

09.12.2019 and 2 WTGS on 03.01.2020] out of the proposed 26 WTGs, the Commissioning Committee did not declare the Project as commissioned.

- (ii) For a project to be declared commissioned, it is incumbent for the Petitioner to demonstrate that independent turbines are erected, installed in all respects and generating power on a regular basis. This can be ascertained, amongst others, from the meter reading, by way of SCADA reading of individual WTGs, communication of telemetry data with RLDC (as RLDC check in telemetry that whether generation is occurring, the MW capacity, MVR and wind speed for individual WTGs).
  - (iii) The allegation of the Petitioner that it achieved commissioning of the Project on 03.01.2020 is wrong and contrary to the Minutes of Meetings, provisions of the Guidelines, RfS and PPA.
- i) **Third site visit of the Commissioning Committee on 19.02.2020:**
- (i) On 18.02.2020, Western Regional Load Despatch Centre (WRLDC) informed the Petitioner about the documents to be submitted for commencement of scheduling of power from Power Project to be commissioned by the Petitioner. Amongst other documents, WRLDC sought for '*Telemetry Integration of WTGS with WRLDC. Scheduling of any of the commissioned capacity will commence only after data availability ensured at WRLDC and at Backup Control Centre (BCC, NRLDC).*'
  - (ii) On 19.02.2020, the Commissioning Committee visited the Project site and witnessed that 10 of proposed WTGs were not integrated with the SCADA system. Out of these 10 WTGs, WTG with ID DYA 101 was erected in October, 2019.
- j) On 05.03.2020, the telemetry integration was completed and the Petitioner fulfilled the criteria for being declared as commissioned in terms of the Guidelines, RfS, PPA and the Commissioning Procedure.
- k) In view of the submission of all the documents and compliance of all the requirements by the Petitioner as per the Commissioning Procedure, on 06.03.2020, SECI issued the Commissioning cum COD Certificate.
- l) In terms of the applicable provisions, the actual Commissioning date and actual Commercial Operation Date will be the date as indicated in the Commissioning Cum COD Certificate i.e. 05.03.2020 and 07.03.2020 respectively.

- m) The Petitioner in their letters dated 06.03.2020 and dated 13.04.2020 sought for extension of SCoD upto 05.03.2020 without levying Liquidated Damages. On 16.03.2020, SECI sought for certain documents from the Petitioner for processing the request for extension of time. SECI vide letter dated 24.04.2020 had dealt with the claims raised by the Petitioner in their letters dated 06.03.2020 and dated 13.04.2020.

***Re: Delay in Tariff Adoption***

- n) The Commission has passed an Order on 03.12.2019 in Petition No.369/AT/2019 filed by SECI. At no point of time, the Petitioner raised any issue in the said proceedings that there has been any impact on account of the alleged delay as claimed in the Petition filed. The PPA executed between Petitioner and SECI do not provide for any such condition precedent of Adoption of Tariff for implementation of the PPA. Article 3 of the PPA provides for Financial Closure to be fulfilled by the Petitioner at its own risk and cost. The said provision does not provide for any condition to be performed by SECI, much less the adoption of tariff by the Commission, to enable the Petitioner to fulfill the Financial Closure.
- o) No issue of alleged delay in tariff adoption was raised at the stage of Financial Closure or commissioning.
- p) SECI denies that there is any delay in passing the tariff adoption Order as alleged by the Petitioner or otherwise.

***Re: Events alleged by the Petitioner do not fall within the scope of Force Majeure***

- q) The claim of the Petitioner needs to be considered strictly in terms of Article 11.3.1 of the PPA. The events alleged by the Petitioner do not fall under any of the sub-clauses specifically dealt in Article 11.3.1 of the PPA. Article 11.4 of the PPA deals with Force Majeure exclusions. Article 11.5.2 of the PPAs provides that an Affected Party is required to give Notice, as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure and such notice is a pre-condition to an affected party's entitlement to claim relief under the PPA. It is settled position of law that where the contract requires issuance of a Notice for invoking the Force Majeure clause, the benefit of Force Majeure cannot be granted in the absence of any such Notice.

- r) The events alleged by the Petitioner for delay in commissioning namely RoW issues, local issues and delay in tariff adoption do not qualify as Force Majeure within the scope of Article 11.3.1 of the PPA. Further, Article 4.5 (Extension of Time) or Article 11.7.1 (b) of the PPA (Available relief for a Force Majeure Event) is not attracted to the facts of the present case.

***Re: Liquidated damages payable for delay in commissioning***

- s) SECI submitted that it has suffered a legal injury/loss on account of non-availability of power from the scheduled commissioning date entitling SECI to recovery of liquidated damages in terms of Article 4.6 of the PPA. SECI vide letter dated 30.04.2020 informed the Petitioner that the applicable Liquidated Damages in terms of Article 4.6 of the PPA is Rs.3,44,44,444. (Rs. Three Crores Forty Four Lacs Forty Four Thousands Four Hundred Forty Four Only).

**Rejoinder by the Petitioner 03.09.2021:**

9. The Petitioner has filed Rejoinder dated 03.09.2021 and reiterated its submissions already made in the plaint and as such , the same are not reproduced for the sake of brevity. Additionally, the Petitioner has submitted as under:

***Re: Alleged delay in in commissioning the project***

- a) SECI's stand is untenable in law.
- b) The Petitioner had issued an advance notice of synchronization under Article 5.1.1 of the PPA on 07.11.2019 intimating SECI and Gujarat Energy Development Agency (GEDA) that it intends to commission the Project around 27.11.2019. GEDA had also provided the GEDA Id that was marked on each Wind Turbine Generators.
- c) The Chief Electrical Inspector to the Government (CEIG) on 05.09.2019 had granted approval for energisation of electrical installations of 220/33 kV SIS near Dayapar /Ratadiya and two (2)-nos. Hybrid GIS Bays(Bay no. 219 and 220) at 7651400/2200 kV Power Grid Corporation of India Limited Bhuj substation of the Petitioner.
- d) On 15.11.2019, CEIG had granted its approval for energisation to all 26 (twenty six) WTGs, 33 kV USS and associated 33 kV lines of the Petitioner after conducting inspection of electrical installation of 52 MW (2.0 MW x 26) WTG (including the 25 Nos of WTGs as considered and declared as commissioned under the project), 33 kV USS and associated 33 kV lines of the Petitioner's Project. The approvals granted by

CEIG clearly establish that the equipments as per rated projectCapacity, were installed, as the CEIG had certified them.

- e) The generated power from all the installed twenty-five (25) WTGs (each of 2 MW capacity) are carried to internal 33/220 kV Pooling sub-station through two dedicated 33 kV feeder lines connected with WTGs in 13:12 proportion. At internal 33/220 kV PSS, generated power is upgraded to 220 kV level through a 33/220 kV Power Transformer at this PSS itself, and then the upgraded power is fed to the 765/400/220 KV Grid S/s of PGCIL at 220 kV level through a dedicated 220 kV line.
- f) The 33kV feeders (bearing nos. 303 and 306) connected to the WTGs of the Project are each installed with the dedicated three (3) nos. of energy meters (Main, Check and Standby) at incoming junction of 33/220 kV PSS for the purpose of recording the energy flown from interconnected WTGs (of this particular project only) to the grid at 33 kV level. In respect of each of these meters, energy flow into the Grid has been recorded on 3<sup>rd</sup>- 4<sup>th</sup> January 2020.
- g) The Petitioner had submitted all the requisite documents with SECI with respect to the commissioning of the Project.

***Re: WTG SCADA and telemetry data is incorrect-***

- h) There are two kinds of SCADA available in the Project:
  - (i) PSS SCADA (33 and 220 kV Systems of the project installed at 33/220 kV pooling substation) and;
  - (ii) WTG SCADA (at each WTG level).
- i) As far as PSS SCADA data validation is concerned, the same was duly obtained *vide* Format-IV approval from the Regional Load Dispatch Centre (RLDC) for charging of 33 kV element. This charging permission dated 26.11.2019 *vide* Format-IV approval is the approval from the appropriate Load Dispatch Centre for charging of project elements. The Format-IV approval for the Project establishes beyond doubt that data communication from PSS SCADA had duly been checked and validated by RLDC. Therefore, there cannot be any dispute with respect to PSS SCADA, as it was already in place much before 03.01.2020.
- j) SECI has stated that without WTG SCADA data validation, it will not be able to consider the Project as commissioned. However, WTG SCADA validation is not a pre-requisite for commissioning at all. Even under the 2018 Commissioning Procedure

which the Respondent No. 1 has heavily relied upon, WTG SCADA validation was to be established post commissioning as per the requirement of power scheduling. Similarly, communication of telemetry data by RLDC was the requirement only for commencing scheduling of power from the Project, and is not a pre-requisite for commissioning the Project even under the 2018 Commissioning Procedure.

- k) In any case, the aforementioned information to the Respondent No. 1 is *vide* email dated 17.02.2020, and the same in any manner does not alter the date of commissioning of the Project, which would be 03.01.2020.
- l) SECI's insistence on WTG SCADA data and telemetry data has nothing to do with the commissioning of the Project even under the 2018 Commissioning Procedure . SECI is conflating the two different technical concepts of "*Commissioning*" versus "*scheduling*".

***The Petitioner has substantially complied with the Commissioning Procedure that was notified on 04.05.2018-***

- m) Clause A4 of the 2018 Commissioning Procedure states that the WTGs shall be deemed to be synchronized to the grid when the transmission line and the incoming feeder at the Central Transmission Utility substation have been charged and power flows from the turbines into the grid, which shall be reflected through a meter reading at the CTU substation.
- n) The Commissioning Committee in its meeting dated 03-04.01.2020 had stated that it had recorded meter reading at the 33 kV level at pooling substation which makes it evident that the power had flown from the WTGs into the grid and the same was recorded at the pooling substation of PGCIL. The Petitioner had synchronised its total Project capacity of 50 MW with the grid system as per Clause B3 of the 2018 Commissioning Procedure.
- o) As per Clause B6 of the 2018 Commissioning Procedure provided by SECI, the Commissioning Committee comprising of officials of GEDA, CTU and the Petitioner shall visit the Project site to witness the commissioning of the Project. Therefore, as per the said procedure, only the members of the Commissioning Committee were entitled to visit the Project site together and not the officials of SECI. The clause only says that the said Commissioning Committee shall visit the Project site (on their own accord). It nowhere casts an obligation on the Petitioner to arrange for such a visit. SECI's refusal

to consider that the Project was commissioned on 03.01.2020, on account of physical verification not being completed, is therefore frivolous despite the fact that some of WTGs were verified physically but the others could not, on account of the Right of Way issue.

- p) The Commercial Operation Date has been defined in the PPA as the date on which the Project shall be declared as commissioned by State Nodal Agency or any other entity as authorized by SECI. The said provision further provides that the COD shall be the date on which 50 MW capacity or fifty percent (50%) of the allotted Project capacity (whichever is higher) is commissioned. Therefore, the SNA or any other entity appointed by the SECI was not entitled to act as per its discretion but to declare the COD as per the aforesaid provision of the PPA.
- q) Article 5 of the PPA states that the energy flow from the Project into the grid system shall be as a whole, and does not specify the requirement of energy flow from each individual WTG. Therefore, when the energy has flown into the grid system from the Project, as has been recorded by the Commissioning Committee in the Minutes of meeting dated 03-04.01.2020, the Project shall be taken to be commissioned on the date the energy had flown from it into the grid system.

***Alternative Plea- Force Majeure-***

- r) The provisions of the PPA are not watertight compartments wherein no flexibility can be exercised by this Commission while interpreting the provisions.
- s) This Commission in *Kudgi Transmission Limited vs. Bangalore Electricity Supply Company Limited and Ors., Petition No. 248/MP/2016* had held the delay caused in the completion of project due to RoW and law and order issues as force majeure events.
- t) The RoW issues and the agitation by the local villagers have prevented the Petitioner in performing its aforesaid obligations under the PPA and the said issues were beyond the reasonable control of the Petitioner. The Petitioner had also filed a police complaint regarding the same. However, the Petitioner even with the help of the police was not able to show the WTGs to SECI. It was the duty of SECI to declare the Project as commissioned which, it should have co-ordinated with the Committee itself. Further, if the Commissioning Committee wanted to visit the Project site, they could have visited on their own .

***Re: Delay in Tariff Adoption:***

- u) SECI had filed the Petition for adoption of tariff only in 2019. The final Order in the said Petition was passed by this Commission on 03.12.2019, which was just one month prior to the revised SCD of the Project. In the absence of the Order of this Commission, no lender was willing to come forward to finance the Project which caused great hardships to the Petitioner in setting up the Project. Despite severe financial hardships faced the Petitioner, it was somehow still able to achieve financial closure on 03.08.2018 i.e. as per the deadline provided in the PPA.

***Re: Liquidated Damages:***

- v) The Project of the Petitioner was commissioned and the energy had flowed into the grid from the same. SECI was not able to verify the WTGs physically on account of the force majeure events. SECI has not suffered any legal injury or losses. Therefore, SECI is not entitled to the liquidated damages under Article 4.6 of the PPA. Hence, the Petitioner is entitled to the refund of Liquidated Damages of Rs. 3,44,44,444/- (Rupees Three Crores Forty Four Lacs Forty Four Thousands Four Hundred Forty Four Only) imposed upon it by SECI.

**Hearing dated 28.06.2022:**

10. Learned counsel for the Petitioner and learned senior counsel for the Respondent, SECI made detailed submissions in the matter and reiterated the submissions made in the pleadings. Considering the request of the learned senior counsel and learned counsel for the parties, the Commission permitted the Petitioner and the Respondent to file their written submissions, if any, within period of two weeks with copy to each other.

**Written Submissions filed by SECI:**

11. SECI has filed Written Statement on 10.07.2020 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:

***Proposition I: The Petitioner is wrong in claiming that 50 MW was commissioned on 03.01.2020 or 19.02.2020 and the commissioning could be considered only on 05.03.2020, when the pre-requisites for the issue of commissioning certificate were finally satisfied by petitioner***

- a) Prior to seeking SECI to issue commissioning certificate, the Petitioner is required to
- (i) Take steps to synchronize the power project with the Grid with due approval of Chief Electrical Inspector (CEI/CEIG);
  - (ii) Obtain necessary approval from RLDC/SLDC in regard to successful data communication between the plant end and SLDC/RLDC having been established; and
  - (iii) The commissioning of the Project, i.e. the power flow from the Wind Energy Project to the Inter-State Transmission licensee's substation, has been observed, and has been further confirmed by members of the Commissioning Committee and the Central Transmission Utility. The Project Developer's representative is a member of the Commissioning Committee appointed for the purpose.
- b) The Petitioner had not furnished the documents on 03.01.2020 and these documents were furnished only on 06.03.2020. The Petitioner is therefore wrong in proceeding on the basis that it had fulfilled all the requirements for commissioning on 03.01.2020 as per definition of the term 'Commissioning' in the PPA as the equipments as per the rated project capacity had already been installed and power had flown to the Grid on the said date. The Petitioner is also wrong in claiming that WTG SCADA data and Telemetry data is not a pre-require for commissioning and is required for commencement of scheduling of power.

**Physical inspection by commissioning committee was specifically provided for and was undertaken for projects prior to 16.04.2020 when the commissioning procedure was amended**

- c) The Petitioner is wrongly alleging that at the relevant time i.e. prior to 16.04.2020, SECI's own policy was that a Project can be declared commissioned without physical witnessing of the commissioning. In this regard, SECI had communicated the amended commissioning procedure to WPDs only on 16.04.2020 and the same is applicable with effect from the said date of notification. The said amended commissioning procedure is not applicable for the Petitioner's power project which was commissioned on 05.03.2020. The said allegation of the Petitioner is an after-thought particularly when the Petitioner itself participated in the witnessing of the commissioning on 03.01.2020 and 19.02.2020 as a member of the Commissioning Committee. The Petitioner did not raise any objection about the Commissioning being witnessed.
- d) At the time of commissioning of 50 MW project, the Petitioner had participated the meetings of the Commissioning Committee appointed under the Commissioning Procedure



and signed the minutes of the said meetings. The Petitioner is now raising the issue regarding the applicability of the Commissioning Procedure as an after-thought.

**Project site visits**

- e) SECI vide email dated 02.12.2019 informed the Petitioner that SECI officials will witness commissioning of the Petitioner's project on 04.12.2019 - 05.12.2019. However, the Petitioner vide e-mail dated 03.12.2019 requested SECI to postpone their visit to 09.12.2019. It is submitted that, the reason for postponement of site visit as unforeseen circumstances, however, it is to be noted that the Developer Permissions for 06 WTGs was issued by GEDA on 06.12.2019 and the same was provided to SECI on 06.12.2019.
- f) The Petitioner had called the Commissioning Committee without obtaining necessary land clearance from the State Nodal Authority (SNA), GEDA. Thereafter, SECI vide email dated 07.12.2019 informed the Petitioner that SECI's officials will witness the commissioning of the Petitioner's project on 09.12.2019 to 10.12.2019.
- g) SECI vide email dated 12.12.2019 to the Petitioner stated that the Petitioner has shown only 18 sites of WTGs (17 WTGs) in three days; the Petitioner informed SECI that it is not possible to visit other sites on account of RoW issues. SECI requested the Petitioner to resolve the RoW issues immediately to enable inspection of other sites.
- h) The Commissioning Committee visited the Project site on 03.01.2020 and 04.01.2020. During the said visit, the Commissioning Committee including the representatives of SECI, GEDA did not find any local people obstructing the witnessing of commissioning of any of the WTGs.
- i) In view of the fact that the Petitioner had shown only 19 nos. of WTGS [17 WTGS on 09.12.2019 and 2 WTGS on 03.01.2020] out of the proposed 26 WTGs, the Commissioning Committee did not declare the Project as commissioned. In this regard, in terms of definition of the term Commercial Operation Date (quoted above), the minimum capacity for commissioning is at least 50 MW.
- j) With regard to the allegation of the Petitioner that energy has flown into the grid on 03.01.2020, it is submitted that it has been clarified in the above minutes of the meeting, that the Commissioning Committee witnessed energy meter reading since energy meters installed at PGCIL substation are common for Wind Power Projects of the Petitioner's Group under various schemes. The energy meter recording did not establish that all the 26 WTGs were in a position to generate and inject electricity to the Grid. In any event, the