

- of 2019 for approval of procurement of power before UPERC.
- (ii) On 01.10.2019, SECI received letter from UPPCL whereby UPPCL informed that the injection and scheduling of power from Wind Power Projects including that of the Petitioner (73.8 MW) will not be permitted until the order is passed by this Commission for the adoption of tariff under Section 63 of the Electricity Act, 2003. SECI had duly forwarded the letter dated 01.10.2019 to the Petitioner. At this stage, UPPCL was required to take the approval of UPERC for the procurement of power. SECI was proposing to apply to the Central Commission for the adoption of tariff immediately on UPERC approving the procurement of power.
 - (iii) On 04.10.2019, immediately after the receipt of the letter dated 01.10.2019 of UPPCL, SECI had approached this Commission under Section 63 of the Electricity Act 2003 for the adoption of tariff for 1000 MW wind power projects (Tranche-II) connected to ISTS including Power Project of the Petitioner.
 - (iv) In the meanwhile, SECI had taken appropriate mitigating steps by diverting the power, in terms of Article 6.5.5 of the PSA namely the capacity of 150 MW to other buying entities, mapped with the power project of ReNew Power, i.e. Government of Goa and PSPCL with effect from 02.10.2019 till 11.01.2020.
- (k) The Petitioner had also not given Notice as per Article 11.5 of the PPA, which has been provided as a pre- condition, for claiming the alleged events of delay in adoption of tariff, non-scheduling of power by UPPCL as Force Majeure events within the scope of Article 11 of the PPA.
- (l) DRC, in its recommendation dated 02.02.2021 regarding the issue of time extension for 250 MW Wind Power Project of the Petitioner has not granted any extension for the alleged delay in adoption of tariff and non-scheduling of power by UPPCL.

Re: Delay due to force majeure event pertaining to extension of lunar holidays in China and Covid-19 pandemic

- (m) The Covid-19 pandemic cannot be said to have any impact on the Project timelines of the Petitioner. The Petitioner achieved Financial Closure on 03.08.2018. In terms of the PPA read with the letter dated 21.11.2019 of SECI, the SCoD date was 12.12.2019 i.e. prior to outbreak of Covid-19 and imposition of lockdown with effect from 25.03.2020 by the Government.
- (n) The Petitioner did not submit any document in support of the claim of disruption of the

supply chain due to spread of Covid-19 in terms of O.M. dated 20.03.2020 of MNRE. In the absence of the requisite documents, the alleged delay on account of disruption of supply chain prior to the notification of lockdown by the Government of India is specifically excluded from the scope and ambit of Force Majeure.

- (o) The extended SCoD expired on 12.12.2019, long-stop date for commissioning of the power project as per Article 4.6.2 of the PPA having expired on 09.02.2021, the Petitioner was not entitled to any further extension of time for commissioning the project on account of Covid-19.

Re: Events alleged by the Petitioner do not fall within the scope of force majeure

- (p) The dominant pre-requisite for an event to be considered as Force Majeure is that it should wholly or partly prevent or unavoidably delay the performance of the obligations under the PPA. In Article 11.3, it is again qualified that an event will be Force Majeure only if and to the extent that the event or circumstance is not within the reasonable control of the affected party and could not have been avoided even taking reasonable care and with prudent utility practices. This is specifically provided in the opening part of Article 11.3.
- (q) Article 11.3.1 of the PPA uses the word ‘means’ while enumerating the events or circumstances or combination of events stated therein as amounting to Force Majeure. It is a settled law that the use of the word ‘means’ implies that the definition is restrictive and not exhaustive and no other meaning can be assigned to the expression than is stated in the definition. It is also a settled principle that Force Majeure clauses are to be narrowly construed. In the context of the above, the claim of the Petitioner needs to be considered strictly in terms of Article 11.3.1 of the PPA.
- (r) Events alleged by the Petitioner do not fall under any of the sub-clauses specifically dealt in Article 11.3.1 of the PPA. The Force Majeure is a contractual provision expressly incorporated in the PPA and has to be considered only on the terms contained in the contract. The Petitioner had also not given Notice as per Article 11.5 of the PPA in regard to the alleged force majeure events.

Re: Claim that the Petitioner’s termination notice is valid and binding

- (s) The events alleged by the Petitioner do not qualify as Force Majeure, much less, sustained force majeure entitling the Petitioner to terminate the PPA.

Rejoinder by the Petitioner

10. The Petitioner vide Rejoinder dated 06.12.2021 has reiterated its submissions given in the pleadings and as such the same have not been reproduced for the sake of brevity. Additionally, the Petitioner has submitted as under:

Re: unprecedented rainfall, floods, and cyclones

- (i) The unprecedented rains during the months of July 2019 till November 2019 caused an unexpected and unforeseeable delay in development of the Project site. The unprecedented rain/cyclone/flood being an Act of God was a Force Majeure event in terms of Article 11.3.1(a) of the PPA and the same directly impacted and delayed the construction works of the Project for a period of 5 months. The Petitioner cannot be made liable for the delay in commissioning the Project during the months of July 2019 till November 2019, and as such, the timeline for commissioning of the Project ought to be extended for a period of 5 months from the Extended SCOD, i.e., up to 12.05.2020.

Re: Lunar Holidays in China and the COVID-19 pandemic

- (ii) SECI's contention that Force Majeure events related to the COVID-19 pandemic cannot be a ground for grant of extension of time to the Petitioner since the same occurred after the Extended SCOD is erroneous, unlawful, and wholly untenable. The timeline for commissioning of the Project ought to have been extended till May 2020, on account of the delay caused by the unprecedented rainfall, floods, and cyclones during July-November 2019. Accordingly, Force Majeure events pertaining to the COVID-19 pandemic ought to be considered for granting extension of time to the Petitioner.
- (iii) The Petitioner has also fulfilled its duty to mitigate under Article 11.6 of the PPA. This is evident from the fact that despite having continued to face numerous difficulties, as explained above, the Petitioner commissioned an additional capacity of 45.6 MW in two tranches of 27.6 MW on 01.09.2020 and 18 MW on 07.02.2021.

Re.: Apprehensions caused due to sudden non- scheduling of power by Uttar Pradesh Power Corporation Limited as a result of delay in adoption of tariff and approval of the Power Sale Agreement dated 24.11.2017.

- (iv) The inordinate delay in tariff adoption and approval of the PSA, aggravated by the stoppage of scheduling of power from commissioned capacity, which events were unforeseeable and beyond the control of the Petitioner, have not only caused grave

prejudice to the financial interest of the Petitioner but also materially contributed towards slowing down of the implementation process of the Project as no prudent utility could have continued to implement the Project and create capacity which could possibly be rendered stranded.

- (v) Even when SECI arranged certain diversion of power apportioned originally for UPPCL, to be scheduled to other beneficiaries i.e., PSPCL and EDG, the same did not put the Petitioner in the same economic position as otherwise it would have been under the PPA. Further, the said arrangement was only a short-term interim arrangement, and clearly, the Petitioner could not have been expected to continue, like in the normal scenario, with the implementation of the Project (balance capacity), basis such interim assurance. There was considerable period that went without scheduling of power (apportioned for UPPCL) and SECI's direction for diversion of power to PSPCL and EDG only came subsequently. During this period, the Petitioner suffered a total generation loss to the tune of approximately Rs. 84,00,000/- (Rupees Eighty-Four Lakhs), which was a direct consequence of the delayed tariff adoption. Therefore, all the above incidents being beyond the control of the Petitioner, cumulatively resulted in delay in execution of the Project by the Petitioner.

Re: Entitled to extension of time for commissioning the project beyond the Extended SCOD

- (vi) Article 4.5 of the PPA explicitly provides that in the event the Petitioner is prevented from fulfilling its obligations under Article 4.1 of the PPA, the SCOD is to be deferred for a reasonable period not less than day-to-day basis for the delay. Therefore, the Petitioner is eligible for grant of extension of time due to the occurrence of various prolonged Force Majeure events.
- (vii) Article 4.5.6 of the PPA an outer limit of 27 months from the date of Letter of Award dated 03.11.2017 (LoA), (i.e., 27 months from 03.11.2017, being 02.02.2020), is prescribed for commissioning of the Project. In this regard, it is the Petitioner's case that the said provision is not applicable with respect to the 45.6 MW Project capacity commissioned between the Extended SCOD and 07.02.2021, for the following reasons:
- a. As per Article 11.7.1(a) of the PPA, no party shall be in breach of its obligations pursuant to the PPA to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure event.

- b. As per Article 11.7.1(d) of the PPA, no payments shall be made by either Party affected by a Force Majeure Event for the period of such event on account of its inability to perform its obligations due to such Force Majeure Event.
- c. The outer limit of 27 months stipulated in Article 4.5.6 of the PPA is an obligation of the Petitioner to commission the Project within the stipulated period.
- d. Therefore, upon a harmonious construction of the PPA, it becomes clear that the Petitioner cannot be held responsible or liable for commissioning the Project within 27 months of the date of the LoA, on account of Force Majeure events, which are beyond the reasonable control of the Petitioner.
- e. Rather, the time period of 27 months is applicable or gets attracted in a normal scenario, where the delay in execution of the Project is on account of delay due to reasons solely attributable to the Petitioner.
- f. As such, the Petitioner is entitled for an extension of time for commissioning the Project beyond 27 months from the date of the LoA.

Re: SECI's conduct of imposing liquidated damages on the Petitioner and reduction of tariff is unlawful and untenable

- (viii) From a bare perusal of Article 4.5 read with Article 4.6 of the PPA, it is evident that consequences for delay in commissioning the Project are only applicable in the absence of extension of time under Article 4.5 of the PPA. SECI does not have any basis whatsoever for encashing the Petitioner's Performance Bank Guarantee ("PBG") for an amount of Rs. 10,98,40,000/- (Rupees Ten Crores Ninety Eight Lakhs Forty Thousand) and/or reducing the tariff of the Project.
- (ix) Article 11.7.1(d) of the PPA provides that no payments shall be made by either Party affected by a Force Majeure Event for the period of such event on account of its inability to perform its obligations due to such Force Majeure Event.
- (x) Since the Petitioner was unable to perform its obligation due to a Force Majeure event, the Petitioner cannot be made to incur payments, in the nature of liquidated damages and/or reduction of tariff and/or reimbursement of the same, for the period during which the Petitioner was impacted by Force Majeure event.
- (xi) The tariff discovered through the competitive bidding for the present transaction is one of the most competitive tariffs and therefore, it does not leave any scope for the

Petitioner to absorb any kind of liquidated damages/other financial prejudices, specifically when the delay has been caused on account of reasons beyond the reasonable control of the Petitioner.

Re: The Petitioner's Termination Notice is valid and binding

(xii) The following events were beyond the reasonable control of the Petitioner, that adversely affected the Project:

- a. Delay in obtaining NOC from MoD, affecting the Project from 26.04.2018 till 24.01.2019 (approximately 9 months);
- b. Unprecedented rainfall, floods and cyclone, affecting the Project from July till November 2019 (approximately 5 months);
- c. Extension of Lunar Holidays in China, affecting the Project from December 2019 till 09.02.2020 (approximately 2 months);
- d. COVID 19 pandemic, the consequent lockdown, and disruption in global and domestic supply chain, affecting the Project from February 2020 till date (approximately 15 months and continuing); and
- e. Apprehensions arising out of non-scheduling of power from the Project by UPPCL (for approx. 3 months), in view of the directions of the Hon'ble UPERC, due to the inordinate delay in filing of the tariff adoption petition by SECI (for approx. 21 months) and approval of power procurement by UPPCL (for approx. 19 months).

(xiii) In terms of Article 11.7.1(b) of the PPA, a party is entitled to claim relief in relation to a Force Majeure event including but not limited to those specified in Article 4.5 of the PPA. Article 4.5.3 of the PPA stipulates that 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 9 (nine) months, the parties may choose to terminate the Agreement as per the provisions of Article 13.5 of the PPA. Further, in terms of Article 13.5 of the PPA, either party shall have the right to terminate the PPA if the Force Majeure event or its effects continue beyond a period of 12 (twelve) months. The combination of Force Majeure events had continued for a period much beyond 9 (nine) months i.e., for approximately 37 months and therefore the Petitioner is entitled to terminate the PPA qua the balance un-commissioned capacity of 19.9 MW.

(xiv) The Petitioner was constrained to issue the Termination Notice dated 20.06.2021 to seek discharge by way of termination of the PPA under Article 4.5.3 read with Article

13.5 of the PPA, with respect to the limited un-commissioned capacity of 19.9 MW out of the total capacity of 250 MW.

Re: The recommendations of the Disputes Resolution Committee are baseless, untenable and in any event, the said findings are not binding on either the Petitioner or this Commission

- (xv) The reliance placed by SECI on the recommendations of the DRC in its Reply, is entirely misplaced. The said recommendations of DRC are not binding on this Commission. Rather, the same does not have any bearing, whatsoever, on the present proceedings before this Commission, which pertain to the contractually and legally protected rights of the Petitioner, emanating from the PPA. Therefore, the said recommendations ought to be disregarded by this Commission. The DRC is an internal administrative review procedure only under the aegis of the MNRE (under whom SECI is a nodal agency) and cannot supplant the jurisdiction and adjudicatory functions of this Commission. In any event, it is submitted that the dispute resolution process envisaged under the DRC cannot overrule/modify the process of adjudication set out under the Electricity Act.
- (xvi) Proceedings before DRC are in the nature of conciliation and the decision rendered therein ought not to have any bearing, whatsoever on the present proceedings. It is completely disingenuous on the part of SECI to place reliance upon the DRC proceedings and findings to prejudice the Petitioner's case.

Hearing dated 05.05.2022:

11. As per Records of Proceedings dated 05.05.2022, *inter-alia* it was held as under:
- “2. Learned senior counsel for the Petitioner and the learned senior counsel for the Respondent No.1, SECI referred to their note of arguments and made detailed submissions in the matter.*
- 3. Considering the request of the learned counsel for the Petitioner and the learned senior counsel for the Respondent, SECI, the Commission permitted the Respondent, SECI to file its note of arguments within two days with a copy to the Petitioner, who may file its written submissions within 15 days thereafter.*
- 4. Subject to the above, the Commission reserved the order in the matter.”*

Written Statement filed by SECI:

12. SECI has filed Written Statement vide which it has reiterated its submissions already given in the pleadings and as such the same are not reproduced for the sake of brevity. Additionally, SECI has submitted as under:

Re: Timeline allowed for commissioning and actual commissioning of project and financial closure

- a) The scheduled Financial Closure date was 03.08.2018 i.e.9 months from date of Letter of Award (03.11.2017) in terms of Article 3 of the PPA. The Petitioner achieved Financial Closure on 03.08.2018. SCoD as defined in Article 1 of the PPA was 03.05.2019 which was revised to 12.12.2019 vide its letter dated 21.11.2019.
- b) Article 4.6 of the PPA provides for the Liquidated Damages for delay in commencement of supply of power to SECI. The timelines for commissioning of the project as per Article 4.6 of the PPA as under:

S. No.	Milestone	Timeline
1	Issuance of LoA	Zero Date (Z)
2	Commissioning of Project (part or full) without Liquidated Damages	Z + 18 Months (SCD of Project)
3	Commissioning of Project (part or full) with encashment of Performance Bank Guarantee on per day basis and proportionate to the capacity not commissioned after SCD	SCD + 06 Months
4	Commissioning of Project (part or full) with encashment of Performance Bank Guarantee for full amount and reduction in tariff at the rate of 0.50 paise/kWh per day of delay proportionate to the capacity commissioned after lapse of the period of PBG encashment (SCD + 06 Months)	SCD + 06 Months + 03 Months

- c) In terms of Office Memorandum dated 13.08.2020 of MNRE dealing with extension of time due to lockdown for Covid-19 and considering the fact that SCoD of the Project (12.12.2019) was prior to Covid-19, SECI vide its letter dated 08.09.2020 has granted relief to Project as under:
- i) Liquidated Damages shall not be levied for the period 25.03.2020 to 24.08.2020 namely the period covered by the MNRE Office Memorandum dated 13.08.2020.
 - ii) The revised end date for the PBG encashment period and Tariff reduction period shall be 10.11.2020 and 09.02.2021 respectively.
 - iii) Accordingly, the commissioning of the Project with levy of liquidated damages was extended up to 09.02.2021.

d) With the revision of SCoD of the Project and relief granted on account of COVID-19 in the period allowed for commissioning with levy of Liquidated Damages, the timeline of commissioning of the 250 MW Power Project of the Petitioner are as under:

S. No.	Milestone	As per PPA	As per SECI letter dated 21.11.2019	As per SECI letter dated 08.09.2020	Remarks
1	Commissioning of Project (part or full) without Liquidated Damages not amounting to penalty	03.05.2019	12.12.2019	12.12.2019	
2	Start Date of PBG Encashment Period	04.05.2019	13.12.2019	13.12.2019	Period from 25.03.2020 to 24.08.2020 was not considered
3	End Date of PBG Encashment Period	31.10.2019	10.06.2020	10.11.2020	
4	Start Date of Tariff Reduction Period	01.11.2019	11.06.2020	11.11.2020	
5	End Date of Tariff Reduction Period	30.01.2020	09.09.2020	09.02.2021	

e) From the above table, it emerges that:

S. No.	Project Capacity	Commissioning Date	Delay (in days)
1.	126 MW	17.05.2019	0
2.	58.5 MW	29.09.2019	0
3.	27.6 MW	01.09.2020	111
4.	18 MW	06.02.2021	268
Total: 230.10 MW			

f) Till 10.11.2020 [end date of PBG Encashment period], the Petitioner had only commissioned 212.1 MW against the awarded capacity of 250 MW.

(i) Till 09.02.2021 [end date of tariff reduction period], the Petitioner had only commissioned 230.1 MW against the awarded capacity of 250 MW.

- (ii) The Petitioner failed to achieve commissioning of the remaining 19.9 MW by 09.02.2021 i.e. the maximum time permissible for commissioning with levy of Liquidated Damages.
- g) As per Article 4.6 of the PPA, SECI has a right to encash the Performance Bank Guarantee for delay up to 6 months from scheduled commissioning date, and reduction in applicable tariff specified in Article 9 (Rs. 2.64/kWh) at the rate of 0.50 paise namely Rs.0.005/kWh (half paise) per day of delay in commissioning of the project beyond 6 months towards payment of the liquidated damages.
- h) As per Article 9.3 of the PPA, the final tariff of the entire Project after commissioning of the balance capacity will be the weighted average of the tariff of the timely commissioned capacity of the Project discovered through Reverse Auction and reduced tariff of the balanced capacity in terms of Article 4.6.2 of the PPA.
- i) Accordingly, the Liquidated Damages have been levied as under:
- i. Encashment of Performance Bank Guarantee for Rs. 10,98,40,000/- [as per Article 4.6.1 of the PPA]
 - ii. Tariff of the Project reduced to Rs. 2.61/kWh [as per Article 4.6.2 read with 9.3 of the PPA]
- j) SECI has suffered a legal injury/loss on account of non-availability of power from the SCoD entitling SECI to the recovery of liquidated damages in terms of Article 4.6 of the PPA. The Liquidated Damages/funds are to be deposited to a separate fund maintained by SECI under the guidance of MNRE. The non-deposit of the Liquidated Damages in the fund is a legal injury in view of the settled principles of law.
- k) In regard to contention made by the Petitioner in Aide-Memoire at Item No.66 that *It is pertinent to highlight that the delay of approximately 5 (five) months in commissioning of the 27.6 MW of the Project capacity from February-March 2020 till 02.09.2020, i.e., the date of actual commissioning, is not attributable to the ReNew as the aforesaid delay is solely due to SECI's refusal to allow commissioning of capacity less than 50 MW*, it is submitted that, Clause 3.14 of the Guidelines, Clause 3.17 A of the RfS Document and Article 1 of the PPA defining Commercial Operation Date provided that the minimum capacity for acceptance of part commissioning shall be 50 MW.
- l) With regard to Petitioner's claim for commissioning of 27.6 MW, SECI vide its letter dated 14.08.2020 informed the Petitioner, inter-alia, that commissioning of 27.6 MW capacity cannot be accepted at this stage.
- m) On 27.08.2020, MNRE issued a Notification temporarily allowing part commissioning of 10 MW or more capacity in case of wind power projects awarded under SECI

Tranche-II to Tranche-VIII. This dispensation was granted in view of COVID-19 pandemic and was valid till 31.12.2020. On 28.08.2020, SECI informed the Wind Power Developers including the Petitioner regarding the Notification dated 27.08.2020 of MNRE. On 01.09.2020, the Petitioner achieved part-commissioning of the capacity of 27.6 MW in terms of Notification dated 27.08.2020 of MNRE. Hence, there was no delay in commissioning of 27.6 MW was for any reasons attributable to SECI as alleged or otherwise.

- n) With regard to part-commissioning of 18 MW, SECI has submitted that, the Notification dated 27.08.2020 issued MNRE temporarily allowing part commissioning of 10 MW was valid till 31.12.2020. The Petitioner was not ready with the commissioning 18 MW by 31.12.2020. Accordingly, the dispensation provided by Notification dated 27.08.2020 of MNRE was not available to Petitioner.
- o) On 03.02.2021, MNRE issued Notification temporarily allowing part commissioning of 10 MW or more capacity in case of wind power projects awarded under SECI Tranche-II to Tranche-VIII. This dispensation was applicable till 31.05.2021. On 03.02.2021 itself, SECI informed the Wind Power Developers including the Petitioner regarding the Notification dated 03.02.2021 of MNRE. On 06.02.2021, the Petitioner achieved Part-commissioning capacity of 27.6 MW in terms of Notification dated 27.08.2020 of MNRE.

Written Submissions filed by the Petitioner:

- 13. The Petitioner has filed Written Statement vide which it has reiterated its submissions already given in the pleadings and as such the same are not reproduced for the sake of brevity. Additionally, the Petitioner has submitted as under:

Re: Termination of PPA to the tune of part capacity of 19.9MW (out of balance 65.5 MW)

- a) Even after the lapse of more than 1 (one) year, there was no clarity as to when the effects of COVID-19 pandemic will subside, and manufacturing and supply will be restored to pre-COVID levels; and more importantly, after already having suffered Force Majeure for approx. 37 (thirty-seven) months, the Petitioner decided to terminate the PPA with respect to the limited un-commissioned capacity of 19.9 MW of the Project.
- b) Article 4.5.3 read with Article 13.5 of the PPA, provides that if a Force Majeure event and/or effect thereof continues to be present beyond a period of 9 (nine) months, either

party shall have the right to terminate the PPA, without any further liability.

- c) Considering as mentioned above, the Petitioner has been continuously impacted by Force Majeure events since April 2018, i.e., for approx. 37 (thirty-seven) months, the Petitioner submits that it could not continue with the development of the remaining capacity of 19.9 MW of the Project. Accordingly, it was constrained to issue a Termination Notice to SECI on 20.06.2021 as a mitigating step claiming discharge by way of termination of the PPA with respect to the limited un-commissioned capacity of 19.9 MW out of the total Project capacity, in accordance with Article 4.5.3 read with Article 13.5 of the PPA.

Hearing dated 15.07.2022:

14. As per Records of Proceedings dated 15.07.2022, *inter-alia* it was held as under:

“The order in the present petition was reserved on 5.5.2022. However, the order could not be passed prior to the Chairperson Shri P. K. Pujari demitting the office. Accordingly, the matter is listed for hearing today through video conferencing.

2. Learned counsel for the Petitioner and the Respondent submitted that the parties have already made their respective submissions in the matter, which may be considered.

3. After hearing the learned counsel for the parties, the Commission reserved the matter for order.”

Analysis and Decision:

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

***Issue No. 1:** Whether the Petitioner was prevented by unforeseen and uncontrollable events/factors, and the same constitute Force Majeure under Article 11 of the Power Purchase Agreement dated 02.01.2018 and Whether the Scheduled Commissioning Date (to the extent of the un-commissioned capacity of 45.6 MW) needs to be extended from 12.12.2019 till the date of actual commissioning, without any adverse consequences (including imposition of liquidated damages)?*

***Issue No. 2:** Whether the Petitioner’s Termination Notice dated 20.06.2021 claiming discharge by way of termination of the Power Purchase Agreement dated 02.01.2018 with respect to the limited un-commissioned capacity of 19.9 MW out of 250 MW is in accordance*

with Article 4.5.3 read with Article 13.5 of the Power Purchase Agreement and is valid and binding?

Issue No. 3: Whether SECI letter dated 05.05.2021 regarding encashment of the Petitioner's Performance Bank Guarantee and reduction of the tariff payable to the Petitioner needs to be set-aside and Whether SECI letter dated 07.05.2021 calling upon the Petitioner to refund alleged excess payment made to the Petitioner needs to be set-aside?

Issue No. 4: Whether SECI be directed to return/release the Petitioner's Performance Bank Guarantee dated 06.11.2020 for an amount of Rs. 13,10,00,000/- (Rupees Thirteen Crores Ten Lakhs Only) issued by IndusInd Bank?

Issue No. 5: Whether SECI needs to be directed to return/refund to the Petitioner the amount of Rs. 10,98,40,00/- (Rupees Ten Crore Ninety-Eight Lakhs Forty Thousand Only) paid by the Petitioner on 12.05.2021 without prejudice to rights and remedies under law?

17. We will now discuss these issues.

Issue No. 1: Whether the Petitioner was prevented by unforeseen and uncontrollable events/factors, and the same constitute Force Majeure under Article 11 of the Power Purchase Agreement dated 02.01.2018 and Whether the Scheduled Commissioning Date (to the extent of the un-commissioned capacity of 45.6 MW) needs to be extended from 12.12.2019 till the date of actual commissioning, without any adverse consequences (including imposition of liquidated damages)?

And

Issue No. 2: Whether the Petitioner's Termination Notice dated 20.06.2021 claiming discharge by way of termination of the Power Purchase Agreement dated 02.01.2018 with respect to the limited un-commissioned capacity of 19.9 MW out of 250 MW is in accordance with Article 4.5.3 read with Article 13.5 of the Power Purchase Agreement and is valid and binding?

18. Since Issue no.1 and Issue no.2 are interconnected and to be decided on same set of facts and law hence, they are taken up together for discussion.

19. The Petitioner was selected for development of 250 MW ISTS-connected Wind Power Project, generation and sale of wind power. On 02.01.2018, the Petitioner and SECI entered into the PPA. The date of SCoD as per PPA to develop and commission the Project was 03.05.2019. On 17.05.2019, the Petitioner successfully commissioned 126 MW which is more than 50% (fifty percent) of the Project capacity. On 01.10.2019, the Petitioner successfully commissioned additional Project capacity of 58.50 MW, thereby increasing the total commissioned Project capacity to 184.50 MW. On 03.12.2019, the Commission in

Petition No. 369/AT/2019, *inter alia* adopted the tariff of Rs. 2.64 per unit for 250 MW quantity power to be generated from the Project. SECI extended SCoD to 12.12.2019 from 03.05.2019 (initial SCoD) on account of delay in issuance of NOC by MoD.

20. The Petitioner has submitted that some events were beyond the reasonable control of the Petitioner and hence constitute Force Majeure events. The Force Majeure that adversely affected the Project are as under:
- a. Delay in obtaining NOC from MoD, affecting the Project from 26.04.2018 till 24.01.2019 (approximately 9 months);
 - b. Unprecedented rainfall, floods and cyclone, affecting the Project from July till November 2019 (approximately 5 months);
 - c. Extension of Lunar Holidays in China, affecting the Project from December 2019 till 09.02.2020 (approximately 2 months);
 - d. COVID 19 pandemic, the consequent lockdown, and disruption in global and domestic supply chain, affecting the Project from February 2020 till date (approximately 15 months and continuing); and
 - e. Apprehensions arising out of non-scheduling of power from the Project by UPPCL (for approx. 3 months), in view of the directions of the Hon'ble UPERC, due to the inordinate delay in filing of the tariff adoption petition by SECI (for approx. 21 months) and approval of power procurement by UPPCL (for approx. 19 months).
21. MNRE vide its letter dated 27.08.2020, after considering the extraordinary situation prevalent due to COVID-19 pandemic, temporarily allowed part commissioning of 10 MW or more capacity in case of wind power projects awarded under SECI Tranche-II to Tranche-VIII and the said dispensation was to remain valid till 31.12.2020. SECI vide its email dated 28.08.2020 permitted the Petitioner to commission 27.6 MW of the Project capacity, out of remaining capacity of 65.5 MW. The Petitioner commissioned 27.6 MW of the Project capacity on 02.09.2020.
22. On 08.09.2020, SECI in compliance of MNRE's O.M. dated 13.08.2020, conveyed that:
- a. The penalty period had been extended up to 09.02.2021;
 - b. No penalty shall be applicable for the period between 25.03.2020 and 24.08.2020; and
 - c. The revised end date for the performance bank guarantee (PBG) encashment period

shall be 10.11.2020 and for the tariff reduction period shall be 09.02.2021.

23. The Petitioner approached the DRC on 03.11.2020 but the claim was rejected. Thereafter, on 05.05.2021, SECI informed the Petitioner that it would encash the PBG towards liquidated damages for alleged delay in commissioning the Project and also reduce the tariff for the Project from Rs. 2.64 per unit to Rs. 2.61 per unit in the context of the portion of the Project capacity commissioned beyond 6 months from the Extended SCoD, i.e., 12.12.2019.
24. Briefly, the gist is as under:

S. No.	Project Capacity	Extended SCoD	Commissioning Date	Penalty
1.	126 MW	12.12.2019	18.05.2019	No Penalty
2.	58.5 MW	12.12.2019	01.10.2019	No Penalty
3.	27.6 MW	12.12.2019	02.09.2020	<ul style="list-style-type: none"> PBG encashment for delay of 111 days <i>As per the letter dated 08.09.2020, SECI has already given benefit for the period from 25.03.2020 to 24.08.2020 (153 days). Therefore, excluding 153 days, the delay is for 111 days [264 days (12.12.2019 to 02.09.2020) minus 153 days]</i>
4.	18 MW	12.12.2019	07.02.2021	<ul style="list-style-type: none"> PBG encashment for delay of 180 days Tariff reduction for 88 days <i>Excluding 153 days as discussed above.</i>
5.	19.9 MW	Termination notice issued on 20.06.2021		

25. The Petitioner commissioned total 230.1 MW of the Project capacity in four phases till 07.02.2021. The Petitioner has submitted that delay in achieving commissioning was due to various unforeseeable events and circumstances which adversely affected the development and setting up the projects. Therefore, the delay is required to be condoned. *Per contra*, SECI has submitted that it has already granted extension of SCoD till 12.12.2019 and any further extension claimed by the Petitioner under the guise of Force Majeure events is not tenable since the events highlighted by the Petitioner are not Force Majeure events.