission where the only issue raised was the return of the bank guarantee with consequential orders.	29.02.2024

MNRE confirmed the DRC's recommendations in the appeal filed by the Petitioner	23.09.2024
SECI informed the Petitioner that the competent authority observed that during the hearing dated 22.03.2024, the Petitioner had orally modified their prayer without supporting it with any formal written submission, due to which the original dispute had lost relevance	15.01.2025
SECI wrote to IREDA that since the performance obligation is not fulfilled by the Party, SECI is invoking the Performance Bank Guarantee of Rs. 35,00,00,000/-	16.01.2025
Petitioner filed an interim application in the present petition	20.01.2025

7. The present petition was filed on 29.02.2024 and listed for hearing on 29.11.2024, wherein the Commission, after hearing the submissions of the Petitioner, admitted the Petition. Subsequent to the hearing conducted on 21.01.2025, the detailed submissions were made by the parties on 06.02.2025. Based on the request of the parties, the Commission permitted both sides to file their respective written submission, and thereafter, the matter was reserved for orders on 06.02.2025.

Submissions of the Petitioner:

8. Briefly, the Petitioner has submitted as under:
- As per PPA, the Scheduled Date of Commissioning (SCoD) was 22.07.2020. However, due to the onset of the global pandemic COVID-19, the Ministry of New and Renewable Energy (MNRE) issued an Office Memorandum dated 13.08.2020, allowing Renewable Energy Projects a blanket time extension of 5 months to achieve SCOD. Consequently, the SCOD was extended from 22.07.2020 to 22.12.2020.
 - The Petitioner could not commission the Project on account of an inordinate delay of about 34 months in the issuance of Government Order (GO) by Karnataka Renewable Energy Development Limited (KREDL) and a delay in the adoption of the Power Supply Agreement (PSA) by Bihar Electricity Regulatory Commission. The approval was given only after 30 months of signing the PPA.
 - As the PPA could not be extended beyond 22.09.2021 (as per Articles 4.5.6 & 4.6.2 of the PPA) therefore, SECI sought directions from the MNRE, vide letter dated 13.10.2021.
 - The MNRE directed the SECI to decide on the issue of time extension as the issue is related to the contract.

- e) The SECI vide letter dated 04.01.2022 informed the Utilities of the time extension sought by the Petitioner and sought its consent for processing such request.
- f) On 29.06.2022, the SECI rejected the request for a time extension.
- g) Against such refusal for granting time extension by the SECI, the Petitioner moved to the Dispute Resolution Committee (DRC) on 18.07.2022.
- h) However, the DRC has no jurisdiction to adjudicate the disputes between the Petitioner and Respondent No. 1 in view of Section 79 (1) (f) of the Electricity Act, 2003. In fact, the Petitioner had erroneously approached the DRC since jurisdiction cannot be conferred either by agreement or by the conduct of parties. Jurisdiction is a question of law and has to be decided only in accordance with the provisions of the Electricity Act, 2003.

Re. Return of Performance Bank Guarantee

- i) A Performance Bank Guarantee (PBG) of Rs. 35 Crores had been given by the Petitioner to SECI under Article 3.3 of the PPA in the form of Payment on Order Instrument guaranteeing commencement of supply of power within the time specified in the PPA.
- j) As the SCOD has not been extended by the SECI, the purpose of the Payment on Order Instrument has been frustrated as the performance under the PPA stands discharged with the denial of the extension of SCOD.

Submissions of SECI:

- 9. SECI, vide its reply dated 29.01.2025, has submitted the detailed timelines of the case and has submitted as under:
 - a) The Petitioner is claiming the return of the performance bank guarantee of the sum of Rs 35,00,00,000/- furnished by the Petitioner under Article 3.3 of the PPA dated 05.04.2019 and other consequential charges such as bank guarantee charges and carrying cost on the basis that the PPA dated 05.04.2019 stands discharged by the conduct of the parties.
 - b) There is no basis for the claim of the Petitioner for the return of the bank guarantee, as the said bank guarantee was furnished under Article 3.3 of the PPA dated 05.09.2019 for guaranteeing the commencement of supply of power up to the contracted capacity. As per the timelines provided in the PPA, if the Petitioner fails to commence the supply of power from the SCoD/extended by SECI, in terms of Article 3.3.3, SECI shall encash the performance bank guarantee.

- c) Therefore, once the Petitioner fails to commence the supply of power from the scheduled commissioning date /extended by SECI, SECI is entitled to encash the bank guarantee submitted by the Petitioner in terms of the above-quoted Articles of the PPA.

Re: Submissions on Bank Guarantee

- d) The original SCoD of the project was 22.07.2020, which was revised to 23.12.2020 by SECI in its letter dated 08/10.09.2020 in terms of the MNRE O.M. dated 13.08.2020. In terms of Article 4.6.2 of the PPA, the maximum timeline available for the commissioning of the project with liquidated damages ends on 22.09.2021.
- e) Vide letter dated 29.06.2022, SECI refused to grant any further extension to the Petitioner and also put notice to the Petitioner that SECI would take steps in terms of the PPA/RfS.
- f) The Petitioner proceeded to invoke the Dispute Resolution Mechanism by way of appeal dated 18.07.2022 in terms of the MNRE's order dated 18.06.2019, wherein the Petitioner specifically sought for no coercive steps to be taken by SECI giving reference to the letter dated 29.06.2022.
- g) In terms of the procedural guidelines dated 20.09.2019 and also 07.06.2023, no coercive steps can be taken till the final disposal of the appeal by the DRC/ MNRE. Therefore, SECI did not encash the bank guarantee of the Petitioner.
- h) The final decision on the appeal filed by the Petitioner before the DRC was received from MNRE on 23.09.2024 (the final decision is by the MNRE/Minister of NRE and DRC provides recommendations to them).
- i) In view of the above, till 23.09.2024, SECI could not have invoked the bank guarantee of Rs. 35 crores. SECI, after internal deliberations and discussions, wrote to the Petitioner on 15.01.2025 that since no further extension was granted by the competent authority, SECI would encash the bank guarantee as per Article 4.6.1 of the PPA. SECI wrote the letter for invocation of the bank guarantee to IREDA on 16.01.2025.
- j) The submissions made by the Petitioner that SECI has raised the issue of bank guarantee as an afterthought/after a lapse of 4 years or that no steps were taken by SECI earlier for encashment of the bank guarantee are incorrect and without any basis on the actual facts of the case.
- k) In fact, on 23.02.2024, the Petitioner. during the hearing before the DRC submitted that the project is no longer viable and that the Petitioner has filed a Petition for termination before this Commission. This was in clear modification to its earlier prayer made before the DRC which was for extension of the SCoD.

- l) It is the Petitioner's conduct, which has been changing from time to time before the various forums and same today cannot be used as an excuse for non-encashment of the bank guarantee by SECI, as the only reason for non-encashment of bank guarantee for the period between 29.06.2022 to 23.09.2024 was on account of the DRC proceedings filed the petitioner seeking for extension of the scheduled commissioning date.
- m) In terms of Articles 3.3, 4.6.2, and 5.2 of the PPA, the bank guarantee is for guaranteeing the commencement of power supply by the scheduled commissioning date. If the Petitioner fails to supply power by the said date, there is no further requirement to prove any actual loss suffered by SECI.
- n) The payment order/bank guarantee furnished by IREDA has agreed ***unequivocally, irrevocably and unconditionally to pay to SECI.... forthwith without demur on demand in writing from SECI....any amount upto*** Further, the payment order specifically provides that ***it shall not require any proof in addition to the written demand by SECI....*** It is specifically provided that IREDA shall make payment on demand without demur or protest or condition that notice has to go to the Petitioner or require SECI to justify the invocation of the Payment Order.
- o) There is a legal injury/loss on account of the non-availability of power from the scheduled commissioning date, entitling SECI to the recovery of liquidated damages in terms of Article 4.6.2, read with Articles 3.3 and 5.2 of the PPA. Thus, in case of liquidated damages being provided, what is necessary to establish is legal injury and loss, and there is no need to plead and/or prove actual loss. Thus, once there is no commencement of supply of power by the scheduled commissioning date, in terms of the PPA Articles 3.3, 5.2, and 4.6, SECI is entitled to encash the bank guarantee.

Rejoinder filed by the Petitioner:

10. Briefly, the Petitioner, vide its rejoinder dated 04.02.2025, has submitted as under:

Re. The PPA does not cover cases of delay beyond 27 months

- a) The SECI has admitted that the reasons for the delay in the instant case were not "*explicitly covered under the provision of the PPA and the RfS*" in its letter dated 13.10.2021 to MNRE. The position is fortified by the fact that SECI has not disputed the contents of Paras 10 to 15 of the petition where the detailed reasons for the delay in commissioning the project have been stated.

- b) The provisions of liquidated damages under the PPA only apply to cases where the PPA survives. However, where there was a delay in the commissioning of the Project due to reasons beyond the control of the Petitioner and the PPA stands discharged, the provisions of liquidated damages cannot apply.
- c) The SECI was not constrained to refuse to grant an extension. The PPA being a contract between the parties, the parties were free to extend the terms of the contract if so required. Further, approval for such an extension could have been sought from the Appropriate Commission. As admitted by the SECI in its communication dated 13.10.2021 to MNRE, it had previously granted an extension beyond the long-stop date to other developers due to reasons not covered in the PPA.
- d) Further, the ultimate beneficiary, the Bihar State Power (Holding) Company, had also consented to the time extension on 04.07.2022.
- e) Since there was no way for the PPA to be performed in the absence of a time extension, the PPA was frustrated by the conduct of the SECI. Since the PPA itself stands discharged, there is no question of the SECI retaining or encashing the PBG given in the form of the POI, and the same is liable to be returned by the SECI.
- f) There is no underlying claim for the payment on order instrument (POI) to be encashed.
- g) In a similar situation, this Commission, in its Order dated 11.10.2017 in Petition No. 304/MP/2013 – *Godavari Green Energy Ltd v NVVNL and Ors*, has held that compensation to the intermediary (NVVN in that case) would be payable under the PPA, only if there is a loss suffered by the ultimate purchaser under the PSA and also if there is a corresponding claim made by the intermediary under the PSA. The High Court of Delhi has held in a situation where there was an intermediary procurer for goods, in the absence of any claim against the intermediary, the intermediary cannot claim any amounts.
- h) SECI has neither in any of its correspondences with the Petitioner nor at any time prior to 15.01.2025, raised any issue with respect to loss caused to SECI due to non-commissioning of the Project and the issue of payment liquidation damages under the PPA.
- i) In the above circumstances, the prayers of the Petitioner may be granted and the POI be returned to the Petitioner. If the proceeds of encashment of the POI have been received by SECI, it is prayed that SECI be directed to refund the amounts with penal interest.

Written Submissions of the Petitioner:

11. Vide written submissions dated 11.02.2025, the Petitioner has reiterated its stand taken in the plaint, and as such, the same has not been reproduced for the sake of brevity. Briefly, the Petitioner has submitted as under:

Re. The performance of the PPA stands discharged due to SECI's conduct

- a) The reasons for the delay in the Project commissioning (delay in providing land by KREDL and passing of adoption order by the BERC) were beyond the Petitioner's control and were not covered under the PPA. The same is admitted by SECI in its letter dated 13.10.2021 to MNRE, wherein it stated that the reasons for the delay in the instant case were not "*explicitly covered under the provision of the PPA and the RfS.*"
- b) SECI refused to grant an extension, stating that the PPA did not allow time for commissioning beyond 27 months from the effective date, even though it had sought materials from the Petitioner to consider giving such an extension, effectively making the performance of the PPA impossible. Hence, the PPA came to an end by the conduct of the parties and stands discharged.
- c) There cannot be any claim for liquidated damages in terms of the PPA since the PPA itself stands discharged.
- d) Article 4.6.1 and Article 3.3.2, relied on by SECI, deal with situations where the PPA survives and the delay is beyond 18 months but up to 27 months.
- e) In the instant case, there is no agreement on the course of action in case the PPA does not survive, and there is a delay beyond 27 months. As per the principles of contract law, in case of any damages or loss suffered by one party for reasons that are outside the scope of the PPA, SECI should have shown that it had suffered an injury and raised a claim.
- f) Despite the SCOD occurring on 22.12.2020, SECI did not raise any claim for damages or state that any loss or injury has been caused to them.
- g) The Petitioner's case is much better since, after initially giving a time extension, SECI took the position that the PPA cannot be extended beyond 27 months at all, even when the Bihar discoms agreed to an extension. SECI is liable to show what damage has been caused to them due to the Petitioner's project not coming on, at the very least, make a claim on the Petitioner.
- h) SECI has stated that it has suffered a legal injury on account of the non-availability of power. However, being only a power trader, it must demonstrate if any claims have been made against it by the ultimate beneficiary. It is quite clear from the pleadings that there has been no claim by the Bihar discoms on the Petitioner. Since SECI would have only supplied the electricity

available from the Petitioner to the Bihar discoms, SECI cannot maintain an independent claim against the Petitioner in the absence of such a claim from the Bihar discoms.

- i) SECI has neither in any of its correspondences with the Petitioner nor at any time prior to 15.01.2025, raised any issue with respect to loss caused to SECI due to non-commissioning of the Project and the issue of payment liquidation damages under the PPA.
- j) There is also no merit in SECI relying on the DRC Guidelines to justify its inaction in the matter. Raising a claim does not amount to a coercive action and nothing prevented SECI from raising a claim on the Petitioner. Further, the petition was filed on 28.02.2024, and the DRC decision was in March 2024.

Written Submissions of SECI:

12. Vide written submissions dated 11.02.2025, briefly, SECI has submitted that:

- a) Under the PPA dated 05.04.2019, the Petitioner had arranged to provide a payment order issued by IREDA of INR 35 Crores in terms of Articles 3.3.1 and 5.2.1 of the PPA.
- b) The SCoD as per the PPA was initially on 22.07.2020 which was extended till 22.12.2020 on account of COVID-19. The long stop date for the project in terms of the extended SCoD of the project, i.e., 9 months from 22.12.2020, is 22.09.2021.
- c) The Petitioner did not commence supply by the extended SCoD, i.e., 22.12.2020 in regard to any part of the entire capacity, the Petitioner became liable to pay liquidated damages. If the power project is commissioned after the SCoD, the liquidated damages are payable, and the performance guarantee given is enforceable in terms of articles 3.3.3, 4.6.2, and 5.2 of the PPA.
- d) By 22.09.2021, the entire quantum of liquidated damages became payable. Such liquidated damages are payable in full even if the Petitioner had commenced supply on 22.09.2021 or thereafter. The obligation to pay such liquidated damages in full as on 22.09.2021 was an accrued right that did not in any manner get affected on account of the long stop date as per Article 4.6.2 of the PPA.
- e) SECI had considered the request for extension of SCoD beyond 22.12.2020 made by the Petitioner and, on 29.06.2022, decided not to agree to the extension of SCoD.
- f) The action of SECI in not agreeing to extend the SCoD did not amount to abandonment of SECI's right under the PPA for non-commencement of supply of Electricity by the Petitioner by the SCoD. There was no novation, substitution, variation, remission, or dispensation of the performance of the PPA (with the scope of Sections 62 and 63 of the Indian Contract Act,

1872) or waiver on the part of SECI within the scope of waiver under Article 17.3 of the PPA. There was no breach or otherwise an act of commission or omission on the part of SECI affecting the performance of the obligations by the Petitioner.

- g) As sufficient time had expired after the last extension had been granted up to 22.12.2020, SECI, vide its letter dated 29.06.2022, decided not to grant any further extension of time. The letter dated 04.07.2022 of Bihar Utilities subsequently granting consent was therefore not acted upon. Vide letter dated 14.07.2022, SECI again wrote to Bihar Utilities that no further extension of time can be granted.
- h) On 18.07.2022, the Petitioner filed an application constituted by the MNRE to the DRC. Therefore, SECI did not proceed to encash the Payment Order given by IREDA.
- i) On 23.09.2024, MNRE confirmed the recommendation of DRC, noting that the Petitioner itself did not wish to proceed further with the establishment of the power project.
- j) The time taken from 18.07.2022 till 23.09.2024 was on account of the proceedings initiated by the Petitioner before the DRC/MNRE and the pendency of the matter in such forum. As such, no objectionable action was taken for the period from 22.09.2021 to 23.09.2024.
- k) In the present proceedings, the Petitioner is not entitled to claim any relief in regard to the encashment of the payment order issued by IREDA. The payment order was issued by IREDA under an independent contract between SECI and IREDA. The Petitioner is not a party to any such contract.
- l) Though the Petitioner filed a petition on 29.02.2024, it did not move any application for a stay, and no such stay order was granted at the relevant time. In such circumstances, on 16.01.2025, SECI proceeded to send the letter to IREDA for encashment of the payment order.
- m) The defence raised by the Petitioner that SECI had abandoned the rights under the PPA by deciding not to grant an extension of SCoD vide letter dated 29.06.2022 despite Bihar Utilities being agreeable to consideration of such extension is misplaced. SECI had enforced its right under the PPA. If the Petitioner had any dispute on the actions of SECI the Petitioner is required to avail appropriate course available in law.
- n) Further, even after deciding not to proceed with the implementation of the project if the Petitioner had any grievance on the actions taken by SECI, the Petitioner is required to file appropriate proceedings before this Commission under section 79(1)(f) of the Electricity Act. In the present petition, the Petitioner has sought the relief of declaration that the PPA dated 05.04.2019 stands discharged by the conduct of the parties and for the return of the performance bank guarantee. The other reliefs sought are consequential.

- o) The Petitioner is in breach of the contract and, therefore, cannot claim that there was any discharge of the PPA by the conduct of both parties. There was also no act on the part of SECI leading to the discharge of the PPA in law. There also cannot be unilateral discharge on the part of the Petitioner on the assumption that both parties have abandoned the contract. In any event, the accrued rights of SECI as on 22.09.2021 for liquidated damages cannot be said to be affected by any alleged subsequent conduct of pursuing the proceedings in DRC. The discharge of the contract can only be in terms of specific provisions of the PPA or under the provision of the Indian Contract Act, 1872.
- p) The discharge of the contract validly entered into is either by performance or by breach or by novation and substitution. There is no such thing to claim any such discharge in the present case. The PPA has not been performed by the Petitioner as per the obligations assumed under the PPA, the power project has not been established, the supply of power has not been commenced, and there is a breach on the part of the Petitioner.
- q) The rights of SECI to get liquidated damages in full got crystallised as on 22.09.2021 as per the terms of the PPA. There is no event of default pleaded, much less shown on the part of SECI in terms of Article 13.2 of the PPA. There is no notice or process adopted as per Article 13.4 of the PPA for any such event of default. There is no claim that the PPA needs to be treated as terminated on account of any sustained force majeure or otherwise with reference to any specific clause in the PPA. There is no provision in the PPA to enable termination of the contract at will. There cannot be any plea of waiver against SECI in terms of Article 17.3 of the PPA.
- r) In any event, there cannot be any restraint on SECI to encash the Payment Order of IREDA as per the settled law. The Petitioner has raised broadly stated two aspects, namely: - a) in the facts and circumstances of the case and on the alleged plea of discharge of PPA by the conduct of parties, the payment order should not be enforced, and b) SECI has not shown any loss suffered by it to encash the payment order. Such specific pleas have been considered in many of the earlier cases and have been consistently rejected by the Hon'ble Supreme Court, Hon'ble High Courts, and APTEL.
- s) Liquidated Damages in Article 4.6.2 have been fixed by agreement between the parties as a genuine and pre-estimate of the loss and damages that will be suffered in case of default on the part of the Petitioner in fulfilling the obligations under the PPA, namely commencement of supply of power and making the contracted capacity available for dispatch by the Scheduled

Commissioning Date. Further, Article 13.7.1 of the PPA provides that the parties acknowledge that a breach of obligation would result in injuries.

- t) The very purpose of liquidated damages is that the parties pre-estimate the loss suffered by the innocent party in case of breach of the contract. The concept of liquidated damages is to, in fact, avoid litigation in proof of actual loss. It is submitted that the liquidated damages clause gives certainty to the consequences of a default by a party and recovery of the amount by a non-defaulting party. If the non-defaulting party is required to establish the actual loss, the very purpose of the party agreeing to the Liquidated Damages will have no purpose.

Analysis and decision:

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

14. On the basis of the submission of the parties, the following issues arise for adjudication:

***Issue No. 1:** Whether the PPA dated 05.04.2019 stands discharged by the conduct of Respondent No. 1 and the Petitioner?*

***Issue No. 2:** Whether the letters dated 15.01.2025 & 16.01.2025 issued by SECI to the Petitioner & IREDA, respectively, should be stayed?*

***Issue No. 3:** Whether Respondent No. 1 should be directed to return the performance bank guarantee of 35 Crores to the Petitioner along with the interest/ carrying cost on the amount of Rs. 35 Crores from Dec 2018 till the same is returned?*

15. Now, we proceed to discuss the above issues.

Re. Issue No. 1

Whether the PPA dated 05.04.2019 stands discharged by the conduct of Respondent No. 1 and the Petitioner?

16. The Petitioner has submitted that for want of issuance of Government Order (GO) by Karnataka Renewable Energy Development Limited (KREDL), the Petitioner requested SECI on 07.09.2021 for an extension of the project beyond 22.09.2021. However, SECI rejected the request for a time extension on 29.06.2022. Since there was no way for the PPA to be performed in the absence of a time extension, the PPA was frustrated by the conduct of SECI. Since the PPA itself stands discharged, there is no question of SECI retaining or encashing the PBG. ***Per-contra***, SECI has submitted that on 23.02.2024, the Petitioner, during the hearing before the

DRC, submitted that the project is no longer viable and that the Petitioner has filed a Petition for termination before this Commission. As such, the Petitioner is in breach of the contract. There was also no act on the part of SECI leading to the discharge of the PPA in law. There also cannot be unilateral discharge on the part of the Petitioner on the assumption that both parties have abandoned the contract.

17. The relevant Articles of the PPA are as under:

ARTICLE 3: CONDITIONS SUBSEQUENT & FINANCIAL CLOSURE

3.1 Satisfaction of conditions subsequent & financial closure by the WPD

The WPD agrees and undertakes to duly perform and complete all of the following activities at WPD's own risk and cost within seven (7) months from the Effective Date, i.e. by 22.08.2019 unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by SECI:

- a) The WPD shall make 100 % Project financing arrangements and provide necessary certificates to SECI in this regard;*
- b) The WPD shall produce the documentary evidence of possession / right to use of 100% of the land identified for the Project;*
- c) The WPD shall submit the details of all planned/proposed wind turbine generators and produce the documentary evidence of the same.*

3.2 Consequences of non-fulfilment of conditions subsequent and financial closure

3.2.1 In case of a failure to submit the documents as above, SECI shall encash the Performance Bank Guarantee submitted by the WPD, terminate this Agreement and remove the Project from the list of the selected Projects by giving a notice to the WPD in writing of at least seven (7) days. The termination of the Agreement shall take effect upon the expiry of the 7th day of the above notice.

An extension can however be considered, on the sole request of WPD, on payment of Rs. 10,000/- per day per MW to SECI. Subsequent to the completion of deadline for achieving fulfilment of condition subsequent and financial closure, SECI shall issue notice to the WPD in case it is not meeting the above requirements as per the RfS deadlines. The notice shall provide a period of 7 days to the WPD to either furnish the necessary documents or make the above mentioned payment of Rs. 10,000/MW/day. In case of non-submission of either the requisite documents or the necessary amount upon expiry of the above mentioned notice period of 7 days, SECI shall encash the PBG of the WPD and terminate the PPA for the Project. The amount of Rs. 10,000/MW/day shall be paid by the WPDs in advance prior to the commencement of the said delay period and shall be calculated based on the period of delay as estimated by the WPD. In case of the WPD meeting the requirements of conditions subsequent and financial closure before the last date of such proposed delay period, the remaining amount deposited by the WPD shall be returned by SECI. Interest on account of delay in deposition of the above mentioned charges or on any enable delivery of electricity at the Delivery Point. The transmission of power up to the point of interconnection where the metering

is done for energy accounting shall be the responsibility of the WPD at his on cost.

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4.5 Extensions of Time

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

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

4.5.2 *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 circumstances 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 Effective Date of this Agreement.***

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

4.6.1 *The Project shall be fully commissioned within 18 months from the Effective Date of this Agreement. In case of failure to achieve this milestone, SECI shall encash the Performance Bank Guarantee (PBG) in the following manner:*

Delay beyond the Scheduled Commissioning Date upto (& including) the date as on 27 months from the Effective Date: Buyer will encash total Performance Bank Guarantee on per day basis and proportionate to the balance Capacity not commissioned.

4.6.2 *The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee shall be limited to 27 months from the Effective Date of this Agreement. In case, the Commissioning of the Project is delayed beyond 27 months from the Effective Date, the PPA capacity shall stand reduced / amended to the Project Capacity Commissioned, provided that the commissioned capacity is not below 50 MW or 50% of the allocated Project Capacity, whichever is lower, and the PPA for the balance Capacity will*

stand terminated and shall be reduced from the selected Project Capacity.

5.2 Performance Bank Guarantee

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5.2.2 If the WPD fails to commence supply of power from the Scheduled Commissioning Date specified in this Agreement, subject to conditions mentioned in Article 4.5, SECI shall have the right to encash the Performance Bank Guarantee without prejudice to the other rights of Buyer under this Agreement.

ARTICLE 11: FORCE MAJEURE

11.3 Force Majeure

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

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

11.4 Force Majeure 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; and*
- f. Non-performance caused by, or connected with, the Affected Party's:*
 - i. Negligent or intentional acts, errors or omissions;*

- ii. *Failure to comply with an Indian Law; or*
- iii. *Breach of, or default under this Agreement.*

18. From the above, we observe that as per Article 3 of the PPA dated 05.04.2019, the Petitioner was to comply with the conditions subsequent & financial closure within seven (7) months from the Effective Date, i.e., by 22.08.2019 unless such completion is affected by any Force Majeure event. The Petitioner was to, *inter-alia*, make 100 % project financing arrangements and produce the documentary evidence of possession/right to use of 100% of the land identified for the Project. As per Article 3.2.1, in case of a failure to submit the documents, SECI has the right to terminate the PPA and encash the PBG, giving seven (7) days' notice. The Petitioner could however, request for an extension on payment of Rs. 10,000/- per day per MW to SECI. As per Articles 4.5.6 & 4.6.2, any extension of the SCoD shall not be allowed beyond 27 months from the Effective Date of this Agreement. As per Article 5.2.2, if the Petitioner fails to commence the supply of power from the SCoD, SECI will have the right to encash the PBG. Article 13.3 specifically stipulates that 'Force Majeure' means any event or circumstance or combination of events viz. Act of God, any act of war, radioactive contamination or ionising radiation, or an event of Force Majeure identified under PSA, thereby affecting the delivery of power from the Petitioner to Buying Entity(ies).

19. We observe that vide Order dated 18.06.2019, MNRE stipulated that:

Sub: Setting UP of a Dispute Resolution Mechanism to consider the unforeseen disputes between solar/ wind power developers and SECI/ NTPC, beyond contractual agreements - regarding.

...

- (b) **All requests of Extension of Time not covered under the terms of contract:** All cases involving unforeseen issues/ circumstances not covered under Contractual Agreements like cases where the site is to be procured by the developer but there is delay in land allotment due to policy change or registration by the Government, delays in grant of proposed connectivity due to court stays, etc., will be placed before the DRC for consideration and make recommendations to M/o New & Renewable Energy (MNRE) for appropriate decision.
- (iv) **The 'Dispute Resolution Committee' (DRC) will examine all such cases referred to it, including the cases where the developer is not satisfied with the decision of SECI/NTPC and it decides to appeal after paying the required fee as laid down under Para (ii) (a) above, in a time bound manner and submit its recommendations to the Ministry of New & Renewable Energy (MNRE), not later than twenty-one (21) days from the date of reference.**
- (v) **The recommendations of the 'Dispute Resolution Committee' (DRC) along with MNRE's observations, will be placed before Hon'ble Minister (NRE) for final decision. The Ministry shall examine and put up such recommendations to Minister (NRE) with the comments of IFD within twenty one (21) days of receipt of recommendation from the DRC.**

- (vi) *DRC members shall be paid Rs.4,000/- per sitting, not exceeding Rs.20,000/- per member per case referred. Cases involving similar issues will be treated as one case. The fee for DRC members shall be paid by SECI/ NTPC.*
- (vii) *The meetings of DRC shall be organized in the premises of SECI/ NTPC respectively. All arrangements for the DRC meeting shall be made by SECI/ NTPC.*
- (viii) *The DRC members shall be provided transportation from their place of residence to the venue of the meeting and back.*
- (ix) *To arrive at any decision, Committee will be free to interact with the relevant parties of the case and shall record their views. For presenting the case before the DRC, no lawyers shall be permitted.*
This issues based on approval of Hon'ble Minister (NRE)

20. We observe that vide letter dated 07.09.2021, the Petitioner requested SECI as under:

Sub: Request for extension of time for achieving Financial Closure, Construction & Commissioning of our SECI-V 175 MW Wind Project located in Kudligi Tehsil, Bellary Dist., Karnataka and request for reduced Performance Guarantee amount – reg

Ecoren Energy India Pvt Ltd., is one of the leading developers of Wind & Solar projects, having commissioned over 900 MW capacity in the States of Andhra Pradesh & Karnataka including 250 MW IPP in wind. It is also executing projects of about 800 MW capacity as on date.

Ecoren Energy India Pvt Ltd., (EEIPL) was awarded 175 MW wind project under SECI Tranche - V, EEIPL proposed the project in Kudligi Tehsil, Bellary Dist., Karnataka. The LOA for the same was issued by SECI on 24th October 2018. Subsequently, EEIPL formed an SPV, Boreas Renewable Energy Private Limited (BREPL), within the provisions of RfS, for development of the project. BREPL executed PPA with SECI for the 175 MW wind project, on 5th April 2019. BREPL has secured Stage 2 Connectivity grant, submitted the Connectivity BG and signed Transmission Agreement with CTU vide ref 5 & 6 above.

Zenataris Renewable Energy Private Limited (ZREPL), an SPV of EEIPL, was awarded wind project of 125 MW capacity under SECI Tranche - VI. ZREPL proposed the 125 MW wind Project, in Kudligi Tehsil, Bellary Dist., Karnataka. Both BREPL and ZREPL are SPVs of EEIPL, both projects of 175 & 125 MW are co-located and share evacuation infrastructure and have common interconnection point at 220 kV level to 400/220 kV Hiriyur ISTS. Both the projects are being developed together.

During Aug & Sep 2018, EEIPL submitted four applications to Karnataka Renewable Energy Development Limited (KREDL), for allotment of 20 MW base Government Order for the development of the wind project in the project area. EEIPL would be transferring part of this 20 MW to BREPL and enhance to 175 MW capacity. The base GO for 20 MW should have been released in July 2019. But, unfortunately, there has been abnormal delay of about 34 months in processing of the applications, for the issual of 20 MW GO at KREDL & Government of Karnataka (GOK), due to various reasons briefed as under:

- *Lok Sabha elections in 2019 in the state of Karnataka*
- *Due to change in governance in 2019, all GOs approved by previous Chief Minister were put on hold by Chief Secretary, Government of Karnataka, in July 2019, the same was informed through letter dated 8th Oct 2020 from Additional Chief*

Secretary to the Government of Karnataka. We have shared the same to SECI along with other communications had with KREDL and Energy department/GoK

- *KREDL received directions from GOK in Jan 2021 only, to process proposals connected to ISTS*

Due to this delay in issue of GO, project progress has been affected, delaying the SCOD. This has been informed/communicated to SECI vide our various communications/discussions for the past two years and have requested SECI to support us in providing suitable the SCOD time extension. As on date, KREDL has recommended the four applications (total 20 MW) to Energy department/GoK, for issual of base GO for 20 MW. We require about 18 months from today, to commission the project & have requested SECI suitable time extension of SCOD. Our request is under review by SECI.

Performance Guarantee in the form of Payment on Order Instrument (POI) for Rs. 35 crores has been issued by IREDA, which is valid till 23rd Sep 2021. Vide letter cited in ref 7 above, SECI has informed us to suitably extend the PBG. In this regard, we would like to put forward the following for your kind consideration:

- *We have discussed with IREDA for extending the validity of POI. The duration of extension is linked to Project Commissioning timelines and SCOD time extension. We request you to kindly consider our requests & provide us the SCOD time extension, considering the 18 months period from today for Commissioning. We shall immediately proceed with arranging for the submission of renewed PBG. Even, IREDA has also sought same clarification for extending the validity of the PBG*
- *Further, as per the RFS document of SECI V, requirement of PBG is @ Rs. 20 lakhs/MW/project, which works out to Rs. 35 crores for the current 175 MW project. Ministry of Finance vide their Official Memorandum dt. 12th Nov 2020, has advised for the reduction in PBG to 3% of the Project cost for all existing projects. Unfortunately, till date, due to the first phase of COVID, financial recovery has been slow and again the second wave of Covid, has further created lot of hardships leading to further financial stress. Keeping the above in mind, we humbly request you to kindly permit us to submit the revised and renewed PBG, @ 2% of the project cost, which works out to PBG of Rs. 21.7 crores as against Rs. 35 crores.*

Thus, summarizing our requests, we earnestly request you to kindly arrange to provide us the SCOD time extension as well as approve for reduction of the PBG to 2% of the Project cost, to enable us to proceed with submission of renewed PBG for Rs. 21.7 crores for the appropriate period.

21. Vide letter dated 13.10.2021, SECI requested MNRE as under:

Sub: Request of M s Boreas Renewable Energy Private Limited to grant time extension to 175 MW Wind Power Project awarded under SECI Wind Tranche - V.

- Vide letter dated 07.09 2021, M/s BREPL has requested SECI to grant time extension to Scheduled Commissioning Date (SCD) for 18 months on account of inordinate delay in issuance of Government Order (GO) by Karnatka Renewable Energy Development Ltd (KREDL). In past too, M s BREPL had requested SECI to grant time extension to SCD on same ground. However, same was not processed due to the non-submission of required documents. The details of the same and brief status of Project is presented in Annexure I*

- iii. *The Article no 4.6.2 of PPA signed between SECI and M/s BREPL states “The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee shall be limited to 27 months from the Effective Date of this Agreement. In case, the Commissioning of the Project is delayed beyond 27 months from the Effective Date, the PPA capacity shall stand reduced / amended to the Project Capacity Commissioned, provided that the commissioned capacity is not below 50 MW or 50% of the allocated Project Capacity, whichever is lower, and the PPA for the balance Capacity will stand terminated and shall be reduced from the selected Project Capacity.”. Also, Article 4 5.6 of the PPA states “Notwithstanding anything to the contrary contained in this Agreement, any extension of the Scheduled Commissioning Date arising due to any reason envisaged in this Agreement shall not be allowed beyond 27 months from the Effective Date of this Agreement”*
- iv. *Considering the above fact, it may not be possible for SECI to grant extension beyond 22.09.2021 as requested by M/s BREPL.*
- v. *However, MNRE may consider the request of M/s BREPL, in line with specific provisions of PPA signed between M/s BREPL and SECI and “Guidelines for tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects” dated 08.12.2017 issued by Ministry of Power. The same are reproduced here under:*
- *Article 17.2 of the PPA states “In case of inconsistencies between the agreement(s) executed between the Parties, applicable Law including rules and regulations framed thereunder, the order of priority as between them shall be the order in which they are placed below:-*
 - *“Applicable Law, rules and regulations framed thereunder. If the Grid Code and in the terms and conditions of this Agreement.”*
 - *Article 1.2.13 of the PPA states “Different parties of this Agreement are to be taken as mutually explanatory and supplementary to each other and if there is any inconsistency between or among the parts of this Agreement, they shall be interpreted in a harmonious manner so as to give effect to each part.”*
 - *The said Project was awarded in compliance with the Guidelines for tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects” dated 08.12.2017, issued by Ministry of Power. This specifically mentioned at (i) Clause no. 1.1.4 and 1.1.5 of the RfS issued for Wind Tranche – V. (ii) Reference A and B of the LoA issued to M/s. BREPL (iii) Recital A and B of the PPA.*
 - *Clause No. 24 of the above referred guideline allows MNRE to make any modification and interpretation. The Clause no. 24 of the Gazette Resolution dated 08.12.2017 states “If any difficulty arises in giving effect to any provision of these Guidelines or interpretation of the Guidelines or modification to the Guidelines. Ministry of New and Renewable Energy is empowered to the same in consultation with Ministry of Power. The decision in this regard shall be on all parties concerned.”*
- vi. *In past SECI with due approval/recommendation from MNRE, Gol (please refer MNRE letter dated 22.10.2019, OM's dated 13.10.2020 and 29.06.2021) had granted time extension to various wind projects awarded under different Tranches. With these extensions SCD of the Projects as well as the outer date to commission the*

Project shifted beyond 27 months from effective date of PPA. It is to be noted that these extensions were granted on the generic issues/difficulties faced by all the Project developers till date, all the time extensions granted were accepted by all interested parties including concerned DISCOMs.

- vii. *In the present project of M/s BREPL outer date to commission the Project (revised SCD + 09 months) has lapsed on 22.09.2021 and the reason for delay in execution of Project quoted by M/s BREPL is not generic in nature and not covered explicitly under the provision of PPA and RfS.*
- viii. **The request of time extension of M/s BREPL was considered in the 21st meeting of the Project Committee of the Board of SECI. In the said meeting, all above mentioned facts were considered and it was decided that M/s BREPL be allowed to submit additional documents for processing the time extension to Scheduled Commissioning Date (SCD) by 15.11.2021. Meanwhile the matter may be referred to MNRE for appropriate directions. After receiving the directions from MNRE and on verification of submission of required documents SECI may take the decision on time extension to SCD by 15.12.2021.**

Annexure – I

- a) *On 20.08.2018, M/s. EEIPL had submitted the applications to KREDL, the nodal agency for Renewable Energy in Karnataka, for issuance of Government Order (GO) for 20 MW capacity allotment with State Grid connectivity (In STS) in the project boundary proposed. These applications for capacity allotment are backed by the No Objection Letters from the previous developers having wind monitoring rights over these boundaries. After issuance of GO for 20 MW, M/s. EEIPL had planned to get in enhance up to 300 MW with ISTS connectivity.*
- b) *On various occasions, SECI had informed M/s BREPL the following;*
 - *In SECI Wind Tranches, Wind Project Developers (WPDs) are required to install and operate the Project on Build Own and Operate Basis. Responsibility of selection identification and procurement leasing of land (revenue and or private) lies with the WPD Obtaining necessary clearances vests with the WPD.*
 - **Applications have been made to M/s KREDL for issuance of Government Order (GO) for setting up of STU) connected Wind Power Project of 20 MW Capacity It is not possible to correlate the earlier submitted 20 MW applications to M/s KREDL with the Projects awarded by SECI to M/s EEIPL. i.e. 175 MW Project awarded to M/s Ecorcn Energy India Pvt Ltd (EEIPL) (executed through SPV name M/s Boreas Renewable Energy Pvt Ltd (BREPL)) under Wind Tranche V.**
 - *No government issued document / rule is there which restricted M/s BREPL in filing a fresh application to KREDL or revised its earlier submitted application (referred above) for the capacity awarded by SECI.*
 - *It is a business decision taken by M/s BREPL itself to wait for the processing of the application for 20 MW than go for enhancement of Project capacity It is to be noted that for the enhancement of Project capacity from 20 MW to 175 MW and change in connectivity from STU network to ISTS network. M/s BREPL have to file a fresh application to KREDL which is also subject to the issuance of GO by KRDEL against earlier 20 MU application KREDL will again take additional time to process the enhancement application Same was also communicated vide SECT'S earlier communications.*

- In the last meeting held on 23.08.2021 between SECI and M/s BREPL, SECI again appraised M/s BREPL that as on date, it is possible to link 20 MW application pending with KREDL to Project capacity awarded by SECI 175 MU. In response Director, EEIPL informed that GO will be issued within 10 days thereafter they will apply for enhancement of Project capacity up to 300 MW with ISTS connectivity. SECI finally submitted that extension request can only be processed when M/s EEIPL gets GO for 20 MW and then file an application for enhancement of capacity without delay.
- c) Parallely, SECI also sought reasons from KREDL w.r.t. delay in processing of applications filed for issuance of GO for 20 MW capacity. Vide letter dated 08.09.2021, KREDL had informed that Energy Department vide letter dated 30.05.2020, had directed KREDL to re-examine the proposals and re-submit, if required. Accordingly, KREDL vide letter dated 11.06.2020 had sought the latest information from the M/s EEIPL. M/s EEIPL had submitted the details to KREDL on 28.08.2020 wherein evacuation details for ISTS connectivity and the network certificate were provided KREDL vide its letter dated 15.09.2020 informed M/s EEIPL to submit fresh proposal for allotment of Projects under ISTS category and also informed to submit the required documents for 20 MW capacity. Thereafter, M/s EEIPL vide dated 18.05.2021 had submitted the documents related to 20 MW capacity but have not submitted the InSTS evacuation capacity details. In response KREDL vide letter dated 24.05.2021 informed M/s EEIPL that proposal for allotment of 20 MW capacity will be processed for State Connectivity only. Vide letter dated 13.08.2021. KREDL resubmitted the proposal to Energy Department, GoK for allotment of 20 MW capacity Wind Power Project under InSTS category. KREDL also informed that in State of Karnataka, the ISTS projects is allocating from 05.01.2021.

22. Vide letter dated 17.12.2021, MNRE informed SECI as under:

Subject Request of M/s Boreas Renewable Energy Private Limited to grant time extension to 175 MW Wind Power Project awarded under SECI Wind Tranche-V - regarding.

Madam,

I am directed to refer SECI's letter dated 13.10.2021 whereby SECI has requested this Ministry's direction regarding the request of M/s Boreas Renewable Energy Private Limited (M/s BREPL) seeking time extension to 175 MW Wind Power Project awarded under SECI Wind Tranche -V.

2. In this regard, since the above issue is related to contract between SECI and the developer, the Ministry is of the view that such matters be decided by SECI itself keeping in view the provisions of the bidding documents and the contract, if any, between SECI and the developer concerned. In case the developer is aggrieved by SECI's decision, he can take recourse to the Dispute Resolution Committee (DRC) mechanism put in place by MNRE. Further, SECI is also advised to be consistent in approach across all such matters.

3. This issues with approval of the Competent Authority.

23. Vide letter dated 04.01.2022, SECI informed BSPHCL, *inter-alia*, as under:

2	Boreas Renewable Energy Private Limited	175	Hiryur PS	Bellary, Karnataka	22.12.2020	a) COVID-19	Construction activity not yet started.
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2. With reference to the project at sl. no. 02 above, it is submitted that M/s BREPL has requested SECI to grant additional time extension to Scheduled Commissioning Date (SCD) on account of delay caused due to following reasons:

a) Delay in issuance of Base Government Order (GO) for setting up of Wind Power plant in Karnataka

Status: Applications were filed with Karnataka Renewable Energy Development Limited (KREDL), designated State Nodal Agency, in Aug - Sep' 2018 and GO was issued on 27.09.2021.

b) Delay in approval of PSA by Bihar Electricity Regulatory Commission Status: Vide order dated 04.08.2021, BERC approved the PSA, i.e., 30 months after the signing of PSA.

On above grounds, M/s BREPL is seeking additions of approval by SECI. SECI is yet to evaluate the time extension request BREPL. Further, please refer Article no. 4.5.6 of the PPA cited above, which states "Notwithstanding anything to the contrary contained in this Agreement, any extension of the Scheduled Commissioning Date arising due to any reason envisaged in this Agreement shall not be allowed beyond 27 months from the Effective Date of this Agreement." In the present case, 27 months from the Effective Date of this Agreement expired on 22.04.2021 and the current revised SCD of the Project (22.12.2020) has also expired.

3. In past, SECI with due approval / recommendation from MNRE, Gol had granted time extension to various wind projects awarded under different Tranches. With these extensions, SCD of the Projects as well as the outer date to commission the Project shifted beyond 27 months from effective date of PPA. It is to be noted that these extensions were granted due to generic issues/difficulties faced by all the Project developers.

SECI had referred this case of M/s BREPL to MNRE, Gol. On this, MNRE vide letter dated 17.12.2021, had informed that above issue is related to contract between SECI and the developer, and the Ministry is of the view that such matters be decided by SECI itself keeping in view the provisions of the bidding documents and the contract, if any, between SECI and the developer concerned.

4. **As per the comments of MNRE as quoted in para 3 above, it is felt that a consent from parties (BSPHCL, NBPDC and SBPDCL) to the PSA of this project is required to process the time extension of M/s BREPL.**

5. We would also like to inform that the above said Project has been awarded at tariff of Rs. 2.77/kWh. In our last two Wind Tranches tariff discovered have been Rs. 2.77-2.78/kWh (Tranche X) and Rs. 2.69-2.70/kWh (Tranche X). In upcoming bids, we are presuming the tariff to be in this range only. The power from Tranche X has been already mapped with State of Rajasthan and power from Tranche XI will be mapped with State of Madhya Pradesh. Further, considering the challenges in execution of Wind Project and based on our experience regarding time taken to commission Wind Projects, SECI has revised the Commissioning date (SCD) of Project to 24 months from effective date of PPA and additional 09 months post SCD to commission the Project with penalties as applicable.

6. **Considering the above, it is proposed that M/s BREPL should take power for meeting its energy demand and non-solar RPO compliance considering that the tariff has been adopted by BERC. If M/s BSHPCCL opts to take 125 MW Power from SECI's new bids then Power supply from the developers will start tentatively from 1st quarter**

of FY 2024-25 (considering effective date of PPA for Tranche XII Project, which is under bidding stage in Apr. 2022) Whereas, if M/s BSPHCL agrees to take power under the already executed PSA then supply of 125 MW power will start much before 1st quarter of FY 2024-25.

In view of the above, it is requested that M/s BSPHCL may kindly give their consent for taking power from the already executed PSA so that the delivery extension request of M/s BREPL, can be processed further.

24. Vide email dated 02.03.2022, BSPHCL informed SECI that in view of the inordinate delay in the start of construction of the wind project by the Petitioner, a grant of time extension for the project will not be accepted.

25. Again, vide email dated 09.06.2022, BSPHCL informed SECI as under:

*In light of discovered price of SECI ISTS Wind Tranche- XII and expected time of commissioning of the new projects of wind, **BSPHCL is in process of reconsideration of extension in SCOD** of the Wind Project tied-up under ISTS Wind Tranche- V from the M/s BREPL. **The final decision on the SCOD extension will be communicated soon.***

26. Vide letter dated 29.06.2022, SECI informed the Petitioner as under:

Sub: Request for time extension in Scheduled date for achievement Financial Closure and condition subsequent, and Schedule Commissioning Date of 175 MW Wind Power Project awarded to M/s EEIPL (executed thorough SPV named M/s BREPL) under SECI Wind Tranche-V.

*With reference to the above cited letter, it is to inform that SECI has reviewed request for **time extension in Scheduled date for achievement of Financial Closure and condition subsequent, and Schedule Commissioning Date** of 175 MW Wind Power Project awarded to M/s EEIPL (executed thorough SPV named M/s BREPL) under SECI Wind Tranche - V and noted that the maximum time period to commission the Project, including penalty period, provided in the PPA signed for the Project expired on 22.09.2021 and no significant progress has been made till the expiration of PPA (please refer Article no. 4.5 and 4.6 of the PPA). The reasons highlighted by M/s BREPL for delay in start of construction activity cannot be considered as a Force Majeure event. Same has also been communicated by SECI in earlier communications.*

In view of the above, we regret to inform that in case of Project stated in the subject matter no further time extension can be granted beyond the period already extended by SECI, which has expired on 22.09.2021.

SECI will initiate further action as per the provisions of RfS and PPA and as per the applicable procedural guidelines under Dispute Resolution Mechanism issued by MNRE. This is issued without prejudice to other terms and conditions of the Project.

27. Vide letter dated 23.09.2024, MNRE informed SECI as under:

a. Recommendation of the DRC:

*DRC has observed that **WPD has orally modified its prayer without supporting it with any formal written submission. Hence original dispute has lost relevance. Once a modified prayer is submitted by the WPD, DRC will take a view as per prescribed procedure.***

28. Vide letter dated 15.01.2025, SECI replied to the Petitioner's letter dated 18.07.2022 as under:

*With reference to the letter cited above and subsequent appeal filed with DRC, it is to inform that **competent authority has observed that during the hearing dated 22.03.2024, M/s BREPL has orally modified their prayer without supporting it with any formal written submission, due to which the original dispute has lost relevance. Further, once a modified prayer is submitted by M/s BREPL, DRC will take a view as per prescribed procedure.** The DRC's report and the MNRE's decision thereupon are enclosed.*

Since no further extension is granted by competent authority beyond what has already been granted by SECI, following Liquidated Damages for delay in commencement of supply of power to Buyer are applicable:

A. Encashment of PBG/POI of Rs. 35 Crores (as per Article no. 4.6.1 of the Power Purchase Agreement (PPA) signed for the Project).

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

29. Vide letter dated 16.01.2025, SECI requested IREDA as under:

*Since Performance Obligation is not fulfilled by the Party therefore pursuant to terms of NIT, **we invoke the said POI amounting Rs. 35,00,00,000/-** (Rupees Thirty Five Crore Only) and hereby make a demand on you to remit a sum of Rs 35,00,00,000/- (Rupees Thirty Five Crore Only) to us immediately through RTGS/NEFT-Account Name-Solar Energy Corporation of India Ltd, Account No-10070882654, IFSC Code-IDFB0020101, Bank Name-IDFC First Bank Ltd, Branch-Express Building, 2nd Floor, 9-10, Bahadurshah Zafar Marg, New Delhi-110002.*

30. From the above, we observe that EEIPL was awarded a 175 MW wind project under SECI Tranche – V. The LOA was issued by SECI on 24.10.2018. Subsequently, EEIPL formed an SPV, Boreas Renewable Energy Private Limited (BREPL), within the provisions of RfS for the development of the project. BREPL executed PPA with SECI for the 175 MW wind project on 05.04.2019. As per the PPA, the SCoD was 22.07.2020, which was subsequently revised to 22.12.2020. As per Article 4.6.2 of the PPA, the long stop date for commissioning the project was 22.09.2021.

31. BREPL has informed that it has secured the Stage 2 Connectivity grant, submitted the Connectivity BG and signed the Transmission Agreement with CTU. It was further informed that during Aug & Sep 2018, EEIPL submitted four applications to KREDL for issuance of

Government Order (GO) for a 20 MW capacity allotment with State Grid connectivity (In STS) in the project boundary proposed, which was to be transferred to the Petitioner subsequently and then the same was to be enhanced to 175 MW capacity. As per the Petitioner, the base Government Order for 20 MW was to be released in July 2019, but due to a *change in government (Lok Sabha elections)*, there was an abnormal delay of about 34 months in processing of the applications. Due to the delay in the issue of the Government Order, the SCoD of the project was delayed.

32. Vide letter dated 08.09.2021, KREDL had informed that the Energy Department, vide letter dated 30.05.2020, had directed KREDL to re-examine the proposals and re-submit if required. Accordingly, KREDL vide letter dated 11.06.2020 had sought the latest information from the M/s EEIPL. M/s EEIPL had submitted the details to KREDL on 28.08.2020 wherein evacuation details for ISTS connectivity and the net worth certificate were provided. KREDL, vide its letter dated 15.09.2020 informed M/s EEIPL to submit a fresh proposal for allotment of Projects under the ISTS category and also informed to submit the required documents for 20 MW capacity. Thereafter, M/s EEIPL vide dated 18.05.2021 had submitted the documents related to 20 MW capacity but have not submitted the InSTS evacuation capacity details. In response, KREDL, vide letter dated 24.05.2021, informed M/s EEIPL that the proposal for allotment of 20 MW capacity will be processed for State Connectivity only. Vide letter dated 13.08.2021, KREDL resubmitted the proposal to the Energy Department, GoK, for allotment of a 20 MW capacity Wind Power Project under the InSTS category.
33. We note that vide the letter dated 07.09.2021, the Petitioner had requested SECI to grant a time extension to SCoD for 18 months. Vide letter dated 13.10.2021 (i.e., after a long stop date viz. 22.09.2021) SECI informed MNRE that the Petitioner's request for extension of time was considered in the 21st meeting of the Project Committee of the Board of SECI and it was decided that the Petitioner should submit additional documents for processing the time extension to SCoD. Meanwhile, the matter was referred to MNRE for appropriate directions in line with specific provisions of PPA since the Petitioner's project outer date to commission the Project (revised SCD + 09 months) has lapsed on 22.09.2021 and the reason for the delay in execution of Project is neither generic in nature and nor covered explicitly under the provision of PPA and RfS. However, vide letter dated 17.12.2021, MNRE informed SECI that since the issue of extension of SCoD is related to the contract between SECI and the developer, the Ministry is of

the view that *such matters be decided by SECI itself, keeping in view the provisions of the bidding documents and the contract*. Further, in case the developer is aggrieved by SECI's decision, he can take recourse to the Dispute Resolution Committee (DRC) mechanism put in place by MNRE. Vide letter dated 04.01.2022, SECI requested BSPHCL that its consent was required to process the time extension of the Petitioner.

34. We note that BSPHCL initially on 02.03.2022 communicated its unwillingness to grant a time extension. However, subsequently, vide email dated 09.06.2022, BSPHCL informed SECI that it is in the process of *reconsideration of extension in SCoD* of the Wind Project tied-up under ISTS Wind Tranche- V from the Petitioner and that the final decision on the SCOD extension will be communicated soon. However, SECI, without waiting for the consent of the Respondents, vide letter dated 29.06.2022, declined the request of the Petitioner for time extension in Scheduled date for achievement of Financial Closure and condition subsequent and SCoD. SECI informed the Petitioner that the request cannot be granted beyond the period already extended by SECI, which has expired on 22.09.2021.
35. We further note that vide letter dated 23.09.2024, MNRE informed SECI that DRC has observed that the Petitioner has orally modified its prayer without supporting it with any formal written submission. Hence original dispute has lost relevance. Once a modified prayer is submitted by the Petitioner, DRC will take a view as per the prescribed procedure. Vide letter dated 15.01.2025, SECI informed the Petitioner *that since no further extension is granted by the competent authority beyond what has already been granted by SECI*, liquidated damages as per Article 4.6.1 will be applicable, and the PBG will be encashed. Vide letter dated 16.01.2025, SECI invoked the POI amounting to Rs. 35,00,00,000/- (Rupees Thirty-Five Crore Only).
36. We note that the Petitioner could not progress in the commissioning of the project before 22.09.2021 (the long stop date). As per Article 3 of the PPA, the Petitioner was to comply with the conditions subsequent & financial closure (including making 100% project financing arrangements and producing the documentary evidence of possession/right to use of 100% of the land identified for the Project) within seven (7) months from the Effective Date, i.e. by 22.08.2019. The Petitioner has submitted that from June 2019 onwards, it has made several communications and several discussions/VCs/meetings explaining the reasons for the delay supported by relevant backup documents & has been requesting SECI for SCoD time extension.

However, none of the letters from June 2019 to 22.08.2019 are available on record. The Petitioner had to comply with the conditions subsequent & financial closure, at its own risk and cost, within seven (7) months from the Effective Date, i.e., by 22.08.2019. However, the Petitioner failed to prove on record the constructive steps taken for complying with the conditions subsequent & financial closure.

37. The Petitioner has argued that SECI has acknowledged time and again the need for a grant of extension of SCOD for the project, as is evident from the letters written by SECI to MNRE and to BSPHCL. However, SECI refused to grant an extension, stating that the PPA did not allow time for commissioning beyond 27 months from the effective date, even though it had sought materials from the Petitioner to consider giving such an extension, effectively making the performance of the PPA impossible. *Per contra*, SECI has argued that the action of SECI in not agreeing to extend the SCoD did not amount to abandonment of SECI's right under the PPA for non-commencement of supply of electricity by the Petitioner within/until the SCoD. There was no novation, substitution, variation, remission, or dispensation of the performance of the PPA (with the scope of Sections 62 and 63 of the Indian Contract Act, 1872) or waiver on the part of SECI within the scope of waiver under Article 17.3 of the PPA. There was no breach or otherwise an act of commission or omission on the part of SECI affecting the performance of the obligations by the Petitioner. As sufficient time had expired after the last extension had been granted up to 22.12.2020, SECI, vide its letter dated 29.06.2022, decided not to grant any further extension of time. The letter dated 04.07.2022 of Bihar Utilities subsequently granting consent was therefore not acted upon. Vide letter dated 14.07.2022, SECI again wrote to Bihar Utilities that no further extension of time can be granted.
38. We note that SECI did not act to invoke the performance bank guarantee as per the timelines provided in the PPA, for instance, after seven days from the effective date (i.e., 22.08.2019) despite failure on the part of the Petitioner to fulfil the Conditions Subsequent and Financial Closure or for that matter immediately after the date (22.12.2020) for scheduled commissioning of the project elapsed or even after the lapse of the long stop date (22.09.2021) which was 27 months from the effective date of the PPA. Rather, SECI continued to communicate with MNRE and the buying DISCOM, making a case for the extension of time for the project. No doubt, this led to uncertainty for the project. However, we note that SECI, in its communication with MNRE, had contended that SECI did not have powers to extend the SCOD beyond the long stop

date (22.09.2021) and hence was seeking special approval from MNRE. We are unable to appreciate under which provision of the PPA, SECI was seeking special approval of MNRE. The timelines for various events are clearly articulated in the PPA, and to avoid uncertainty, the contracting parties are expected to act strictly as per the said timelines. We find that neither party has acted as per the timelines in the PPA. However, we note that the novation of the contract (in the instant case, extension of time beyond the long stop date) cannot be unilateral. Both the parties have to agree, and in the instant case, one of the parties, viz., SECI, has not consented to novation.

39. Further, we note that an extension of time for SCOD (limited to the long stop date) without any liability for the Petitioner to liquidity damages could be granted inter alia under Force Majeure conditions. Article 13.3 specifically stipulates that ‘Force Majeure’ means any event or circumstance or combination of events viz. Act of God, any act of war, radioactive contamination or ionising radiation, or an event of Force Majeure identified under PSA, thereby affecting the delivery of power from the Petitioner to Buying Entity(ies). We are of the view that change in Government (due to elections) and delay in the issuance of Government Order (GO) in the project boundary are not covered under Article 13.3 of the PPA.
40. As regards the claim of the Petitioner that proof of legal injury is a pre-condition for claiming liquidity damages by the Respondent, we note that Article 4.6.1 of the PPA stipulates that “*The Project shall be fully commissioned within 18 months from the Effective Date of this Agreement. In case of failure to achieve this milestone, SECI shall encash the Performance Bank Guarantee (PBG) in the following manner:*
- Delay beyond the Scheduled Commissioning Date upto (& including) the date as on 27 months from the Effective Date: Buyer will encash total Performance Bank Guarantee on per day basis and proportionate to the balance Capacity not commissioned.***”

We are of the view that having agreed to this dispensation in the PPA, the Petitioner cannot claim that it is not liable to pay compensation to the Respondent. We are of the view that clause 4.6.1 of the PPA is a genuine pre-estimate of damages agreed upon by the parties at the time of execution of the contract. Section 74 of The Indian Contract Act is explicit; it reads as “*when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have*

been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.” Thus, irrespective of whether any damage is caused or not, if it is stipulated in the agreement, the penalty is required to be paid. Accordingly, the Petitioner is liable to make payment to the Respondent.

41. In view of the above, it is held that no favourable relief can be extended to the Petitioner on this issue. The issue is decided accordingly against the Petitioner.

Re. Issue No. 2:

Whether the letters dated 15.01.2025 & 16.01.2025 issued by SECI to the Petitioner & IREDA, respectively, should be stayed? AND

Re. Issue No. 3:

Whether Respondent No. 1 should be directed to return the performance bank guarantee of 35 Crores to the Petitioner along with the interest/ carrying cost on the amount of Rs. 35 Crores from Dec 2018 till the same is returned?

42. In view of our findings on Issue No. I, other issues viz., Issue No. 2, Issue No. 3 are also decided against the Petitioner and in favour of the Respondents.

43. Petition No. 241/MP/2024, along with IA no. 10 of 2025, is disposed of in terms of the above.

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